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REFRAMING TAXIGRATION

Jacqueline Lainez Flanagan

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REFRAMING TAXIGRATION

JACQUELINE LAÍNEZ FLANAGAN*

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Tax compliance by undocumented immigrant workers could and should be the architectural centerpiece of immigration reform. Analyzing this premise using broad economic frameworks and examining corresponding mechanisms in U.S. tax and immigration systems, this article seeks to reframe “taxigration” to signify tax filing as a threshold condition to legalization.

“Taxigration” was originally coined by immigration practitioners to signal the intersection between immigration and tax law, most often when individuals in the midst of legalization proceedings file tax returns to supplement their immigration petitions. Conversely, unauthorized workers with no viable path toward legalization must adhere to a tax filing mandate, facilitated by an IRS-issued individual taxpayer identification number (ITIN), but with no correlated immigration benefit. In fact, undocumented workers perceive risk in tax return filing, with an estimated fifty-percent tax compliance rate largely due to fear of detection, detention, and deportation. Further, since the 2016 election, ITIN applications and renewals have reportedly decreased, demonstrating a foreseeable chilling effect on tax filings.

This article explores the benefit of conferring a quasi-protected status upon this class of worker, allotting certain preferences in immigration proceedings directly correlated to tax compliance. It argues political rhetoric surrounding immigration reform must be tempered with appreciable fiscal realities, including the undocumented population’s utility in the workforce and their extensive sales, income, and payroll tax contributions that further governmental interest in GDP growth and U.S. tax base expansion. Moreover, the devastating effects of the Covid-19 global pandemic underscore the socioeconomic disparities of the undocumented immigrant population in America, with legislation like the CARES Act excluding economic relief to undocumented workers, despite their ongoing contributions to the economy and lack of viable legalization options. Meanwhile, DACA recipients, many of whom are classified as essential workers, including frontline healthcare professionals, currently await a more permanent resolution following a favorable Supreme Court ruling on proposed

termination of the program. Ideally, reframing taxigration would generate significant political goodwill to aid passage of meaningful immigration reform. Reframing taxigration would aid the development of strategic, humane responses to the ongoing influx of new arrivals, benefitting the social and financial security of native citizens and society writ large.

INTRODUCTION

Tax compliance by undocumented immigrant workers is a desirable outcome, with the potential to raise significant revenue and advance meaningful immigration reform. Analyzing and proceeding from this premise, this article explores the current state of tax compliance by undocumented workers, assessing tensions between tax and immigration systems and emphasizing that the current immigration system is not efficiently addressing the need for migrant labor, nor effectively stemming the tide of unauthorized immigration.

This work reviews recent tax reforms that enhance the disparate treatment of undocumented workers and consequently reduce tax filing incentives. Interestingly, these recent tax law changes also increase the possibility of immigration reform because they anticipate some of the increased costs and spending associated with reform. This article aims to demonstrate some of the value in addressing immigration reform by highlighting the economic contributions made by unauthorized workers, as well as existing connections between seemingly disparate U.S. policies and populations. The article underscores how America's restrictive immigration laws, coupled with lax enforcement, confer benefits on employers and industries with the largest reliance on immigrant labor. These putative employer benefits are ultimately corrosive to society because they leverage overly restrictive immigration policies to allow the dismissal of workers' rights, public safety concerns, and human rights.

Meanwhile, the U.S. tax system presents opportunities and incentives to more closely connect tax and revenue collection with immigration benefits, albeit with added costs associated with increased wages and workers' rights. This implicit system of levers and pulleys adds to the intricacy of formulating potential solutions to these large-scale social issues. The proposals within this paper offer modest improvements to key aspects of U.S. tax and immigration systems invoking broad economic and equity principles.

Part I of the article explores why tax compliance matters and examines how increasingly regressive tax systems could actually provide political traction for potential immigration reform because

legalization would involve decreased expenditures insofar as refundable, family-based tax credits like the EITC are involved, an important bipartisan element to address the concerns of fiscal conservatives. This section highlights relevant tax law changes embedded in the 2015 PATH Act, and the 2017 Tax Cut and Jobs Act, along with instructive observations of the New Mexico and District of Columbia tax systems. Without the proposals advocated in this work to provide an appropriate counterbalance, these increasingly regressive tax developments, in combination with populist anti-immigrant sentiment, could effectively serve to drive undocumented immigrant workers further “underground” and out of the U.S. tax system, acutely contracting America’s tax base.

Part II examines overlaps between existing tax and immigration systems, instructive in the effort to fashion a more cohesive system. This section describes current objectives in tax return filings connected with immigration petitions, including tax issues most commonly encountered by immigration lawyers. It explores how to increase political will in support of meaningful immigration reform by revisiting past efforts at reform and the instructive failures of past parties in power to reach an accord.

Part III of the article examines how undocumented immigrants contribute to the economy. It provides a broad overview of the economic contributions of unauthorized workers, acknowledging considerable data limitations. This section reviews segments of the economy where immigrants and undocumented labor will significantly contribute to future economic growth, and reviews the landscape at the lower ends of the economic spectrum, including former industrial and manufacturing communities experiencing steep economic declines and the nonobvious connection between these groups. Specifically, this paper correlates the fiscal impacts of immigrant labor with the potential for increased government-sponsored benefits, including education and job training to reposition native workers displaced, not by migrant laborers, but by technological advancements and global economic shifts.

Part IV offers a proposal for a way forward, specifically recommending systemic changes to increase tax compliance by directly connecting tax filings with immigration benefits. This section reviews a survey conducted by the author documenting the direct experience of low income tax clinics across the country. It briefly touches on compound security concerns within the undocumented community and urges reforms recognizing mutual interests in enhancing accountability and transparency in the workplace, as well as among law enforcement and within communities. The article

concludes by entreating action on both immigration and tax policy to produce crucial societal net gains by thoughtfully reforming two fraught systems.

I. WHY TAX COMPLIANCE MATTERS

Tax compliance by undocumented workers substantially supplements federal and state coffers, most notably through contributions made to the Social Security system.¹ Many Americans are not aware of the significant, ongoing tax contributions made by undocumented workers to Social Security, or of the disconnect between unauthorized workers' use of an invalid Social Security Number (SSN) to work, and the requirement to secure an Individual Taxpayer Identification Number (ITIN) to file taxes due to the lack of a valid SSN. To date, the combination of federal and state tax compliance, together with Social Security trust fund contributions by undocumented workers and their employers, has yielded a net surplus upwards of one trillion dollars.² Simply stated, tax compliance by undocumented workers significantly contributes to the economic solvency of the United States.³ This section examines the mechanics of tax compliance among the undocumented population and fleshes out in detail why it matters.

As of this writing there are nearly eleven million undocumented immigrants currently residing in the United States, down from an estimated twelve million a decade ago,⁴ representing roughly three

1. See SOC. SEC. ADMIN., OFFICE OF THE INSPECTOR GEN. FY 2017 BUDGET JUSTIFICATION 191 (2017), <https://www.ssa.gov/budget/FY17Files/2017OIG.pdf> ("Per the latest available data, the [Earnings Suspense File (ESF)] had accumulated over \$1.2 trillion in wages and 333 million wage items for Tax Years 1937 through 2012. In Tax Year 2012 alone, [the Social Security Administration] posted 6.9 million wage items, representing \$71 billion, to the ESF.").

2. See *id.*

3. Tax contributions by immigrant workers are estimated at \$11.74 billion annually, with legalization estimated to increase these contributions by over \$2 billion per year. See LISA CHRISTENSEN GEE ET AL., INST. ON TAXATION & ECON. POLICY, UNDOCUMENTED IMMIGRANTS' STATE AND LOCAL TAX CONTRIBUTIONS 2 (2017), <https://itep.org/wp-content/uploads/immigration2017.pdf>.

4. See Jose A. Del Real, *The Number of Undocumented Immigrants in the U.S. Has Dropped, A Study Says. Here Are 5 Takeaways.*, N.Y. TIMES (Nov. 27, 2018) (citing Jeffrey S. Passel & D'Vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, PEW RES. CTR. (Nov. 27, 2018)), <https://www.pewresearch.org/hispanic/2018/11/27/u-s-unauthorized-immigrant-total-dips-to-lowest-level-in-a-decade/>, <https://www.nytimes.com/2018/11/27/us/illegal-immigrants-population-study.html>; see also Jeffrey S. Passel, *Measuring Illegal Immigration: How Pew*

percent of the U.S. population who face uneven tax and immigration policies.⁵ These policies are, in part, an inheritance from prior immigration reform measures; most notably the 1986 Immigration Reform and Control Act (IRCA)⁶ that legalized an estimated three million undocumented immigrants.⁷ Since then, efforts to enforce stricter immigration controls have fallen considerably short of expectations, largely due to imprecise mechanisms to address the influx of new arrivals seeking to fill labor shortages at the lowest ends of the market.⁸ While visa programs like the H-2A and H-2B, often termed “guest worker” programs,⁹ exist to help address the need for low-skilled labor in various industries, the shortage of available visas under the H-2B program in particular (relative to the need for these

Research Center Counts Unauthorized Immigrants in the U.S., PEW RES. CTR. (July 12, 2019), <https://www.pewresearch.org/fact-tank/2019/07/12/how-pew-research-center-counts-unauthorized-immigrants-in-us/>; Jens Manuel Krostad et al., *5 Facts About Illegal Immigration in the U.S.*, PEW RES. CTR. (June 12, 2019), <http://www.pewresearch.org/fact-tank/2018/11/28/5-facts-about-illegal-immigration-in-the-u-s/>.

5. See *Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045218> (last visited Aug. 23, 2019) (interactive table showing U.S. Census estimates for U.S. population, with 327,167,434 people estimated for 2018).

6. Pub. L. No. 99-603, 100 Stat. 3359 (1986). This Bill is also known as the Simpson-Mazzoli Act, named after the legislative sponsors of the bill who lamented the failure of full enforcement of the “three-legged stool approach.” See Jacqueline Lainez, *Measure for Measure: The Uneasy Marriage of Tax Policy and Immigration Reform*, 87 TAX MAG. 37, 38 (2009). This approach consisted of enhanced border enforcement, employer accountability for unlawful hiring practices, and legalization pathways for unauthorized workers present in the United States. See *id.* at 38–39.

7. See generally Emily Badger, *What Happened to the Millions of Immigrants Granted Legal Status Under Ronald Reagan?*, WASH. POST (Nov. 26, 2014, 9:06 AM), <https://www.washingtonpost.com/news/wonk/wp/2014/11/26/what-happened-to-the-millions-of-immigrants-granted-legal-status-under-ronald-reagan/> (discussing the ICRA’s impact on immigration); *A Reagan Legacy: Amnesty for Illegal Immigrants*, NAT’L PUB. RADIO (July 4, 2010, 2:12 PM), <https://www.npr.org/templates/story/story.php?storyId=128303672> (same).

8. See Lainez, *supra* note 6, at 38–39 (briefly discussing the creation of ICRA and its effects); see also Brad Plumer, *Congress Tried to Fix Immigration Back in 1986. Why Did It Fail?*, WASH. POST (Jan. 30, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/01/30/in-1986-congress-tried-to-solve-immigration-why-didnt-it-work/>.

9. See ANDORRA BRUNO, CONG. RESEARCH SERV., R44849, H-2A AND H-2B TEMP. WORKER VISAS: POLICY AND RELATED ISSUES 1 (2017), <https://fas.org/sgp/crs/homesec/R44849.pdf>.

workers) leaves a perpetual shortage in the demand-supply loop.¹⁰ Thus, undocumented migrant workers frequently arrive to perform jobs native workers will not accept,¹¹ while employers expediently fail to implement employment verification systems developed to document the lawful status of these workers.¹² This has created a modern labor market consisting of a revolving cycle of low-skilled, low-paid workers and employers facilitating the circumvention of immigration laws with varying degrees of complicity.¹³

It should be briefly noted that H-1B workers, those recruited to fill higher-skilled jobs in the tech and IT-service industries, also play

10. See *id.* at 15–16, 19; see also, e.g., Jeff Barker & Thalia Juarez, *I'm Not Here to Take Anyone's Job: Mexican Crab Pickers Quietly Work in Maryland as Immigration Debate Rages*, WASH. POST (Oct. 12, 2019, 5:25 PM), https://www.washingtonpost.com/local/im-not-here-to-take-anyones-job-mexican-crab-pickers-quietly-work-in-maryland-as-immigration-debate-rages/2019/10/12/26042b9c-e3cb-11e9-a6e8-8759c5c7f608_story.html (noting the failure of crab processing plants to obtain enough visas to support their operations); Scott Dance, *Crab Crisis: Md. Seafood Industry Loses 40 Percent of Workforce in Visa Lottery*, WASH. POST (May 3, 2018, 5:35 PM), https://www.washingtonpost.com/local/crab-crisis-md-seafood-industry-loses-40-percent-of-workforce-in-visa-lottery/2018/05/03/bf397874-4ef0-11e8-af46-b1d6dc0d9bfe_story.html (same). An in-depth examination of the H-2 and H-1 visa programs is beyond the scope of this article; however, it is important to note that the H-2A program is uncapped, while the H-2B program has historically had an annual cap of 66,000 issued visas. See BRUNO, *supra* note 9, at 7.

11. The H-2B program is often used to secure temporary seasonal labor that industries like the Maryland crab industry rely on after failing to secure domestic workers through ads, job fairs, and temp agencies, among other efforts. See Barker & Juarez, *supra* note 10.

12. There is a distinction between H-2A and H-2B temporary workers with respect to taxation. The former category connotes *agricultural* temporary workers, who are exempt from Social Security taxes. The latter, designated *non-agricultural* temporary workers, are not exempt from Social Security tax contributions, despite both groups being unable to collect Social Security benefits. See generally U.S. CITIZENSHIP AND IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., 2010 NAT. CONG. CONFERENCE: OVERVIEW OF H-2A AND H-2B NONIMMIGRANT WORKER CLASSIFICATIONS (2010), <https://www.uscis.gov/sites/default/files/USCIS/Resources/Resources%20for%20Congress/Congressional%20Reports/H-2A%20and%20H-2B%20Nonimmigrant%20Worker%20Classifications.pdf>; see also *Aliens Employed in the U.S. Social Security Taxes*, INTERNAL REVENUE SERV., <https://www.irs.gov/individuals/international-taxpayers/aliens-employed-in-the-us-social-security-taxes> (last visited Nov. 8, 2019).

13. See Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 195 (2007) (arguing that employment prohibitions under IRCA framework have actually increased the exploitation of undocumented workers, encouraged illegal immigration, and led to a deterioration of working conditions and wages).

a role in the immigration debate, including the workers' substantial tax contributions through their employment.¹⁴ For example, shortly after the Gang of Eight¹⁵ introduced their sweeping immigration bill in the Senate in 2013,¹⁶ the Hoover Institution published a study estimating that the bill provisions increasing H-1B visas would result in the addition of an "estimated \$456 billion to GDP and \$113 billion to federal tax revenue over the next ten years."¹⁷

Further nuance to the immigration polemic is the fact that the majority of undocumented workers in the United States actually arrive using a legal means of entry. Robert Warren, a veteran demographer previously with the Census Bureau (and a former director of the statistics division of the then-Immigration and Naturalization Service during the crucial period immediately post-IRCA), created one reliable method of estimating the number of visa overstays in the United States based on existing Immigration and Naturalization Service databases.¹⁸ One study utilizing this

14. See Nicole Torres, *The H1-B Visa Debate, Explained*, HARV. BUS. REV. (May 4, 2017), <https://hbr.org/2017/05/the-h-1b-visa-debate-explained>. An in-depth examination into the parameters of H-1B visa needs and the effect of high-skilled foreign workers on the American economy is outside the scope of this work, but it is generally conceded that the higher wages and thus higher tax remittances by this immigrant group is desirable, although laden with industry-wide wage suppression concerns. See Derek Thompson, *Is the H-1B Program a Cynical Attempt to Undercut American Workers?*, ATLANTIC (Feb. 15, 2017), <https://www.theatlantic.com/business/archive/2017/02/the-dark-side-of-the-h-1b-program/516813/> (citing John Bound et al., *Understanding the Economic Impact of the H-1B Program on the U.S.* 5–6, 8–10 (Nat'l Bureau of Econ. Research, Working Paper No. 23,153)), <https://www.nber.org/papers/w23153.pdf>.

15. See generally Rachel Weiner, *Immigration's Gang of 8: Who Are They?*, WASH. POST (Jan. 28, 2013, 12:00 PM), <https://www.washingtonpost.com/news/the-fix/wp/2013/01/28/immigrations-gang-of-8-who-are-they/> ("Comprised of four Republicans and four Democrats, the group came together remarkably quickly on an emotional and divisive issue that lawmakers have struggled to deal with for decades.").

16. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013).

17. The report noted, "\$244 billion of that increase in GDP would accrue to current US citizens and residents," and the balance of revenue increases would accrue to the H-1B holders. THOMAS V. CHURCH, IMMIGRATION REFORM—INFORMING THE DISCUSSION: ESTIMATING THE ECONOMIC AND BUDGETARY EFFECTS OF NEW H-1B VISAS IN THE SENATE'S GANG OF EIGHT'S PROPOSED IMMIGRATION BILL, HOOVER INST. 2 (2013), <https://www.hoover.org/sites/default/files/uploads/aafs/2013/05/Estimating-the-Economic-and-Budgetary-Effects-of-H-1B-Reform-In-S.744.pdf>.

18. See *Modes of Entry for the Unauthorized Population*, PEW RES. CTR. (May 22, 2006), <https://www.pewresearch.org/hispanic/2006/05/22/modes-of-entry-for-the-unauthorized-migrant-population/> ("Leaving aside the security concerns, this situation

methodology estimated that in 2006, nearly half of unauthorized U.S. workers originally entered the country legally.¹⁹ A decade later, Warren himself observed in a subsequent study that 62% of the undocumented population were individuals who arrived by plane and overstayed their temporary visa.²⁰ These are important data points to consider, given the ongoing vilification and dehumanization of the unauthorized population, including children, and the rhetoric around the need for a border wall.²¹ Immigrant taxpayers arrive in the United States much like others before them since time immemorial—that is, they often arrive with a connection to someone already in the States.²² New unauthorized arrivals reach the United States with perhaps a name, address, or general location of a relative or

poses a statistical challenge for researchers. Since there is no systematic tracking of temporary visitors, the number of people overstaying visas can only be estimated. The basis for almost all such estimates is the work of Robert Warren, a veteran demographer . . .”).

19. See *id.*; accord CONG. BUDGET OFFICE, HOW CHANGES IN IMMIGRATION POLICY MIGHT AFFECT THE FEDERAL BUDGET 8 (2015), <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/49868-Immigration4.pdf>. The Department of Homeland Security has since developed a biometric system to track entry and exit data that covers just a fraction of recent nonimmigrant entries, but expansion of the program is expected, taking into account logistical impediments to full implementation. See U.S. DEPT OF HOMELAND SEC., FISCAL YEAR 2017 ENTRY/EXIT OVERSTAY REPORT 3 (2017), <https://www.dhs.gov/publication/entryexit-overstay-report>.

20. See Robert Warren, *US Undocumented Population Continued to Fall from 2016 to 2017, and Visa Stays Significantly Exceeded Illegal Crossings for the Seventh Consecutive Year*, CTR. FOR MIGRATION STUD. (Jan. 16, 2019), <https://cmsny.org/publications/essay-2017-undocumented-and-overstays/> (“Of the estimated 515,000 arrivals in 2016, a total of 320,000, or 62 percent, were overstays and 190,000, or 38 percent, were EWIs [Entries Without Inspection].”).

21. See generally Shani M. King, *Child Migrants and America’s Evolving Immigration Mission*, 32 HARV. HUM. RTS. J. 59 (2019) (asserting that political expedience, Cold War ideology, and xenophobia have long been the driving forces of United States immigration policy).

22. See *Rise of Industrial America, 1876–1900, Immigration to the United States, 1851–1900*, LIBR. CONGRESS, <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/riseind/immgnts/> (last visited Oct. 29, 2019) (“Many immigrants wanted to move to communities established by previous settlers from their homelands.”).

acquaintance.²³ Typically arriving to secure employment,²⁴ they begin to work as soon as feasible in order to send money to family at home.²⁵ In fact, remittances by immigrants to their home countries are substantial, totaling \$148.5 billion in 2017.²⁶ Recent arrivals may work “under the table” or “off the books”²⁷ earning wages to keep

23. See AM. IMMIGRATION COUNCIL, WHY DON'T IMMIGRANTS APPLY FOR CITIZENSHIP? (2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/why_dont_immigrants_apply_for_citizenship.pdf (noting that “a family-based visa is unavailable to any unauthorized immigrant who doesn't have a qualified relative or who fails to meet those eligibility requirements”).

24. Miriam Jordan, *8 Million People Are Working Illegally in the U.S. Here's Why That's Unlikely to Change.*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/us/undocumented-immigrant-workers.html> (noting that eight million out of approximately eleven million unauthorized immigrants in the United States work, representing 5% of the workforce, overwhelmingly in low-paid, low-skilled labor, such as construction, childcare, and agricultural work).

25. David R. Henderson, *Immigrant Remittances Are Private Foreign Aid*, HOOVER INST. (June 25, 2019), <https://www.hoover.org/research/immigrant-remittances-are-private-foreign-aid> (“[T]he top 10 recipients of U.S. remittances in 2017 were all countries where the majority of people are poor by U.S. standards. Mexico led the list with receipts of \$30 billion from the United States, followed by China (\$16.1 billion), India (\$11.7 billion), and the Philippines (\$11.1 billion).”).

26. *Id.*

27. *The Effects of the Underground Economy on Small Business and Workers: Hearing Before the Comm. on Small Business and Entrepreneurship*, 110th Cong. 2 (2008) (statement of Mark Erlich, Exec. Sec'y-Treasurer, New Eng. Reg'l Council of Carpenters), <https://www.govinfo.gov/content/pkg/CHRG-110shrg44568/html/CHRG-110shrg44568.htm>. According to the statements of Executive Secretary-Treasurer Erlich:

By the late 1990s, the economic boom increased demand for workers in the Massachusetts building industry, and our region witnessed an influx of immigrant workers, many of whom were undocumented.

The employers who had been willing to cheat through misclassification now realized that they could take advantage of this new workforce. They simply began to forget the niceties of misclassification and just pay in cash, off the books and under the table. In many parts of our industry, particularly the private non-union construction sector, this approach has become standard practice.

How bad is the problem? Well, it is impossible to measure precisely because so much of this economic activity is unreported. One study claimed that the shadow or underground economy in the United States grew by 28 percent between 1990 and 2003. And a 2005 Bear Stearns report that has been referred to suggested that the overall underground economy was nearly \$3 trillion a year, nearly 9 percent of our GNP.

themselves fed and somewhat securely housed.²⁸ Thus, a predominant feature of our fractured immigration system is the ability of recent arrivals to secure employment with relative ease, most of them in the low-skilled worker category and who lack any viable claim for legalized immigration status. These workers obtain falsified documents that provide indicia of employability, and they tender these documents to innocent or complicit employers.²⁹ That is, concisely, the threshold requirement to gainful employment. These workers are then legally required to file and pay taxes on the income they earn, regardless of the source or classification of the income.³⁰

Therefore, the disparate interrelationship between tax and immigration systems essentially stems not only from the availability of jobs, but also the absence of legal immigration options. Immigration quotas and visa limits severely restrict legal migration into the United States,³¹ and even fewer opportunities exist for the legalization of undocumented immigrants already residing in the United States who entered the United States without permission or inspection.³²

Id.

28. *Cf. generally* National Housing Law Project, Comment Letter in Response to Proposed Rulemaking: Housing and Community Development Act of 1980: Verification of Eligible Status (July 9, 2019), https://www.nhlp.org/wp-content/uploads/National-Housing-Law-Project_Comments-in-Response-to-Proposed-Rulemaking_HCDA-of-1980-Verification.pdf (arguing that the proposed rule would have disproportionately negative consequences for immigrant families “who rely or would rely on housing assistance as a critical lifeline.”).

29. *See, e.g.,* John Burnett, *Employers Struggle with Hiring Undocumented Workers: ‘You Cannot Hire American Here’*, NAT’L PUB. RADIO (Aug. 21, 2019), <https://www.npr.org/2019/08/21/752336132/employers-struggle-with-hiring-undocumented-workers-you-cannot-hire-american-her> (describing a restaurant that is staffed with mostly unauthorized Latinx workers, including a kitchen manager who used a fake Social Security Number to obtain work).

30. This includes income earned as a W-2 employee, as an independent contractor issued a 1099, and income earned performing childcare, cleaning, or maintenance work where it is easier to earn cash or “under the table” income.

31. For example, under Section 203(c) of the Immigration and Nationality Act (INA), the diversity visa lottery program allows the issuance of up to 55,000 visas each year. *See* BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, PUB. NO. 9514, IMMIGRANT NUMBERS FOR OCTOBER 2019, at 6 (2019), https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_october2019.pdf; *see also* 8 U.S.C. § 1153(c) (2019). Section 201 of the INA allows a family-sponsored preference program limited at 226,000 people annually and employment-based minimum of 140,000. *See* BUREAU OF CONSULAR AFFAIRS, *supra*, at 1; *see also* 8 U.S.C. § 1153(a).

32. Bars to adjustment of status under section 241 of the INA include entering the United States without inspection. *See* 8 U.S.C. § 1255(i) (2009). Immigrant categories that provide a basis for adjustment include immediate relatives of U.S.

Importantly, in terms of undocumented worker tax compliance, estimates indicate only half³³ of undocumented workers file income tax returns.³⁴

The 50% tax filing rate is most likely due to the demonstrable level of risk involved, despite protections afforded by Internal Revenue Code (IRC) section 6103, designed to prevent government agencies from disclosing taxpayer information subject to certain exceptions.³⁵

citizens, persons admitted as the fiancé(e) of a citizen, asylees, refugees, human trafficking victims, and others. See U.S. DEPT. OF HOMELAND SECURITY, U.S. CITIZENSHIP AND IMMIGRATION SERVICES POLICY MANUAL 2A (2019), <https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-2>.

33. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-475, REFUNDABLE TAX CREDITS 49 (2016) (piecemeal assembly of estimates include data extracted from government reports, such as a 2016 Government Accountability Office (GAO) report stating that "[i]n 2013, 4.38 million tax returns were filed with ITINs (about 3 percent of all returns)").

34. As previously noted, there is no singular, definitive governmental data source to confirm this estimate: "The best evidence suggests that at least 50 percent of undocumented immigrant households currently file income tax returns using Individual Identification Numbers (ITINs), and many who do not file income tax returns still have taxes deducted from their paychecks." GEE ET AL., *supra* note 3, at 3.

35. See I.R.C. § 6103 (2012). "In 1976, Congress amended Section 6103 of the IRC to establish that federal tax return information is confidential by default unless a statute expressly authorizes disclosure. Congress made these changes in part to curtail the President's authority to acquire tax return information in response to revelations that President Nixon sought to use tax return information for improper purposes." DAVID H. CARPENTER ET AL., CONG. RESEARCH SERV., LSB10275, CONGRESSIONAL ACCESS TO THE PRESIDENT'S FEDERAL TAX RETURNS 2 (updated May 7, 2019), <https://fas.org/sgp/crs/secretary/LSB10275.pdf>; see also Christopher Bergin, *Welcome to the Dark Side of Tax*, FORBES (May 5, 2014, 1:02 PM) <https://www.forbes.com/sites/taxanalysts/2014/05/05/welcome-to-the-dark-side-of-tax/#44f20c1768cc>. See generally INTERNAL REVENUE SERV., OFFICE OF CHIEF COUNSEL, PUB. 4639, PROCEDURE & ADMINISTRATION, DISCLOSURE AND PRIVACY LAW REFERENCE GUIDE (2012), <https://www.irs.gov/pub/irs-pdf/p4639.pdf> (detailing the history of the disclosure of tax information and how this led to the enactment of § 6103). Although this code section was amended in 1976 in response to Nixon's actions, on December 13, 1973, former Commissioner Alexander responded to the same day request of the Chief of Staff of the Joint Committee on Taxation, releasing the 1968 tax return of former President Richard Nixon (who had agreed to the review of his 1969–1972 tax returns). In early 1974, the Joint Committee sought information related to Tax Years 1963–1967, of which the 1966 and 1967 returns were released. See Memorandum from Chairman Richard E. Neal of the House Ways and Means Comm. to the Members of the House Ways and Means Comm. (July 25, 2019), https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/REN%20Memo_%20Historical%20Use%20of%20Authority%20to%20Obtain%20Confidential%20Tax%20Inf

For example, undocumented immigrant workers must disclose their unlawful entry date into the United States in order to secure a tax identification number as part of the ITIN Form W-7 application process.³⁶ By engaging in the Form W-7 application process, combined with regularly filing federal and state income tax returns post-ITIN assignment, these individuals become remarkably visible to authorities as unlawfully present in the United States.³⁷ This affirmation of their ongoing undocumented status makes them easy targets should the federal government proceed to enforce immigration laws in such a way as to implement mass deportation efforts through any means necessary.³⁸

It would then be logical to question why an undocumented worker would venture to file tax returns in the first place. While tax return filing is mandatory³⁹ for anyone residing in the United States and

ormation%20%28with%20attachments%29_0.pdf (regarding the historical use of authority to obtain confidential tax information).

36. See INTERNAL REVENUE SERV., CAT. NO. 10229L, FORM W-7 APPLICATION FOR IRS INDIVIDUAL TAXPAYER IDENTIFICATION NUMBER (2019), <https://www.irs.gov/pub/irs-pdf/fw7.pdf> (noting that line 6d requests “[d]ate of entry into the United States”).

37. See NAT’L TAXPAYER ADVOCATE SERV., 2016 ANNUAL REPORT TO CONGRESS: MOST SERIOUS PROBLEMS 241 (2016) [hereinafter 2016 ANNUAL REPORT TO CONGRESS], https://taxpayeradvocate.irs.gov/Media/Default/Documents/2016-ARC/ARC16_Volume1_MSP_18_ITINS.pdf. According to the report:

However, an individual is also a resident for tax purposes if he or she is present in the United States a minimum number of days, regardless of immigration status, which creates a tension between tax law and immigration law. In these cases, it is especially important for the IRS to protect a taxpayer’s *right to confidentiality*, which generally prohibits the IRS from sharing any taxpayer information with the Department of Homeland Security. If the IRS fails to protect this right, taxpayers may stop filing and paying their taxes out of fear of deportation.

Id.

38. See Katie Rogers et al., *Trump Says He Will Seek Citizenship Information from Existing Federal Records, Not the Census*, N.Y. TIMES (July 11, 2019), <https://www.nytimes.com/2019/07/11/us/politics/census-executive-action.html>.

39. See *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938); see also *United States v. Tedder*, 787 F.2d 540, 542 (10th Cir. 1986); *United States v. Drefke*, 707 F.2d 978, 981 (8th Cir. 1983); *United States v. Schulz*, 529 F. Supp. 2d 341, 349 (N.D.N.Y. 2007); *Foryan v. Comm’r*, 109 T.C.M. (CCH) 1591 (2015); *Jones v. Comm’r*, 107 T.C.M. (CCH) 1495 (2014); INTERNAL REVENUE SERV., THE TRUTH ABOUT FRIVOLOUS TAX ARGUMENTS 2 (2018), https://www.irs.gov/pub/irs-utl/friv_tax.pdf (“The requirement to file an income tax return is not voluntary and is clearly set forth in sections 6011(a), 6012(a), et seq., and 6072(a) of the Internal Revenue Code. . . . Failure to file a tax

earning U.S. source income, that is unlikely the main motivator behind the majority of tax returns filed by undocumented workers. A more likely rationale is that tax compliance by undocumented immigrant workers establishes a semblance of legitimacy upon a population deemed unlawful by their very presence in the United States.⁴⁰ This potential for empowerment is an opportunity many undocumented workers affirmatively strive toward, using tax compliance as a lever toward legality and a modicum of acceptance in their communities.⁴¹

However, inherent risks in the tax return filing process serve to counterbalance the choice to file. When an immigrant in the midst of immigration legalization proceedings files tax returns, the returns provide indicia of good moral character, proof of financial self-reliance, and documentation of continuous physical presence. But when an undocumented immigrant with no viable path toward legalization files a tax return, the cost-benefit analysis becomes more complex.

A. *Mechanics of Undocumented Worker Tax Return Filings*

It is only within the past two decades that undocumented immigrant workers have had a legitimate avenue to file income tax returns. Although they may have no legally cognizable right to remain in the United States, undocumented workers have a route to file tax returns to declare their U.S. source income.⁴² The specifics of this tax filing regime are outlined below.

return could subject the non-compliant individual to civil and/or criminal penalties . . .”).

40. *But cf. infra* notes 69–70 and accompanying text (outlining some practically strategic reasons as to why an undocumented immigrant might file taxes).

41. See Alexia Fernandez Campbell, *Trump Says Undocumented Immigrants Are an Economic Burden. They Pay Billions in Taxes*, VOX (Oct 25, 2018, 2:15 PM), <https://www.vox.com/2018/4/13/17229018/undocumented-immigrants-pay-taxes> (“Unauthorized immigrants paid more than \$20 billion in income taxes in 2015. They also fund Medicare, Medicaid, and Social Security.”). *But cf. Tankard & Paluck, infra* note 348, at 181–82 (arguing that independent perceptions of norms within an immediate community play a far greater role in influencing behavior than social influences of a broader society).

42. See *supra* note 37.

1. Individual Taxpayer Identification Number (ITIN) Program

The Internal Revenue Service introduced the ITIN system in 1996 as a rather ingenuous solution to the problematic receipt of tax returns filed by undocumented workers using the invalid SSNs these taxpayers used to secure work.⁴³ Following a formal application process, approved ITINs issued to undocumented workers and eligible dependents are distinguished from SSNs by their first digit, the number 9, but are similar to SSNs in that they consist of a total of nine digits.⁴⁴ Since their introduction, ITINs have been central to tax filing compliance for anyone without a valid SSN.⁴⁵

Over the last two decades, Congress has mandated changes to the ITIN program to allay security concerns,⁴⁶ most recently via the 2015 PATH Act, discussed in more detail below. Since the introduction of the ITIN in 1996, it appears the number of individuals self-reporting income using ITINs largely remained static, with a noted 62% decline between 2011 and 2015, and continued declines caused by additional legislative measures discussed below.⁴⁷ Tax returns filed with ITINs are not tracked as part of public IRS record keeping, such as the yearly IRS Data Book, although it does appear the data is accessed internally by governmental offices like the National Taxpayer Advocate (NTA) as part of annual reports to Congress.⁴⁸ It is similarly difficult to precisely pinpoint tax filing by undocumented workers using data gathered by Volunteer Income Tax Assistance (VITA)⁴⁹ programs

43. See generally JACQUELINE LAÍNEZ ET AL., CTR. FOR ECON. PROGRESS, THE IRS INDIVIDUAL TAXPAYER IDENTIFICATION NUMBER: AN OPERATIONAL GUIDE TO THE ITIN PROGRAM (2004), <https://www.aecf.org/resources/the-irs-individual-taxpayer-identification-number/> (providing guidance to organizations when dealing with individuals who have ITINs).

44. *Id.* at 3. This similarity between SSN and ITIN digits caused confusion for some unauthorized workers and their employers in the early years of the ITIN program and is discussed in more detail in Part IV.

45. *Id.*

46. See generally *Social Security Number and Individual Taxpayer Identification Number Mismatches and Misuse: Hearing Before the H. Subcomm. on Oversight and H. Subcomm. on Soc. Sec. of the Comm. on Ways and Means*, 108th Cong. 37–48 (2004) (statement of Michael Brostek, Dir. of Tax Issues, Internal Revenue Serv.).

47. See 2016 ANNUAL REPORT TO CONGRESS, *supra* note 37, at 240 (“ITIN applications and associated return filings have dropped 62.5 percent between 2011 and 2015, suggesting some taxpayers may have stopped filing returns due in part to the difficulty of obtaining an ITIN.”).

48. See *infra* note 52.

49. E-mail from Teresa Hinze, Exec. Dir., Cmty. Tax Aid, Wash., D.C., to Jacqueline Laínez-Flanagan (July 16, 2019) (on file with author). Teresa Hinze reports

because they do not track the number of tax returns filed specifically by unauthorized workers.⁵⁰ The 2016 NTA Report provides one of the few official estimates, noting that on a yearly basis, about 4.6 million taxpayers require an ITIN to comply with income tax filing requirements.⁵¹

A 2019 NTA report provides additional illuminating data, citing sharp decreases in ITIN applications and tax filings using ITINs, with the filing of only a quarter of the expected number of ITIN renewals.⁵² The report does not expressly attribute these steep declines to the 2016 presidential election, but the timing of ITIN application reductions, specifically the 2017 tax year, fuels speculation.⁵³ This potential chilling effect on voluntary tax compliance within the undocumented immigrant community is unsurprising but troubling.⁵⁴

that ITIN data is not tracked by tax filing software, as security measures mask tax identification numbers when generating reports.

50. Just as tracking tax filing data with any degree of precision is difficult, documentation illustrating a *decrease* in tax filing is largely anecdotal, outside of data internally accessed by the Taxpayer Advocate Service. Several Washington, D.C., tax filing sites primarily serving Latinx immigrant communities have noted decreased foot traffic and demand for services during the 2018 tax filing period than in earlier years. See Interview with VITA volunteers.

51. See 2016 ANNUAL REPORT TO CONGRESS, *supra* note 37, at 239.

52. The National Taxpayer Report to Congress is one of the few sources of data tracking for ITIN-filed returns. The 2015 NTA Report to Congress assessed ITIN issues as a serious problem that needed to be addressed. See NAT'L TAXPAYER ADVOCATE SERV., 2015 ANNUAL REPORT TO CONGRESS: MOST SERIOUS PROBLEMS 196–212 (2015) [hereinafter 2015 ANNUAL REPORT], https://taxpayeradvocate.irs.gov/Media/Default/Documents/2015ARC/ARC15_Volume1_MSP_18_ITIN.pdf. The 2019 Objectives Report highlighted additional efforts necessary to increase compliance: “Interim steps to expand outreach into new areas include the [ITIN] renewal effort, which included outreach to organizations working with ITIN communities, low-income taxpayer clinics, and others able to reach the affected taxpayers. The IRS developed and delivered outreach materials in seven languages to support the effort.” NAT'L TAXPAYER ADVOCATE SERV., FISCAL YEAR 2019 OBJECTIVES REPORT TO CONGRESS: VOLUME 2, at 102 (2019) [hereinafter 2019 NTA OBJECTIVES], https://taxpayeradvocate.irs.gov/Media/Default/Documents/2019-JRC/JRC19_Volume2.pdf.

53. 2019 NTA OBJECTIVES, *supra* note 52, at 140. (“Although the IRS projected it would receive 450,000 ITIN renewal applications for ITINs expiring in late 2016, it had received only 176,000 at the close of the filing season . . .”).

54. It should also be noted that Treasury Inspector for General Tax Administration (TIGTA) annual reports do not reflect a decrease in general filing compliance in corroboration with decreases in ITIN-filed returns. Results of the 2017 tax filing season reported 139.6 million actual returns for the 2016 tax year compared with 138.9 million returns for the 2017 tax year. See TREAS. INSPECTOR GEN. FOR TAX ADMIN., REF. NO. 2018-40-012, RESULTS OF THE 2017 FILING SEASON 5–6 (2018),

Thus, due to the inability to document filing decreases among ITIN filers with publicly available information, open questions remain. Without concrete data, it is possible to conclude that despite the current political climate and increases in immigration enforcement, tax return filings by undocumented workers have not decreased. If, in fact, tax filings among undocumented immigrants remain static at the estimated 50% filing rate, it could be attributable to several factors. One rationale could be that undocumented workers who file taxes, and who continue to do so undeterred by current events, are optimistically preparing themselves for eventual immigration reform. Another possibility could be that the specter of detection, detention, and the defensive cancellation of removal proceedings that would follow result in *more* unauthorized workers availing themselves of the tax system.⁵⁵ That is to say, it is possible that the undocumented workers who continue to file personal income tax returns, despite the risks, do so in hopes that tax return filing will increase their chances of succeeding in a defensive cancellation of removal immigration proceeding.⁵⁶ Unless and until a government agency officially publishes data related to the number of tax returns filed by undocumented workers, there is no tangible method to confirm or deny the exact filing statistics of undocumented workers.

2. Social Security Earnings Suspense File

A 2015 Social Security Administration Inspector General Report found that as of 2012, \$1.2 trillion had accumulated in the Earnings

<https://www.treasury.gov/tigta/auditreports/2018reports/201840012fr.pdf>.

Comparative filing statistics as of May 4, 2018 showed that for the 2018 filing season, 140.9 million returns were filed, reflecting a 1.4% increase over the previous year. See TREAS. INSPECTOR GEN. FOR TAX ADMIN., REF. NO. 2019-40-013, RESULTS OF THE 2018 FILING SEASON 5–6 (2018), <https://www.treasury.gov/tigta/auditreports/2019reports/201940013fr.pdf>. Again, these data sets do not track ITIN filers as a separate category, other than to make determinations relative to identity theft claims.

55. It is possible that an increase in strategic tax filings could result if conventional wisdom surrounding increased immigration enforcement made defensive cancellation of removal options more likely; thus, rational choice theory might dictate a logical pursuit to file tax returns to provide indicia of substantial presence and contributions, (although the undue hardship element may not be directly affected by tax filings). There is also a possibility that ITIN filings have measurably decreased and the 1.4% increase in tax filings between Tax Years 2017 and 2018 represents a general increase of individuals working and filing tax returns, including younger tax filers new to the workforce.

56. See *infra* Part II (discussing tax and immigration systems in more detail).

Suspense File (ESF).⁵⁷ The ESF is the central repository where Social Security taxes are placed when they cannot be traced to the individual who earned the subject wages, usually because the worker does not possess a valid SSN.⁵⁸

The ESF is directly supplemented in two different ways. The most common method is where Federal Insurance Contributions Act (FICA)⁵⁹ taxes are collected after an unauthorized worker furnishes an employer a false SSN, triggering payroll deductions for Social Security taxes through mandatory income withholding and corresponding employer contributions (each typically contributes a total of 7.65% representing Social Security and Medicare taxes, for a combined total of 15.3% of each paycheck).⁶⁰ An alternate contribution method is when an unauthorized worker files income tax returns to report self-employment income and the total 15.3% of Self-Employed Contributions Act (SECA)⁶¹ taxes, representing Social Security and Medicare tax contributions, are collected solely from the individual at the time of tax return filing.⁶²

The regressive⁶³ nature of these Social Security tax contributions should also be noted here, as most unauthorized workers are unlikely

57. See OFFICE OF THE INSPECTOR GEN., A-03-15-50058, STATUS OF THE SOCIAL SECURITY ADMINISTRATION'S EARNINGS SUSPENSE FILE 1 (2015), <https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-03-15-50058.pdf>. Although the report was compiled in 2015 and reported numbers current as of 2014, the monetary accumulation in the ESF only accounts for tax years from 1937 through 2012. See *id.*

58. See *id.* at 3. A minority of wage items cannot be tracked to the individual earning them under an erroneous SSN, something that can occur when SSNs are incorrectly reported due to human error, such as when the last two digits of a valid SSN are inadvertently switched (e.g., "78" being reported as "87").

59. I.R.C. §§ 3101–3128 (2012).

60. The social security tax contribution rate is currently 6.2% for both employers and employees, and the Medicare rate requires a contribution of 1.45% each. *Social Security & Medicare Tax Rates*, INTERNAL REVENUE SERV., <https://www.irs.gov/taxtopics/tc751> (last visited Jan. 6, 2020) [hereinafter *Social Security & Medicare Tax Rates*]; see also *Social Security and Medicare Tax Rates*, SOC. SECURITY ADMIN., <https://www.ssa.gov/oact/progdata/taxRates.html> (last visited Jan. 6, 2020).

61. See I.R.C. §§ 1401–1403 (2012).

62. Social Security taxes are specifically contributions toward old age, survivors, and disability insurance, while Medicare taxes are intended to cover hospital insurance. See *Self-Employment Tax (Social Security and Medicare Taxes)*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/self-employment-tax-social-security-and-medicare-taxes> (last visited Jan. 6, 2020).

63. A variety of arguments exist positing that claims of regressivity (insofar as the Social Security tax system are concerned) are overblown, including arguments centered around workers' net return on investment based on years worked. See *Fact*

to benefit from the income cap on these taxes, which for the 2020 tax year is \$137,700.⁶⁴ More acutely, and notwithstanding examples of progressivity in the Social Security and payroll tax regimes as applied to the general population,⁶⁵ undocumented workers who lack any possibility of legalization are divested of any social safety net upon retirement, despite in many cases directly contributing to Social Security via the ESF.

Annually, anywhere from \$12 to \$13 billion is estimated to accumulate in the ESF due to these ongoing payments by and on behalf of undocumented workers, leading to an additional approximate \$90 billion contributed to the ESF to date.⁶⁶ The chilling effect of noncompliance incentives would, predictably, reduce this amount despite the requirement that all workers earning United States source income must file income tax returns.

3. Protections from Disclosure – IRC 6103

When an unauthorized immigrant files a federal tax return, they are essentially relying on current protections preventing

or Fiction: Is Social Security Regressive?, COMM. FOR A RESPONSIBLE FED. BUDGET (July 25, 2013), <https://www.crfb.org/blogs/fact-or-fiction-social-security-regressive>.

64. SOC. SEC. ADMIN., FACT SHEET: SOCIAL SECURITY, 2020 SOCIAL SECURITY CHANGES, <https://www.ssa.gov/news/press/factsheets/colafacts2020.pdf> (last visited Aug. 11, 2020).

65. *See Policy Basics Federal Payroll Taxes*, CTR. ON BUDGET & POL'Y PRIORITIES (June 24, 2019), <https://www.cbpp.org/research/federal-tax/policy-basics-federal-payroll-taxes> ("For instance, Social Security benefits represent a higher proportion of a worker's previous earnings for workers at lower earnings levels; and while all Medicare beneficiaries are eligible for the same services, high-income beneficiaries pay more in Medicare taxes and premiums.").

66. Again, exact numbers are difficult to pinpoint, with different Social Security Administration (SSA) reports citing slightly different numbers. Some SSA reports note:

[U]nauthorized immigrants worked and contributed as much as \$13 billion in payroll taxes to the OASDI program in 2010 . . . we estimate that earnings by unauthorized immigrants result in a net positive effect on Social Security financial status generally, and that this effect contributed roughly \$12 billion to the cash flow of the program for 2010. We estimate that future years will experience a continuation of this positive impact on the trust funds.

STEPHEN GOSS ET AL., OFFICE OF THE CHIEF ACTUARY, SOC. SEC. ADMIN., NO. 151, EFFECTS OF UNAUTHORIZED IMMIGRATION ON THE ACTUARIAL STATUS OF THE SOCIAL SECURITY TRUST FUNDS 3 (2013), https://www.ssa.gov/oact/NOTES/pdf_notes/note151.pdf; *see also* Passel, *supra* note 4.

unauthorized disclosure.⁶⁷ These protections are provided under IRC section 6103, which requires that the information contained within the tax return will be protected from disclosure, subject to certain exceptions.⁶⁸ Nevertheless, the author has observed consistent behavioral patterns within the unauthorized immigrant community that indicate section 6103 protections are not the determining factor in voluntary tax compliance among undocumented workers. Most notably, over the last two decades, the author has witnessed a correlation between increased perceptions of viable immigration reform yielding greater numbers of undocumented workers voluntarily subjecting themselves to the potentially risky proposition of filing income tax returns.⁶⁹ This is reflected in recent data quantifying the negative impacts of normative perceptions on undocumented workers.⁷⁰ It is logical to conclude that when fear and distrust become too high, these workers recede further into the shadows.

Yet these observations remain largely anecdotal due to a dearth in data specifically and publicly tracking ITIN filed returns. Empirical data to corroborate reports of decreased state and federal income tax filings (as would be the case for unauthorized workers seeking to mitigate risk), continue to elude researchers.⁷¹ These anecdotal

67. See I.R.C. § 6103 (2012).

68. There are certain notable exceptions, such as disclosure permitted pursuant to court order or disclosure pursuant to suspected terrorist activity. See §§ 6103(h), 6103(i)(3).

69. See generally Jaqueline Laínez, *To File or Not to File: Tax Compliance Among Undocumented Immigrant Workers*, 3 BUS. L. BRIEF 23 (2007) (“This article explores the tensions circling the immigration debate with respect to tax policy and examines whether undocumented immigrants are materially participating in the American obligation of ‘filing’ taxes[.]”).

70. The Pew Research Center conducted a National Survey of Latinos between July 26 and September 9, 2018 that included 1501 participants, of which 742 were U.S. born (including Puerto Rico) and 759 were foreign born (excluding Puerto Rico). Roughly an equal percentage of survey participants indicated they had been subject to discrimination or negative treatment due to being Hispanic/Latino (38%) as those who heard expressions of support (37%). Mark Hugo Lopez et al., *More Latinos Have Serious Concerns About Their Place in America Under Trump*, PEW RES. CTR. (Oct. 25, 2018), <https://www.pewresearch.org/hispanic/2018/10/25/more-latinos-have-serious-concerns-about-their-place-in-america-under-trump/>.

71. As the American Immigration Council explains in its factsheet addressing ITINs:

Because applicants provide the IRS with a great amount of personal information, privacy is highly critical to the success of the program. Section 6103 of the Internal Revenue Code states that the

references are, however, supported by recent data from the National Taxpayer Advocate reflecting a shift in the perception of tax compliance risks by undocumented workers borne out in the significant reduction in ITIN applications during the 2017 tax year.⁷² In addition, the Pew Hispanic Center documented that most Latinos in the United States have fears they, or someone close to them, will be deported under the current administration, fueling speculation that affirmatively avoiding tax compliance is sound reasoning.⁷³ In contrast, voluntarily filing tax returns in this environment would arguably constitute heightened risk-seeking behavior. Thus, it is reasonable to conclude more risk-averse undocumented immigrant workers would be less likely to voluntarily file income tax returns. However, Part IV of this paper analyzes data gathered from a national survey of low income taxpayer clinics indicating that taxpayer outreach and education may counter fears of the tax-immigration nexus and induce increased tax compliance.

B. Recent Tax Reforms Affecting Undocumented Workers

Within the last several years Congress has enacted legislation further divesting recently legalized migrant workers from tax benefits enjoyed by native tax filers, discussed in detail below.⁷⁴ Congress has

IRS is not authorized to release taxpayer information to other government agencies except for providing information to the Treasury Department for investigations that pertain to tax administration, or under a court order related to a non-tax criminal investigation. *Expanding information-sharing beyond this would require a new law an issue that arises often during legislative debates.*

AM. IMMIGRATION COUNCIL, THE FACTS ABOUT THE INDIVIDUAL TAX IDENTIFICATION NUMBER (ITIN) 2 (2018) (emphasis added) (citing 26 U.S.C. § 6103 (2012)), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_facts_about_the_individual_tax_identification_number.pdf.

72. See 2019 NTA OBJECTIVES, *supra* note 52, at 140 (noting 176,000 ITIN renewals despite IRS projections that it would receive 450,000).

73. Mark Hugo Lopez et al., *Hispanic Trends: More Latinos Have Serious Concerns About Their Place in America Under Trump*, PEW RES. CTR. (Oct. 25, 2018), <https://www.pewresearch.org/hispanic/2018/10/25/more-latinos-have-serious-concerns-about-their-place-in-america-under-trump/>.

74. Tax scholars have emphasized the regressive nature of the United States tax system with respect to undocumented immigrant workers who are expected to file taxes despite their unauthorized status and lack of political representation, specifically the right to vote. Notwithstanding nor overlooking these immensely valid concerns, this Article seeks to find common ground in the immigration debate by using

also increased proposals to limit means-tested, family-based tax benefits from the reach of undocumented immigrant tax filers, regardless of the immigration status of family members, including citizen children, most recently evidenced through the Coronavirus Aid, Relief, and Economic Security (CARES) Act.⁷⁵ For example, the CARES Act specifically excludes undocumented immigrant families from stimulus payments, but that in many cases affects U.S. citizens within the family unit.⁷⁶

In reality, these recent tax law changes only marginally influence the tax filing behavior of undocumented workers.⁷⁷ Instead, ITIN processing delays, coupled with political rhetoric solely focused on immigration law enforcement, more deeply affect undocumented workers' perceptions of the risks inherent in tax return filing, thus reducing voluntary tax compliance within this population.⁷⁸

It was largely projected that the 2017 tax reform bill would negatively impact immigrant families, with changes slated to a

tax policy as an incentive to explore sensible immigration reform. See Francine Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 4–5 (2006) (“Despite the historic and strong American 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.”).

75. CARES Act, S. 3548, 116th Cong. (2020), <https://www.congress.gov/bill/116th-congress/senate-bill/3548/text>.

76. Meena Duerson, *This Woman and Her Kids Are U.S. Citizens But They Can't Get Any Coronavirus Stimulus Money*, VICE NEWS (Apr. 16, 2020), https://www.vice.com/en_us/article/bvgq78/this-woman-and-her-kids-are-us-citizens-but-they-cant-get-any-coronavirus-stimulus-money.

77. See 2015 ANNUAL REPORT, *supra* note 52, at 197. According to the report: During the 2015 filing season, the IRS advised taxpayers to wait up to 11 weeks, and at one point had a backlog of nearly 120,000 ITIN applications with returns. While concerns about refund fraud are legitimate, the IRS's solutions do not effectively target the fraud nor do they balance the anti-fraud regime with the taxpayer's need for a process no more intrusive than necessary, part of a taxpayer's right to privacy.

Id. (citing IRM PROCEDURAL UPDATE NO. WI-03-0215-0352, REVISIONS TO PROCESSING TIMES OF FORMS W-7 (2015)), <https://www.irs.gov/pub/foia/ig/spder/WI-03-0215-0352%5B1%5D.pdf>.

78. However, as the prior section notes, without public, quantifiable ITIN tax filing data, it is difficult to pinpoint whether recent rhetoric may actually be increasing tax filing if individuals are anticipating an increase in defensive cancellation of removal litigation. See *supra* Part I.

variety of family-based tax credits, especially the Child Tax Credit.⁷⁹ This concern came to fruition. This section tracks the most notable changes impacting unauthorized immigrant workers in the last few years, principally concentrating on the effects of the Protecting Americans from Tax Hikes Act of 2015 and Tax Cut and Jobs Act of 2017, with a brief overview of passed and proposed legislation related to the coronavirus pandemic.

1. 2015 Path Act

Under the Protecting Americans from Tax Hikes (PATH) Act of 2015,⁸⁰ low-wage immigrant taxpayers who successfully adjust their immigration status are barred from claiming retroactive payroll tax relief offered to low income native-born residents through the Earned Income Tax Credit (EITC).⁸¹ To put this in context, a single working mother with three children who is granted Legal Permanent Resident (LPR) status during the 2016 tax year or later is no longer eligible to claim the EITC for prior tax years. This is significant, as retroactive access to the EITC could result in a life-altering capital contribution to a low-income family.⁸²

To make a finer point regarding the interrelationship between undocumented workers and the EITC, it should be noted that all tax credits have an innate purpose. The EITC is intended to offset payroll taxes as an incentive for low income workers to actively engage in the workforce and thus reduce poverty.⁸³ However, undocumented

79. Kenneth Megan, *Tax Reform Will Raise Costs for Many Immigrant Families*, BIPARTISAN POL'Y CTR. (Dec. 22, 2017), <https://bipartisanpolicy.org/blog/tax-reform-will-raise-costs-for-many-immigrant-families/>.

80. Pub. L. 114-113, 129 Stat. 2242, 3086-90 (2016).

81. Kenneth Megan, *Understanding the PATH Act's Impact on Immigrants*, BIPARTISAN POL'Y CTR. (Dec. 18, 2015), <https://bipartisanpolicy.org/blog/understanding-the-path-acts-impact-on-immigrants/>.

82. The author's personal experience representing undocumented workers at the Center for Economic Progress in Chicago during 2002-2004 verifies the life-changing difference the retroactive claim previously afforded unauthorized workers who subsequently adjusted their immigration status to retroactively claim the EITC. One working mother with three children not only claimed the retroactive EITC resulting in thousands of dollars in tax refunds for the subject tax years, she was also able to secure a bank account at a local community bank program that offered 2-to-1 Individual Development Accounts, resulting in a doubling of the tax refunds, which was sufficient to send her eldest child to community college and place a down payment on a home for the family.

83. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-160475, GOVERNMENT ACCOUNTABILITY OFFICE REPORT ON REFUNDABLE TAX CREDIT 45 (2016).

workers are not only *not* entitled to the EITC, they are not entitled to claim Social Security benefits, despite paying into the system.⁸⁴ Payroll taxes are paid by undocumented workers through ongoing income tax withholding, reported at the end of the tax year via Form W-2.⁸⁵ For undocumented workers who file taxes and earn 1099 income, they pay into the Social Security system (in the form of SECA taxes) when they file their tax return and pay the tax due.⁸⁶ Thus, these workers are not entitled to offset payroll taxes, or claim the benefit of contributing payroll taxes to the Social Security system.⁸⁷ Legislation like the PATH Act further limits the benefits undocumented workers can access through the tax system.⁸⁸ Moreover, when viewed through an equity and fairness lens, undocumented workers shoulder more of a tax burden than they are given credit for with regard to their contributions to both the U.S. tax and Social Security systems.⁸⁹

84. Nina Roberts, *Undocumented Immigrants Quietly Pay Billions into Social Security and Receive No Benefits*, MARKETPLACE (Jan. 28, 2019), <https://www.marketplace.org/2019/01/28/undocumented-immigrants-quietly-pay-billions-social-security-and-receive-no/>; see also *Spotlight on SSI Benefits for Aliens 2020 Edition*, SOC. SECURITY ADMIN., <https://www.ssa.gov/ssi/spotlights/spot-non-citizens.htm> (last visited Aug. 12, 2020) (noting that proof of immigration status is required to apply for Social Security benefits).

85. These taxes are also known as Federal Insurance Contributions Act (FICA) taxes. See *Social Security & Medicare Tax Rates*, *supra* note 60.

86. Most individuals do not recognize the difference between payroll and income tax so that a worker earning 1099 self-employment income is unaware that their tax return shows a balance due higher than what they would owe if they were a W-2 employee. In the latter case, during the tax year the worker and the employer would each contribute the standard 7.65% each (except in the case of occasional payroll tax holidays), whereas someone considered self-employed would contribute the entire 15.3% (in the form of SECA taxes) upon filing their annual tax return. See *What Are FICA and SECA Taxes?*, SOC. SEC. ADMIN. (last updated Nov. 24, 2019), <https://faq.ssa.gov/en-us/Topic/article/KA-02375> (explaining the distinguishing features of FICA and SECA taxes); Megan, *supra* note 79.

87. See sources cited *supra* note 84.

88. See Megan, *supra* note 79.

89. Tax system equity involves how fair participants view the system to be. “The ability to pay principle states that those who are more capable of bearing the burden of taxes should pay more taxes than those with less ability to pay.” See U.S. COMM. ON FIN., 109TH CONG., REP. ON KICK-OFF FOR TAX REFORM: TACKLING THE TAX CODE 27 (Comm. Print 2006). This should be duly noted when one considers the perennial data point in yearly IRS Data Book reports showing corporations contribute less than 10% of yearly revenues (7.6% for Tax Year 2018) in the U.S., compared with nearly 60% by U.S. individual taxpayers, including undocumented workers. See CHARLES P. RETTIG

The PATH Act also instituted changes to the ITIN Program. The NTA 2019 Objectives Report to Congress provides one of the few public glimpses⁹⁰ into the ITIN application process and details some of the impacts of the PATH Act, including the new requirement that the IRS must study the efficacy of ITIN program controls.⁹¹ The resulting study found significant issues during the 2017 tax year, including ineffective ITIN deactivation notices.⁹² Most significantly, only 176,000 ITIN renewals were received, instead of the 450,000 projected, and over 5000 original passports were mailed to foreign embassies due to the failure to locate a valid taxpayer address.⁹³ These statistics indicate ITIN renewals may have sharply decreased because these undocumented immigrant workers may have left the United States, or simply opted to drop out of sight.⁹⁴

The number of ITINs issued and used in any given tax year is difficult to ascertain with any degree of precision. Since the changes instituted through the PATH Act, a 2018 TIGTA report noted that 409,627 new and renewal applications had been received by the IRS in the five-month period between October 2016 and 2017, but there is no corresponding indicator for how many of those applications were approved and, subsequently, how many tax returns were filed using the new or renewed ITINs.⁹⁵

ET AL., INTERNAL REVENUE SERV., PUB. 55B, 2018 INTERNAL REVENUE SERVICE DATA BOOK 3 (2019), <https://www.irs.gov/statistics/soi-tax-stats-irs-data-book>.

90. However, the report explicitly noted some of the tensions with the IRS in accessing this data: “The IRS has refused to include TAS on the study team or share its draft report.” 2019 NTA OBJECTIVES, *supra* note 52, at 140.

91. *See id.* at 141–42.

92. *See id.* at 140, 142.

93. *Id.* at 140.

94. *See* 2016 ANNUAL REPORT TO CONGRESS, *supra* note 37, at 244 (“Of the approximately 11million ITINs planned to be deactivated in January 2017, the IRS only sent letters to 440,000 taxpayers whose ITINs were used on a return during the last three years, telling them they need to renew.”).

95. TREASURY INSPECTOR GEN. FOR TAX ADMIN., NO. 2018-40-010, PROCESSES NEED TO BE IMPROVED TO IDENTIFY INCOMPLETE AND FRAUDULENT APPLICATIONS FOR INDIVIDUAL TAXPAYER IDENTIFICATION NUMBERS, 9–10 (2018). The report did include data indicating that additional processes were needed to ensure the integrity of ITINs issued for tax treaty purposes after 662,168 total ITINs were issued by the IRS to claim tax treaty benefits as of March 11, 2017, yet only 5.3% of total ITINs used between Tax Years 2014 and 2016 were actually used for tax treaty purposes. *Id.* at 7. Further, only 54,294 ITINs were used on tax returns between Tax Years 2014 and 2016, a number that seems particularly low. *Id.* The report also noted that the IRS may have issued 151,384 ITINs erroneously. *Id.* at 14.

2. 2017 Tax Cut and Jobs Act

Signed into law on December 22, 2017, the Tax Cut and Jobs Act (TCJA) changed IRC provisions for individuals and families, including a modification of tax rates, changes to the standard deduction and the child tax credit, the creation of a new credit for dependents, removal of personal exemptions,⁹⁶ and alterations to the shared responsibility payment.⁹⁷ Following passage of the TCJA, standard deductions were increased across the board,⁹⁸ and undocumented workers filing taxes have been severely impacted by the law.⁹⁹ For instance, prior to passage of TCJA, section 24 of the IRC allowed a nonrefundable child tax credit of up to \$1000 per qualifying child and a refundable portion in the form of the additional child tax credit equal to the remainder of the child tax credit amount in excess of tax.¹⁰⁰ The credit was available for filers who had children with ITINs or SSNs issued by the due date of the tax return (including extensions).¹⁰¹ The TCJA removed these

96. See Tax Cut and Jobs Act (TCJA), Pub. L. No. 115-97 § 11000, 131 Stat. 2054-59 (2017). Pre-TCJA (the 2017 Tax Year), the personal exemption was \$4,050. Section 11041 of the TCJA amended § 151(d)(5) of the IRC, effective for Tax Years 2018-2025, reducing personal exemptions to \$0. See TCJA § 11041.

97. Specifically, the standard deduction during the 2017 Tax Year for Single/Married Filing Separately tax returns was \$6,350. The Married Filing Jointly deduction was \$12,700, and the Head of Household deduction was \$9,350. See TCJA §§ 11001, 11021, 11022, 11041, 11081.

98. See sources cited *supra* note 96. The changes were as follows: Single/Married Filing Separately to \$12,000; Married Filing Jointly to \$24,000; and Head of Household to \$18,000.

99. Additionally, some changes were speculated to, among other things, result in a decrease in charitable contributions to churches and nonprofits. See Brian Faler, *Republican Tax Law Hits Churches*, POLITICO (June 26, 2018), <https://www.politico.com/story/2018/06/26/republican-tax-law-churches-employees-670362> (illustrating the impact of the tax law on places of worship). See generally *Resources on How the New Federal Tax Law Impacts Charitable Nonprofits*, NAT'L COUNCIL OF NONPROFITS, <https://www.councilofnonprofits.org/how-tax-cuts-jobs-act-impacts-nonprofits> (last visited Jan. 11, 2020) (demonstrating the availability of resources on the subject).

100. In other words, up to \$1,000 per child could be claimed, if not previously claimed, to reduce tax due. See TCJA § 11022. If any amount was used to reduce tax due, the balance could be claimed in additional child tax credit. The TCJA removed the ability of ITIN or SSN filers to claim either the child tax credit, or additional child tax credit if the dependent child(ren) listed on the tax return did not possess a SSN. *Id.*

101. *Id.*

filing incentives for undocumented workers with children who possess an ITIN and not a SSN.¹⁰²

Section 11022 of the TCJA did add section 24(h) of the IRC, applicable for tax years 2018–2025, increasing the non-refundable portion of the Child Tax Credit (CTC) up to \$2,000 per qualifying child, and an additional child tax credit (ACTC, operating as the refundable portion of the CTC) for taxpayers with more than \$2,500 of taxable income equal to the remainder of the CTC amount in excess of tax, but only up to \$1,400.¹⁰³ However, as noted above, the CTC is now solely available for children with SSNs issued by the due date of the tax return including any filing extensions.¹⁰⁴ While this change is mitigated by the fact that parents with ITINs can still claim the CTC (and ACTC) if the dependent child has a valid SSN, it affects families with ITIN-holding children who would otherwise benefit.¹⁰⁵

Section 11022(a) of the TCJA also added section 24(h)(4) of the IRC, applicable for tax years 2018 through 2025, creating a new nonrefundable tax credit of \$500 for each dependent¹⁰⁶ (as defined in section 152 of the IRC) of the taxpayer other than a qualifying child (as defined in section 24(c) of the IRC). This new credit for other dependents permits the dependent or tax return filer to hold any form of Taxpayer Identification Number; that is, either an ITIN or SSN would qualify the tax filer for the credit.¹⁰⁷ However, United States residency (but not citizenship) is required.¹⁰⁸

102. *Id.*

103. *Id.* (citing I.R.C. § 24 (2018)).

104. *Id.*

105. See INTERNAL REVENUE SERV., PUB. NO. 972, CHILD TAX CREDIT AND CREDIT FOR OTHER DEPENDENTS 2 (2020) [hereinafter IRS PUB. NO. 972], <https://www.irs.gov/forms-pubs/about-publication-972> (for use in preparing 2018 and 2019 returns).

106. See TCJA § 11022(a).

107. See IRS PUB. NO. 972, *supra* note 105, at 2. As previously discussed, the ITIN, introduced in 1996, allows those without a valid SSN to file federal and state tax returns. But recent changes have made the ITIN more difficult to secure, and increased measures intended to enhance security include a renewal requirement and expiration of ITIN for failure to file for a period of years. See Megan, *supra* note 73 (detailing PATH Act changes and impact on immigrants).

108. An IRS publication provides the following example: “Your 10-year-old nephew lives in Mexico and qualifies as your dependent. He is not a U.S. citizen, U.S. national, or U.S. resident alien. You cannot use him to claim ODC.” IRS PUB. NO. 972, *supra* note 105, at 4. Note that United States resident alien status only requires substantial presence not legalized status, thus allowing an ITIN-holder to qualify for the Other Dependent Credit (ODC). See IRS PUB. NO. 972, *supra* note 105, at 4 (citing INTERNAL REVENUE SERV., PUB. NO. 519, U.S. TAX GUIDE FOR ALIENS 3 (2019)).

3. State Tax Issues – New Mexico & DC

While Internal Revenue Service (IRS) procedures and federal protocol provide the most compelling impetus affecting the tax filing behavior of undocumented workers, state tax systems also impact how unauthorized workers interact with revenue agencies. New Mexico and the District of Columbia provide instructive examples of troubling state tax administration practices as applied to undocumented workers. In 2016, it was reported that the state of New Mexico had been withholding more than \$4 million in tax refunds from unauthorized workers.¹⁰⁹ Under the administration of Republican Governor Susana Martinez, the New Mexico Department of Taxation and Revenue refused refunds to immigrants for a variety of reasons, including tax identification number mismatches and claims of penalties and interest due to the same.¹¹⁰

One of the attorneys who sued New Mexico's Revenue Department stated New Mexico was targeting immigrants with the expectation that few would follow up to comply with documentation and substantiation requests.¹¹¹ Ultimately, by October 2016, after a lawsuit was filed by the Mexican American Legal Defense and Educational Fund (MALDEF) and the United Workers Center of New Mexico, along with local lawyers, the New Mexico Taxation and Revenue Department entered an agreement aimed at reducing the number of tax refunds withheld from immigrant taxpayers who used ITINs.¹¹² The settlement also provided redress for the 2015 tax year, including reprocessing of state tax returns filed by foreign nationals using ITINs with previously withheld refunds issued to qualified

[hereinafter IRS PUB. NO. 519]], <https://www.irs.gov/forms-pubs/about-publication-519>.

109. Daniel C. Vock, *Can New Mexico Refuse Tax Refunds to Immigrants?*, GOVERNING MAG. (Apr. 15, 2016), <https://www.governing.com/topics/finance/gov-can-new-mexico-refuse-tax-refunds-immigrants.html>.

110. *See id.*

111. *See id.* (citing Albuquerque-based David Urias, one of the attorneys bringing suit on behalf of Roberto Sanchez and additional plaintiffs); *MALDEF and Co-Counsel File Lawsuits Against New Mexico Taxation and Revenue Department*, MALDEF (Feb. 12, 2015), <https://www.maldef.org/2015/02/maldef-and-co-counsel-file-lawsuits-against-new-mexico-taxation-and-revenue-department/>.

112. Morgan Lee, *New Mexico Settles Lawsuit Over Immigrant Tax Refunds, Santa Fe New Mexican*, ASSOCIATED PRESS (Oct. 28, 2016), <https://apnews.com/73e878f05dc64f97b95703d7bdb6349d> (citing the involvement of the immigrant rights group Somos Un Pueblo Unido).

taxpayers who could also pursue withheld refunds for tax years 2012 through 2014.¹¹³

In a similar example of the disparate tax treatment of undocumented workers, in the 2014 tax year the District of Columbia Office of Tax and Revenue (DC OTR) elevated their response¹¹⁴ to tax returns filed with inconsistent information, including tax returns filed with ITINs.¹¹⁵ Instead of the general policy instituted by the New Mexico Taxation and Revenue Division which “instituted an arbitrary policy of denying tax refunds to immigrant residents who file returns using their ITINs” for the 2012 tax year,¹¹⁶ DC OTR began flagging tax returns under the auspices of implementing their identity theft measures.¹¹⁷ Unfortunately, these measures cast far too wide a net and frequently target not only foreign nationals filing with an ITIN, but also those with foreign-sounding names who file Washington D.C. personal income tax returns using their properly issued SSN.¹¹⁸

Despite written memoranda¹¹⁹ directed at D.C. OTR administrators and in-person meetings with agency heads to address concerns of the unequal treatment of immigrant taxpayers, the primary result was the addition of a website disclaimer regarding ITIN use for tax returns filed with the District.¹²⁰ Among other

113. *See id.*

114. *See generally* SABRINA PHILLIPS, OFFICE OF TAX AND REVENUE COMPLIANCE ADMIN., CRIMINAL INVESTIGATION DIVISION (Jan. 8, 2014), https://otr.cfo.dc.gov/sites/default/files/dc/sites/otr/service_content/attachments/TaxPractitionerInstitute-CriminalInvestigationDivision2015.pdf (highlighting the organization’s priorities for investigating tax fraud).

115. Tax returns filed by unauthorized workers are often filed with an ITIN, but include W-2 information with a SSN that does not belong to the person working with the SSN. *See e.g.*, Burnett, *supra* note 29.

116. *MALDEF and Co-Counsel File Lawsuits Against New Mexico Taxation and Revenue Department*, *supra* note 111 (stating that New Mexico was illegally withholding millions from immigrant taxpayers who use individual tax ID numbers to file).

117. *See OTR Policy Related to Processing Returns Filed With Individual Taxpayer Identification Number (ITIN)*, OFFICE OF TAX AND REVENUE, <https://otr.cfo.dc.gov/page/otr-policy-related-processing-returns-filed-individual-taxpayer-identification-number-itin> (last visited Aug. 12, 2020).

118. *See Testimony of Taxpayer in Support of Bill 23 41*, Taxpayer Advocate Act of 2019, S.928, 116th Cong. (2019), <http://dccouncil.us/event/finance-revenue-public-hearing-18/>.

119. Joint Memorandum from the Univ. of D.C., David A. Clarke Sch. of Law, D.C. Fiscal Policy Inst., Cmty. Tax Aid, CentroNia, and CARECEN to Keith Richardson, Chief Fin. Officer and the Staff of the D.C. Office of Tax Revenue Adm’rs. (Dec. 1, 2017) (on file with author).

120. The disclaimer reads:

measures, D.C. OTR's Questionable Return Detection protocols serve to disallow payroll tax withholdings of compliant ITIN taxpayers, as well as to question legitimate self-employment income, undermining the fairness of the D.C. tax system and discouraging voluntary compliance.¹²¹ It is conceivable that immigrant tax filers who fail to receive their state or local tax refund will cease filing these tax returns in the future. Moreover, while designed as an anti-fraud measure, D.C. OTR's current policy is causing compliant ITIN taxpayers the loss of withholding credits, creating a double tax regime on the District's vulnerable immigrant communities.¹²² It remains to be seen whether continued efforts will convince the District to amend its ultimately discriminatory policies. Meanwhile, OTR's current handling of ITIN returns and SSN tax returns filed by D.C. residents with foreign-sounding names will only decrease effective tax administration because voluntary compliance is likely to diminish within these disparately impacted communities.¹²³

The Office of Tax and Revenue (OTR) accepts both paper and electronically filed returns that have Individual Taxpayer Identification Number (ITIN) as the primary identification number. All returns, including returns with ITINs are processed through the normal workflow that includes fraud review. ITIN returns selected for review will be reviewed according to procedures set forth to verify items on the return. This includes income and identity verification. For all returns, the taxpayer is responsible for substantiation of income, identity and any other information requested by the reviewer.

OFFICE OF TAX AND REVENUE, *supra* note 104.

121. In one recent instance, a Legal Permanent Resident's refund was denied based on Questionable Return Detection protocols that failed to properly attribute the modest self-employment income of the elderly taxpayer despite numerous offers of proof. In a direct denial of due process, after refusing the in-person substantiation produced by the taxpayer, OTR agents simply referred the taxpayer to D.C. Superior Court to bring suit against DC OTR (with a threshold filing fee of over \$100). The author worked on the case before DC OTR on a *pro bono* basis. It was resolved in favor of the taxpayer resulting in a refund of several thousand dollars during the writing of this Article.

122. See *OTR Institutes New Fraud Prevention Measures*, OFFICE OF TAX AND REVENUE (Feb. 29, 2016), <https://otr.cfo.dc.gov/release/otr-institutes-new-fraud-prevention-measures>; Comm. on Fin. & Revenue, *Public Roundtable/Public Hearing: Emi Yamauchi Testimony*, at 29:43, COUNCIL D.C. (Mar. 18, 2019), http://dc.granicus.com/MediaPlayer.php?view_id=2&clip_id=4928.

123. See Comm. on Fin. & Revenue, *supra* note 122 (commenting on Emi Yamauchi's testimony: "Ms. Yamuchi cites a systemic problem clearly with taxpayer fraud software.").

II. OVERVIEW OF TAX AND IMMIGRATION SYSTEMS

A. *Current Overlap Between Tax and Immigration Policy*

The term “taxigration”¹²⁴ was coined and is most often used by immigration practitioners, much the same way the term “crimmigration” was created to signal the overlap between immigration and criminal law issues.¹²⁵ Tax and immigration law have also been reasonably deemed comparable in terms of their mutual complexity.¹²⁶

A brief exploration of the immigration and taxation terms used to distinguish *lawful* presence from mere *physical* presence is instructive insofar as respective complexity is concerned. The terms “Resident Alien” and “Legal Permanent Resident” are easy to conflate. Resident Alien is a term of art used almost exclusively within the tax community, whereas Legal Permanent Resident (LPR) is a legally significant immigration designation.¹²⁷ A Resident Alien is not conferred any legal status insofar as documentation to reside legally in the United States: the Resident Alien designation only indicates physical presence sufficient to justify an application for an ITIN.¹²⁸

124. See, e.g., “Taxigration”: Tax Issues in Removal and Family-Based Cases, AILA AGORA (Jan. 12, 2017), <https://agora.aila.org/product/detail/3239>.

125. See César Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 U.C. DAVIS L. REV. 197, 197 (2018) (stating “Born of fears of migrants ferrying drugs into the United States, fueled by concern of foreign terrorists, and concretized by a three-decades long securitization of migration, crimmigration law now occupies a prominent place in the country’s legal regime.”).

126. See Dana Leigh Marks, Opinion, *I’m an Immigration Law Judge: Here’s How We Can Fix Our Courts*, WASH. POST (Apr. 12, 2019), https://www.washingtonpost.com/opinions/im-an-immigration-judge-heres-how-we-can-fix-our-courts/2019/04/12/76afe914-5d3e-11e9-a00e-050dc7b82693_story.html?noredirect=on (“The legal provisions that we apply have been compared to tax law in their complexity and can test even the most experienced attorneys.”).

127. There are other instances of the “Resident Alien” designation, although still largely within the context of taxation. For example, in electing S corporation members, the requirement that shareholders must be Resident Aliens was often confused with a requirement that shareholders must be Legal Permanent Residents (LPRs), although this distinction was undone with the 2017 TCJA. Rusudan Shervashidze & Stanley C. Ruchelman, *A New Opportunity for Nonresident Aliens, Ownership in an S-Corp*, LEXOLOGY (Mar. 5, 2018), <https://www.lexology.com/library/detail.aspx?g=4679e46f-fd29-4e46-980b-6e5f6da3ead>.

128. See PUB. NO. 519, *supra* note 95, at 25–26.

The Resident Alien designation is largely controlled by the substantial presence test,¹²⁹ and residency rules for tax purposes are codified under IRC section 7701(b). As the IRS notes on its website, “Although the tax residency rules are based on the immigration laws concerning immigrant and nonimmigrant aliens, the tax rules define residency for tax purposes in a way that is very different from U.S. immigration law.”¹³⁰ As it stands, the substantial presence test for tax purposes as defined in IRC section 7701(b)(3)(A)(ii) essentially requires “continual” physical presence totaling 183 days over the previous three years.¹³¹ A Resident Alien for tax purposes can proceed to file income taxes only once they have secured a valid ITIN.¹³² Yet the requisite physical presence test is a low bar, with thirty-one days of physical presence in the current tax year serving to support an ITIN application.¹³³

The overlap between tax and immigration law is vast. Tax issues in immigration cases can arise from the taxpayer unknowingly filing an incorrect tax return, or knowingly and dishonestly filing (or failing to file) a tax return for one or more years. The range of concerns in tax filings vary from incorrect classification of dependents or tax forms filed with incorrect tax identification numbers for one or more members of a family,¹³⁴ to more substantial issues including inaccurate income reporting.¹³⁵ In tandem with discrete immigration

129. See I.R.C. § 7701(b)(1)(A).

130. See *Taxation of Alien Individuals by Immigration Status H-1B*, INTERNAL REVENUE SERV. (last updated Jul. 22, 2019), <https://www.irs.gov/individuals/taxation-of-alien-individuals-by-immigration-status-h-1b>.

131. But see I.R.C. § 7701(b)(3)(A)(ii) (providing for modification of the calculation of days present in the United States based on the number of years preceding the current calculated year); but see also §§ 7701(b)(3)(B)–(D) (providing for exceptions to the general requirement outlined in § 7701(b)(3)(A)).

132. Prior to the implementation of the ITIN program, the IRS often received tax returns filed by undocumented workers using the SSN the worker used for employment, leading to the development of ITINs. EINs can also be solicited by ITIN holders. See *How to Apply for an EIN*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/how-to-apply-for-an-ein> (last visited Sept. 30, 2019).

133. See I.R.C. § 7701(b)(3)(A); accord *Substantial Presence Test*, INTERNAL REVENUE SERV. (last updated Jan. 15, 2020), <https://www.irs.gov/individuals/international-taxpayers/substantial-presence-test>.

134. This occurs whether a valid SSN or ITIN is used.

135. Both underreporting and overreporting can be a concern. The former implicates predictable incentives to lower tax liability, while the latter can arise when there is an incentive to inflate income to clear the public charge hurdle or to provide substantiation for the purchase of a home. See *Taxes and Immigration Law*,

petitions, immigration practitioners must request that their clients gather prior year tax information,¹³⁶ or in some cases, request correction of a prior year incorrect tax filing through a Form 1040X.¹³⁷ When it is discovered that no prior year tax returns were filed, immigration lawyers must recommend immediate compliance.¹³⁸ In some cases, this requires securing an ITIN because the immigrant worker or a family member may not have a valid SSN for tax filing purposes. It may also require filing corrected tax returns, often due to imprecise family member and dependent designations as noted above.

Depending on the type of immigration proceeding involved, tax returns may serve different evidentiary purposes. In an adjustment of status case, tax returns efficiently document continual physical presence and prove that the applicant is capable of earning enough income to support themselves, as well as any family member or dependent.¹³⁹ Thus, supplying tax returns helps to reduce concerns that the applicant will become a “public charge.”¹⁴⁰

IMMIGRATION SOLUTIONS LLC, <https://immsolutionsllc.com/immigration/taxes-and-immigration-law> (last visited Aug. 12, 2020).

136. See *infra* note 141 and accompanying text.

137. See *About Form 1040-X, Amended U.S. Individual Income Tax Return*, INTERNAL REVENUE SERV., <https://www.irs.gov/forms-pubs/about-form-1040x> (last visited Mar. 23, 2020).

138. See *supra* notes 47–48 and accompanying text (discussing strategic rationale for tax compliance in the context of contemplated immigration and removal proceedings); see also *infra* note 142 and accompanying text.

139. According to the guidelines published by the Department of Homeland Security:

Evidence establishing continual physical presence, which may include, but is not limited to:

- (A) Documentation by any governmental or nongovernmental authority, provided the documentation contains your name . . .
- (B) Educational documents; (C) Employment records; (D) . . . *tax returns showing that you attended school or worked in the United States* . . . ; (F) Documents showing installment payments, such as a series of monthly rent receipts or utility bills; (F) A list of the type and date of documents already contained in your DHS file that establishes physical presence . . . ; or (G) Your own affidavit attesting to your continuous physical presence.

U.S. CITIZENSHIP AND IMMIGRATION SERVS., DEP'T. OF HOMELAND SEC., OMB NO. 1615-0023, INSTRUCTIONS FOR APPLICATION TO REGISTER PERMANENT RESIDENCE OR ADJUST STATUS 28–29 (2019) (emphasis added), <https://www.uscis.gov/sites/default/files/document/forms/i-485instr-pc.pdf>.

140. See *id.* at 12; see also Cori Alonso-Yoder, *Publicly Charged: A Critical Examination of Immigrant Public Benefits Restrictions*, 97 DENV. L. REV. 1, 1 (2019)

During cancellation of removal proceedings under Section 240A(b)(1) of the Immigration and Nationality Act (INA), or other defensive, discretionary forms of relief, copies of filed tax returns are often tendered as proof that the applicant has resided peacefully and productively in the United States.¹⁴¹ While a long history of tax contributions could theoretically indicate a higher threshold of obligations satisfied, including requisite good moral character,¹⁴² tax returns are more practically used to meet the requirement of continual physical presence for at least ten years.¹⁴³ In a naturalization case, tax returns aid in meeting the burden of proof regarding an applicant's threshold eligibility to naturalize and illustrate that the individual is genuinely undertaking their civic commitments as a future U.S. citizen.¹⁴⁴

B. Tax Issues Encountered by Immigration Lawyers

Based on a 2019 survey¹⁴⁵ administered to immigration attorneys in New York, primarily those working in and around Manhattan, Brooklyn, the Bronx, and surrounding boroughs, the tax issues which most commonly surfaced in immigration legal services included filing taxes to prove a client is worthy of a benefit because taxes were filed

(arguing that the Trump administration's expansion of the definition of "public charge" is an attempt to discriminate against immigrants).

141. See 8 U.S.C. § 1229b(b) (2018) (allowing for possible cancellation of removal proceedings with, among other things, a showing of both continual presence and "good moral character").

142. IMMIGRANT LEGAL RES. CTR., NON-LPR CANCELLATION OF REMOVAL 12 (2018), https://www.ilrc.org/sites/default/files/resources/non_lpr_cancel_remov-2018-0606.pdf (noting that tax returns may aid a judge in determining that an individual is "the 'sort of person' that should be allowed to stay in the United States").

143. See *id.* at 1–2.

144. For example, at least one U.S. Citizenship and Immigration Services document confirms this idea: "Your tax returns are very important proof that you are eligible for naturalization. On the day of your interview, bring certified tax returns for the last 5 years (3 years if you are married to a U.S. citizen). Certified tax transcripts may be ordered by using Internal Revenue Service (IRS) Form 4506-T . . ." DEP'T. OF HOMELAND SEC., G-1151, THINKING ABOUT APPLYING FOR NATURALIZATION? (Apr. 2019), <https://www.uscis.gov/sites/default/files/USCIS/Office%20of%20Citizenship/Citizenship%20Resource%20Center%20Site/Publications/PDFs/G-1151.pdf>.

145. 2019 New York Immigration Lawyer Survey (on file with author). The survey was conducted by the Immigrant Advocate Response Collaborative; the author was provided a copy in preparation for a technical advice and Continuing Legal Education training called Tax Issues for Immigration Attorneys. The event was co-sponsored by Cornell Law School and the New York Immigration Coalition and held at Morrison Foerster in New York City on June 10, 2019.

and paid, concerns over incorrect filing status for filed returns, the need to supply copies of filed tax returns for naturalization applications, fee waiver requests, and to establish continuous presence.¹⁴⁶

Immigration practitioners are often at a loss when they are faced with the realization that their client's tax returns may be inaccurate at best, or in a worst-case scenario, potentially fraudulent. There are many instances when, in part due to the complexity of tax laws and a dearth of tax return preparers who are adequately versed in tax law requirements and myriad amendments, tax returns are filed incorrectly.¹⁴⁷ There are also practical hurdles encountered by immigration practitioners, such as when a client either does not want to file, or is detained and has not filed.¹⁴⁸

Depending on the particular Immigration Judge¹⁴⁹ and Immigration Court,¹⁵⁰ when tax issues arise in Adjustment of Status and other cases,¹⁵¹ the tax issues can make, break, or have negligible

146. *Id.* One example might be filing under Head of Household instead of Married when a taxpayer is legally married but their spouse resides outside of the United States. Conversely, some couples file Married Filing Jointly when they are not legally married and do not live in a state that recognizes common law marriage. Another common issue is when dependents do not qualify to be listed on a tax return but are listed by sometimes unscrupulous preparers who are actively trying to inflate tax refunds to claim a percentage of same, without regard to the potential audit risk to the immigrant worker. All of these issues can complicate immigration filings.

147. *See id.*

148. *See id.*

149. There have been recent instances of immigration judges denying bail because of tax returns. During one such proceeding in Atlanta: "The magistrate considered that it was impossible that with the money earned by [the defendant] could he have supported his family consisting of him, his wife and three daughters. The judge did not specify, however, what years of 'taxes' he considered wrong." Karina Neyra, *Judge Denies Bail to NC Immigrant and Says He Has No Moral Character Due to His Taxes*, QUEPASA RALEIGH/DURHAM (Apr. 29, 2019), <https://raleigh.quepasanoticias.com/noticias/carolina-del-norte/judge-denies-bail-to-nc-immigrant-and-says-he-has-no-moral-character-due>.

150. *See Marks, supra* note 99 (noting that the structure of immigration courts within a larger administrative agency can result in "crucial decisions [being] made by officials with little or no experience as judges.").

151. Tax returns are generally necessary in immigration proceedings as follows:

- Naturalization requires three to five years of tax return filings. *See generally* U.S. CITIZENSHIP AND IMMIGRATION SERVS., DEP'T. OF HOMELAND SEC., OMB NO. 1615-0052, INSTRUCTIONS FOR APPLICATION FOR NATURALIZATION (Sept. 17, 2019), <https://www.uscis.gov/n-400>.
- Adjustment of Status requires tax returns to prove bona fide marriage. *See generally* U.S. CITIZENSHIP AND IMMIGRATION SERVS., DEP'T. OF HOMELAND SEC., OMB NO. 1615-0023, INSTRUCTIONS FOR APPLICATION

impact on an immigration petition. For example, Atlanta is frequently cited as a difficult immigration court system, where supporting tax returns were invoked in at least one immigration court proceeding as the basis to deny an immigration petition.¹⁵² Expressions of prejudice by Immigration Judges against immigrants appearing before them have been witnessed and extensively documented in Atlanta courtrooms by organizations seeking reform.¹⁵³

Moreover, it is worthwhile to note that the current environment has provided fertile ground for bad actors seeking to perpetrate fraud and prey upon unsophisticated immigrants.¹⁵⁴ This includes both tax

TO REGISTER PERMANENT RESIDENCE OR ADJUST STATUS (Oct. 15, 2019), <https://www.uscis.gov/i-485>; U.S. CITIZENSHIP AND IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., OMB NO. 1615-0038, INSTRUCTIONS FOR PETITION TO REMOVE CONDITIONS ON RESIDENCE (Dec. 2, 2019), <https://www.uscis.gov/i-751>.

- Cancellation of removal proceedings requires ten years of returns. See *supra* note 143 and accompanying text. Green Card renewals and benefits require “compliance with applicable laws and authorities,” which includes consistently meeting filing requirements. U.S. CITIZENSHIP AND IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., OMB NO. 1615-0082, INSTRUCTIONS FOR APPLICATION TO REPLACE PERMANENT RESIDENT CARD 12-13 (Feb. 27, 2017), <https://www.uscis.gov/i-90>.

Determining an applicant's residency start date for the purpose of tax and immigration filings, disclosures related to tax filings, and unauthorized employment before USCIS officials can all pose additional challenges. See 8 U.S.C. § 1427(e) (2012) (expanding the permissible range for examination for determination of “good moral character” as well as the requirements for residency); see also 8 C.F.R. § 316.10 (2019) (requiring naturalization applicants to demonstrate “good moral character”); Henry J. Chang, *U.S. Citizenship Acquired Through Naturalization*, CHANG AND BOOS' CAN.-U.S. IMMIGRATION LAW CTR., <http://www.americanlaw.com/citnat.html> (last visited Mar. 23, 2020).

152. See, e.g., Hilda Bonilla, *The Sad State of Atlanta's Immigration Court*, IMMIGR. IMPACT (Mar. 10, 2017), <http://immigrationimpact.com/2017/03/10/atlanta-immigration-court/#.XRLtI6fMwWo>; see also Letter from Hallie Ludsin et al. on Observations of Atlanta Immigration Court to Juan P. Osana, Dir., Exec. Office for Immigration Review, U.S. Dep't of Justice (Mar. 2, 2017), https://www.splcenter.org/sites/default/files/2017-atl_complaint_letter_final.pdf (open letter cited in the Bonilla article, *supra*, that lists grievances based on six law students' observations of immigration proceedings in the Atlanta Immigration Court over the course of two months).

153. See sources cited *supra* notes 149, 152.

154. See Lam Thuy Vo, *She Paid a Lawyer Thousands of Dollars to Apply for a Green Card. She Got a Deportation Order Instead*, BUZZFEED (Sept. 29, 2018), <https://www.buzzfeednews.com/article/lamvo/undocumented-immigrants-10-year-green-card> (contending that immigrant fears and fraud committed by immigration attorneys are numerous and telling the story of a couple who were non-filers for

preparers and immigration law practitioners.¹⁵⁵ There are unfortunately far too many instances of abuses committed against recent arrivals, including “notario” fraud¹⁵⁶ and other avenues to mislead trusting and often unsophisticated new arrivals in the United States, most of whom are loathe to go to the authorities to report crimes committed against them.¹⁵⁷

C. Recent Efforts Toward Immigration Reform

Experience around the world demonstrates that the single most important ingredient for effective tax administration is clear recognition of its importance at high political levels and the willingness to support good administrative practices—even if it is politically difficult to do so.¹⁵⁸

decades until they believed they were going to get a green card); *see also* Burnett, *supra* note 29 (“Jaime[] has been using a fake Social Security number since he came to the U.S. from Mexico 21 years ago. He says he paid an underground seller \$60 for it and didn’t ask any questions.”).

155. *See, e.g.*, Liz Robbins, *Immigrants Claim Lawyers Defrauded Them and They May Be Deported*, N.Y. TIMES (May 3, 2018), <https://www.nytimes.com/2018/05/03/nyregion/immigrants-lawyers-defrauded-deportation.html> (depicting the pervasive problem of fraudulent immigration attorneys); *Rhode Island Woman Sentenced for Massive Immigration Scam*, U.S. ATT’Y OFF. (June 28, 2016), <https://www.justice.gov/usao-ma/pr/rhode-island-woman-sentenced-massive-immigration-scam> (same).

156. *See, e.g.*, Kati Daffan, *Notarios Are No Help with Immigration*, FED. TRADE COMM’N: CONSUMER INFO. BLOG (Sept. 26, 2019), <https://www.consumer.ftc.gov/blog/2019/09/notarios-are-no-help-immigration> (“[T]ime after time, we see stories of notarios who take people’s money and documents, make big promises, and then do nothing.”); *About Notario Fraud*, AM. BAR ASS’N (July 19, 2018), https://www.americanbar.org/groups/public_interest/immigration/projects_initiatives/fight-notario-fraud/about_notario_fraud/.

157. One interview broadcasted on “This American Life” provides an instructive example:

I asked the brothers and Nubi, if Patria’s crime had happened to them today, would they still work with ICE. They said they’d think twice about it, but yeah, they’d do it again. They’re not so sure how many others would come forward, though. Here’s Brigido: [If it were today, it would be difficult, because people wouldn’t have the same degree of trust they had before. It’s a different point in time, and things don’t seem the same, don’t look the same, as years ago.]

ICE Capades, THIS AMERICAN LIFE (July 21, 2018) (brackets inserted to indicate superimposed translation from Spanish), <https://www.thisamericanlife.org/652/transcript> (interview conducted and narrated by Miki Meek).

158. *See* RICHARD BIRD, SMART TAX ADMINISTRATION, THE WORLD BANK 2 (Oct. 2010),

The quote above centers on tax administration, but it resonates in the context of immigration reform, and the important intersections between tax and immigration. It is a central tenet of this article that the political will to advance immigration reform exists, but it is difficult to consistently and uniformly acknowledge across the partisan political spectrum. A few salient examples follow.

Three months before the 2016 election, South Carolina Senator Lindsay Graham declared his interest in reviving the Gang of Eight immigration reform bill introduced during the 113th Congress.¹⁵⁹ Senator Graham's impetus was the prediction that Latinos would "thrash[]" Republicans in the upcoming election.¹⁶⁰ Senator Graham stated, "I'm going to take the Gang of Eight bill out, dust it off and ask anybody and everybody who wants to work with me to make it better to do so."¹⁶¹ The Gang of Eight's immigration bill was introduced in mid-April 2013 by Senator Charles "Chuck" Schumer (D-NY), and co-sponsored by seven other senators, for a total of four Democrats and four Republicans.¹⁶² Although the comprehensive immigration reform bill passed the Democratic-controlled Senate, it stalled in the House,

<http://documents.worldbank.org/curated/en/281951468162555914/pdf/573980BRI0EP360Box353747B01PUBLIC1.pdf>.

159. See Seung Min Kim & Burgess Everett, *Immigration Reformers Eye Gang of 8 Revival*, POLITICO, (July 5, 2016, 5:25 AM), <https://www.politico.com/story/2016/07/immigration-reform-gang-eight-225028>.

160. *Id.*

161. *Id.*

162. The other senators consisted of John McCain (R-AZ), Richard Durbin (D-IL), Lindsey Graham (R-SC), Robert Menendez (D-NJ), Marco Rubio (R-FL), Michael Bennett (D-CO), and Jeff Flake (R-AZ). See Weiner, *supra* note 15. The bill was introduced on April 16, 2013, and all seven senators were original co-sponsors. See Erin Kelly, *'Gang of Eight' Say They Believe Immigration Bill Will Pass*, USA TODAY (last updated Apr. 19, 2013, 1:38 AM), <https://www.usatoday.com/story/news/politics/2013/04/18/immigration-senate-gang-of-eight/2094785/>. The bill passed in the Senate on June 27, 2013, with an amendment 68–32, but failed to progress in the House. See Philip E. Wolgin, *2 Years Later, Immigrants Are Still Waiting on Immigration Reform*, CTR. FOR AM. PROGRESS (June 24, 2015, 9:05 AM), <https://www.americanprogress.org/issues/immigration/news/2015/06/24/115835/2-years-later-immigrants-are-still-waiting-on-immigration-reform/>. For more information on the bill, see Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013).

something at least one Republican Gang of Eight member reportedly expected.¹⁶³

The politics of comprehensive immigration reform cannot be overstated. At least three of the four Republican Gang of Eight Senators, Marco Rubio, the late John McCain, and Lindsey Graham, shifted their positions on immigration reform to varying degrees, with Rubio and McCain pulling back on their pro-reform stance due to their respective 2016 presidential and Senate election and re-election bids.¹⁶⁴ Politically, it appears as if immigration reform would have to emerge as an issue that voters would be willing to support in order for the Gang of Eight proposals to regain momentum.¹⁶⁵ Yet it is unclear whether voters will respond to measured approaches stressing mutual benefits of reform or whether divisiveness will ultimately win out.¹⁶⁶

In a recent op-ed, two former elected officials from Michigan wrote:

To the extent that voters feel strongly about immigration, it is culture and American identity that drive the debate on those issues, not policy. Numerous polling and academic analyses of the Trump victory confirm that it was primarily cultural anxiety that

163. See *Rubio: Gang of 8 Bill Never Intended to Become Law*, NBC NEWS (Feb. 15, 2016, 1:20 PM), <https://www.nbcnews.com/politics/2016-election/rubio-gang-8-bill-never-intended-become-law-n518936>.

164. See Kim & Everett, *supra* note 159 (noting the withdrawal of Senators McCain and Rubio from the issue). Senator Graham, Chair of the Senate Judiciary Committee, faced criticism ahead of the August 2019 recess for altering committee procedures in order to get an asylum bill passed that would stand little chance of being passed by the current Democratic-controlled House: “I still look forward to working with him on a bipartisan basis but the opportunities are fewer and his political approach is more strident now that he is up for reelection in South Carolina,” said Sen. Dick Durbin (D-Ill.), a member of the Judiciary Committee.” See Marianne Levine, *Senate Dems Accuse Lindsey Graham of Underhanded Tactics During Ugly Fight over Asylum*, POLITICO (Aug. 01, 2019, 4:21 PM), <https://www.politico.com/story/2019/08/01/senate-democrats-lindsey-graham-1444383>.

165. “McCain, for one, wouldn’t even discuss the possibility of another run at reform [during his candidacy for president]. The 2008 presidential nominee . . . ha[d] long championed immigration reform, albeit with occasional lurches to the right.” Kim & Everett, *supra* note 159.

166. *Cf. id.* (“Sen. Jeff Sessions (R-Ala.), who has worked methodically to kill past comprehensive immigration reform efforts on Capitol Hill, said the results in November will play a major role in whether Congress decides to take up the perennially difficult issue again, and what it would look like.”).

drove many white voters to Trump, not economic insecurity.¹⁶⁷

Ultimately, these authors noted that the fears and uncertainties of a wide swath of voters must be directly addressed with a mixture of realistic and positive narratives on immigration.¹⁶⁸ It remains to be seen whether these narratives can overcome the casting of immigrants as the ever dangerous “other” element in society appealing to darker, more ominous visions of a divided social order.¹⁶⁹

In 2006, twenty years after the passage of IRCA under Reagan, Congress again appeared poised to overhaul the U.S. immigration system to address additional arrivals in the United States and to tighten up border security.¹⁷⁰ In fact, the 109th, 110th, and 113th Congresses were particularly prolific in their considerations of potential reform, holding numerous hearings on the proposed effects of reform, studying outlays to support expected strains on existing security infrastructure, development of new security measures, and

167. Steve Tobocman & John Austin, *How Democrats Can Turn Immigration into Trump's Kryptonite*, POLITICO, (Oct. 20, 2019), <https://www.politico.com/magazine/story/2019/10/20/trump-democrats-immigration-2020-229863>.

168. *See id.*

169. *See* Ibrahim Hirsi, *Trump Administration's 'Public Charge' Provision Has Roots in Colonial US*, PRI (Dec. 19, 2018, 2:00 PM), <https://www.pri.org/stories/2018-12-19/trump-administration-s-public-charge-provision-has-roots-colonial-us> (demonstrating the discriminatory roots of the phrase “public charge”); Margot Adler, *Immigration Study: 'Second Generation' Has Edge*, NAT'L PUB. RADIO (Aug. 24, 2008, 12:01 AM), <https://www.npr.org/templates/story/story.php?storyId=93861094> (noting ongoing questions as a result of difficulties in legal immigration); *see also* *Historical Overview of Immigration Policy*, CTR. FOR IMMIGR. STUD., <https://cis.org/Historical-Overview-Immigration-Policy> (providing an overview of the history of immigration in the U.S.); Archie Bland, *Rats: The History of an Incendiary Cartoon Trope*, GUARDIAN, (Nov. 18, 2015, 2:06 PM), <https://www.theguardian.com/artanddesign/shortcuts/2015/nov/18/rats-the-history-of-an-incendiary-cartoon-trope> (noting a history of using vermin to depict immigrants and refugees).

170. *See* Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006); *Senate Passes Immigration Bill*, CNN (May 26, 2006, 3:42 AM), <https://www.cnn.com/2006/POLITICS/05/25/immigration/index.html> (highlighting the bipartisan nature of the bill's passage in the Senate). *But see* Miriam Valverde, *Did Senate Pass Immigration Bills in 2006, 2013 and House Failed to Vote on Them?*, POLITIFACT, (Jan. 26, 2018), <https://www.politifact.com/factchecks/2018/jan/26/ronald-brownstein/did-senators-pass-immigration-reform-bills-2006-20/> (“The Comprehensive Immigration Reform Act of 2006 passed in the Senate on May 25, 2006, along a 62-36 vote. . . . But the bill was never taken up by the House.”).

revenue outlays and increases that would result from legalizing the immigration status of millions.¹⁷¹

Then-Senator Jeff Sessions co-sponsored a bill introduced during the 109th Congress proposing amendments to IRC section 6103¹⁷² to permit information sharing among the three main agencies, the IRS, the Social Security Administration, and the Department of Homeland Security.¹⁷³ It appears that bill did not make it past referral to the Committee on Finance,¹⁷⁴ yet it is conceivable that future amendments to IRC section 6103 could leave undocumented workers who file taxes more vulnerable to detection and prosecution given sufficient political will. This may ultimately be a key element to immigration reform.¹⁷⁵ As of the last official Code publication in 2018, Section 6103 has been amended nearly fifty-four times since IRCA was passed,¹⁷⁶ and it has continued to be amended through 2019, with its most recent alteration effective on December 19, 2019.¹⁷⁷ It is thus an entirely realistic proposition that protections under Section 6103 could be modified by Congress to achieve the aims of stricter immigration law enforcement should the parties in power agree on reform.¹⁷⁸

171. See generally RUTH ELLEN WASEM, CONG. RESEARCH SERV., R42980, BRIEF HISTORY OF COMPREHENSIVE IMMIGRATION REFORM EFFORTS IN THE 109TH AND 110TH CONGRESSES TO INFORM POLICY DISCUSSIONS IN THE 113TH CONGRESS (Feb. 27, 2013), <https://fas.org/sgp/crs/homesec/R42980.pdf> (summarizing three major comprehensive immigration reform efforts).

172. See Border Security and Interior Enforcement Improvement Act, S. 2368, 109th Cong. (2006). Section 431 of the bill specifically calls for amendments to IRC section 6103 to allow the sharing of taxpayer information between the Department of Homeland Security, the IRS, and the SSA.

173. *Id.*

174. See generally *S. 2368 (109th): Border Security and Interior Enforcement Improvement Act of 2006*, GOVTRACK, <https://www.govtrack.us/congress/bills/109/s2368> (last visited Aug. 13, 2020) (noting that the bill did not receive a vote).

175. See *infra* note 178.

176. See I.R.C. § 6103 History (2018) (number derived from a tally of amendments listed subsequent to the October 22, 1986 passage of IRCA).

177. See *Fostering Undergraduate Talent by Unlocking Resources for Education Act*, Pub. L. No. 116-91, 133 Stat. 1189 §§ 3–4.

178. See generally Cynthia Blum, *Rethinking Tax Compliance of Unauthorized Workers After Immigration Reform*, 21 GEO. IMMIGR. L.J. 595 (2007) (discussing various reform possibilities and strategies).

III. HOW UNDOCUMENTED WORKERS CONTRIBUTE TO THE ECONOMY

Political rhetoric surrounding immigration reform often approaches the issue from a disingenuous standpoint because the economic equation is frequently disregarded.¹⁷⁹ Undocumented workers primarily contribute to the U.S. economy through their labor. In migrating to America, they exercise a combination of risk-seeking and risk-averse behavior.¹⁸⁰ To analyze the economic contributions of undocumented workers, this Article borrows a number of economic theories and principles, including micro and macroeconomics.¹⁸¹ From a microeconomic perspective, choice theory and the rational choices made by undocumented workers provide a backdrop for examining current incentives in tax and immigration policies often at odds with one another.¹⁸² Rational choice is the selection of the best option from

179. See, e.g., Alan Hyde, *Law and Economics of Family Unification*, 28 GEO. IMMIGR. L.J. 355, 366 (2014) (“Neither the case for or against family unification has invoked much economic analysis.”); Pia M. Orrenius et al., *The Economics of U.S. Immigration Reform*, 9 CAPITALISM & SOC’Y 3, 4 (2014) (“The highly politicized debate over immigration reform is in danger of losing sight of the economic fundamentals involved.”).

180. See generally JONATHAN LEVIN & PAUL MILGROM, INTRODUCTION TO CHOICE THEORY 24 (2004), <https://web.stanford.edu/~jdlevin/Econ%20202/Choice%20Theory.pdf> (“[T]he [rational choice model] abstracts from the idea that preferences might be influenced by contextual details, by the policies themselves, or by the political process. Moreover, rational choice approaches to policy evaluation typically assume people will act in a way that maximizes these preferences . . .”).

181. See D. Wade Hands, *Normative Rational Choice Theory: Past, Present, and Future*, 1–13 (July 2013) (unpublished paper originally presented at the Fourth Annual Conference on the History of Recent Economics), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1738671 (acknowledging the classic economics distinction between the two approaches of positive and normative economics, and “the positive-normative dichotomy written by economists during the twentieth century”). “As [Milton] Friedman put it in a 1955 paper on utility theory: ‘Science is science and ethics is ethics . . . only confusion, misunderstanding and discord can come from not keeping them separate and distinct, from trying to impose the absolutes of ethics on the relatives of science.’” *Id.* at 6. This Article does not adopt a binary approach between positive and normative economic principles; however, it does address a normative economics analysis appreciating the objective, fiscal contributions made by unauthorized workers while advancing the normative assertion that, supported by sound economic principles, the U.S. “should” move toward a more efficient, practical immigration policy to replace the current fractured system.

182. See Emily Ryo, *On Normative Effects of Immigration Law*, 13 STAN. J.C.R. & CIV. LIBERTIES 95, 127–28 (2017), <https://law.bepress.com/usclwps-lss/204/> (“The current study found only partial support for the idea that immigration laws can change people’s attitudes and beliefs in the direction consistent with the laws’ content. The

an array of possibilities, implementing a utility maximization or optimization-based approach.¹⁸³

A. *The Impact of Immigrant Labor*

Determining the net benefits and net costs of unauthorized immigrant labor in the United States is laden with challenges, most notably, incomplete data sets.¹⁸⁴ The unauthorized immigrant population is difficult to establish precisely, but it is generally recognized as fluctuating in recent decades from a peak of 12.2 million in 2007,¹⁸⁵ to more current estimates of nearly 11 million.¹⁸⁶ While there has been an exponential increase in data in past decades specifically reporting the economic contributions of immigrant workers, it has always been difficult to accurately ascertain the net tax benefits of immigrant labor.¹⁸⁷ Depending on the source, estimates in the mid-1990s ranged from net fiscal benefits of \$27 billion to net losses ranging between \$16 and \$40 billion.¹⁸⁸

Recent data related to unauthorized immigrant workers indicate the state and local tax contributions by unauthorized workers total \$11.7 billion.¹⁸⁹ Yet the “send [them] back” contingent of the U.S.

effects . . . appear to be much more complicated, likely involving a priming effect that either bolsters or negates the law’s content effects.”).

183. See Hands, *supra* note 181, at 3–5.

184. See *supra* Part I.

185. See Jynnah Radford & Luis Noe-Bustamante, *Facts on U.S. Immigrants, 2017: Statistical Portrait of the Foreign-Born Population in the United States*, PEW RES. CTR. (June 3, 2019), <https://www.pewresearch.org/hispanic/2019/06/03/facts-on-u-s-immigrants/>.

186. See *id.*; see also Passel, *supra* note 4.

187. See Peter H. Schuck, *The Morality of Immigration Policy*, 45 SAN DIEGO L. REV. 865, 882 (2008) (“Reliance on census data, which employ rather crude, self-reported ethnic categories and do not include off-the-books income, is also controversial. These and other methodological issues make it difficult to resolve authoritatively some of the most fundamental empirical, policy-relevant questions . . .”).

188. See GEORGE J. BORJAS & BARRY R. CHISWICK, FOUNDATIONS OF MIGRATION ECONOMICS 434 (2019) (“It is doubtful, however, that *any* of these numbers estimates accurately the gap between the taxes paid by immigrants and the cost of services provided to immigrants.”); see also Schuck, *supra* note 187, at 883 (“Attempting to take into account all these economic factors, a National Research Council report published in 1997 concluded that immigration makes Americans as a whole slightly wealthier.”).

189. See Dan Kosten, *Immigrants as Economic Contributors: Immigrant Tax Contributions and Spending Power*, IMMIGR. F. (Sept. 6, 2018), <https://immigrationforum.org/article/immigrants-as-economic-contributors-immigrant-tax-contributions-and-spending-power/>.

populace is perhaps unbowed by the net cost of removing all immigrants from the country,¹⁹⁰ an effort estimated to require twenty years to fully execute and cost \$400–600 billion, not to mention an anticipated economic contraction of over \$1 trillion.¹⁹¹ It would seem that immigration reform of some sort is needed to bridge these polarized viewpoints, to the extent that public opinion can be meaningfully swayed. As noted in Part I, the Social Security ESF offers a compelling glimpse into the net positive contributions to the Social Security system by undocumented workers that continue to accumulate yearly, beyond the \$1.2 trillion amassed as of 2012.¹⁹² Whether greater publicity about these ongoing contributions by undocumented workers to national economic solvency reforms public perceptions of immigrants remains to be seen. Part IV delves more deeply into recent academic studies surveying public opinion and reasons for underlying resistance to immigration reform, and also

190. See Paul Bedard, *Border Surge Highest Since 2011, Each Illegal Immigrant Costs \$70,000, 7x Deportation Price*, WASH. EXAMINER (Oct. 31, 2018, 9:48 AM), <https://www.washingtonexaminer.com/washington-secrets/border-surge-highest-since-2011-each-illegal-immigrant-costs-70-000-7x-deportation-price>. In the cost/benefit analysis, similar arguments against immigration frequently calculate “cost of immigration” simply by subtracting a percentage of money budgeted for governmental services from estimates of income tax paid by immigrants without consideration to any other economic factors or sources of revenue and expense. See generally, e.g., MATTHEW O’BRIEN ET AL., FED’N FOR AM. IMMIGRATION REFORM, *THE FISCAL BURDEN OF ILLEGAL IMMIGRATION* 1 (2019), <https://www.fairus.org/sites/default/files/2017-09/Fiscal-Burden-of-Illegal-Immigration-2017.pdf>. Most telling is the fact that these claimed costs of immigration are frequently synonymous with broader social welfare budgets allocated for the assistance low-income individuals in general regardless of nationality. See Bedard, *supra* (quoting Steven Camarota, Director of Research for the Center for Immigration Studies: “Those with low incomes as a group, regardless of legal status, use more in public services than they pay in taxes.”).

191. Ben Gitis & Jacqueline Varas, *The Labor and Output Declines from Removing All Undocumented Immigrants*, AM. ACTION F. (May 5, 2016), <https://www.americanactionforum.org/print/?url=https://www.americanactionforum.org/research/labor-output-declines-removing-undocumented-immigrants/> (“[F]ully enforcing current law towards all undocumented immigrants would take at least 20 years and cost the government \$400 billion to \$600 billion. . . . Most importantly, under both the 20-year and 2-year time frames, the U.S. economy would shrink by over \$1 trillion.”).

192. In 2015, a Social Security Administration Inspector General report indicated that \$1.2 trillion in unclaimed payroll tax contributions had accumulated in the Earnings Suspense File as of 2012. Earnings Suspense File accumulations are actually part of the larger Social Security trust fund, which is a “pay as you go” system. See OFFICE OF THE INSPECTOR GEN., *supra* note 57, at 1.

presents preliminary findings from a nationwide survey of tax clinics conducted by the author.

Most noncitizens currently living in the United States are typically within the working ages of 25–64, and while they paradoxically are less likely to have earned at least a high school education, they hold advanced degrees at about the same rate as citizens, attesting to the variety of immigrant non-citizens residing in the United States.¹⁹³ While this Article focuses on the economic impact and contributions of unauthorized immigrants, there is another important segment of authorized immigrants in the United States who provide an instructive glimpse of economic contributions: asylum-seekers and refugees.¹⁹⁴ A brief overview of the distinction between “refugee” and “asylee” is in order and is particularly informative with respect to the tax filing behavior of different immigrant groups.

Refugees under the INA are identified¹⁹⁵ and must be approved before arrival, generally due to a demonstrable well-founded fear of prosecution; whereas asylees may be present at a U.S. port of entry, or may already be residing in the United States.¹⁹⁶ An asylum application can be classified as either affirmative, via an application through U.S. Citizenship and Immigration Services, or defensive, as part of removal proceedings before an immigration judge.¹⁹⁷ In 2017, nearly 140,000 affirmative asylum applications were filed in the United States, almost 1.5 times greater than the number of applications recorded in 2014.¹⁹⁸ In 1990, the number of actual refugee admissions totaled over 122,000, compared with 53,691 actual admissions in 2017,¹⁹⁹ and a cap of 18,000 for the 2020 fiscal year.²⁰⁰

193. See CONG. BUDGET OFFICE, *supra* note 19, at 1, 10.

194. See *Figures at a Glance*, UNITED NATIONS REFUGEE AGENCY, <https://www.unhcr.org/en-us/figures-at-a-glance.html> (last visited Aug. 16, 2019) (reporting that global displacement is at an all-time high, with 70.8 million forcibly displaced, including almost 26 million refugees and 3.5 million asylum seekers).

195. See 8 U.S.C. § 1101(a)(42) (2018).

196. See NADWA MOSSAAD, U.S. DEPT OF HOMELAND SEC. OFFICE OF IMMIGRATION STATISTICS, ANNUAL FLOW REPORT, REFUGEES AND ASYLEES: 2017, at 2 (Mar. 2019), https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2017.pdf.

197. See *id.* at 6.

198. See *id.* at 7. This number includes only principal applications, and there were an additional nearly 70,000 dependents. See *id.* at n.18.

199. See *id.* at 4 (referring to Figure 1).

200. *Trump Approves Plan to Cap Refugees at 18,000 in 2020*, AP NEWS (Nov. 2, 2019), <https://apnews.com/70b6d94da0b54d089b92064fcbca536e>.

Without attempting to precisely quantify the overall economic impact of asylum seekers and refugees, it is recognized that many refugees and asylees are active participants in the labor force.²⁰¹ Indeed, the net positive effect of the refugee immigrant diaspora in the United States is complex but tangible.²⁰² There are also distributional consequences to contemplate concerning immigrant labor, including job competition and wage depression from an influx of low skilled workers accepting lower salaries than native or existing immigrant workers, largely accruing to the benefit of employers.²⁰³ Social service distribution invokes a secondary, related consequence “[as a] kind of a tax on the rest of the society. . . . [E]conomists point to both the labor market impacts and to the fiscal impacts.”²⁰⁴ Social services will be discussed in more detail below, particularly unauthorized workers’ impact on state and national healthcare costs, but there are documented gains insofar as overall *refugee* contributions to public coffers is concerned, especially when compared to their use of social services.²⁰⁵

For example, cities like Utica, New York, have experienced economic transformation from refugee resettlements.²⁰⁶ While the number of refugees in the United States is currently capped at 18,000

201. See Paul Solman, *What’s the Economic Impact of Refugees in America?*, PBS (Apr. 7, 2016), https://www.pbs.org/newshour/economy/whats-the-economic-impact-of-refugees-in-america_

202. See *id.* (“For the world, it’s positive, because people are leaving desperate situations and getting to economically better situations. For the U.S., on net, it’s positive, because there are gains when people come, add to the labor market, add skills and generally, earn less than what they can contribute to the society as a whole.”).

203. See *id.* (quoting Jeffrey Sachs.)

204. *Id.* (“Of course it depends country by country [M]igrants fleeing violence in Central America or Mexico and so forth are also quite different from the Syrian refugees that come to the United States by plane and who are officially classified as refugees.”).

205. See sources cited *infra* notes 209–13.

206. See Solman, *supra* note 201; see also *Bringing New Cuisines, Building Structures, Refugees Rebuild American Cities*, PBS (Feb. 2, 2019, 5:47 PM), <https://www.pbs.org/newshour/show/bringing-new-cuisines-building-structures-refugees-rebuild-american-cities> (quoting Andrew Lim, Director of Quantitative Research at New American Economy, as stating: “Refugees were . . . really actually contributing in meaningful ways to economic activity, to neighborhood revitalization and helping some of these communities you know keep from declining population to growing.”); *How Refugee Resettlement Became a Revival Strategy for this Struggling Town*, PBS (Apr. 7, 2016, 7:53 PM), <https://www.pbs.org/newshour/show/how-refugee-resettlement-became-a-revival-strategy-for-this-struggling-town> (quoting Shelly Callahan of the Mohawk Valley Resource Center for Refugees as stating: “We receive \$1,125 federal to be spent on behalf of each arriving refugee.”).

per year following an executive order,²⁰⁷ refugees arrive owing the government their plane fare and are expected to quickly secure employment.²⁰⁸ Additionally, refugees in the United States are the most highly screened immigrant group, undergoing background checks involving the Department of Homeland Security, Immigration and Customs Enforcement, the Federal Bureau of Investigation, and the State Department.²⁰⁹ This intense vetting takes about two years to complete, including the administration of DNA tests.²¹⁰ Furthermore, and despite broad calls to end America's obligation to uphold international refugee protocols due to costs to the United States,²¹¹ little attention is given to the more than \$63 billion surplus contributed by refugees and asylees between 2005 and 2014.²¹² This figure represents the excess contribution by refugees and asylees in comparison to public services used by this population.²¹³

These contributions are possible, in large part, due to a notable immigration status distinction. Refugees and asylees are considered

207. See David Nakamura et al., *Trump Administration Slashes Refugee Limit for the Third Consecutive Year to a Historic Low of 18,000*, WASH. POST (Sept. 26, 2019, 7:45 PM), https://www.washingtonpost.com/politics/trump-administration-proposes-slashing-refugee-limit-for-the-third-consecutive-year-to-a-historic-low-of-18000/2019/09/26/3a554a60-e0a4-11e9-be96-6adb81821e90_story.html.

208. See *Frequently Asked Questions (FAQs)*, U.S. COMM. FOR REFUGEES AND IMMIGRANTS, <https://refugees.org/serving-the-uprooted/faq/#loans> (last visited Feb. 19, 2020).

209. See generally Press Release, Dep't of Homeland Sec., Improved Security Procedures for Refugees Entering the United States (Oct. 24, 2017), <https://www.dhs.gov/news/2017/10/24/improved-security-procedures-refugees-entering-united-states#> (explaining the screening process); *Refugee Processing and Security Screening*, U.S. CITIZENSHIP AND IMMIGRATION SERVS. (last updated June 3, 2020), <https://www.uscis.gov/refugeescreening> (same).

210. See *How Refugee Resettlement Became a Revival Strategy for this Struggling Town*, *supra* note 206.

211. The United States is a signatory to the 1951 United Nations Refugee Convention and the 1967 Protocol, created to respect and protect the human rights of refugees. See Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

212. Madeline Buiano & Susan Ferriss, *Data Defies Trump's Claims that Refugees and Asylees Burden Taxpayers*, CTR. FOR PUB. INTEGRITY (May 8, 2019), <https://publicintegrity.org/immigration/data-defies-trump-claims-that-refugees-and-asylees-are-a-taxpayer-burden/>.

213. See *id.*; Julie Hirschfield Davis & Somini Sengupta, *Trump Administration Rejects Study Showing Positive Impact of Refugees*, N.Y. TIMES (Sept. 18, 2017), <https://www.nytimes.com/2017/09/18/us/politics/refugees-revenue-cost-report-trump.html>.

legal immigrants and are issued work permits and SSNs, facilitating legal employment and tax filings.²¹⁴ The surplus of refugee and asylee contributions is particularly notable because it was calculated as part of a government study rejected by the current administration, resulting in ranking House members' calls for an investigation of the administration's efforts to include only government expenditures and disregard all revenue contributions by this population.²¹⁵

The distinctions noted above, specifically the earning power and net revenue benefits of refugees and asylees, are illustrative of the potential revenue-generating benefits inherent in immigration reform if legal pathways are implemented for the current undocumented population. "If they had a pathway to secure legal status, they would likely earn more and, consequently, more of their income would be on the books. Their state and local tax contributions would increase accordingly, by an estimated \$2.2 billion."²¹⁶

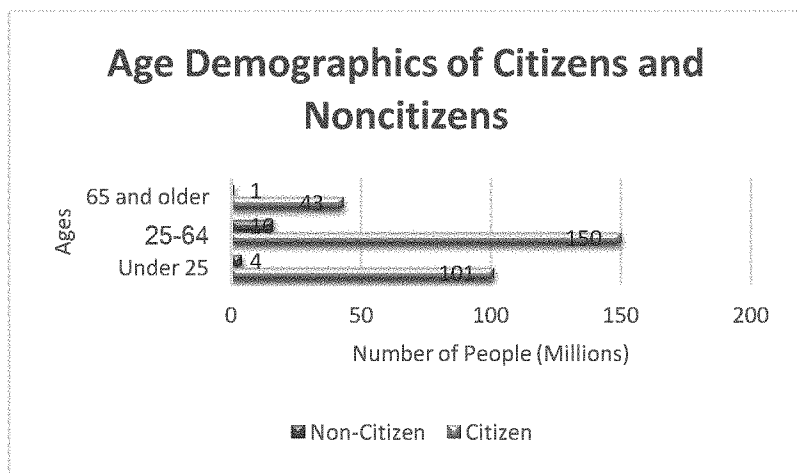
214. These migrants are classified as "alien authorized to work" indefinitely. See *USCIS Handbook for Employers M-274: 7.3 Refugees and Asylees*, U.S. CITIZENSHIP AND IMMIGRATION SERVS. (last updated July 17, 2017), <https://www.uscis.gov/i-9-central/73-refugees-and-asylees>.

215. See Davis & Sengupta, *supra* note 213.

216. Kosten, *supra* note 189.

1. Role in Population Replacement and the Caring Economy

Figure 1

Source: Congressional Budget Office, January 2015 Report²¹⁷

The native U.S. population is not replenishing the need for workers sufficient to fuel sustained economic growth.²¹⁸ Immigration, in all of its forms, improves the economy by increasing the population and enhancing the workforce.²¹⁹ Immigration also facilitates the ability to care for the rising elderly population.²²⁰ This is vital, as native U.S. citizens age sixty-five and over far outweigh the number of older immigrants and noncitizens currently residing in the United States.²²¹ Recognition of this reality is a vital factor in discussions of immigration reform; an express acknowledgment of the need for immigrants not only from an economic standpoint, but from the humanitarian perspective of addressing the needs of an aging population.

The state of Maine is providing a preview of the effects of anticipated population declines, with existing populations aging in

217. See CONG. BUDGET OFFICE, *supra* note 19, at 7 tbl.2 (representing data from the Census Bureau's 2013 American Community Survey from January 2015).

218. See *Perspectives on Immigration Reform Episode 2: The Numbers Tell the Story*, IMMIGRANT TAX INQUIRY GRP. (Mar. 7, 2019), <https://immigranttax.podbean.com/e/episode-2-entin/> (Interview of Tax Foundation economist Steve Entin).

219. *Id.*

220. *Id.*

221. See *supra* Figure 1.

place, leaving a severe shortage of workers in the caring economy inadequate to address the needs of the aging and triggering an increased role for immigrant workers.²²² A contributing factor to the caring economy labor shortage is the disproportionate aging of native healthcare workers, with particularly acute disparity in rural areas.²²³ Reports indicate jobs in health support services and other service industries are more difficult to fill than jobs requiring a college degree.²²⁴ The U.S. Labor Department projects a 14% increase in healthcare jobs between 2018 and 2028, more than any other job sector, representing 1.9 million new positions directly due to the growth of the elderly population.²²⁵

Further, Labor Department statistics confirm that home health aides and other healthcare support occupations are the lowest paid jobs across the entire economic spectrum.²²⁶ As with many low-paying, low-skilled jobs, immigrants fill many of these positions. A 2018 study using 2016 U.S. Census Data found that nearly a quarter of home health aides were born outside the United States, with the majority emigrating from the Caribbean and Central America.²²⁷ The term “replacement migration” first surfaced in a 2001 United Nations report, noting the concept as one of international concern, with countries and regions across the globe facing decreased fertility rates insufficient to replace population losses due to mortality.²²⁸

While it can be said that replacement migration has filled some of the need across all job sectors in the United States, the role of

222. See Jeff Stein, *‘This Will Be Catastrophic’: Maine Families Face Elder Boom, Worker Shortage in Preview of Nation’s Future*, WASH. POST (Aug. 14, 2019), https://www.washingtonpost.com/business/economy/this-will-be-catastrophic-maine-families-face-elder-boom-worker-shortage-in-preview-of-nations-future/2019/08/14/7cecafc6-bec1-11e9-b873-63ace636af08_story.html?arc404=true.

223. *Id.*

224. Alexia Fernandez Campbell, *The U.S. Labor Shortage, Explained*, VOX (Aug. 12, 2019, 3:50 PM), <https://www.vox.com/2019/8/12/20801941/us-labor-shortage-workers-quit>.

225. *Occupational Outlook Handbook: Healthcare Occupations*, U.S. BUREAU OF LABOR STATISTICS (last modified Sept. 4, 2019), <https://www.bls.gov/ooh/healthcare/home.htm>.

226. *See id.*

227. See Yash M. Patel, et al., *Proportion of Non-US-Born and Noncitizen Health Care Professionals in the United States in 2016*, 320 J. AM. MED. ASS’N 2265, 2266 (2018), <https://jamanetwork.com/journals/jama/article-abstract/2717463>.

228. See U.N. DEPT OF ECON. AND SOC. AFFAIRS, REPLACEMENT MIGRATION: IS IT A SOLUTION TO DECLINING AND AGEING POPULATIONS?, at 1–3, U.N. Doc. ST/ESA/SER.A/206, U.N. Sales No. E.01.XIII.19 (2001), <https://www.un.org/en/development/desa/population/publications/ageing/replacement-migration.asp>.

undocumented labor is neither a panacea nor a desirable outcome. Insofar as undocumented labor is concerned, the United States should take the long view, acknowledging the reality that undocumented labor fills needs across low-wage yet vital industries, but also that the workers themselves are not fungible. Undocumented workers who reside and work in the United States typically remain in and age within the United States.²²⁹ They work until they are no longer able to support themselves, without a viable retirement plan.²³⁰ Their health deteriorates and they do not seek medical attention until they can no longer delay treatment, reaching a point where urgent treatment is required, which is far costlier than preventative care.²³¹

Further, based on the fact that undocumented workers are vastly uninsured and underinsured, there is a higher cost of medical care associated with this population. A 2005 empirical study reported the rate of unauthorized workers in Los Angeles County not covered by insurance was 68% compared with 23% of citizen immigrants.²³² More recent estimates vary, citing unauthorized worker uninsured rates between 39% and 71% for a population not covered under the Affordable Care Act, Medicaid, Medicare, or even Social Security,

229. Roberts, *supra* note 84.

230. See Alfredo Torres et al., *Elderly Undocumented Latinos and Their Retirement Strategies*, SOC. FAC. PUBLICATIONS, at 2 (2016), <https://scholarworks.lib.csusb.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1000&context=sociology-publications>.

231. See Nadereh Pourat et al., *Assessing Health Care Services Used by California's Undocumented Immigrant Population in 2010*, 33 HEALTH AFF. 840, 845 (May 2014), <https://www.ncbi.nlm.nih.gov/pubmed/24799582>.

232. According to the study:

[O]nly one in five have job-based coverage, and virtually none purchase coverage on their own. . . . [U]ndocumented immigrants also have lower use of public insurance. Perceived and actual barriers might both play a role.

In California, undocumented immigrants can apply for Medicaid (Medi-Cal) coverage just as any ordinary citizen would, but the benefits are not as generous. Coverage is restricted to emergency (including labor and delivery), prenatal, and long-term care. These services, as well as nonemergency services for recent legal immigrants, do not qualify for federal funds and are financed fully by the state.

Dana P. Goldman et al., *Legal Status and Health Insurance Among Immigrants*, 24 HEALTH AFF. 1640, 1645 (2005).

despite many of these workers paying into the system and with 10% of workers in this population currently aged 55 or older.²³³

Yet there have also been interesting, unanticipated developments in healthcare delivery for undocumented workers under the current administration and political climate.²³⁴ For instance, federal law mandates emergency care for the uninsured, including undocumented workers.²³⁵ Under the Trump administration, states may have greater control over their healthcare spending; including applying for federal waivers, something Florida and Texas have done resulting in a 50–70% increase of amounts awarded to safety-net hospitals who provide care to undocumented, uninsured patients.²³⁶ These waivers were more difficult to secure under the Obama administration in an attempt to fuel state incentives to expand Medicaid programs as part of the Affordable Care Act, and included potential repeal of safety net funding in states that declined Medicaid expansion.²³⁷

California, the nation's most populous state, is prepared to avail itself of federal Medicaid dollars that aid states in offsetting a portion of the emergency care costs of treating the uninsured.²³⁸ On July 9, 2019, California Governor Gavin Newsom signed a bill granting state

233. Teresa Wiltz, *Aging, Undocumented and Uninsured Immigrants Challenge Cities and States*, PEW STATELINE (Jan. 3, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/01/03/aging-undocumented-and-uninsured-immigrants-challenge-cities-and-states>.

234. See Samantha Artiga & Maria Diaz, *Health Coverage and Care of Undocumented Immigrants*, HENRY J. KAISER FAMILY FOUND. (July 15, 2019), <https://www.kff.org/disparities-policy/issue-brief/health-coverage-and-care-of-undocumented-immigrants/> (providing an overview for health care and coverage for undocumented immigrants).

235. See Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 1011, 117 Stat. 2066 (2003). The law was approved on December 3, 2003; however, a law dating back to 1986 and the Reagan administration first approved federal funds for emergency medical care.

236. A. Taylor Kelley & Renuka Tipirneni, *An Ironic Health Care Twist for Undocumented Immigrants*, IHIP NEWS (May 2, 2018) [hereinafter *An Ironic Health Care Twist*], <https://ihpi.umich.edu/news/ironic-health-care-twist-undocumented-immigrants>; see also A. Taylor Kelley & Renuka Tipirneni, *Care for Undocumented Immigrants Rethinking State Flexibility in Medicaid Waivers*, 378 N. ENGL. J. MED. 1661 (2018), <https://www.nejm.org/doi/full/10.1056/NEJMp1801871> (noting in a supplemental audio interview that slightly less than half of undocumented workers do not have insurance).

237. *An Ironic Health Care Twist*, *supra* note 236.

238. See Angela Hart, *California Relies on Federal Funds to Expand Undocumented Health Coverage*, POLITICO (June 15, 2019, 9:00 AM), <https://www.politico.com/states/california/story/2019/06/15/california-relies-on-federal-funds-to-expand-undocumented-health-coverage-1061599>.

Medicaid to low-income undocumented adults under age twenty-five; this in a state where undocumented workers represent 14% of the state's residents and where approximately 138,000 unauthorized residents are expected to be covered under the new law, anticipated to cost \$98 million in the first year.²³⁹ Doctor Taylor Kelly, discussing his 2018 study with a colleague at the University of Michigan, pertinently noted the shortsighted nature of fiscal constraints on healthcare spending related to unauthorized workers:

"Some might ask, what does care for the undocumented have to do with me as an American citizen. And the reality is that, because we provide care to anyone who stands in need of a health emergency, we all pay for everyone's healthcare sooner or later" "When we provide access to care for undocumented immigrants, it's not necessarily going to be a cost burden every time. In some ways, it may be beneficial to us in both indirect ways and even in direct ways."²⁴⁰

As the effects of the coronavirus pandemic continue to unfold, it will be instructive to observe how undocumented essential workers fare in terms of access to medical care.²⁴¹ At present, the Families First Act omitted some immigrants, including DACA recipients and TPS holders, from COVID-19 related testing and medical services.²⁴²

2. Intersection with the Decline of Labor Participation Rates of Native Workers

In an attempt to underscore connections across seemingly disparate U.S. populations, this section discusses the intersection of

239. Bobby Allyn, *California Is 1st State to Offer Health Benefits to Adult Undocumented Immigrants*, NAT'L PUB. RADIO (July 10, 2019, 3:41 AM), <https://www.npr.org/2019/07/10/740147546/california-first-state-to-offer-health-benefits-to-adult-undocumented-immigrants>.

240. *An Ironic Health Care Twist*, *supra* note 236.

241. Lissandra Villa, *'We're Ignored Completely.' Amid the Pandemic, Undocumented Immigrants Are Essential but Exposed*, TIME (Apr. 17, 2020, 4:46 PM), <https://time.com/5823491/undocumented-immigrants-essential-coronavirus/>.

242. *Id.*; see also Manar Waheed & Avidah Moussavian, *COVID-19 Doesn't Discriminate Neither Should Congress' Response*, ACLU (Apr. 2, 2020), <https://www.aclu.org/news/immigrants-rights/covid-19-doesnt-discriminate-neither-should-congress-response/>.

immigrant and native born workers in the wake of globalization. In addition to the general decline in population and the role of immigrants in replacing native aging workers discussed in the preceding section, immigrants and refugees fill a void in some cities caused by job displacement, lower economic opportunity, and the related drug crisis.²⁴³ As of 2017, men in the United States aged 25–54 are participating in the labor market at a rate 10% lower than its peak over sixty years ago.²⁴⁴ A 2017 Federal Reserve Report underscored some of the reasons behind this shift, including the fact that some low-skilled workers “did not meet the minimum job requirements or were unable to pass pre-employment screenings such as drug tests” in at least one part of the country.²⁴⁵ The report also noted that recent immigration policy changes resulted in low-skilled worker labor shortages, significant enough to lead farmers to discard crops.²⁴⁶

Underscoring trends in the contemporary labor force, in 2017 Princeton researchers Anne Case and Angus Deaton published a stark study chronicling the dire mortality and morbidity rates among white non-Hispanics without a college degree, attributable in part to the opioid epidemic, but proposed to originate from a “cumulative disadvantage” that spans across several strata of life for those with less than a college degree.²⁴⁷ While noting the potential causal connection with educational attainment, one economist called for the necessity of policy responses and the possibility of governmental intervention including “wage subsidies, perhaps through mechanisms like the earned income tax credit, that provide greater support for those with the lowest wages.”²⁴⁸ Professors Case and Deaton have continued their work into 2019, offering a deeper comparative analysis of the overall decline in death rates in the twentieth century

243. See Dan Lieberman, *As More Americans Fail Drug Tests, Employers Turn to Refugees*, CNN (Mar. 29, 2017), <https://www.cnn.com/2017/03/27/us/refugees-jobs-drug-testing/index.html>.

244. Pat Gillespie, *The Opioid Crisis is Draining America of Workers*, CNN MONEY (July 27, 2017), <https://money.cnn.com/2017/07/07/news/economy/opioid-epidemic-job-market/index.html>.

245. FED. RESERVE BD. OF GOVERNORS, *THE BEIGE BOOK L-1* (2017), https://www.federalreserve.gov/monetarypolicy/files/BeigeBook_20170531.pdf.

246. *Id.*

247. See Anne Case & Angus Deaton, *Mortality and Morbidity in the 21st Century*, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2017, at 397, 429, <https://www.brookings.edu/bpea-articles/mortality-and-morbidity-in-the-21st-century/>.

248. See *id.* at 466 (Adriana Lleras-Muney, commenting).

with rising mortality in communities experiencing steep economic declines.²⁴⁹ They view these correlated events as by-products of capitalism and the rent-seeking behavior of those at the top prioritizing profits instead of utilizing potentially redistributive employment and economic innovation that would benefit the working class.²⁵⁰

Late Princeton economist Alan Krueger also studied the decline in labor force participation in the United States among prime-age men and relatedly noted that nearly half of men out of the labor force regularly consumed pain medication.²⁵¹ Examining the causal relationship of opioid use and labor participation rates as a “macroeconomic problem and a social concern,”²⁵² Professor Krueger remarked that reversing this trend would involve a combination of approaches, including immigration, tax, and even criminal law initiatives to address the effects of mass incarceration that defined the 1980s until the mid-2000s.²⁵³

However, job displacement and drug abuse are not the sole reasons cited for declines in labor participation rates.²⁵⁴ Other factors include the aging workforce spurring increased retirements, as well as globalization and technological advancement.²⁵⁵ A 2013 Organisation for Economic Co-operation and Development (OECD) empirical study on job displacement among member countries²⁵⁶ used

249. See 2019 Tanner Lecture Abstracts, MCCOY FAM. CTR. FOR ETHICS IN SOC’Y, <https://ethicsinsociety.stanford.edu/2019-tanner-lecture-abstracts-anne-case-and-angus-deaton> (last visited Aug. 18, 2020). This economic-based mortality theory more recently entertained by the authoring professors is a marked departure from their preliminary findings in 2017. See Case & Deaton, *supra* note 247, at 425 (“It is possible that it is not the last 20 years [of economic activity] that matter, but rather that the long-run stagnation in wages and incomes has bred a sense of hopelessness.”).

250. See 2019 Tanner Lecture Abstracts, *supra* note 249.

251. Alan B. Krueger, *Where Have All the Workers Gone? An Inquiry into the Decline of the U.S. Labor Force Participation Rate*, BROOKINGS PAPERS ON ECON. ACTIVITY, Fall 2017, at 1.

252. *Id.* at 54.

253. *Id.* at 56 (“[P]olicies that raise after-tax wages for low-wage workers, such as an increase in the minimum wage or expansion of the Earned Income Tax Credit, would also likely help raise labor force participation.”).

254. E.g., Abby Goodnough, *A New Drug Scourge: Deaths Involving Meth Are Rising Fast*, N.Y. TIMES (Dec. 17, 2019), <https://www.nytimes.com/2019/12/17/health/meth-deaths-opioids.html>.

255. Although it is fair to state that globalization and technological advancement is tied to job displacement. See *infra* note 272.

256. See GLENDA QUINTINI & DANIELLE VENN, ORG. FOR ECON. CO-OPERATION & DEV., VS/2011/0352 – SI2.609973 (DI110934), BACK TO WORK: RE-EMPLOYMENT, EARNINGS AND SKILL USE AFTER JOB DISPLACEMENT, HELPING DISPLACED WORKERS

regression analysis²⁵⁷ to determine the effect of earning losses, particularly in countries where losses were traced to company closures and mass layoffs.²⁵⁸ The study found older individuals and those with less education were more likely to be unemployed after one year, a consistent finding across several countries.²⁵⁹ The report noted that dropping out of the workforce to resume educational efforts or to care for family members are valid reasons for remaining out of the workforce; “[h]owever, very few displaced workers are in full-time education or training within one year of displacement and those that are tend to have higher levels of education already. Many older displaced workers who are not re-employed retire completely from the labour force.”²⁶⁰ The OECD report specifically noted that in the United States, “displaced workers have lower levels of occupational status, job authority/autonomy and employer-provided pension and health insurance than in their pre-displacement jobs. The biggest losses in employer-provided benefits are found for less-educated, blue-collar and manufacturing workers”²⁶¹

Further, a 2019 study in the *Journal of the American Medical Association (JAMA)* evaluating life expectancy and mortality rates over a nearly sixty-year period noted that “[b]y 2014, midlife mortality was increasing across all racial groups, caused by drug overdoses, alcohol abuse, [and] suicides”²⁶² The study cited the highest increases in New England and the Ohio Valley.²⁶³ The lead researcher, Dr. Steven Woolf, commented on the concentration of deaths in Ohio, Pennsylvania, Kentucky, and Indiana, observing that “[t]he history of when this health trend started happens to coincide with when these economic shifts began — the loss of manufacturing

BACK INTO JOBS BY MAINTAINING AND UPGRADING THEIR SKILLS 10–11 (Oct. 2013), <http://www.oecd.org/employment/emp/Backtowork-report.pdf> (“This report summarizes the results of a cross-country study of job displacement over the past decade, covering [fourteen member countries]. It attempts to fill some of the gaps in the existing literature by using a comparable methodology to examine job displacement and its consequences in these countries.”).

257. *Id.* at 25 (“The regression model is estimated using [a] fixed-effects specification”).

258. *Id.*

259. *See id.* at 16.

260. *Id.* at 23.

261. *Id.* at 32.

262. Steven H. Woolf & Heidi Schoomaker, *Life Expectancy and Mortality Rates in the United States, 1959–2017*, 322 J. AM. MED. ASSOC. 1996, 1996 (2019).

263. *Id.*

jobs and closure of steel mills and auto plants.”²⁶⁴ It is interesting to note the geographic overlap in states experiencing rising mortality and contested political regions ahead of the 2020 presidential race.²⁶⁵ And in a departure from original reports citing increases in death rates largely among non-Hispanic whites, Dr. Woolf’s report ascertains that “[i]ncreasing midlife mortality began among whites in 2010, Hispanics in 2011 and African Americans in 2014.”²⁶⁶

As the United States struggles to stabilize the tangible losses attributable to decreases in workforce participation and to determine the sources of these declines, including the role of pain medication use and abuse, a July 17, 2019 Federal Reserve Report noted that in order to fill construction jobs, some employers were considering relaxing their hiring standards related to drug testing.²⁶⁷ It is perhaps arguable or simply naïve to assume more workers contributing labor

264. Gina Kolata & Sabrina Tavernise, *It’s Not Just Poor White People Driving a Decline in Life Expectancy*, N.Y. TIMES, (Nov. 26, 2019), <https://www.nytimes.com/2019/11/26/health/life-expectancy-rate-usa.html>; see also ROBIN GHERTNER & LINCOLN GROVES, OFF. ASSISTANT SEC. FOR PLAN. & EDUC., THE OPIOID CRISIS AND ECONOMIC OPPORTUNITY: GEOGRAPHIC AND ECONOMIC TRENDS 1 (2018), <https://aspe.hhs.gov/system/files/pdf/259261/ASPEEconomicOpportunityOpioidCrisis.pdf> (examining the relationship “between indicators of economic opportunity and the prevalence of prescription opioids and substance use in the United States” and noting that “[o]verall, areas with lower economic opportunity are disproportionately affected by the opioid crisis.”).

265. See, e.g., Joel Achenbach, *‘There’s Something Terribly Wrong’: Americans Are Dying Young at Alarming Rates*, WASH. POST (Nov. 26, 2019, 11:00 AM), https://www.washingtonpost.com/health/theres-something-terribly-wrong-americans-are-dying-young-at-alarming-rates/2019/11/25/d88b28ec-0d6a-11ea-8397-a955cd542d00_story.html.

266. *Id.* This article on the death rates of young Americans provided an interesting array of reader comments, including the following two opposing viewpoints related to immigration: “Am I supposed to feel gratitude as you cut taxes for yourself and raise taxes for me again and again and again . . . allow one hundred million more immigrants into the country that share none of the majority culture’s assumptions about right and wrong (and none of their foundational heritage)?” (attributed to Bart Tare), and another’s direct response to the above, “Fear of immigration is how the fascists keep the peasantry divided. What good is your sight if you can’t make the most basic of connections? If you can’t accept your fellow worker bc he’s brown or Muslim or gay?” (attributed to Beware the Kitten Army).

267. See FED. RESERVE BD. OF GOVERNORS, *supra* note 245 (additionally reporting implementation of wage increases in an attempt to lure qualified workers: “Wages continued to rise moderately over the reporting period due to brisk competition for qualified workers across sectors. Wages for construction jobs rose solidly in parts of the District where building activity picked up. Hourly rates for delivery drivers at a major shipping and logistics business in California rose moderately.”).

fuels America's economic engine, thus expanding the size of the putative macroeconomic pie.²⁶⁸ But it is conceivable that more workers contributing to the economy, as well as federal and state tax systems, will result in an expanded tax base to support more government-sponsored programs focused on re-education efforts, vocational training, and engaged communities. Investing time and energy to bridge divides and forge connections among seemingly disparate U.S. residents (namely displaced American workers and undocumented migrants) may seem simplistic or unrealistic, but it may ultimately prove more effective than the divisions sown by tribal politics.²⁶⁹ Overall, in sections of the United States—areas like Clarksburg, West Virginia,²⁷⁰ Letcher County, Kentucky,²⁷¹ and Muncie, Indiana,²⁷²—business as usual is a thing of the past. Luring back employers using tax credits and other business-friendly incentives only go so far, as it becomes more difficult to find workers in these post-industrial towns due to resettlement to more attractive communities closer to urban and city centers.²⁷³ It has been asserted, “[i]n the age of globalization, cities and states would rather build bridges to the world than to the town next door. Some of this is simply the way the economy works.”²⁷⁴

268. Macroeconomic arguments are laden with empirical challenges, and there continue to be divisions between advocates championing redistribution over economic growth to efficiently address income inequality. See Stephen Rose & Robert D. Atkinson, *Is It Still Worth Growing the Economic Pie?* INFO. TECH. & INNOVATION FOUND. (Nov. 9, 2018), <https://itif.org/publications/2018/11/09/it-still-worth-growing-economic-pie>.

269. See generally Amy Chua & Jed Rubenfeld, *The Threat of Tribalism*, ATLANTIC (Oct. 2018), <https://www.theatlantic.com/magazine/archive/2018/10/the-threat-of-tribalism/568342/> (discussing the historical aspects of tribalism and its current role in American politics).

270. See Sam Quinones, *Physicians Get Addicted Too*, ATLANTIC (May 2019), <https://www.theatlantic.com/magazine/archive/2019/05/opioid-epidemic-west-virginia-doctor/586036/> (noting the changing prospects for the city of Clarksburg as a result of economic changes and the opioid crisis).

271. See Campbell Robertson, *In Coal Country, the Mines Shut Down, the Women Went to Work and the World Quietly Changed*, N.Y. TIMES (Sept. 14, 2019), <https://www.nytimes.com/2019/09/14/us/appalachia-coal-women-work-.html> (noting how coal mine bankruptcies and layoffs led to a gender balance shift in labor forces in Letcher County).

272. See Aaron M. Renn, *How Globalization Isolates Struggling Cities*, GOVERNING MAG. (Jan. 2014), <https://www.governing.com/columns/transportation-and-infrastructure/gov-how-globalization-screws-struggling-cities.html> (noting that struggling cities like Muncie do not benefit from prosperous surrounding cities).

273. See *id.*

274. *Id.*

B. The Economy, DACA Youth, and Employer Accountability

Different tactics to address the immigration quagmire have been proposed throughout the years, from raising visa processing fees,²⁷⁵ to advocating for state citizenship,²⁷⁶ to arguments for liberalized immigration to deliver economic benefits tantamount to free trade.²⁷⁷ Despite obstacles preventing a full understanding of the economics of undocumented labor, it remains important to attempt an economic analysis, albeit with an asymmetry of information.²⁷⁸

One segment of the immigrant economy of particular interest is workers covered under the Deferred Action for Childhood Arrivals program (DACA)²⁷⁹ put into place under President Obama, which allows youth who qualified for the program the right to legal employment in the United States.²⁸⁰ This has already resulted in an estimated 91% employment rate of DACA recipients, contributing approximately \$1.6 billion in taxes.²⁸¹ Additionally, as of this writing,

275. See Schuck, *supra* note 187, at 891, 896 (arguing that because an immigrant is the recipient of the largest economic benefits of a visa, processing fees should be commensurate, with special dispensation for those unable to afford higher fees: “[B]etween the immigrant who reaps a vast windfall from the visa, and the taxpayer who benefits only indirectly and slightly, both economic principle and common morality dictate that the immigrant should bear most, if not all, of the cost.”).

276. Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869, 869–70 (2015) (“[T]he federalist structure enshrined in the Constitution and in the prevailing interpretations of the Fourteenth Amendment leaves untouched the historic power of the states to define the boundaries of their own political communities more generously than the federal government.”).

277. Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147, 1149 (1997) (“Immigration barriers interfere with the free flow of labor internationally For any given class of labor, residents of high-wage countries could gain by employing more immigrant labor, and residents of low-wage countries could gain by selling more of their labor to employers in high-wage countries.”).

278. Schuck, *supra* note 187, at 897 (“Any rigorous moralizing about immigration must ultimately grapple—among other things—with its empirical consequences. . . . [A]lthough our understanding of those consequences is growing, our ignorance remains vast. . . . [W]hen social scientists can dispel this ignorance—and perhaps even then—the nation’s economic growth will constitute a major social goal and our immigration policy will be a very important means for achieving it.”).

279. See generally *Deferred Action for Childhood Arrivals (DACA)*, U.S. DEP’T OF HOMELAND SECURITY (Sept. 23, 2019), <https://www.dhs.gov/deferred-action-childhood-arrivals-daca> (concisely setting out the origin and current status of the program).

280. *Id.*

281. Dan Kosten, *Immigrants as Economic Contributors: Immigrant Tax Contributions and Spending Power*, NAT’L IMMIGR. F. (Sept. 6, 2018),

an estimated 27,000 DACA recipients are working on the front lines of the coronavirus pandemic, including doctors, nurses, and paramedics.²⁸² It is significant that many of these medical workers are younger, often in their 20s, as opposed to the doctors and nurses called out of retirement to assist with coronavirus response efforts who comprise a higher risk group.²⁸³

In late 2014, with over 600,000 original childhood arrivals approved for DACA, the program was expanded to allow additional arrivals and deferred action for parents of citizen-children and legal permanent residents.²⁸⁴ This resulted in projections that there would be 2 to 2.5 million people in receipt of deferred action by 2017.²⁸⁵ Instead, the DACA program faces an uncertain future following a September 5, 2017 rescission.²⁸⁶ Yet reports indicate that current DACA holders, DACA eligible youth, and Temporary Protected Status (TPS) recipients collectively contributed over \$5.5 billion in 2017 taxes and held over \$25 billion in spending power.²⁸⁷

Coupled with the DACA population's low usage of social service programs, their inability to participate in the health insurance marketplace, their sizeable rates of entrepreneurship, and their low cost to law enforcement, the net gains to the economy are significant.²⁸⁸ The economic harm of ending TPS programs is significant. For example, if TPS status is ended for Haitians, as well as those from El Salvador and Honduras, potential losses are estimated to be over \$45 billion in GDP and a reduction of nearly \$7

<https://immigrationforum.org/article/immigrants-as-economic-contributors-immigrant-tax-contributions-and-spending-power/>.

282. Maria Sacchetti, *Dreamers' Risk Lives on Pandemic's Front Lines While They Await a Decision on Their Own Futures*, WASH. POST (Apr. 11, 2020), https://www.washingtonpost.com/immigration/dreamers-risk-lives-on-pandemics-front-lines-while-they-await-court-ruling/2020/04/11/d34a7b58-76c4-11ea-85cb-8670579b863d_story.html; see also Adam Liptak, *Dreamers' Tell Supreme Court Ending DACA During Pandemic Would be 'Catastrophic'*, N.Y. TIMES (Mar. 27, 2020, 3:41 PM), <https://www.nytimes.com/2020/03/27/us/dreamers-supreme-court-daca.html>.

283. See Sacchetti, *supra* note 255 (noting calls in Illinois for retired doctors and nurses to come forward, even though these individuals "would be at higher risk of complications if they become infected because of their ages").

284. See CONG. BUDGET OFFICE, *supra* note 19, at 2.

285. See *id.*

286. See *Deferred Action for Childhood Arrivals (DACA)*, *supra* note 279.

287. NEW AM. ECON. RESEARCH FUND, OVERCOMING THE ODDS: THE CONTRIBUTIONS OF DACA-ELIGIBLE IMMIGRANTS AND TPS HOLDERS TO THE U.S. ECONOMY 2 (2019), https://www.newamericaneconomy.org/wp-content/uploads/2019/05/DACA-TPS_Brief.pdf.

288. *Id.* at 7. One of the conditions of DACA status is to abide in the United States as lawfully as possible in terms of misdemeanor or felony convictions.

billion over a decade.²⁸⁹ Ending DACA is projected by some to result in an economic contraction of \$280 to \$430 billion over a decade.²⁹⁰

Adding to the economic argument toward less restrictionist policies, proponents of DACA note:

If DACA expires without Congress passing a permanent solution for these individuals, states and localities collectively face a loss of almost \$800 million in tax revenue. . . . [I]f they lose work authorization, their income would drop, and more of it would be “off the books.” On the other hand, if Congress provides a path to citizenship for these individuals, states and localities would see their revenue boosted by about \$50 million.²⁹¹

On June 18, 2020, approximately 700,000²⁹² DACA recipients were granted a brief reprieve regarding the fate of the DACA program following the U.S. Supreme Court’s narrow determination that the 2017 rescission violated the Administrative Procedure Act and the rights of those covered under DACA.²⁹³

Attorney General Jeff Sessions was central in the rescission, citing that the previous administration’s “open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch.”²⁹⁴ This claim of unlawful overreach of

289. *Id.* (citing AMANDA BARAN, JOSE MAGAÑA-SALGADO, & TOM K. WONG, IMMIGRANT LEGAL RES. CTR., ECONOMIC CONTRIBUTIONS BY SALVADORAN, HONDURAN, AND HAITIAN TPS HOLDERS: THE COST TO TAXPAYERS, GDP, AND BUSINESSES OF ENDING TPS 1 (2017)), https://www.immigrationresearch.org/system/files/2017-04-18_economic_contributions_by_salvadoran_honduran_and_haitian_tps_holders.pdf.

290. *Id.* (citing Ike Brannon & Logan Albright, *The Economic and Fiscal Impact of Repealing DACA*, CATO INST. (Jan. 18, 2017, 3:00 PM), <https://www.cato.org/blog/economic-fiscal-impact-repealing-daca>; Silva Mathema, *Ending DACA Will Cost States Billions of Dollars*, CTR. FOR AM. PROGRESS (Jan. 9, 2017, 9:04 AM)), <https://www.americanprogress.org/issues/immigration/news/2017/01/09/296125/ending-daca-will-cost-states-billions-of-dollars/>.

291. Kosten, *supra* note 281.

292. See Michael D. Shear, Julie Hirschfeld Davis & Adam Liptak, *How the Trump Administration Eroded Its Own Legal Case on DACA*, N.Y. TIMES (last updated Nov. 12, 2019), <https://www.nytimes.com/2019/11/11/us/politics/supreme-court-dreamers-case.html>.

293. See *Regents of the Univ. of Cal. v. United States Dep’t of Homeland Sec.*, 908 F.3d 476, 486, 492 (9th Cir. 2018). The Eastern District of New York and D.C. Circuit cases were consolidated and granted petition for writ of certiorari on June 28, 2019. See *United States Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 139 S. Ct. 2779 (2019).

294. Office of the Attorney Gen., Comment Letter from Jeff Sessions to Acting Dep’t of Homeland Sec. Sec’y Elaine C. Duke, on the Executive Branch’s

constitutional power is central to the case before the Supreme Court, with DACA proponents citing that this argument is flawed and not based on the otherwise broad and discretionary presidential power to affect public policy.²⁹⁵ As noted, the U.S. Supreme Court rendered their decision in June 2020, and as anticipated, Chief Justice Roberts played a prominent role in DACA's fate, writing the majority's 5-4 decision.²⁹⁶

Notably, in late March 2020, Michael J. Wishnie, a Yale law professor representing some of the DACA recipients, directed a letter to the justices emphasizing the contributions of Dreamers during the pandemic, urging due consideration to the "significant adverse consequences of eliminating their ability to live and work without the fear of deportation."²⁹⁷

However, the Supreme Court's ruling against the validity of the 2017 rescission does not change the fact that a congressional fix is needed to definitively address potential paths to legalization and citizenship for these childhood arrivals. Some scholars have rooted their critique of current immigration restrictions in economic policy.

For instance, University of Pennsylvania Law Professor Howard F. Chang has written extensively about immigration and economic policy, advocating against the restrictive Reforming American Immigration for a Strong Economy ("RAISE") Act,²⁹⁸ and invoking economic analysis as an underlying rationale for more liberalized immigration.²⁹⁹ Utilizing an economic framework, Professor Chang points to the marginal value of labor, noting a worker immigrating to the United States is generally paid more for their labor than in their homeland, and "higher wages for the same worker mean that the

Unconstitutional Authority in Effectuating DACA (Sept. 4, 2017), https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf; see also Mahita Gajanan, *Read Jeff Sessions' Letter Calling for the End of DACA*, TIME, (Sept. 5, 2017), <https://time.com/4927250/jeff-sessions-daca-rescind-letter/>.

295. See Kevin J. Fandl, Opinion, *How Far-Reaching Are the President's Powers on DACA?*, WHYY.ORG (Oct. 17, 2017), <https://whyy.org/articles/far-reaching-presidents-powers-daca/> (noting that while "Congress is the only entity in our government tasked with making laws . . . the president has a great deal of power in deciding how those laws are enforced.").

296. 592 U.S. __ (2020); See David Savage, *Dreamers' Best Hope for Victory in DACA Case May Be Supreme Court Chief Justice John Roberts*, L.A. TIMES (Nov. 11, 2019, 3:30 AM), <https://www.latimes.com/politics/story/2019-11-11/supreme-court-case-about-dreamers-may-come-down-to-chief-justice-roberts>.

297. Ariane de Vogue, *DACA Recipients Ask Supreme Court to Consider Their Work in Fight Against Coronavirus*, CNN (Mar. 27, 2020, 4:26 PM), <https://www.cnn.com/2020/03/27/politics/dreamers-health-care-workers-coronavirus-daca-supreme-court/index.html>.

298. S.354, 115th Cong. (2017).

299. Howard F. Chang, *The Economics of Immigration Reform*, 52 U.C. DAVIS L. REV. 111, 114–15 (2018).

worker produces more value in the country of immigration than in the country of emigration” leading to an anticipated labor flow toward the country that will pay or value the labor the most.³⁰⁰ Reframing taxigation is offered as one potential vehicle toward creating a pathway to legalization.

C. Wage Suppression and Public Safety Concerns

Myths persist about how undocumented workers affect the American economy, with frequent invocations of harm to U.S. taxpayers, schools, hospitals, and public safety, as well as diverting resources from the poorest citizens.³⁰¹ While some of the rhetoric around the wage suppression effects of unauthorized labor is overblown, it is true that immigrants often work in areas without proper training or experience in order to drive down costs that ultimately directly benefit employers.³⁰² Business owners can actively circumvent more costly options, such as hiring more skilled,³⁰³ properly trained workers who are subject to greater regulation and oversight, including proper licensing to operate heavy machinery.³⁰⁴

Efforts to bypass current systems not only pose a threat to public safety generally, they also result in a higher incidence of on-the-job

300. *Id.*

301. Gretchen Frazee, *4 Myths About How Immigrants Affect the U.S. Economy*, PBS NEWSHOUR (Nov. 2, 2018, 6:48 PM), <https://www.pbs.org/newshour/economy/making-sense/4-myths-about-how-immigrants-affect-the-u-s-economy>.

302. Chokwe Lumumba, *After Immigration Raids in Mississippi, Mayor of Jackson Calls on Churches to Become Safe Havens*, WBUR (Aug. 8, 2019), <https://www.wbur.org/hereandnow/2019/08/08/immigration-raids-jackson-mississippi>. Jackson, Mississippi Mayor Chokwe Antar Lumumba addressed the August 7, 2019 immigration raids near Jackson that resulted in over 600 arrests: “It will have a significant impact on the economics of this state . . . this all flows from a horrible economic policy where we pit people against one another suggesting that you have a population that are taking people’s jobs.” *Id.*

303. Joshua Partlow et al., *“My Whole Town Partially Lived There”: From Costa Rica to New Jersey, a Pipeline of Illegal Workers for Trump Goes Back Years*, WASH. POST (Feb. 8, 2019, 2:58 PM), https://www.washingtonpost.com/politics/my-whole-town-practically-lived-there-from-costa-rica-to-new-jersey-a-pipeline-of-illegal-workers-for-trump-goes-back-years/2019/02/08/8cdbc1dc-2971-11e9-97b3-ae59fbae7960_story.html (reporting on interviews with several undocumented workers who were hired as low-cost labor sources who could, for example, work construction for “a fraction of what a state-licensed heavy equipment operator would make, with no benefits or overtime pay.”).

304. *Id.* “The company’s recent purge of unauthorized workers from at least five Trump properties contributes to mounting evidence that the president benefited for years from the work of illegal laborers he now vilifies.” *Id.*

accidents and worker compensation concerns. This is not an unforeseeable consequence, nor a problem unique to the United States.³⁰⁵ There is also a correlation between workplace accidents and deportation efforts, with states like Florida amending state workers' compensation laws to criminally charge those filing claims using false documentation.³⁰⁶ In those instances, insurance companies are able to avoid paying the medical care and lost wages for these injured workers by turning them into the state, where they are prosecuted and subsequently deported.³⁰⁷

Viewing these issues from an economic perspective, it would seem that if immigration enforcement is the sole approach to the problem of undocumented labor in the United States, there will be a continuing stream of migrant workers making their way into the United States to fill grueling low-wage positions that fail to attract native U.S. workers.³⁰⁸ With the open possibility of deportation as a solution to any undocumented employee's claims or grievances, such as calls for workers' compensation or fairer wages, it is an unrealistic belief that undocumented hiring practices will decrease, rather than increase, with more rigorous deportations.³⁰⁹ Meaningful dialogue around these

305. See Guiseppe Mastrangelo et al., *Work Related Injuries: Estimating the Incidence Among Illegally Employed Immigrants*, 3 BMC RES. NOTES, at 1 (2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3019162/> (chronicling workplace accidents among illegally employed immigrant workers in Northeast Italy).

306. Michael Grabell, *They Got Hurt at Work Then They Got Deported*, NAT'L PUB. RADIO (Aug. 16, 2017, 5:00 AM), <https://www.npr.org/2017/08/16/543650270/they-got-hurt-at-work-then-they-got-deported> ("Florida's lawmakers added a catch, making it a crime to file a workers' comp claim using false identification. Since then, insurers have avoided paying for injured immigrant workers' lost wages and medical care by repeatedly turning them in to the state.").

307. *Id.* ("And in a challenging twist of logic, immigrants can be charged with workers' comp fraud even if they've never been injured or filed a claim, because legislators also made it illegal to use a fake ID to get a job.").

308. See *id.* ("[J]udges and lawmakers nationwide have long acknowledged that the employment of unauthorized workers is a reality of the American economy. . . . [S]ome 8 million immigrants work with false or no papers nationwide, and studies show they're more likely to be hurt or killed on the job than other workers.").

309. See Frazee, *supra* note 301; see also Kevin R. Johnson, *Lessons About the Future of Immigration Law from the Rise and Fall of DACA*, 52 U.C. DAVIS L. REV. 343, 353 (2018) ("Rather than deterring undocumented immigration and reducing the undocumented immigrant population, the aggressive border enforcement strategies . . . appear to have increased the permanent settlement of undocumented immigrants in the United States." (quoting Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 246 (2003))).

issues necessitates addressing the need for living wages³¹⁰ in addition to reasonable immigration laws. Further, when viewed through the lens of the societal benefit of participatory governance, including and perhaps especially the benefit of voluntary tax compliance to facilitate an expansive tax base to aid in the allocation of scarce government resources,³¹¹ correlating tax compliance with viable immigration reform becomes a more compelling and central issue.³¹²

These present a combination of complex social and economic issues without a facile solution. Social Security Advisory Board panels have studied the challenges faced by Social Security and the impact of immigration. In one such study, the Advisory Board noted substantial economic pressures to grow the immigrant population but also qualified that, given declining fertility rates in Mexico, the country “cannot continue to be the high supplier of working age people that it has been in the past. Their emigration rate is lagging the fertility rate . . . so 20 years from now they might not have surplus population to export to the U.S.”³¹³

IV. PROPOSAL FOR A WAY FORWARD

America and Americans are currently in an untenable situation. The economy relies on labor and human capital to function and grow. While native population levels fluctuate and population replacement rates depend on a variety of factors, including the number of childbearing women, marriage rates, and the vibrancy of the

310. Eric Ravenscraft, *What a 'Living Wage' Actually Means*, N.Y. TIMES (June 5, 2019), <https://www.nytimes.com/2019/06/05/smarter-living/what-a-living-wage-actually-means.html>.

311. See BRIAN WAMPLER & STEPHANIE L. MCNULTY, WOODROW WILSON INT'L CTR. FOR SCHOLARS, DOES PARTICIPATORY GOVERNANCE MATTER? EXPLORING THE NATURE AND IMPACT OF PARTICIPATORY REFORMS 15–16 (2011), https://www.wilsoncenter.org/sites/default/files/media/documents/publication/CUSP_110108_Participatory%20Gov.pdf.

312. See Frank Fischer, *Participatory Governance: From Theory to Practice*, THE OXFORD HANDBOOK OF GOVERNANCE, Mar. 2012, at 1. Professor Fischer's work explores the interconnected issues of citizen competence and empowerment in relation to participatory governance, in addition to political representation and social equity: “Participatory governance seeks to deepen citizen participation in the governmental process by examining the assumptions and practices of the traditional view that generally hinders the realization of a genuine participatory democracy.” *Id.*

313. See JOEL FIENLEIB & DAVID WARNER, SOC. SEC. ADVISORY BD., THE IMPACT OF IMMIGRATION ON SOCIAL SECURITY AND THE NATIONAL ECONOMY 10 (2005).

economy,³¹⁴ current indicators generally point to reduced population and population replacement rates.³¹⁵ Steve Entin, a Senior Fellow Emeritus at the Tax Foundation and former Treasury Deputy Assistant Secretary for Economic Policy under Reagan, pointedly frames the benefits of legal immigration:

Immigration aids us economically. It bolsters our position in global affairs and our military strength. We are less than five percent of the world's population . . . we can't maintain our position in the world if we don't keep our population growing. And it aids in our ability to support a rising elderly population. . . . It's certainly better to have legal immigration so people can come and go in an orderly manner. We'll know who's coming in and we'll be fair to those who respect the law and are waiting in line and we'll probably have more tax revenue and GDP if we have a legal orderly process.³¹⁶

Entin cites the political “hot button” underpinning of the current immigration system and the potential for reform.³¹⁷ This section explores these political tensions and briefly engages the underlying theoretical perspectives.

As previously stated, this Article does not attempt to undertake a complete economic analysis of immigration.³¹⁸ The Article does claim from the outset, however, that tax filing by undocumented workers is a desirable social good that should be encouraged.³¹⁹ America's

314. See Gretchen Livingston, *Is U.S. Fertility at an All Time Low? Two of Three Measures Point to Yes*, PEW RES. CTR. (May 22, 2019), <https://www.pewresearch.org/fact-tank/2019/05/22/u-s-fertility-rate-explained/>.

315. *Id.*

316. *Perspectives on Immigration Reform Episode 2: The Numbers Tell the Story*, *supra* note 218, at 4:42.

317. *Perspectives on Immigration Reform Episode 2: The Numbers Tell the Story*, *supra* note 218, at 3:59.

318. The Article does not engage questions related to the relative merits of tax collection; or of tax efficiency and governmental spending; or potential alternate pathways toward legalization if immigrants and immigration were viewed as so innately beneficial that tax incentives, such as low tax rates and tax credits, should be created to encourage and increase immigration. I appreciate and credit Professor Alexander “Sasha” Volokh for his insightful ruminations as to these points.

319. Tax compliance and corporate accountability by large multinational companies is also a desirable social good and should be encouraged for similar reasons. See generally Jacqueline Laínez Flanagan, *Holding U.S. Corporations Accountable: Toward a Convergence of U.S. International Tax Policy and International Human*

current bifurcated approach in facilitating tax return filing yet severely restricting legal immigration is self-defeating, and reframing taxigration by directly connecting immigration system benefits to tax return filing is of ultimate benefit to native citizens and society as a whole.

The issue of America's current fractured, yet interconnected, tax and immigration legal systems can be approached from a combined positive and normative economics framework.³²⁰ Acknowledging innate tensions in this approach³²¹ and taking certain liberties,³²² this evaluation of U.S. tax and immigration systems requires recognition of the income tax system's objective economic realities and a subjective striving to improve current systems. For example, a positive economic analysis of the contribution of undocumented workers to our tax system could be encapsulated in the statement, "Undocumented workers who pay income taxes contribute to the public fisc." The objective recognition that unauthorized workers tangibly make fiscal contributions is a positive economics perspective. A normative economics framing of this concept might be stated as "undocumented workers *should* file income taxes," or "the U.S. should grant greater protections to unauthorized workers who file taxes." The problem of asynchronous immigration and tax systems must be formulated within these conflicting realities, instead of necessarily working solely toward a singular shift of a normative "what should be" construction.³²³

Rights, 45 PEPPERDINE L. REV. 685 (2018) (discussing the existing tax regime and proposals for reform).

320. Although classic economics theory would frown on such a proposition. See Hands, *supra* note 181, at 5 ("Positive economics is concerned (exclusively) with *what* is objectively the case, while normative economics is concerned *what ought to be*, and [Rational Choice Theory (RCT)] is (and should be) part of the former and not the latter.").

321. *Id.* at 5 ("Neville Keynes in his much cited *Scope and Method of Political Economy* . . . warned against mixing the normative and the positive: 'the endeavor to merge questions of what ought to be with questions of what is tends to confuse, not only economic discussions themselves, but also discussions about economic method.'" (citation omitted)).

322. *Id.* at 14 ("The more psychologically-oriented among contemporary theorists seem to hold on to the strict dichotomy between normative and positive, while experimental economists and neuroeconomists more sympathetic to RCT seek to bridge the gap between, or unify, these two different aspects of economic theorizing.").

323. It is perhaps indulgent or idealistic to seek a compromise between "what should be" based on "what is;" thus, the author concedes a likely overreliance on a heuristic process striving for practical solutions.

Further, in considering this population of unauthorized workers and their many contributions, this Article broadly considers the value of public versus private ordering.³²⁴ In order to expand the U.S. tax base and effectively address the ongoing and necessary influx of new arrivals in the United States, corporations and corporate profits tied to undocumented immigrant labor should cede ground to governmental and societal interests. This would take the form of a tacit acknowledgment that immigration reform is a general societal good, and the cost of this good (to corporations) would take the form of payment of higher wages. These higher wages would, in turn, result in higher tax revenues “from increased reporting of employment income by workers who are currently not paying taxes.”³²⁵

Legal immigrants’ entitlement to higher wages could perpetuate positive cycles of greater corporate and social accountability, including increased noncitizen community engagement with law enforcement.³²⁶ Yet, this push and pull of changes to the immigration status of currently unauthorized aliens in the United States imposes an array of consequences in the workplace. For instance, if a path to legalized status also required increased and potentially mandatory implementation of employment verification systems, this could yield a decrease in revenue collection because more undocumented workers might be paid outside of the tax system by employers attempting to shield themselves and their companies from detection.³²⁷ This would, in turn, deepen the cycle and patterns or practices that permit employers to disregard workers’ rights. Thus, immigration reform efforts would likely have to implement sizable employer fees and penalties for bypassing, or attempting to bypass, employment verification systems.

324. See generally Jonathan R. Macey, *Public and Private Ordering and the Production of Legitimate and Illegitimate Legal Rules*, 82 CORNELL L. REV. 1123 (1997) (discussing the concept and rules of public and private ordering).

325. See CONG. BUDGET OFFICE, *supra* note 19, at 5.

326. See Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463, 1463 (2019) (arguing that the current immigration enforcement structure “leaves little room for good faith actors to incentivize socially valuable behavior” and that “[i]n its impact, immigration enforcement bears unappreciated structural similarities to certain low-level criminal law enforcement techniques”); see also Kevin R. Johnson, *Protecting National Security Through More Liberal Admission of Immigrants*, 2007 U. CHI. LEGAL F. 157, 160 (2007) (“Unrealistic immigration laws, in place for decades, have forced millions of people to evade the law in order to enter and remain in the United States and, once here, have forced them to remain in the recesses of American social life.”).

327. See Grabell, *supra* note 306.

A. Potential Application of a Corrective Tax Regime

Acknowledging nuances among the immigrant diaspora, this Article has noted distinctions in the vast tax and economic contributions made by unauthorized immigrant, asylum, and refugee resettlement populations. Further, in urging practical changes to domestic policy and before entreating the promotion and facilitation of tax compliance by undocumented immigrants, a brief exploration of the opportunities and tensions of a “corrective tax” regime is in order.

Harvard Professor Steven Shavell has addressed the utility of implementing a *corrective tax* regime to counter imperfect state information negatively impacting the ability to institute regulation to offset anticipated harm.³²⁸ Although Professor Shavell considered the corrective tax concept with respect to torts such as pollution and the allocation of property rights,³²⁹ a corrective tax theory is essentially the regime some proponents of alternate routes toward immigration reform are advocating. For instance, the Immigrant Tax Inquiry Group has proposed a “5 + 5” plan calling for employers and immigrant workers to each contribute a 5% tax to begin forging a path toward legalization and, more specifically, to offset costs incurred by the government for education, healthcare, and other social services.³³⁰

The concept of a corrective tax is generally a proposal to offset harm, which in the case of immigrant workers, will tend to weigh in favor of offsetting increased education and health care costs.³³¹ Thus, most recent immigration overhaul proposals calling for the payment of fees in order to secure a place in the immigration queue³³² are in essence invoking a corrective tax regime. In fact, since IRCA was passed, many immigration proposals have included corrective tax elements.³³³ Whether any will gain sufficient traction to ultimate passage remains to be seen.

Professor Louis Kaplow approached the corrective tax analysis outside of a dualistic “regulation v. taxation” system, instead

328. See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 94–101 (2004) (noting the concept of a corrective tax regime as a means to control external effects was first introduced by the English economist Arthur Cecil Pigou in 1912).

329. *Id.* at 94–95.

330. Mark Jason on the Third Way of Immigration Reform, Explained: Ep. 7 May 16, 2019.

331. See *supra* Part I.

332. See, e.g., S. 744, 113th Cong. (2013).

333. See *supra* Part II.

proposing a combination of regulation and taxation.³³⁴ In the case of immigration, a combined approach using both principles of regulation by way of broadened opportunities for legal migration into the United States, coupled with corrective taxes to offset potential increased costs to domestic populations, specifically healthcare and education, could move the dial on immigration reform. This interplay between increased costs and offsets to these costs can be seen in the anticipated spike of administrative costs to DHS in processing visas and related immigration documentation, with offsets potentially secured by the collection of application fees, calibrated as closely as possible to these anticipated cost increases.³³⁵

Overall, this writing primarily invokes general elements of economic efficiency in asserting that taxation of undocumented labor may and should be the force that creates sufficient political will to encourage dialogue to support immigration reform. Without discounting valid human rights, morality, or deontological and consequentialist precepts,³³⁶ the overwhelming contention within this work is that current immigration policy is economically inefficient, particularly with respect to taxation.³³⁷ Similarly, while theories of earned citizenship and related critiques are outside the scope of this Article, the author acknowledges the recommendations contained herein could be viewed as a mere commodification of immigrants, with the economic value of immigrant labor primarily determining priority

334. Louis Kaplow, Optimal Regulation with Exemptions and Corrective Taxes, at 2–3 (Dec. 12, 2013) (unpublished paper on file with the Harvard University Department of Economics), https://economics.harvard.edu/files/economics/files/kaplow_regtax5_11_22_13.pdf.

335. See CONG. BUDGET OFFICE, *supra* note 19, at 23.

336. See generally Schuck, *supra* note 187, at 866 (addressing various deontological arguments regarding immigration and contending that “although national economic growth is a highly imperfect measure of the instrumental value of immigration, an immigration policy that is moral in the consequentialist sense would nevertheless place greater weight on economic growth than the current system does.”). This Article acknowledges the existence of extremely cogent analyses of U.S. immigration policy, including explorations involving morality, particularly aspects of deontological reasoning that greatly inform immigration dialogue but are outside the immediate scope of the current Article.

337. See DAVID D. FRIEDMAN, LAW’S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS 24 (2000) (“An alternative argument for efficient law is that, even when legal rules can be used to redistribute, there are better tools available, such as taxation. If so, it may be sensible to use the legal system to maximize the size of the pie and leave to the legislature and the IRS the job of cutting it.”).

when carving out pathways for legalized status.³³⁸ However, this Article only seeks to advance actual and potential tax and revenue contributions of undocumented workers as a form of political capital to advance discussions to support immigration reform, not as an exhaustive set of metrics to definitively rule out immigrants who are unable to work and pay taxes.³³⁹ Lastly, although many of the concepts presented herein are expansive and cannot be afforded comprehensive coverage, this examination is written intent on advancing discourse with the earnest hope it is not interpreted as reductionistic.

B. From Subjective Perceptions of Norms to Objective Reality

Based on the evidentiary weight tax returns carry in immigration proceedings,³⁴⁰ it would seem that anyone seeking a legal pathway in the United States would file taxes essentially upon first securing employment. But it should be expressly noted that one of the central fears in tax return filing, particularly non-filing as opposed to underreporting of income, is the fear that the Internal Revenue Service works with the Department of Homeland Security.³⁴¹

This fear invites a brief discussion of the subjective perception of norms and the role of tax return filing as perceived by immigrant taxpayers. Immigrant workers consume information through word of

338. See Alia Al-Khatib & Jayesh Rathod, *Equity in Contemporary Immigration Enforcement: Defining Contributions and Countering Criminalization*, 66 U. KAN. L. REV. 951, 990 (2018) (noting critiques of earned citizenship, including Prof. Muneer Ahmad's salient concerns that "earned citizenship heavily emphasizes economic performance in its calculus" and leads to a requisite showing of immigrant "worth" before permission to enter or stay in the United States is granted (citing Muneer I. Ahmad, *Beyond Earned Citizenship*, 52 HARV. C.R.-C.L. L. REV. 257, 279 (2017))).

339. For example, the author firmly believes in immigration based on humanitarian grounds should continue and not be negatively affected by the proposals contained herein. See generally *Humanitarian*, U.S. CITIZENSHIP & NATURALIZATION SERVICES, <https://www.uscis.gov/humanitarian> (last visited Feb. 22, 2020) (listing USCIS humanitarian programs).

340. See *supra* Part II.1.

341. *New York Immigration Lawyer Survey Results* (on file with author). In addition, over the course of working with undocumented taxpayers since the early 2000s, the author has had numerous opportunities to counsel new tax filers about compliance mandates, including the requirement that they must comply with tax laws despite their unauthorized status. Although protections afforded under I.R.C. § 6103 somewhat allay the tax filing concerns of undocumented workers, ultimately workers must file trusting that the current system will remain in place and that agencies will not share information.

mouth at their workplace, native language news networks,³⁴² and social media. Notably in the Latinx³⁴³ community, Spanish-language television stations, websites,³⁴⁴ and social media³⁴⁵ platforms serve a large consumer base.³⁴⁶ While there are important cultural nuances that are outside the scope of this paper, including language as an identity-forming principle particularly in the multiple-generation households of U.S.-born Hispanics,³⁴⁷ Spanish-language information and news sources help shape immigrant taxpayer subjective perceptions of norms which are important to explore:

[U]nlike statisticians and policymakers, the average person does not know the actual rates of behaviors or opinions in their community, such as recycling or approval of domestic violence. Individuals' subjective

342. See Sarah Fischer, *Spanish Language Media Is Having a Local News Boom*, AXIOS (May 14, 2019), <https://www.axios.com/spanish-language-media-is-having-a-local-news-boom-15245537-3e11-45b2-b7e6-58ba68069fd0.html>.

343. *Descubrimiento Digital: The Online Lives of Latinx Consumers*, NIELSEN DEMOGRAPHICS (Aug. 28, 2018), <https://www.nielsen.com/us/en/insights/report/2018/descubrimiento-digital-the-online-lives-of-latinx-consumers/> ("Nielsen uses the term Latinx in this report to connote unspecified gender. The decision is a nod toward greater inclusion of women, LGBT+ and non-binary Hispanics and the growing popularity of the term in social media and academic writing.").

344. See Antonio Flores & Mark Hugo Lopez, *Among U.S. Latinos, the Internet Now Rivals Television as a Source for News*, PEW RES. CTR. (Jan. 11, 2018), <https://www.pewresearch.org/fact-tank/2018/01/11/among-u-s-latinos-the-internet-now-rivals-television-as-a-source-for-news/>.

345. *The Database: Young, Digital and Social Connecting with Today's Hispanic Consumers*, NIELSEN (Sept. 14, 2018), <https://www.nielsen.com/us/en/insights/podcast/2018/young-digital-and-social-connecting-with-todays-hispanic-consumers/> ("Hispanics 18 and older are 9% more likely to own a smartphone, 11% more likely to own a game console, and 13% more likely to own a smartwatch than non-Hispanic Whites.").

346. See Elisa Shearer, *Hispanic and Black News Media Fact Sheet*, PEW RES. CTR. (July 9, 2019), <https://www.journalism.org/fact-sheet/hispanic-and-black-news-media/>.

347. See, e.g., Mark Hugo Lopez et al., *Most Hispanic Parents Speak Spanish to Their Children, but This Is Less the Case in Later Generations*, PEW RES. CTR. (Apr. 2, 2018), <https://www.pewresearch.org/fact-tank/2018/04/02/most-hispanic-parents-speak-spanish-to-their-children-but-this-is-less-the-case-in-later-immigrant-generations/> ("Not only do nearly all Hispanic adults have a personal connection to Spanish . . . 88% say it is important to them that future generations of Hispanics living in the U.S. be able to speak Spanish, with vast majorities holding this view across generations."); see also *The Database: Young, Digital and Social Connecting with Today's Hispanic Consumers*, *supra* note 345.

perceptions of norms are not derived directly from a comprehensive survey or a census. Instead, individuals have subjective perceptions of norms, based on their unique and local experience.³⁴⁸

Subjective perceptions of norms play a large part in tax compliance by undocumented workers. Over nearly two decades, the author has directly interacted with immigrant taxpayers with mixed-status households where a combination of spouses and/or children are undocumented.³⁴⁹ The rationale for filing or non-filing in immigrant communities is often the result of subjective perceptions within communities. If a neighbor files a tax return and reports a refund, others in the community may follow suit. If a local Spanish-language news channel extols the virtues and obligations of tax return filing, interviewing community members and service providers, others may be convinced to follow suit.³⁵⁰ Moreover, the author has interacted with a variety of legal service providers and community members in various cities, in some instances providing technical advice on tax compliance or tax controversy issues, and the subjective perception of norms of the tax filing behavior of undocumented immigrant workers across these cities has tracked the political mood surrounding potential immigration reform.³⁵¹ Namely, the more likely immigration reform appears, the more likely risk-aversion is cast aside and tax compliance is embraced, leading to an uptick in requests for tax compliance assistance and tax controversy resolution.³⁵²

348. See Margaret E. Tankard & Elizabeth Levy Paluck, *Norm Perception as a Vehicle for Social Change*, 10 SOC. ISSUES & POL'Y REV. 181, 181–82 (2016).

349. This experience includes time as a volunteer tax preparer for the 2000 tax year at Benito Juarez High School in the Pilsen neighborhood of Chicago as part of the Tax Assistance Project (TAP). It also includes time spent performing related pro bono work and work as Assistant Low Income Taxpayer Clinic (LITC) Director at the Midwest Tax Clinic, a program of the Center for Economic Progress in Chicago from 2001 to 2005, as well as work directing the University of D.C. David A. Clarke School of Law LITC.

350. See generally *IRS Announces Some ITINs Will Expire and Should Be Renewed in 2020*, UNIVISION (June 21, 2019), <https://www.univision.com/local/miami-wltv/irs-anuncia-que-venceran-algunos-numeros-itin-y-deberan-ser-renovados-para-el-2020-video> (explaining which ITINs will expire and require renewal, as well as how to renew through a Form W-7, including the requirement to furnish a passport and advice to allow enough lead time to receive a renewed ITIN in time for the tax season).

351. See generally LAÍNEZ, *supra* note 43 (discussing tax compliance efforts that have been pursued alongside immigration reforms).

352. Tax compliance relates primarily to tax return filing, while tax controversy work involves assisting individuals to navigate outstanding tax debt, through

Thus, subjective norms frequently converge to become a more objective reality, and in this case, immigrant workers are more likely to file tax returns and fully engage with state and federal tax systems when friends and neighbors and media and local legal service providers project the possibility of imminent immigration reform.³⁵³ It is possible that this collective action may increase political power within these communities, ultimately culminating in the passage of comprehensive reform.

C. National Survey of Low Income Taxpayer Clinics

In November 2019, the author conducted a month-long survey to ascertain if and how ITIN services had been affected since the 2016 election and recent ITIN administration changes resulting from the 2015 PATH Act and the 2017 TCJA. The survey was shared on a national listserv inviting participation by Low Income Taxpayer Clinic (LITC) staff.³⁵⁴ By way of brief background, the LITC program was developed by an act of Congress as part of the Internal Revenue Service Restructuring and Reform Act of 1998,³⁵⁵ and codified in IRC section 7526.³⁵⁶

administrative channels or tax litigation. Few, if any, undocumented immigrants avail themselves of tax litigation, whether in U.S. Tax Court or through refund litigation established under the *Flora* rule. See generally *Flora v. United States*, 362 U.S. 145 (1960) (the tax controversy resolution establishing the *Flora* rule in part); *Flora v. United States*, 357 U.S. 63 (1958) (same). For information on recommendations for reassessment and reform of the *Flora* rule, see NAT'L TAXPAYER ADVOCATE SERV., 2018 ANNUAL REPORT TO CONGRESS: LEGISLATIVE RECOMMENDATIONS 364–86 (2018), https://taxpayeradvocate.irs.gov/Media/Default/Documents/2018-ARC/ARC18_Volume1_LR_03_FIXFLORA.pdf.

353. See Tankard & Paluck, *supra* note 348, at 181–82; see also Dan Nowicki, *Reform Tied to Immigrant Taxes*, USA TODAY (Apr. 28, 2013), <https://www.usatoday.com/story/news/nation/2013/04/28/immigration-reform-taxes/2119353/> (quoting former Sen. John McCain, the “Gang of Eight’s” lead GOP negotiator, as saying: “[Undocumented immigrants] should pay back taxes, and they should pay a fine and they should make sure that they get in line behind everybody else.”).

354. In the interest of full disclosure, in 2006 the author served as the founding director of the University of D.C. Law LITC and, as of this writing, is completing a two-year academic visit at the Janet R. Spragens Federal Tax Clinic, an LITC named after the late Professor Janet Spragens who, along with former National Taxpayer Advocate Nina Olson, was a central figure in the creation of the IRS LITC Program, cited *infra* at note 303.

355. H.R. 2676, 105th Cong. § 3601 (1998).

356. Internal Revenue Restructuring and Reform Act of 1998, Pub. L. No. 105–206, § 3601(a), 112 Stat. 775 (1998). See generally Keith Fogg, *Taxation with*

Due to their provision of direct tax controversy and ancillary tax preparation services, LITCs are particularly well-positioned to observe trends within the ITIN-filer community. There are currently LITCs in forty-six states and the District of Columbia, with large states like New York, California, and Florida each offering at least seven, and as many as thirteen, LTC-grant funded programs.³⁵⁷

The survey yielded close to fifty responses.³⁵⁸ Nearly 40% of respondents indicated their program assists thirty or more ITIN filers in a given year.³⁵⁹ All survey respondents answered the question “Have you noticed a decrease in the demand for ITIN services within the last two years?”³⁶⁰ Interestingly, the responses were nearly evenly distributed, with over one-third of respondents (35%) indicating “No,” over one-third (35%) chose “Unable to Determine,” and slightly less than 30% responded affirmatively that they had noticed a decrease in the demand for ITIN services.³⁶¹

The survey also provided the opportunity for respondents to anonymously comment, or provide additional data, regarding their experience providing ITIN services. Over half of participants (26) submitted comments, ranging from expressions of disdain about perceived shortcomings of the ITIN Unit,³⁶² to one respondent indicating their organization had ceased operating their ITIN Certified Acceptance Agent (CAA) program, noting: “It is our view that the ITIN program is no longer a tax compliance matter but has

Representation: The Creation and Development of Low-Income Taxpayer Clinics, 67 TAX L. 3, 5–32 (2013) (providing a chronological history of the development of LITCs); Keith Fogg, *A Brief History of Low-income Taxpayer Clinics* (Villanova Law Sch. Pub. Law & Legal Theory Working Paper Series, Working Paper No. 2013–3005, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2142144 (discussing the role the Revenue Reform Act of 1998 played in supporting the growth of Low-Income Taxpayer Clinics).

357. TAXPAYER ADVOCATE SERV., PUB. NO. 5066-A, LOW INCOME TAXPAYER CLINICS PROGRAM REPORT 2019 8, fig.1 (2019), <https://www.irs.gov/pub/irs-pdf/p5066.pdf>. According to the 2019 Taxpayer Advocate Service Report, coverage is still lacking in North Dakota, West Virginia, and Hawaii, as well as in some specific regions in other states. *Id.*

358. ITIN SERVICES, Online Survey of LITCs, Administered Nov. 7 – Dec. 17, 2019 (on file with author). 98% of respondents indicated they offered ITIN services, nearly 40% offered aid in all three major areas of immigrant tax services, specifically: ITIN applications, tax controversy representation, and tax preparation. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.*

become an immigration enforcement tool.”³⁶³ Others wrote that there has been a perceptible change in the last couple of years: “ITIN filers appeared to withdraw a bit,” and “ITIN holders in general are more frustrated with the tax system than SSN holders, particularly when they are trying to comply with their obligations.”³⁶⁴

Of the twenty-six respondents who provided additional comments about their experiences with the ITIN program, many shared marked *decreases* in ITIN traffic, one cited a drastic reduction, stating their organization previously assisted over 100 ITIN holders per year, a number recently reduced to the low double digits.³⁶⁵ Respondents noted the national mood around immigration, complications related to ITIN expiration and renewal policies, and related reasons behind recent declines.³⁶⁶

The author also contacted several LITC program directors requesting on-the-record comments about their experience with the ITIN program.³⁶⁷ Sarah Lora, an Assistant Clinical Professor at the

363. *Id.* Information about the IRS CAA Program can be found on the IRS website. See *New ITIN Acceptance Agent Program Changes*, INTERNAL REVENUE SERV. (last updated Dec. 21, 2019), <https://www.irs.gov/individuals/new-itin-acceptance-agent-program-changes>.

364. ITIN SERVICES, *supra* note 358.

365. ITIN SERVICES, *supra* note 358.

366. One respondent shared:

We have seen a decrease in taxpayers who have ITINs coming in for tax prep even before the change in administration and the changes to the tax code and immigration policies. A social service agency partner tells us they hear several reasons: (1) think that a paid preparer will work harder to get them a larger refund or the VITA volunteers won't let them claim some things a paid preparer will let them claim / VITA volunteers ask too many questions (leads to identifying cash income they don't want to claim, determining taxpayers can't file as single, or can't claim a dependent or a credit, etc.); (2) fear that filing taxes will risk contact from ICE; (3) fear claiming tax benefits will cause problems with their immigration.

ITIN SERVICES, *supra* note 358.

367. The author had firsthand experience working with an in-house LITC CAA in the early 2000s. One weekend, several members of the LITC drove from Chicago to downstate Illinois and completed no fewer than 700 W-7 ITIN applications (approximately 200 individuals were in attendance but the application rules at the time permitted ITIN applications without the need to file accompanying tax returns). Many in attendance brought several ITIN applications for family members and had to tender all required, original supporting documentation in order for an application to be approved. It was a full day event in a large multi-purpose room in the basement of a church; attendance was standing room only due to the tremendous need and effective

Lewis & Clark Law School LITC in Oregon, has worked with immigrant taxpayers for over sixteen years, thirteen as a farmworker attorney with a tax docket, and three as a LITC program director.³⁶⁸ Professor Lora notes increased ITIN traffic resulting from 2015 PATH Act changes, namely the ITIN renewal requirement.³⁶⁹ She cites the difficulties many of her clients with dependents in Mexico encounter as ITIN application requirements ask for extremely narrow medical and school records difficult to acquire.³⁷⁰ She also notes the 2017 TCJA removal of dependency exemptions has yielded complications for ITIN filers.³⁷¹

Luz Arevalo, Senior Attorney at the Greater Boston Legal Services LITC, along with volunteer CAA William Rosenfeld, assist a wide array of taxpayers and provided insightful comments and data. Mr. Rosenfeld, a volunteer with Greater Boston Legal Services since the fall of 2015, kindly provided organizational data related to ITIN applications over the past decade, which showed a single ITIN application in 2010, 37 in 2014, 9 in 2016, to an all-time high of just under 100 ITIN applications during 2019.³⁷² Mr. Rosenfeld shared that ITIN holders are filing tax returns as part of immigration petitions, or to claim a spouse or dependent; others seek ITINs to facilitate the performance of contract work, or to simply “do what’s

education and outreach employed by local downstate Illinois and Chicago area community organizations.

368. E-mail from Sarah Lora to author (Dec. 18, 2019, 12:28 PM EST) (on file with author).

369. See *supra* Section I.B.1.

370. See E-mail from Sarah Lora, *supra* note 368 (“For example, I had a client who applied for an ITIN for his daughter in Mexico with a birth certificate and school records. The school record was rejected because it had a GPA, not individual grades. . . . These requirements are much more restrictive than is required by the statute or reg[ulations].”).

371. Specifically noting the “TCJA reduction of exemption amount to \$0. The problem is that taxpayers are running into issues with the state because most states have not reduced the exemption amount to \$0.” See also *supra* Section I.B.2; Richard C. Auxier, *The TCJA Eliminated Personal Exemptions. Why Are States Still Using Them?*, TAX POL’Y CTR. (Dec. 17, 2018), <https://www.taxpolicycenter.org/taxvox/tcja-eliminated-personal-exemptions-why-are-states-still-using-them>; Robert McClelland, *Fixing the TCJA: Restore the Personal Exemption*, TAX POL’Y CTR. (Mar. 21, 2019), <https://www.taxpolicycenter.org/taxvox/fixing-tcja-restore-personal-exemption>.

372. Email to Luz Arevalo from William Rosenfeld (Dec. 18, 2019, 1:48 PM EST) (on file with author). Noting the increase, Bill shared, “We now receive referrals from the IRS and VITA sites when individuals need ITINs. I believe most of the increased volume is due to these referrals.” *Id.*

right” by paying their share of taxes.³⁷³ Ms. Arevalo has focused on immigrant taxpayers for nearly twenty years and shared the following reflections:

Contrary to what I expected with the anti-immigrant administration, our clients keep coming out to “do the right thing.” The overwhelming majority of immigrant workers don’t want to owe, want to avoid problems, and simply need to learn how to stay compliant. Despite their fear and mistrust of government, immigrant taxpayers courageously show up and want to pay what is fair. They are survivors by definition and will not be deterred if they know that paying their tax and filing is the right thing to do. And they do it with the hope that the system will respond fairly. Of course, it is a contract, so the expectation is that we get the services we pay for. In that regard, the U.S. is not keeping its end of the contract.³⁷⁴

D. Proposal to Add Incentives to File

The modest proposal central to this work is that if additional protections are granted to undocumented workers who file income taxes, the surge in tax returns filed would benefit both national and state tax revenues and our national immigration system.³⁷⁵ Not unlike proposals put forth by the Immigrant Tax Inquiry Group, the payment of filing fees and income taxes by unauthorized workers in order to secure priority in immigration proceedings has the capacity to create the political will to encourage dialogue to hopefully finally spur action insofar as meaningful immigration reform is concerned. This proposal would have to overcome challenges that it is akin to amnesty. However, maintaining the status quo will only serve to diminish security in immigrant communities and allow employers to continue to pay subpar wages to workers with few protections and fewer options.³⁷⁶

373. *Id.*

374. Email from Luz Arevalo to author (Jan. 10, 2020, 12:28 PM EST) (on file with author).

375. See CONG. BUDGET OFFICE, *supra* note 19, at 11 (citing increased immigration fee filings and increased tax return filing and immigrant earnings).

376. See Chang, *supra* note 299, at 114–15.

Implementation of tax-compliance-based immigration reform could be predicated on a system where the Social Security Administration assigns a unique SSN to immigrant tax filers who wish to avail themselves of the tax-immigration queue. For example, the ITIN program uses tax identification numbers that begin with the number “9” because SSA does not assign any SSNs with the number 9. Thus, a similar program could be instituted allotting undocumented immigrant workers queued up for legalization with a unique SSN indicating they are part of this legalization program. As it stands, SSA could use any combination of SSNs not currently issued, to setoff participants in a legalization program. Currently, SSNs assignments are randomized and specifically exclude 00 and 0000 as valid assignments,³⁷⁷ as well as area number clusters of 000, 666, and 900–999.³⁷⁸ Any combination could be used as part of new immigration reform efforts and continue to be used to distinguish new arrivals who queue up for their chance at legalization.

These recommendations are also made based on the fact that changes to the ITIN program have resulted in fewer immigrants voluntarily engaging with the IRS and local tax systems. In the early, extraordinarily popular years of the ITIN program, the IRS issued an ITIN card.³⁷⁹ The card was very similar to a SSN card insofar as it was an official, government-issued document that arrived in letter form, with a perforated section where the recipient could remove the card.³⁸⁰ The ITIN card itself had a green upper border and had a passing semblance to SSN cards in that ITINs are also nine digits. During the time of the ITIN card, some unauthorized workers assumed these cards granted them some form of legitimate status and they provided these cards to their employers.³⁸¹ Even shortly after the

377. *Social Security Number Randomization Frequently Asked Questions*, SOC. SECURITY ADMIN., <https://www.ssa.gov/employer/randomizationfaqs.html> (last visited Aug. 19, 2020).

378. *See id.*; *see also Social Security Number Randomization*, SOC. SECURITY ADMIN., <https://www.ssa.gov/employer/randomization.html> (last visited Aug. 19, 2020).

379. “The IRS changed from an ITIN card to an authorization letter to avoid any possible similarities with a Social Security Number card.” *Revised Application Standards for ITINS*, INTERNAL REVENUE SERV. (last updated Nov. 8, 2019), <https://www.irs.gov/individuals/revised-application-standards-for-itins>.

380. *See ITIN SERVICES*, *supra* note 358.

381. During this time, the author was on the receiving end of numerous phone calls from anxious small business owners and employers who were unsure of whether to turn over these cards to their payroll companies. These employers had to be advised of the purpose of the ITIN, that is, solely a vehicle to declare income and granting no

ITIN card was discontinued, interest in ITINs was very high and community outreach events were extremely well-attended.³⁸² The current iteration of the ITIN program, with mandatory renewal and other administrative roadblocks preventing accessibility and ease of use, coupled with the current political climate, portend decreased participation and a greater need for large scale immigration reform.³⁸³

It is conceivable local and national business leaders welcome the current state of immigration, where few are eligible to legalize their status and thus possess less political power to implement change, including demanding fairer wages.³⁸⁴ As previously noted, the Congressional Budget Office has opined that increased tax revenues would most surely flow from the legalization of workers, due to the payment of higher wages to those with legal status.³⁸⁵ While higher tax collection on higher wages may prompt some to exclusively champion the legalization of high-skilled workers who necessarily earn more and pay higher taxes (and decrease refundable tax credit expenditures),³⁸⁶ this is short-sighted when consideration is given to the low-skilled workers who earn less but fill a multitude of necessary jobs within the healthcare, agriculture, and service industries. These same workers are also at greater risk of exploitation.

While there are considerations around the timing of reform in light of potential expenditures related to increased benefit claims,³⁸⁷ the 2015 PATH Act and 2017 TCJA deliberately and significantly

legal right to work. The workers, in turn, often presented with SSA “no-match” letters when they furnished employers fabricated SSNs because ITINs could not be used for employment purposes. *See generally Know Your Rights About the Social Security No-Match Letter*, NAT’L IMMIGR. L. CTR. (Mar. 2019), <https://www.nilec.org/issues/workersrights/no-match-letter-toolkit/no-match-letter-know-your-rights/> (explaining the role of no-match letters in employment settings).

382. These events frequently paired tax professionals and immigration attorneys to address community questions related to risks and benefits around the ITIN number and voluntary tax compliance. The author participated in ITIN outreach events primarily in Chicago and Washington, D.C., although she also consulted with undocumented workers in Memphis, Tennessee.

383. ITIN SERVICES, *supra* note 358.

384. *See supra* note 309 and accompanying text.

385. *See* CONG. BUDGET OFFICE, *supra* note 19, at 4. The Congressional Budget Office report noted the House of Representatives mandate requiring the Congressional Budget Office and the Joint Committee on Taxation to “include the budgetary feedback of any macroeconomic effects in cost estimates for some major pieces of legislation.” *Id.* (citing H.R. Res. 5, 114th Cong. (2015)).

386. *Id.* at 20.

387. Such considerations include refundable, family-based tax credits and social security benefits, which previously unauthorized workers had no right to claim.

whittled down the tax benefits accruing to undocumented workers, reducing potential outlays.³⁸⁸ Furthermore, an increased flow of unauthorized immigrants would increase tax revenues once these workers started working and paying taxes, provided the 50% estimate of undocumented worker tax filings holds.³⁸⁹ And if immigration reform legalized the status of millions already residing in the United States, this too could serve to significantly increase tax revenues.³⁹⁰

When IRCA was enacted in 1986, amnesty was granted to 3 million individuals.³⁹¹ The growth in the undocumented population since then has been invoked to illustrate the failed policies of the last comprehensive immigration reform bill, particularly failed enforcement measures.³⁹² Immigration reform and the attendant costs related to improved enforcement of humane immigration laws will very likely not be a revenue neutral proposal. Whether the establishment of a closer connection between immigration benefits and tax compliance will be revenue generating is not known as of this writing. Yet one of the most intractable issues around proposed reform remains that expenditures are often invoked without acknowledgment of likely corresponding revenue increases, typically

388. *See generally* Pub. L. No. 115-97.

389. CONG. BUDGET OFFICE, *supra* note 19, at 15–16 (citing ECONOMIC REPORT OF THE PRESIDENT, COUNSEL OF ECON. ADVISERS (Feb. 2005)); Social Security Administration, Office of the Chief Actuary Letter to Sen. Richard J. Durbin (June 5, 2007); Alice H. Wade et al., *Projections of Immigration for the 2008 Social Security Trustees Report*, ACTUARIAL NOTE 148, SOCIAL SECURITY ADMINISTRATION, OFFICE OF THE CHIEF ACTUARY (March 2009).

390. CONG. BUDGET OFFICE, *supra* note 19, at 15.

391. *See* 152 Cong. Rec. 5505, 5510 (daily ed. Apr. 6, 2006) As Senator Sessions stated for the record:

Indeed, in 1986, as part of the amnesty that was signed in that year, the quid pro quo for the amnesty of some 3 million people was an effective worksite verification program and employer sanctions for those employers who cheat and hire people on the black market of human labor. We know, because the Federal Government failed to provide that effective Federal Government worksite verification program, that now we are dealing with approximately 12 million people who have come here in violation of our immigration laws, and we are confronted with the monumental challenge of how to address those 12 million in a way that both respects our legacy as a nation that believes in the rule of law while we continue to celebrate our heritage as a nation that believes we are indeed a nation of immigrants and better for it.

Id. at 5510–11.

392. *Id.*

along party lines.³⁹³ Reform can become a reality if voters en masse are convinced that an orderly, humane immigration system is not only possible, but necessary, and that seemingly disparate populations have more in common than discordant politics would have them believe.

An early 2020 working paper by two Harvard economists revisited earlier related studies of perceptions of immigration and redistribution acquired through the use of online surveys and experiments in Germany, France, Italy, Sweden, the United States, and the United Kingdom.³⁹⁴ They noticed a consistent pattern: “[N]atives have striking misperceptions about the number and composition of immigrants. . . . For instance, in the U.S., the actual number of legal immigrants is 10%, but the average perception is 36%. . . .”³⁹⁵ The paper notes that the educational attainment of native respondents strongly correlated with the degree of misperceptions, as well whether right-wing views were espoused by survey respondents.³⁹⁶ The paper notes that priming survey participants by asking randomized questions about immigrants increased resistance

393. As Senator Sessions further explained with respect to the Securing America's Borders Act:

We can deal humanely and fairly with the 11 million to 12 million—or maybe even 20 million—illegals who are here. We don't have to give them every single benefit we give to those who follow the law, but we can allow most to stay and work and live here, if that is what they have been doing and if that is possible. We can work out all those things. We can deal with those issues in an effective way. But this legislation doesn't do it, and it is too late to fix it. We need to have some real hearings, get the best minds in America to tell us about this problem, and work out legislation that is not amnesty, that doesn't cost \$27 billion, that creates a lawful system on our borders so people can enter and exit easily with biometric identifiers if they are lawful and those who try to come in unlawfully get apprehended. That can be done. This bill doesn't do it. The compromise legislation doesn't do it. It needs to be voted down.

Id. at 5537.

394. The “large-scale” surveys were conducted by three economists, Alberto Alesina, Armando Miano, and Stefani Stantcheva. IMMIGR. AND REDISTRIBUTION (June 2018) (unofficial NAT'L BUREAU OF ECON. RESEARCH PUBL'N) (on file with author).

395. Alberto Alesina & Stefanie Stantcheva, *Diversity, Immigration and Redistribution* 5 (Nat'l Bureau of Econ. Research, Working Paper No. 26620, 2020), <http://www.nber.org/papers/w26620>.

396. *Id.*

to redistribution³⁹⁷ It concludes that “while misperceptions could in principle be corrected, biases pose a much larger challenge and can perpetuate misperceptions.”³⁹⁸

So that is the inherent challenge in the personal and political lives of modern-day Americans: reconciling perceptions and assumptions with reality. It is reasonable to conclude that increased educational efforts would yield dividends for those on all sides of this debate. Based on the direct experience of the community service providers cited herein, undocumented workers would likely respond quite favorably to the proposition of receiving expanded immigration protections in exchange for increased voluntary tax compliance. Native citizens who would benefit from government-sponsored programs such as vocational and job training to address the displacement spurred by globalization (and plant and mine closures) might soften their stance on immigrants, heartened by the knowledge that immigrant workers were significantly contributing their human capital to help fund these reeducation programs.

But it is unlikely politicians who benefit from instilling fear, and who sow division in order to remain in power, will welcome increased education and outreach efforts. It is true “[s]ome may oppose expanding protections for undocumented immigrants who file tax returns because such an action might symbolize governmental acquiescence of those immigrants’ place in society.”³⁹⁹ Yet the government and general public have already acquiesced to immigrants’ place in society. Acquiescence was central to the creation of the IRS ITIN program, which is by itself an acknowledgement not only of the presence of undocumented workers, but their myriad economic contributions as well.

CONCLUSION

The proposed frameworks cited herein to increase the voluntary tax compliance of current and future undocumented workers are intended to work in tandem with potential meaningful immigration reform. The proposed overhaul of two crucial systems is intended to bridge communities and forge connections. This work invokes tax and

397. *Id.*

398. *Id.* at 6.

399. Hayes Holderness, *Weekly SSRN Tax Article Review and Roundup: Holderness Reviews Flanagan’s ‘Reframing Taxigration’*, TAXPROF BLOG (Dec. 13, 2019), https://taxprof.typepad.com/taxprof_blog/2019/12/weekly-ssrn-tax-article-review-and-roundup-holderness-reviews-flanagans-reframing-taxigration.html.

economic⁴⁰⁰ policies as frameworks to establish practical solutions to divisive societal issues.⁴⁰¹ Overall, this article is an attempt to highlight the opportunities inherent within U.S. tax and immigration systems with the sincere hope that future reform will take these opportunities into consideration for the benefit of native Americans and those who migrate to the United States in search of better lives.

Perhaps the most salient statements regarding the principles of good governance and the intersection of immigration reform and tax administration were delivered by the late Republican Senator John McCain on the Senate floor in 2006, criticizing pending efforts to prevent EITC claims by newly legalized immigrants should impending immigration reform succeed. It is not solely the content of his rhetoric that is striking, but the fact that throughout most of his extraordinary career he was often willing to cross party lines seeking the best way forward to advance the promise of American ideals. Perhaps his legacy will reverberate in future Congressional sessions as debates to bring forth meaningful reform continue:

The CBO and Joint Tax Committee estimate that bringing these legal immigrants into the Federal tax system would substantially increase Federal revenue collections overall. It is patently unfair to make them abide by our tax rules yet deny any legal workers equal treatment under these same rules. . . . Some of these amendments are sending a very troubling message to the American public about what direction we want our country to go. We need to be going forward and not backward. . . . These people are here to work, and they are doing jobs that most of us do not have the will to do. These are workers. They are not risking their lives to come into this country with the goal of freeloading off of us. They are here to earn a wage for the betterment of themselves and their families, the same reason our forebears came here to this country. They aren't looking for a handout. They

400. See generally FRIEDMAN, *supra* note 337 (discussing the intersection of law and tax policy for efficient legal systems); AVERY WIENER KATZ, FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW (1998) (assessing how economic analysis interacts with the law); see also SHAVELL, *supra* note 328, at 93–94.

401. See generally Louis Kaplow, *Horizontal Equity: Measures in Search of a Principle*, 42 NAT'L TAX J. 139 (1985) (analyzing horizontal equity in the context of tax reforms seeking greater equality) (subsequent 1993 and 2000 works)).

are looking for a chance, a chance for a better life. And they are willing to work harder than most of us to have just a few of the opportunities most of us take for granted.⁴⁰²

402. See 152 CONG. REC. S5136 (daily ed. May 25, 2006) (statement of Sen. McCain) (discussion of Comprehensive Immigration Reform Act of 2006).

