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Bearing Witness to Economic Injustices of Undocumented Immigrant Families: A New Class of 'Undeserving' Working Poor

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I. Introduction: Bearing Witness

Seven fifty-five, Wednesday evening, November 8th, the day before her 82nd wedding anniversary and twenty-nine days before her 100th birthday, my grandmother slipped away from the American family and dream that she loved everyday of her life. A first generation United States citizen, Rose was born at home on 15th Street in New York City to twenty-something Russian immigrants. Her father, Eli, had traveled to America at the turn of the century to find work and a better life for his family. Eli eventually earned enough money to send for several members of his close family, including his beloved wife, Annie. Annie stepped on American soil in 1904 and her only child, my grandmother, was born on December 7, 1906.

Like thousands of other Russian immigrants escaping anti-Semitism at the turn of the century, Eli arrived on the shores of America and enjoyed full equality and freedom. America offered Eli the promise of a better tomorrow and it delivered handsomely. In 1933, the Nazis came to power in Germany with more than nine million Jews living in Europe. By 1945, only three million had survived Adolph Hitler’s Final Solution.

The Holocaust,¹ the intentional and premeditated genocide of Jews, was the result of institutionalized racism. If America had not been the Promiseland for my family, my great-grandparents and grandparents likely would not have survived the Holocaust and my parents would have never been born. And you would not be reading this Essay.

¹ The word “Holocaust” is Greek in origin and means literally that which is offered up or a burnt sacrifice. The term has acquired the secular meaning of a complete sacrifice or destruction, especially by fire, of a large number of human beings.
More than one hundred years later, immigrants still travel to America seeking work and a better life for their families. Although the percentage of immigrants to the total population is lower today than at the turn of the century, because of restrictive immigration policies millions of immigrants are living and working in the United States without government authorization. \(^2\) Since 1995, the average number of undocumented immigrants arriving in the United States has exceeded the average number of arrivals of documented immigrants. \(^3\) In 2006, there were approximately 12 million undocumented immigrants.

\(^2\) The most commonly used term to describe undocumented immigrant is “illegal aliens,” which “is racially loaded, ambiguous, imprecise, and pejorative.” Beth Lyon, When More “Security” Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers, 6 U. PA. J. LAB. & EMP. L. 571, 576 (2004) (citations omitted). In her article, Professor Lyon presents a thoughtful, comprehensive and necessary analysis about the appropriate terminology for non-U.S. citizens and their immigration status. Id. at 573-82. Consistent with her well-supported conclusion, I will use the term “undocumented immigrants” to refer to “people who presently possess no proof of any right to be present in the United States, whether or not they have been declared deportable by the U.S. government (and the vast majority have not).” Id. at 581. The term “unauthorized workers” will be used to describe people who are forbidden under the immigration laws to work for pay. Id. at 582. As Professor Lyon describes the distinction between these terms “is important because although the two groups overlap numerically, personally, and politically, they are not co-terminous . . . . [I]mmigrants who are unauthorized to work are not all undocumented and those who are undocumented did not all enter the country illegally.” And there are many undocumented immigrants who do not work. Id. Professor Lyon prefers these terms because they are commonly used, relatively uncontroversial, “accurately convey the legal situation of the groups described,” and create a meaningful distinction. Id.

\(^3\) See JEFFREY S. PASSEL, UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS, PEW HISPANIC CENTER, (June 14, 2005), available at http://pewhispanic.org/files.reports/46.pdf, at 6 (determining that the
immigrants residing in the United States including more than 7 million unauthorized workers, who comprise approximately five percent of the U.S. workforce.\textsuperscript{4}

Oppressive restrictions on immigration seem “to derive from fear of (or distaste for) foreigners, especially foreigners of minority races or ethnic groups.”\textsuperscript{5} More recently, undocumented immigrants (57% to 70%) originate predominately from the U.S.’s southern-border neighbor, Mexico.\textsuperscript{6} Undocumented immigrants also originate from Latin

\begin{itemize}
\item \textsuperscript{4} Id.; Center for American Progress, Don’t Abandon Comprehensive Immigration Reform (Sept. 20, 2006) (urging Americans to push Congress to succeed rather than fail at comprehensive immigration reform and recounting the facts rather than the rhetoric on immigration) available at www.americanprogress.org/issues/2006/09/immigration_reform (last visited Dec. 2, 2006).
\item \textsuperscript{6} See B. LINDSEY LOWELL AND ROBERTO SURO, PEOHISPANIC CENTER, THE NUMBERS BEHIND THE U.S.-MEXICO IMMIGRATION TALKS 6 (Mar. 21, 2002), available at http://pewhispanic.org/files/reports/6.pdf (noting that Mexicans have a long history of immigration to the U.S.); Pia Orrenius & Madeline Zavodny, Immigration Policy: What are the Consequences for an Amnesty for Undocumented Immigrants?, 9 GEO. PUB. POL’Y REV. 21, 23 (Spring 2004) (finding that Mexico, the primary source country for undocumented immigrants, accounts for almost 70% of undocumented immigrants in 2000); JEFFREY S. PASSEL, PEOHISPANIC CENTER, Estimates of the Size and Characteristics of the Undocumented Populations, 1 (Mar. 21, 2005), available at http://pewhispanic.org/files/reports/46.pdf (discovering that the number of undocumented immigrants from Mexico is 5.9 million or 57% of the aggregate number as of March 2004, a percentage that has remained constant for the last decade); Jeffrey S. Passel, et al., Undocumented Immigrants: Facts and Figures, 1 (Jan. 12, 2004), available at
\end{itemize}
America (23%), Asia (9%) and, Europe and Canada, (5% combined). The growing hostile reaction to immigration seems to be fueled by the rise in the number of immigrants of color. Deliberate race based exclusion has existed in America since its inception. Despite progress, pervasive and persistent racism continues to be a significant national tragedy.

Racism is a toxic mind-set with catastrophic results. The Holocaust is a horrific testament to this truth. Survivors of the Holocaust speak loudly and uniformly of one commandment: Never again: Bear witness to injustice, racism and hate and do what is necessary to prevent them. As Dr. Reverend Martin Luther King, Jr. proclaimed during the civil rights movement, “Injustice anywhere is injustice everywhere.”

The American people and their representatives in Congress are wrestling to fix our broken immigration system. In the process, we must learn from the past and not repeat this country’s tragic historical mistakes. “The shameful treatment of Chinese

http://www.urban.org/UploadedPDF/1000587_undoc_immigrantsfacts.pdf (determining that Mexicans make up about 57% of undocumented immigrants in 2002).

Lowell and Suro, supra note 6, at 6; Passel, Estimates of the Size and Characteristics of the Undocumented Populations, supra note 6, at 2.

“As a nation we began by declaring that ‘All men are created equal.’ We now practically read it ‘All men are created equal, except Negroes.’ When the know-nothings get control, it will read ‘All men are created equal, except Negroes and foreigners and Catholics.’ When it comes to this, I shall prefer emigrating to some country where they make no pretense of loving liberty . . . where despotism can be taken pure, and without the base alloy of hypocrisy.” Abraham Lincoln, from a letter to Joshua Speed, written at Springfield, August 24th, 1855; see also KEVIN R. JOHNSON, THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS 16- 20 (TEMPLE UNIVERSITY PRESS 2004) (describing the tragic history of racial exclusion in U.S. immigration laws).
immigrants by federal, state, and local governments (as well as by the public at large) in the 1800s represents a bitter underside to U.S. history.”

In the late 1930s, President Roosevelt denied critical immigration opportunities for hundreds of thousands of Jews and in 1942 he authorized the imprisonment of almost 120,000 people of Japanese ancestry, including more than 73,000 American citizens, in “permanent relocation

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9 KEVIN R. JOHNSON, THE “HUDDLED MASSES” MYTH (TEMPLE UNIVERSITY 2004) 17. In his insightful scholarly, yet accessible book on U.S. immigration and civil rights, Professor Johnson demonstrates that the poem inscribed on the Statue of Liberty, “The New Colossus,” while descriptive of much of the history of U.S. immigration, is inconsistent with the shameful treatment of “those categories of immigrants who share common characteristics with groups that are disfavored in this country.” Id. at 2. Professor Johnson concludes that “those who are truly committed to racial justice in the United States cannot ignore the treatment of immigrants.” Id. at 12.

10 While the United States received about 100,000 Jewish immigrants until 1939, from 1933-1943 there were over 400,000 unfilled immigration quotas from countries subject to Hitler’s persecution. Daniel J. Steinbock, Refuge and Resistance: Casablanca’s Lessons for Refugee Law, 7 GEO. IMMIGR. L.J. 649, 678 & n.191 (1993) (stating that social conditions in the United States between 1938-41 “included a substantial amount of . . . anti-Semitism”). Other countries denied entry to hundreds of thousands of Jews as well, including Cuba when the government refused to honor entry to 930 Jews onboard the SS St. Louis. As the ship sat in Havana harbor within yards of the shore, a bribe of $1,000,000 was solicited, but could not be raised within the 24 hour deadline. Colombia, Chile, Paraguay, Argentina and the United States either ignored requests for entry or explicitly denied it. Eventually, the SS St. Louis turned around and left its passengers off in Belgium, the Netherlands, England and France. Most of these passengers, other than the 288 who disembarked in England, were murdered in the Holocaust. MICHAEL BERENBAUM, THE WORLD MUST KNOW: THE HISTORY OF THE HOLOCAUST AS TOLD IN THE UNITED STATES HOLOCAUST MEMORIAL MUSEUM 58 (LITTLE BROWN & COMPANY 1993) (describing the tragic journey of the SS St. Louis).
centers.”¹¹ A year later, President Roosevelt pronounced: “Americanism is not, and never was, a matter of race or ancestry.”¹² Then American institutions, policies and actions should not be based upon race or ancestry.

But they are. U.S. immigration, welfare and tax systems, among others, have evolved from invidious race-based policies that have resulted in discriminatory rules leading to irrational actions. Not that many years ago Hitler’s obsession with the supremacy of an Aryan master race, the central and pervasive theme of Nazism, also led to race-based policies and actions. Hitler used spellbinding magnetism and simple propaganda to play on the sympathies and fears of mass audiences and united them behind an urgent, hysterical, struggle against an evil enemy.

My ancestors were the evil enemy who escaped the lethal wrath of the Nazis through the narrow window of open-door, U.S. immigration policy. Today when I hear broad proclamations of misinformation casting “illegal aliens”¹³ as the scapegoat for all of the nation’s problems, I fear the intoxicating power of simple propaganda. I fear the strength of misguided frustration and hate. I fear the inability of the masses to see

¹¹ On February 19, 1942, President Franklin D. Roosevelt signed Executive Order No. 9066 and authorized the removal of all Japanese from the west coast and their confinement in relocation camps. Prejudice against the Japanese was based on the idea that race, not citizenship determined loyalty to the United States. The U.S. Supreme Court upheld this internment in its opinion in Korematsu v. United States, 323 U.S. 214 (1944).

¹² President Roosevelt, February 1, 1943.

through the mendacity because of unjustifiable complexity and lack of transparency in our institutions.

Because of the lessons I have learned from the brave survivors of unspeakable past atrocities, I know I cannot be a bystander. As the granddaughter and great-granddaughter of persecuted immigrants, I must confront and alleviate threats to human dignity, social justice, and civil rights everywhere. I must discover the truth and explain it precisely, pensively, patiently and with passion.

I bear witness.

II. U.S. Social Welfare Policy Toward Undocumented Immigrants: “The Less than Undeserving” Working Poor

A. Institutionalized Racism

American public policy has been forever defined by and institutionalized according to racial and ethnic hierarchies. For centuries through systemic racial and ethnic inequality, America has abandoned people of color “‘to murder and mayhem in the streets, to substandard schools, to dilapidated housing, to inadequate health care, to a pervasive sense of hopelessness.’”14 In the early 1900s, termed the “Progressive Era,” U.S. and state governments established an unprecedented number of legislative and administrative actions intended to protect the social and economic rights of the “deserving” poor, that is, the white poor.15 These actions were wrought with regressive civil rights policies that reflected and reinforced the subordinated status of people of

color. The modern U.S. welfare state has evolved from this social and political landscape.\textsuperscript{16}

\section*{B. The Racialization and Reconstruction of Welfare}

Since its inception government assistance has been designed “to impose white, middle-class norms on a population deemed worthy of assistance only if it embraced the superiority of this white middle-class culture.”\textsuperscript{17} From 1911 through 1932, state-based mothers’ pension laws and aid programs preserved and protected white, middle-class women and their children, intentionally excluding African-Americans, nonwhite immigrants and the poor.

In 1935, Franklin D. Roosevelt federalized this institutionalized racism when he signed the Social Security Act into law and established a bifurcated U.S. welfare state: a national “social insurance” program for worthy retired workers and their dependents and public assistance programs for the remainder.\textsuperscript{18} The former beneficiaries were deemed “deserving” and not subject to ANY exclusionary testing. And the later remnants of society were subject to raced-based scrutiny and means-testing to prove their need and

\textsuperscript{16} See generally, Ward, supra note 13 (providing “a powerful array of documentary and statistical evidence to reveal the mechanisms, centrality, and deep historical continuity of racial exclusion in modern ‘welfare’ provisions in the United States.”).

\textsuperscript{17} Id. at 54; “The cornerstone of U.S. welfare policy has always been to separate the ‘deserving’ poor from the ‘undeserving.’” Joel F. Handler, “Ending Welfare As We Know It”: The Win/Win Spin or the Stench of Victory, 5 J. GENDER RACE & JUST. 131, 134 (2001); Angela Onwuachi-Willig, The Return of the Ring: Welfare reform’s Marriage Cure as Revival of Post-Bellum Control, 92 CAL. L. REV. 1647, 1665-67 (noting that Americans were supportive of early welfare programs because the primary beneficiaries were “deserving” pitiable white widows who needed to care for their white fatherless children).

\textsuperscript{18} Ward, supra note 13, at 99.
their worthiness.\textsuperscript{19} With the addition of Survivor’s Insurance in 1939, white widows and their precious children once again gained worthy status as they were segregated intentionally from the unfit and unworthy welfare recipients of color and were added to the protection of the Social Security “insurance” system.\textsuperscript{20}

As it became more and more difficult to exclude people of color from government assistance, the public image of “welfare” became increasingly negative and sated with racist stereotypes.\textsuperscript{21} The portrait of the worthy and unfortunate respectable white widow and sympathetic fatherless children were replaced with the “welfare queen:” a Black, irresponsible, lazy drug addict mother who produced children out of wedlock for decades solely for the increased copious cash flow from the over-taxed taxpayers.\textsuperscript{22}

Empirical evidence demonstrates that these stereotypes are grossly inaccurate and that no outright cases of welfare fraud have been discovered.\textsuperscript{23} Indeed, African Americans have never represented a majority of those receiving welfare despite their disproportionate poverty.\textsuperscript{24} However, once people of color could no longer be excluded from government assistance the white public and media spun welfare into an overwhelming economic drain on society costing all Americans their limited financial

\textsuperscript{19} Id. at 99-130 (describing the evolution of mothers’ pensions through the New Deal).

\textsuperscript{20} Id. at 126; Onwuachi-Willig, supra note, at 1668.

\textsuperscript{21} Id. at 1668-73.

\textsuperscript{22} Id.


\textsuperscript{24} Ward, supra note 13, at 9.
resources. The intentional racialization of welfare accomplished the goal of its certain demise.

With the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)\(^{25}\) by a Republican Congress, President Clinton responding to an incensed and enraged white public cut off the “free ride” for “undeserving welfare queens” and signed PRWORA into law. With the “end of welfare as we knew it,” work became the primary “new” remedy for poverty. Nevertheless, the government’s provision of effective tools to secure work such as education, training and child care continues to be based upon race.

Since the implementation of the welfare-to-work program, studies have demonstrated that white welfare recipients are more likely than other ethnic groups to be encouraged to get an education and receive child care subsidies and less likely to be sanctioned for welfare policy violations.\(^{26}\) These studies also indicate that white women are more likely to receive benefits for children born out of wedlock.\(^{27}\) Today “[w]ell over 30 million Americans live below the federal poverty line, and while a majority of the poor are White, African Americans and Latinos constitute approximately twice the proportion of the country’s poor as they do of the population overall.”\(^{28}\)

With the increasing population of undocumented immigrants in the United States, American


\(^{26}\) Ward, supra note 13, at 145.

\(^{27}\) Id.

institutions have devised a new exclusionary category of “undeserving poor” who even are treated even less favorably: “The Less Than Undeserving Poor.”

C. Welcome to America: Those with the Gold Come through Our Door

Despite the warm welcome to the poor inscribed on the Statute of Liberty, being poor in America today is a life fraught with daily insurmountable challenges. Forever in fear of abuse of its social welfare systems, America has denied entry to the poor since colonial times. Even today the “public charge exclusion” accounts for most initial substantive State Department visa denials. Immigrants who are granted entry, but later become public charges are subject to deportation. However, because of aggressive use of the public charge exclusion and the chilling effect on seeking financial assistance, the U.S. has not deported many poor immigrants.

Poor lawful immigrants, as the “undeserving” poor in America, must try to survive with limited public benefits and persistent fear of losing their lawful status because they are a “public charge.” Undocumented immigrant families, “the less than undeserving” poor, are ineligible for most public assistance programs, including

29 See Johnson, supra note, at 93-96.

30 "Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tossed to me. I lift my lamp beside the golden door." Emma Lazarus, The New Colossus, in THE POEMS OF EMMA LAZARUS, vol. 1 at 2 (1889).


32 Johnson, supra note, at 93-96.

33 Id. at 97 (recounting that 90% of initial visa denials in 1998 were due to the “public charge exclusion”).

34 Id. at 91-93.
meaningful tax relief, and therefore pay federal, state and local income, property, excise, and sales taxes at exceptionally high effective marginal tax rates.

D. Welfare Relief Under the Tax Code for Most of the Working Poor in America

Similar to U.S. citizens, undocumented immigrant families are subject to federal, state and local income, property, excise and payroll taxes. However, consistent with U.S. welfare policy the federal income tax system is designed to encourage work by providing that poverty level working families do not pay taxes. Undocumented immigrant families are excluded statutorily from this relief.

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

In 1972, then-Governor Ronald Reagan, testifying before Congress regarding a workfare approach to government assistance, “suggested that the federal government should exempt low income families from income taxes and give them a rebate for their Social Security taxes.” Several years later, Senator Russell Long, the conservative Democrat chairman of the Senate Finance Committee, and Congressman Al Ullman, the

35 See William Safire, The 25% Solution, THE NEW YORK TIMES, at A19 (Apr. 20, 1995) (commenting that most taxpayers believe that the poor should not pay any taxes, the middlers something and the rich the highest percentage); SAUL D. HOFFMAN & LAURENCE S. SEIDMAN, HELPING WORKING FAMILIES: THE EARNED INCOME TAX CREDIT, 1-4, 50-51 (2003).

36 For purposes of this Essay a family residing in the United States long enough to be subject to U.S. federal income taxes as a “resident alien” and in which not every member has a valid SSN will be described as an “undocumented immigrant family.”

37 See HOFFMAN & SEIDMAN, supra note 26, at 12.
moderate chairman of the House Ways and Means Committee, were able to package the idea in a refundable tax credit and garner liberal support for the Earned Income Tax Credit (EITC). Since it was developed and established in 1975 by conservative forces, the EITC has enjoyed strong support across the entire political spectrum for encouraging work over welfare. The EITC is the largest and most successful antipoverty program in the United States for working poor families. “Research strongly confirms that the EITC has played a critical role in bringing more single mothers into the workforce.” The EITC encourages work and lifts millions of taxpayers out of poverty, including almost three

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38 See id. at 11-16 (recounting the conservative history and liberal support of the EITC).


40 Steve Holt, The Earned Income Tax Credit at Age 30: What We Know (The Brookings Institution 2006) at 14 (citing studies that find that the larger EITC was responsible for 84 percent of the difference in the employment rate increases between one-child and multi-child families; 60 percent of the increase in single mothers’ work between 1984 and 1996 and 34 percent of the increase in employment among single mothers between 1993 and 1999).
million children each year, more than any other social program. Without the EITC, the number of children living in poverty would increase by twenty-five percent.

The EITC is a refundable tax credit that provides cash refunds of up to $4,716 (for 2007) to ensure that working poor families pay no taxes. While designed to offset the burden of Social Security payroll taxes, the EITC in some cases provides a meaningful wage subsidy for low-income working families. The EITC provides critical cash refunds “for basic necessities like housing, utilities, food, and basic household appliances.” More than 21 million taxpayers, almost 17 percent of all taxpayers, received average EITCs of $1,788, or in excess of $38 billion in 2003.

a. Qualifying for the EITC

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

42 See id. at 13.

43 See I.R.C. § 32.

44 See HOFFMAN & SEIDMAN, supra note 26, at 11; ROBERT GREENSTEIN, CTR. ON BUDGET AND POLICY PRIORITIES, THE EARNED INCOME TAX CREDIT: BOOSTING EMPLOYMENT, AIDING THE WORKING POOR 1 (2005), http://www.cbpp.org/7-19-05eic.pdf (describing EITC basics and reporting that EITC expansions were responsible for more than one-half of the large increase in employment among single mothers between 1984 and 1986).


Throughout its thirty-plus year history, the EITC has encouraged low-income families to work.\textsuperscript{47} Accordingly, to qualify for the EITC an individual and her spouse, if married, must have earned income within certain lower-earned income ranges.\textsuperscript{48} The EITC and the earned income ranges are indexed for inflation annually and vary meaningfully with the number of qualifying children.\textsuperscript{49} For eligible individuals with two or more qualifying children, the maximum 2007 EITC is $4,716 for earned income or adjusted gross income (AGI) levels of $11,790 to $15,390 ($17,390 for married filing jointly) and phases out completely at $37,783 ($39,783 for married filing jointly) of the greater of earned income or AGI.\textsuperscript{50} Because the EITC is targeted for families, the maximum EITC benefits drop for eligible individuals with one qualifying child ($2,853) or no qualifying children ($428).\textsuperscript{51} And married taxpayers, with or without children, who file their tax return separately will not receive any EITC.\textsuperscript{52} The EITC is not intended to

\textsuperscript{47} See \textsc{hoffman} \& \textsc{seidman}, supra note 26, at 11-16 (describing the history of the EITC’s design and evolution).

\textsuperscript{48} I.R.C. § 32(a)(1).

\textsuperscript{49} I.R.C. § 32(b), (j).

\textsuperscript{50} Id.


\textsuperscript{52} See I.R.C. § 32(d) (setting forth requirement that married taxpayers must file a joint tax return to qualify for the credit). Moreover, nonresident aliens do not qualify for the credit unless they are married to a U.S. citizen or resident alien and they elect to have their worldwide income subject to U.S. income tax. See I.R.C. § 32(c)(1)(D) (providing that a nonresident alien may qualify if she will be treated as a resident alien for tax purposes due to an election under Section 6013(g) or (h).
benefit low wage earners with above average investments so eligible individuals cannot have investment income in excess of $2,900 per year.\textsuperscript{53}

If an eligible individual does not have a qualifying child she must satisfy several additional conditions.\textsuperscript{54} An eligible individual without a qualifying child must (1) have a principal place of abode in the United States for more than 1/2 of the tax year; (2) not be a dependent; and (3) be at least age 25, but under age 65 (if married, only one spouse must satisfy the age requirement) as of the close of the tax year.\textsuperscript{55}

Eligible individuals with one or more qualifying children meet the criteria for significantly greater EITC benefits than eligible individuals without any qualifying children.\textsuperscript{56} A qualifying child is defined under the uniform definition of a child.\textsuperscript{57} Therefore, if a taxpayer has a qualifying dependent, she will satisfy most of the requirements for a qualifying child under the EITC.\textsuperscript{58}

\textsuperscript{53} See I.R.C. § 32(i) (describing the disqualifying investment income as interest (taxable and tax-exempt), dividends, net capital gains, net rents, net royalties and net passive income).

\textsuperscript{54} I.R.C. § 32(c)(1)(A).

\textsuperscript{55} I.R.C. § 32(c)(1)(A)(ii).

\textsuperscript{56} I.R.C. § 32(c)(1)(A)(i).

\textsuperscript{57} I.R.C. § 32(c)(3) (referring to section 152(c) to define a “qualifying child”). In addition to satisfying the requirements under a uniform definition of a child, the dependent must live in United States for more than six months. Id.

\textsuperscript{58} Id.
b. Congress Limits EITC Relief for Authorized Work

In 1996, Congress enacted and President Clinton signed into law PRWORA which included unprecedented restrictions on federal benefits for many immigrants.\(^59\) Among the long list of benefit restrictions, Congress decided that “individuals who are not authorized to work in the United States” should be denied EITC benefits.\(^60\) To accomplish this goal, Congress amended the Internal Revenue Code (Code) to require that any taxpayer (and, if married, her spouse) and each qualified child must provide a valid Social Security Number (SSN) (issued to individuals authorized to work in the United States) to receive any EITC benefits.\(^61\)

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60 STAFF OF JOINT COMMITTEE ON TAXATION, 104TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 104TH CONGRESS, 394 (Comm. Print 1996).

61 Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2276-77; I.R.C § 32(c)(1)(E), (m); Working Families Tax Relied Act of 2004, Pub. L. No. 108-311, § 205, 118 Stat. 1176 (renumbering the clauses added by the 1996 Act). Specifically, the Code requires a SSN that is issued for reasons other than to apply for or receive benefits fully or partially funded with federal funds. See I.R.C. § 32(m) (finding that for this purpose the TIN is a SSN issued pursuant to provisions other than “clause (II) (or that portion of clause (III) that relates to clause (II)) of section 205(c)(2)(B)(i) of the Social Security Act”).
i) Taxpayer Identification Numbers (TINs)

a) SSNs

SSNs have been issued to workers since the implementation of the 1935 Social Security Act.\(^{62}\) The initial purpose of the number was to provide employers and the U.S. government to report or track Social Security earnings for purposes of payroll tax and retirement benefits calculations.\(^{63}\) In the 1960s computerization caused the Internal Revenue Service (IRS) and private businesses to rely on SSNs as a method of accumulating, sorting and tracking information.\(^{64}\) The government issued Social Security cards until the early 1980s to unauthorized workers and only kept internal records regarding their unauthorized status.\(^{65}\) Beginning in 1982, Social Security cards issued to unauthorized workers were marked “Not Valid for Employment” and temporarily authorized workers received cards marked “Valid Only With INS Authorization.”\(^{66}\)

In an effort to stop unauthorized workers from being hired, Congress enacted the Immigration Reform and Control Act of 1986.\(^{67}\) This Act, among other things, required employers to have all new employees prove their identity and work authorization with


\(^{63}\) Id.

\(^{64}\) Id. at 1431.

\(^{65}\) Id.

\(^{66}\) Id. (noting that with the replacement of the INS with the Department of Homeland Security the new annotation is “Valid for Work Only with DHS Authorization”).

specific documents.\textsuperscript{68} Congress listed the Social Security card as an acceptable document evidencing proof of work authorization.\textsuperscript{69} As a result of this requirement, there has been widespread use of counterfeit Social Security cards among unauthorized workers making “it more common and easier than ever for [unauthorized] workers to enter and function in the U.S. labor market.”\textsuperscript{70}

\textbf{b) Individual Taxpayer Identification Numbers (ITINs)}

As late as 1996, the Social Security Administration (SSA) began limiting its issuance of SSNs to individuals who are U.S. citizens and alien individuals legally admitted for permanent residence or under another immigration category authorized for employment in the United States.\textsuperscript{71} In response to this void, the IRS introduced a new TIN for use by individuals who are not citizens or nationals of the United States and are not eligible for SSNs.\textsuperscript{72} Qualifying individuals must apply for and use their unique ITIN on all their tax filing after December 31, 1996.\textsuperscript{73} The ITIN is “for tax purposes only and

\textsuperscript{68} See Singer and Dodd-Major, supra note, at 1431.
\textsuperscript{69} Id.
\textsuperscript{70} Id.; see Lyon, supra note, at 590 (finding that purchased or borrowed SSNs are easily obtained throughout the country and employers look the other way).
\textsuperscript{71} See Dept. of Treasury, supra note, at 4; Singer and Dodd-Major, supra note, at 1432.
\textsuperscript{72} Id.; see Treas. Reg. § 301.6109-1(d)(3) (noting that the ITIN is for use by alien individuals who do not qualify for a SSN); Dept. of Treasury, supra note, at 4 (noting that the IRS rather than the SSA, the INS or the U.S. consulate office was the best government agency to issue the number because the number is for tax purposes only).
\textsuperscript{73} See I.R.C. § 6109(a); Treas. Reg. § 301.6109-1(d)(3); Dept. of Treasury, supra note, at 4. The ITIN is a nine-digit number resembling a SSN but starting with the number “9” and having the number “7” or “8” as
does not affect immigration status, authorize work in the United States or provide
eligibility for Social Security benefits.” Undocumented immigrants are not authorized
to work in the United States and, therefore, are not eligible for a SSN.

2. The Ban on EITC Benefits for Undocumented Working Poor Families

Consequently, undocumented immigrant families cannot qualify for the EITC.
While this may seem consistent with the denial of virtually all government assistance for
undocumented immigrants, it is not. The SSN requirement is poorly targeted and is both
overbroad and under-inclusive. This requirement denies EITC benefits for certain legally
working and present hard-working poor undocumented immigrant families and provides
EITC benefits for certain unauthorized work. The requirement that every member of the
household have a SSN (authorizing work) is ill-conceived because it is inconsistent with
Congress’ stated intent.

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the fourth digit. Qualifying taxpayers must apply for an ITIN using Form W-7, Application for Individual
Taxpayer Identification Number, which requires taxpayer information including the individual’s name,
address, foreign tax identification number (if any), and specific reason for obtaining the ITIN. In addition,
the IRS may prescribe that applicants provide documentary evidence to establish their alien status and
identity. Acceptable documentary evidence for this purpose may include items such as an original (or a
certified copy) of the original) passport, driver’s license, birth certificate, identity card, or immigration
documentation.

10, 2003).

75 See Singer and Dodd-Major, supra note, at 1430.
a. The SSN Requirement is Too Restrictive

The requirement is too restrictive because it excludes families in which every person is legally working and present in the United States from EITC benefits. Two U.S. citizen parents with a child without a SSN (authorizing work) cannot receive any EITC benefits even if the child is not working. The Code precludes any EITC benefits for this obviously legally working and present family including lower amounts of EITC benefits available for eligible individuals without a child.\(^{76}\) However, if the same family has one child with a SSN and one child without an SSN, but with an ITIN, the family can qualify for EITC benefits for a married couple with one qualifying child.\(^{77}\)

The requirement also denies EITC benefits to any U.S. citizen or authorized worker whose nonworking spouse has a valid ITIN, but no SSN.\(^{78}\) The spouse could be legally present in the United States or a resident of another country (a nonresident alien for tax purposes) who elects to subject her otherwise nontaxable income to U.S. income tax by filing with her U.S. citizen or resident spouse. Even if the couple has one or more qualifying children who are U.S. citizens with SSNs, this legally present and working undocumented immigrant family will not qualify for any EITC benefits.\(^{79}\)

If the family decides to file a married filing separate return so that all individuals on the EITC tax return have SSNs, they will not qualify for any EITC. Married taxpayers cannot qualify for the EITC with a married filing separate tax return.\(^{80}\) Only if the couple

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\(^{76}\) See I.R.C. § 32(c)(1)(G).

\(^{77}\) See id.; I.R.C. § 32(m)

\(^{78}\) I.R.C. § 32(c)(1)(E)(ii), (c)(1)(F).

\(^{79}\) See id.

\(^{80}\) See I.R.C. § 32(d).
ends their marriage or never enters into marriage, will crucial EITC benefits be available.\textsuperscript{81} If the spouse and/or child with an ITIN obtains a SSN within the statute of limitations period, the family can amend their married filing separately tax returns and file a joint return. However, if either married filing separate return becomes the subject of certain tax controversies, then the returns cannot be amended for a joint filing and the opportunity for any EITC during those tax years is lost.\textsuperscript{82}

b. The SSN Requirement is Too Narrow

The SSN requirement also permits families who have members that are working in the United States without authorization and without current documents to receive EITC benefits. For example, a taxpayer with a SSN that authorized work when issued, but that is no longer valid for employment, will qualify for EITC benefits. The provision requiring a SSN on the tax return does not require that the SSN be currently valid for work or residence in the United States.\textsuperscript{83} Literally, the provision only requires that the SSN not be issued to secure federal benefits.\textsuperscript{84} Therefore, SSNs issued temporarily for work, but that are no longer valid, or SSNs issued to unauthorized workers before 1982 to  

\textsuperscript{81} This is not only inconsistent with Congress’ targeted EITC recipients, but also inconsistent with the strong push for marriage as a cure for poverty. See generally Angela Onwuachi-Willig, \textit{supra} note (demonstrating that the current administration’s policy of promoting marriage as a cure for poverty shifts the burden of poverty from the government to the welfare recipient analogous to the government’s use of “marriage to financially and socially domesticate newly freed Blacks to ensure that the white public faced minimal responsibility for former slavers’ economic security”).

\textsuperscript{82} See I.R.C. § 6013(b)(2)(B), (C), (D).

\textsuperscript{83} See I.R.C. § 32(m).

\textsuperscript{84} \textit{Id}. 

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secure state or local benefits are valid for EITC benefits, while SSNs initially issued to secure federal benefits but that are now work authorized are not. The SSN requirement as stated and enforced does not assure that only authorized work qualifies for EITC benefits.

Ironically, the government permits EITC benefits to families retroactively for tax years in which they were working and/or present in the United States without government authorization. If unauthorized workers, their spouse, or qualifying children obtain a SSN after a tax return is filed, the return can be amended merely to add the SSN to claim retroactively EITC benefits. The IRS has ruled that EITC benefits are retroactively available as long as the statute of limitations has not lapsed. Therefore, once all members of the family have SSNs, EITC benefits are available even if during the tax year at issue no family members were authorized to work or even be in the United States.

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86 C.C.A. 2000-28-034 (June 9, 2000) (finding that an individual otherwise eligible for the EITC without a valid SSN may claim the EITC on an amended return with a valid SSN subject to the lapsing of the statute of limitations); C.C.A. 2000-320-12 (May 9, 2000) (same with respect to a taxpayer who is not authorized to work, but later after becoming authorized obtains a valid SSN); C.C.A. 2001-26-030 (May 15, 2001) (same and noting that the SSN must be issued for an alien lawfully admitted to the United States and entitled to engage in U.S. employment).
89 See C.C.A. 2000-320-12 (May 9, 2000).
3. Congress Can and Must Act Immediately to Remedy its Unintentional (?) Race Based Exclusion of Hard-working Poor Undocumented Immigrant Families from Welfare

If Congress intends, as it has stated, that EITC benefits should not be provided for unauthorized work, the SSN requirement is poorly designed. The provision does not require that the work upon which the credit is based be authorized. The requirement is mechanical and requires that taxpayers record a SSN (issued for other than federal benefits) on the tax return, as filed or as timely amended, for the taxpayer and spouse, if any, and at least one of any children. This requirement is overbroad because it denies EITC benefits to families in which all workers are authorized.

The provision is too narrow in that it allows EITC benefits for tax years in which family members were working without authorization. Taxpayers can amend tax returns, subject to the statute of limitations, once all required individuals have SSNs and retroactively receive EITC benefits based upon unauthorized work. In an effort to quickly and efficiently deny EITC benefits to “less than undeserving” poor working immigrant families Congress has devised a mechanical, clerical test.

The requirement categorizes the working poor in America into two separate groups: those that are holders of SSNs and those that are holders of ITINs or SSNs issued for federal benefits. The result is separate, unequal, and irrational tax treatment of hard-working poor undocumented immigrant families.\(^90\) The denial of critical EITC benefits

to undocumented immigrant families merely because one family member does not have a SSN (even if she is not working or even present in the United States) is a glaring example of institutionalized xenophobia and racism.

Congress could remedy this problem easily, by requiring that each working individual have a SSN authorizing the work qualifying the taxpayer for EITC benefits. This simple change would achieve the clearly stated goal of only providing federal assistance for authorized work. This decade old denial of EITC benefits has created a growing new class of “undeserving” poor in America: “The Less than Undeserving” Poor. Sadly, it gets worse.

III. Bearing the Burden Without Any Benefits: Unauthorized Workers Are Required to Pay Payroll Taxes, But Are Not Eligible for Social Security Benefits

A. Undocumented Immigrant Working Families Bear a Higher Marginal Tax Rate Than High Income Households Because of Regressive Social Security Taxes and No EITC

Unauthorized workers and their employers must each pay Social Security payroll taxes of 7.65 percent on all wages for an aggregate tax of 15.3 percent. “Most economists believe that the burden of most payroll taxes paid by employers falls on the employees themselves.”91 Therefore, undocumented immigrant working families likely bear an effective marginal tax rate of at least 15.3 percent. High income families will bear a significantly lower effective marginal tax rate from payroll taxes because their

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91 JONATHAN BARRY FORMAN, MAKING AMERICA WORK at 67-68 (The Urban Institute 2006).
wages above $97,500 (in 2007) and investment income are not subject to Social Security tax.\textsuperscript{92} Clearly, payroll taxes are horribly regressive.

“When both income and payroll taxes are considered, the effective marginal tax rates on earned income can be extraordinarily high, especially on low-income workers with children.”\textsuperscript{93} “Some of the very highest marginal effective tax rates are imposed on couples earning around $30,000 a year.”\textsuperscript{94} Effective marginal tax rates as high as 45 percent (and likely even higher if state sales, excise, property and income taxes are added into the analysis) on hard-working, low-income families are an onerous and unjust economic burden to bear.

The amount of Social Security taxes paid by unauthorized workers and their employers has been increasing steadily and is now in the billions of dollars annually. In 2003, the government collected an estimated $8.5 billion in Social Security and Medicare taxes, or approximately one percent of overall revenue, from 7.5 million workers and their employers with mismatched SSNs.\textsuperscript{95} This dollar amount has more than tripled in

\textsuperscript{92} The Medicare portion of Social Security taxes (1.45 percent for each the employee and the employer) is not capped at $97,500 (in 2007) and is assessed on every dollar of wages without limitation.

\textsuperscript{93} Forman, supra note 83, at 69-70.

\textsuperscript{94} Id. at 69.

\textsuperscript{95} See Alan Zarembo, \textit{Garment Laborers Say Bush Guest-Worker Plan an Ill Fit}, LOS ANGELES TIMES, at A1, A16 (Feb. 8, 2004); see also Singer and Dodd-Major, supra note, at 1435 n.9 (reporting $7 billion in Social Security payroll taxes and $56.1 billion in wages in 2001 added to suspense accounts).
the last decade.\textsuperscript{96} While some of the mismatches are due to clerical errors, the majority exist because unauthorized workers do not qualify for a SSN.\textsuperscript{97}

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

Social Security is the largest and most successful social welfare program in the United States. For more than seventy years Social Security has provided critical financial benefits to tens of millions of individuals every month. Today, Social Security provides more than 48 million individuals with average benefits of about $10,500 per year. While not means-tested, Social Security presently lifts about thirteen million senior citizens and one million children out of poverty. Without Social Security, almost one-half of all senior citizens would live in poverty. For sixty-six percent of all seniors Social Security benefits comprise the majority of their income and for almost one-third of all seniors Social Security benefits comprise ninety percent or more of their income.

Senior citizens of color are less likely than white senior citizen to receive Social Security benefits or to have other income from private pensions or assets. Only seventy-seven percent of Hispanics age sixty-five or older receive Social Security benefits. Of the Hispanic seniors receiving Social Security seventy-six percent rely on Social Security for more than one-half of their retirement income and almost fifty percent rely on Social Security for most of their retirement income. Without Social Security benefits almost one third of all Hispanic seniors would live in poverty.

\textsuperscript{96} See Alan Zarembo, *Garment Laborers Say Bush Guest-Worker Plan an Ill Fit*, LOS ANGELES TIMES, at A1, A16 (Feb. 8, 2004).

\textsuperscript{97} Id.; Singer and Dodd-Major, supra note, at 1431 (describing proliferation of false use of SSNs and Social Security cards).
While Social Security taxes are terribly regressive, Social Security benefits are surprisingly progressive. The Social Security system is designed to redistribute meaningful financial resources from high wage earners to lower wage earners. The redistribution occurs through a very complicated and opaque benefits formula. The lack of transparency may be one secret to Social Security’s success and its overwhelming public support. Although Social Security is not means tested, it is a phenomenally successful antipoverty government assistance program that bears none of the oppressive stigma of welfare. It is a program for the “deserving” poor and, of course, the middle class, rich and super rich folks too.

Any and all workers over the age of 62 generally are entitled to Social Security retirement benefits if they have worked in covered employment for at least forty quarters (ten years). A retiree’s monthly benefit is based upon her thirty-five year earnings history (up to the maximum annual earnings cap, which is $97,500 for 2007) through age 60 adjusted for wage inflation. The highest 35 years of wage-adjusted annual earnings are combined and divided by 420 (12 months x 35 years) to derive a monthly amount.

This monthly amount is then put into a formula to derive the retiree’s monthly full retirement benefit. This formula is notably progressive. For a worker turning 62 in 2006, the monthly benefit equals 90 percent of the first $656, plus 32 percent of the next $3,299 (if any) plus 15 percent of any remaining amount.98 This monthly amount is decreased if a retiree starts her benefits before her full retirement age (65 and eight months in 2006 and increasing to age 67 by 2027) or increased if a retiree continues to work beyond her full retirement age.99

98 Forman, supra note, at 187-88.
99 Id.
In addition to retiree benefits, Social Security provides monthly benefits for a retiree’s dependents, spouse and survivors. A retiree’s nonworking spouse can retire and receive a benefit derived solely from her spouse’s benefit. This benefit is equal to 50 percent of the worker’s benefit. If the retiree dies leaving a surviving spouse, she is entitled to a monthly benefit equal to 100 percent of the retiree’s benefit for her lifetime and any dependents will also receive monthly benefits through age 18.

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

A lower-wage worker earning $24,000 wage adjusted average annual earnings for the last thirty-five years retiring in 2006 would receive tax-free Social Security benefits of $12,245 per year for the rest of her life. If she is married to a nonworking spouse, upon his retirement they would receive tax-free Social Security benefits of $18,369 per year or almost 77 percent of their pre-retirement income. This critical antipoverty relief,

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100 See Fernando Torres-Gil, Robert Greenstein, and David Kamin, “The Importance of Social Security to the Hispanic Community” (June 28, 2005) for an extensive discussion of these issues.

which is contingent upon thirty-five years of hard-work and steady payment of regressive payroll taxes, is not available to unauthorized workers and their families.

Unauthorized workers who pay billions of dollars of Social Security taxes each year on tens of billions of dollars of wages (one percent of total U.S. wages) will never qualify for these critical Social Security benefits unless they obtain work authorization and are legally present in the United States. 102 After President Bush signed the Social Security Protection Act of 2004 into law a noncitizen who files for Social Security benefits based on a SSN assigned on or after January 1, 2004, is required to have work authorization at the time the SSN is assigned or at some later time. Only if they achieve work authorization and a valid SSN may they apply for Social Security benefits based on all Social Security-covered earnings regardless of their work status during the earning period.103 However, the retiree has the burden of proving her earnings history and only wages that are reported to the SSA, and not paid “under the table,” count toward the required forty quarters of earnings to qualify for Social Security.

102 See DAWN NUSCHLER & ALISON SISKIN, SOCIAL SECURITY BENEFITS FOR NONCITIZENS: CURRENT POLICY AND LEGISLATION, CRS7-8 (Congressional Research Service Report for Congress, 2005) (noting that unless contrary to a totalization agreement or Section 202(t) of the Social Security Act (the alien nonpayment provision) noncitizens not lawfully present in the United States during any month may not receive social security benefits for such month).

103 Nuschler & Siskin, supra note 94, at CRS-3-4. After President Bush signed the Social Security Protection Act of 2004, Pub. L. No. 108-203, H.R. 743, into law a noncitizen who files a Social Security benefits application based on a SSN assigned on or after January 1, 2004, is required to have work authorization at the time the SSN is assigned or at some later time. If the worker receives authorization at some point all of her social security covered earnings would count toward her forty quarters of earnings of at least $900 or $3,600 per year (in 2004) insured status requirement.
Because unauthorized workers do not have a SSN the SSA will not have an accurate record of their earnings history. Accordingly, unauthorized workers must provide satisfactory documentation to the SSA evidencing their annual earnings history. Currently, the SSA has a policy of assisting, and not prosecuting these workers, because the SSA is charged with maintaining correct earnings records. However, this constructive policy is subject to change immediately. It is a felony to falsely use a SSN carrying a penalty of up to $5,000 and five years in prison. Even if unauthorized workers become legal residents with work authorization many are too afraid to risk coming forward even to receive life-changing Social Security credits for decades of work.

Because of the complexity and lack of transparency in the Social Security system, most U.S. citizens do not understand how their benefits accrue. Unauthorized workers, many of whom lack critical English language skills, an education, and any familiarity with the U.S. tax and retirement systems most likely are unaware that this substantial benefit is available to them. If they have ten years of covered wages and obtain work authorization, they have a lifetime of meaningful, antipoverty family benefits awaiting them amounting to hundreds of thousands of dollars. However, with long-term Social Security deficits looming on the horizon, Congress and its constituents are looking

104 See Capps, et al., The Health and Well-Being of Young Children of Immigrants 17-20 (2004), available at http://www.urban.org/UploadedPDF/31139_ChildrenImmigrants.pdf (finding “that immigrants who lack English proficiency and have lower educational attainment earn lower wages” and that the “[l]ack of English proficiency is also strongly associated with poverty, food insecurity, and other forms of economic hardship in immigrant families”).

105 See id. at 23 (comparing the percent of native-born (9%) and legal immigrants (25%) who have not completed high school and noting that 32% have less than a 9th grade education).
for increased Social Security contributions and decreased benefits. Not surprisingly, many members of Congress have found their cash cow in vulnerable and hard-working undocumented immigrant families who have no meaningful opportunity to object.

1. Pouring Salt in the Wound: Congress Narrowly Defeats a Provision to Deny Social Security Benefits to Otherwise Eligible Lawfully Present Immigrant Workers

On May 18th, 2006, the Senate narrowly defeated (50-49) Senator John Ensign’s (R-NV) amendment to deny Social Security quarterly credits to legally present immigrant workers for work performed while the workers did not have a SSN authorizing employment but upon which the worker and her employer paid Social Security and Medicare taxes. This is not the first time this economic injustice has been proposed. In 2003, the Senate Finance Committee considered a similar proposal, but the then SSA Commissioner stated that the proposal was not practicable. The Commissioner stated in writing that the information regarding the immigration status necessary to implement any accurate adjudication of benefits under this proposal does not exist.

Denying Social Security benefits for work upon which taxes were paid would deter tax compliance for the millions of unauthorized workers and their employers. According to the SSA’s Chief Actuary three-quarters of unauthorized workers pay payroll taxes. These employers and their employees paid more than $8.5 billion in

106 Congressional Record Senate, S4739-4747.


108 Congressional Record Senate, S4739-4747.
payroll tax revenues as well as federal and state income tax withholding on $50-60 billion of reported wages in 2003. If this proposal were implemented, employers may choose to pay unauthorized workers cash “under the table” and forgo sending tax payments or any information to the Internal Revenue Service or SSA.\(^{109}\)

This mean-spirited strategy comes at a significant cost to the U.S. government. The National Taxpayer Advocate has warned, “a change in tax compliance of even one percentage point equates to an annual loss of more than $20 billion of revenue to the federal government.”\(^{110}\) Moreover, “[o]ver the next 75 years, new immigrants will provide a net benefit of approximately $611 billion in present value to the Social Security system.”\(^{111}\) In short, this proposal is not only fundamentally unjust and un-American it is poor fiscal policy that could undermine the continuation of the most successful social welfare program for white retirees and their families.

IV. Inaction is Not an Option

The insidious casting of blame for all of the economic pressures in America on undocumented immigrants is a dangerous and ineffective approach to problem solving. Sadly, it has haunting historic precedence in America and in Congress. Alarmist propaganda must be countered with persistent education and dissemination of accurate information describing any injustice.

\(^{109}\) See Singer and Dodd-Major, supra note, at 1432.

\(^{110}\) Id. at 1432-33.

\(^{111}\) National Immigration Law Center, Proposed Ensign Amendment to Immigration Reform Bill Would Strip Immigrant Workers of Social Security Earnings: Bad for the System and an Affront to Our Values (May 16, 2006).
As the debates in Congress and across this country continue, unauthorized workers will likely continue to pay regressive Social Security taxes and never receive otherwise available Social Security benefits for such years. And undocumented working poor immigrant families will pay taxes at a shockingly high effective marginal tax rate because they do not receive EITC benefits (although every worker in the family is authorized to work). Even though the public at large is unaware of the details of these economic injustices, they are incensed and outraged at the situation.

Their fury is misguided. The public believes that they are the victims and that undocumented immigrant families are reaping enormous windfalls. Restrictionists have focused the public’s attention and fueled its venom on inflammatory misinformation about undocumented immigrants. Many Americans believe that undocumented immigrants do not pay any taxes and consume billions of dollars of government benefits annually.

The exact opposite is true. Undocumented immigrants pay billions of dollars in taxes annually and do not qualify for most government benefits including EITC, Social

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112 Recent studies indicate that 68 or 74 percent of Americans believe that undocumented immigrants are a very or extremely serious problem. Fifty-two percent say “immigrants today are a burden on our country because they take our jobs, housing and health care.” When asked “Do you think illegal immigrants do more to strengthen the U.S. economy because they provide low-cost labor and they spend money, or do illegal immigrants do more to weaken the U.S. economy because they don’t all pay taxes but use public services?” Seventy percent said weaken. Ruy Teixeira, The Century Foundation and the Center for American Progress, what the public really wants on immigration (June 27, 2006) available at www.tcf.org (last visited Dec. 1, 2006).

Security and Medicare. “[E]very empirical study of illegals’ economic impact demonstrates the opposite . . . : undocumenteds actually contribute more to public coffers in taxes than they cost in social services.”\textsuperscript{114} Undocumented immigrants provide a fiscal windfall to America and may be the most fiscally beneficial of all immigrants.\textsuperscript{115}

Because of increasing complexity and lack of transparency in U.S. tax, retirement, welfare and immigration systems, race based discrimination is easy to conceal and misrepresent. The victim is positioned as the enemy and they become solely responsible for all perceived and imagined problems. President George W. Bush has stated that “no really respectable person wishes to be supported by others” and that the goal of welfare reform is “returning [welfare recipients and their families] to lives of self-reliance and dignity.” The public’s focus has been deflected from ill-functioning U.S. institutions, and has been finely-tuned on welfare recipients and undocumented immigrants. Undocumented immigrants have become a new scapegoat for any real or imagined problem in the U.S. economy including unemployment, low wages, exploding deficits, the looming Social Security crisis and failing health care services.

Undocumented immigrants have little or no recourse for economic injustice. Despite America’s historically strong opposition to taxation without representation,

\textsuperscript{114} Peter L. Reich, Public Benefits for Undocumented Immigrants: State Law Into the Breach Once More, 21 N.M. L. Rev. 219, 243, 244-46 (1991) (discussing the voluminous empirical literature supporting the “net economic benefit” of undocumented immigrants on the federal, state and local economies).

\textsuperscript{115} JULIAN L. SIMON, THE ECONOMIC CONSEQUENCES OF IMMIGRATION at 320 (1989) (concluding that undocumented immigrants are a national fiscal asset after reviewing “every study that provides dollar estimates show[ing] that when the sum of the tax contributions to the city, state and federal government are allowed for, those payments vastly exceed the cost of services used, by a factor of five, ten or more.”).
undocumented immigrants have not enjoyed the right to vote on any local, state or federal tax for almost eighty years, except in rare and unusual cases. Furthermore, because of their precarious immigration and economic status undocumented immigrants are vulnerable to deportation and exploitation and are chilled from protesting any injustice. As a result they suffer economic injustices daily, which translate into lower prices for countless goods and services that are an everyday part of privileged life in America. The burden of speaking out loudly and clearly about these injustices therefore is ours.

Inaction is not an option, because taking its course is action. As German student resisters proclaimed against the Nazi regime: “Every people deserves the government it is willing to endure.” Nothing is so unworthy of a civilized people as allowing itself to be governed without opposition by an irresponsible clique that has yielded to base instinct.”

116 The election of 1928 was the first national election in which no immigrant had the right to vote in any national, state or local election. See Virginia Harper-Ho, Noncitizen Voting Rights: The History, the Law, and Current Prospects for Change, 18 LAW & INEQ. J. 271, 282, 295-14 (Summer 2000) (describing the fierce opposition to granting voting rights to undocumented (and documented) immigrants and finding the rare cases in which undocumented immigrants can vote in certain elections including school board elections in New York and city tax matters in Takoma Park, Maryland ). “[M]ost scholars advocate extending [voting rights] to permanent residents who have met relevant residency requirements for the jurisdiction.” Id. at 306.


118 Id.
V. Conclusion

As a country of immigrants, we cannot forget that America’s success is due to the hard work, loyalty and commitment of a melting pot of immigrants from across the globe. The economic injustices described in this Essay are only two examples of too many. In addition to economic injustices, undocumented immigrant families suffer routine physical abuse as well. The death rate of enhanced security border crossings has tripled. The U.S. – Mexican border has become a private hunting ground for racist vigilantes who proudly proclaim themselves as loyal Americans taking border patrol into their own hands, which carry and use lethal military weapons.

Race based fear and hate are a toxic mixture that if left unchecked can explode into destructive violence. The complexity and lack of transparency in the U.S. tax, retirement, welfare and immigration systems can result in the inability of most Americans to provide a meaningful check and balance. Without any understanding of fundamental government systems, misinformation can spread like wildfire and is just as dangerous. As scholars, academics and lawyers studying these systems it is our burden and privilege to ferret out the issues and shine a bright light for all to witness and understand.

119 “Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tossed to me. I lift my lamp beside the golden door.” Emma Lazarus, The New Colossus, in THE POEMS OF EMMA LAZARUS, vol. 1 at 2 (1889). Emma Lazarus' famous sonnet has come to symbolize the Statue of Liberty’s universal message of hope and freedom for immigrants coming to America and people seeking freedom around the world.

America’s past history reveals unspeakable persecutions. “But we can hope that the recollection of the past can prevent its recurrence.”121 As Ansel Adams, renowned photographer, so eloquently wrote in his book, *Born Free and Equal*, on the internment of nearly 120,000 people of Japanese ancestry from early 1942 through late 1945:

“We, as citizens, can agitate for tolerance and fair play, but our agitation must be dynamic and persistent. It is easy for a ‘fair-weather lover of the Constitution’ to ‘favor’ tolerance, and mouth principles of democracy, but it is quite another thing to stand up against opposition and fight for principles.”122 “It is our task to retain the individual as the foundation of society, irrespective of his race, color or religion.”123 “We must be certain that, as the rights of the individual are the most sacred elements of our society, we will not allow passion, vengeance, hatred and racial antagonism to cloud the principles of universal justice and mercy” for all.124 It is a problem we must face and solve—no matter what the cost may be to our false dignity or imagined self-interest. Left unsolved, the cost will prove beyond computation.”125

We must bear witness.126

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121 Berenbaum, supra note, at 3 (recounting that Vice-President Walter Mondale invoked the failure of the United States to rescue Jews during the Holocaust at the Evian Conference at the International Conference on the Boat People resulting in outreach across the globe that allowed the boat people to rebuild their lives).


123 Id. at 118.

124 Id.

125 Id. at 115.

126 “I have told you this story not to weaken you, but to strengthen you. Now it is up to you.” Berenbaum, supra note, at 223 (quoting the words from a survivor of Sachsenhausen, a concentration camp).