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## ESSAYS

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### TAXING UNDOCUMENTED IMMIGRANTS REDUX

*Francine J. Lipman*



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# ESSAYS

## TAXING UNDOCUMENTED IMMIGRANTS REDUX

*Francine J. Lipman\**

### I. INTRODUCTION

Almost twenty years ago in the early morning light on April 15 while assisting a long line of anxious taxpayers at a Volunteer Income Tax Assistance Program<sup>1</sup> in Santa Ana, California, I faced the reality that undocumented immigrants are taxed separately, without representation, and unequally compared to their work-authorized counterparts.<sup>2</sup> In this real-world setting, I realized that these foreign-born, American residents and workers were subject to federal, state, and local income, sales, excise, property, transfer, and payroll taxes, even though they do not qualify for most

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\* William S. Boyd Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. This Essay is dedicated to countless advocates across America, including the authors in this symposium issue, who work tirelessly at various level for federal, state, and local tax justice and equality on behalf of immigrant taxpayers, their families, and communities. *Si se puede*.

<sup>1</sup> *Free Tax Return Preparation for Qualifying Taxpayers*, IRS.GOV, <https://www.irs.gov/individuals/free-tax-return-preparation-for-qualifying-taxpayers> (last updated Jan. 18, 2024) (“The IRS’s Volunteer Income Tax Assistance (VITA) and Tax Counseling for the Elderly (TCE) programs offer free basic tax return preparation to qualified individuals. The VITA program has operated for over 50 years. VITA sites offer free tax help to people who need assistance in preparing their own tax returns.”).

<sup>2</sup> See generally Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1 (2006); see also Joel Feinleib & David Warner, *Issue Brief #1: The Impact of Immigration on Social Security and the National Economy*, SOC. SEC. ADVISORY BD. (Dec. 2005), [https://s3-us-gov-west-1.amazonaws.com/cg-778536a2-e58c-44f1-9173-29749804ec54/uploads/2023/12/2005-Impact-of-Immigration-on-Social-Security-Brief\\_2005.pdf](https://s3-us-gov-west-1.amazonaws.com/cg-778536a2-e58c-44f1-9173-29749804ec54/uploads/2023/12/2005-Impact-of-Immigration-on-Social-Security-Brief_2005.pdf); IMPACTS OF BORDER ENFORCEMENT ON MEXICAN MIGRATION: THE VIEW FROM SENDING COMMUNITIES (Wayne A. Cornelius & Jessa M. Lewis eds., 2007); LISA CHRISTENSEN GEE ET AL., UNDOCUMENTED IMMIGRANTS’ STATE & LOCAL TAX CONTRIBUTIONS 1 (2017). CONG. BUDGET OFF., PUB. NO. 2500: THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS (2007).

federal benefits.<sup>3</sup> While they are required to pay into Social Security and Medicare on every dollar of earnings, they do not qualify for a Social Security Number (SSN), Social Security benefits, Medicare, Supplemental Security Income, unemployment insurance, the Child Tax Credit (CTC), the Earned Income Tax Credit (EITC), or most other federal benefits.<sup>4</sup> Congress requires that these taxpayers use a different Taxpayer Identification Number (TIN) that I quickly discovered was an Individual Taxpayer Identification Number (ITIN).<sup>5</sup> The government-provided free tax software that we were using that tax season did not accept ITINs as a valid TIN, and, therefore, all of the ITIN returns scheduled that long, stressful tax deadline day had to be prepared and filed manually. Preparing tax returns manually rather than by using computer software means using paper forms, working through every schedule together with the instructions, and a calculator. After preparing these tax returns, we had to make copies for mailing rather than electronically submitting the federal and state income tax returns as we did for the 250 other clients with appointments. My dedicated students who were volunteering with me on that April 15 were undergraduates majoring in accounting. I

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<sup>3</sup> See generally Lipman *supra* note 2; see also Francine J. Lipman, *The “ILLEGAL” Tax*, 11 CONN. PUB. INT. L.J. 93 (2011) [hereinafter *The Illegal Tax*]; Francine J. Lipman, *Unintended Consequences? Undocumented, Working Poor Families and the Refundable Child Tax Credit* (Tax Section Paper, 2004), <https://ssrn.com/abstract=617121>; CHRISTENSEN GEE ET AL., *supra* note 2; CONG. BUDGET OFF., *supra* note 2; SOC. SEC. ADMIN., ACTUARIAL NOTE NO. 151: EFFECTS OF UNAUTHORIZED IMMIGRATION ON THE ACTUARIAL STATUS OF THE SOCIAL SECURITY TRUST FUNDS (2013); *Summary of the 2023 Annual Reports*, SOC. SEC. ADMIN., <https://www.ssa.gov/oact/trsum/> (last visited Feb. 23, 2024). Leah Zallman et al., *Unauthorized Immigrants Prolong the Life of Medicare’s Trust Fund*, 31 J. OF GEN. INTERNAL MED. 122 (2015); *Fact Sheet: Undocumented Immigrants and Federal Health Care Benefits*, NAT’L IMMIGR. F. (Sept. 21, 2022), <https://immigrationforum.org/article/fact-sheet-undocumented-immigrants-and-federal-health-care-benefits/> (describing New American Economy research indicating that in 2018 undocumented immigrants contributed \$20.1 billion in federal taxes).

<sup>4</sup> Tanya Broader & Gabrielle Lessard, *Overview of Immigrant Eligibility for Federal Programs*, NAT’L IMMIGR. L. CTR. (Oct. 2023), <https://www.nilc.org/wp-content/uploads/2023/10/overview-immeligfedprograms-2023-10-01.pdf>; *Fact Sheet: Immigrants and Public Benefits*, NAT’L IMMIGR. F. (Aug. 21, 2018), <https://immigrationforum.org/article/fact-sheet-immigrants-and-public-benefits/> (describing the many benefits undocumented immigrants are denied despite billions of dollars in annual tax contributions resulting in proven fiscal windfalls in Arizona and Florida); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009.

<sup>5</sup> I.R.C. § 6109(i); Treas. Reg. § 301.6109-1(d)(3)(i) (as amended in 2013) (defining an ITIN as a “taxpayer identifying number issued to an alien individual by the Internal Revenue Service, upon application, for use in connection with filing requirements under this title.”); see also *Individual Taxpayer Identification Number*, IRS.GOV, <https://www.irs.gov/individuals/individual-taxpayer-identification-number> (last updated Jan. 4, 2024).

remember their “deer in the headlights” confusion and tight fists full of sharpened pencils, erasers, and calculators as they did their best to serve these taxpayers. It was an eye-opening, instructive, and transformative day for all of us.

On April 16, after a hard-earned rest, I started researching, writing, and working with undocumented immigrants in my local community and across the country.<sup>6</sup> Almost twenty years later I am still at it. While not much has changed over the decades, today I partner with other lawyers, accountants, economists, think tanks, organizers, and advocates across America who similarly research, write, advocate, and support undocumented immigrants and their families and communities. Their efforts include calls for change to tax policies, administration, and laws at the federal, state, and local levels. And they have been and are making progress across America at the federal, state, and local levels. This symposium issue includes essays by frontline passion warriors for tax justice and equality. But before you dive into these evocative essays, this introduction will provide a general background on the demographics of undocumented immigrants and their tax treatment under federal law. Then I will briefly introduce and describe each essay to ensure that you read this entire issue from cover to cover.

## II. DEMOGRAPHICS OF UNDOCUMENTED IMMIGRANTS

### A. *Who Are Undocumented Immigrants and Where Do They Come From?*

“Undocumented” or “unauthorized” individuals, who are also denigratingly described as “illegal” immigrants, are noncitizens described pejoratively in statutes and in other legal contexts as “aliens.”<sup>7</sup> Undocumented immigrants “generally have entered the United States without inspection, overstayed a period of lawful admission, or violated the

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<sup>6</sup> See generally Lipman, *supra* note 2; *The Illegal Tax*, *supra* note 3; Francine J. Lipman, *Bearing Witness to Economic Injustices of Undocumented Immigrant Families: A New Class of “Undeserving” Poor*, 7 NEV. L.J. 736 (2007).

<sup>7</sup> The term *alien* refers to people who are not U.S. citizens or U.S. nationals. Aliens include foreign nationals who are legally present as well as those not legally present. The term is defined in the Immigration and Nationality Act, Pub. L. No. 82-414, § 101(a)(3), 66 Stat. 163, 166 (codified as amended at 8 U.S.C. § 1101(a)(3)).

terms of their admission.”<sup>8</sup> While the majority of the undocumented immigrant population presently residing in the United States are individuals who “entered without inspection” in the last decade (e.g., generally after 2010), individuals who overstayed their lawful immigration period have accounted for the majority of the increase in the population.<sup>9</sup> The proportion of overstayers has increased predominately because, since 2000, the number of immigrants entering the United States without inspection has declined.<sup>10</sup> By 2017, about 46% of the total undocumented population were individuals who had overstayed their lawful immigration period.<sup>11</sup>

The largest group of undocumented immigrants residing in the United States is from Mexico.<sup>12</sup> However, consistent with the decline in undocumented immigrants entering the United States without inspection, Mexican immigrants were only 39% of the undocumented population in 2021.<sup>13</sup> This decrease is a result of Mexican immigrants leaving the United States while the number of immigrants from Central America and Asia has increased.<sup>14</sup> After Mexico, the top countries of origin are El Salvador, Guatemala, India, Honduras, and China.<sup>15</sup> Consequently, 72% of undocumented immigrants speak Spanish in their household, with English, Chinese, Tagalog, and Portuguese languages spoken in the remaining

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<sup>8</sup> ABIGAIL F. KOLKER & HOLLY STRAUT-EPPSTEINER, CONG. RSCH. SERV., R47218, UNAUTHORIZED IMMIGRANTS: FREQUENTLY ASKED QUESTIONS 1 (2022) (describing a range of data and details regarding undocumented immigrants).

<sup>9</sup> *Id.* at 4.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Profile of the Unauthorized Population: United States*, MIGRATION POL’Y INST., <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US#> (last visited Feb. 2, 2024).

<sup>13</sup> Jeffrey S. Passel & Jens Manuel Krogstad, *What We Know About Unauthorized Immigrants Living in the U.S.*, PEW RSCH. CTR. (Nov. 16, 2023), <https://www.pewresearch.org/short-reads/2023/11/16/what-we-know-about-unauthorized-immigrants-living-in-the-us/>.

<sup>14</sup> *Id.*

<sup>15</sup> KOLKER & STRAUT-EPPSTEINER, *supra* note 8, at 4 (describing a range of data and details regarding undocumented immigrants).

households, with the majority (54%) also speaking English well or very well.<sup>16</sup>

*B. How Many Undocumented Immigrants Reside in the United States and How Long Have They Been Here?*

Recent estimates of the undocumented population generally range between 10 and 11 million individuals with a high of more than 12 million individuals in 2007.<sup>17</sup> In 2021, this group represented about 3% of the total U.S. population and 22% of the immigrant population.<sup>18</sup> These are the lowest percentages since the 1990s.<sup>19</sup> Eighty percent of all undocumented immigrants have been in the United States for five years or longer, compared with only 70% in 2007.<sup>20</sup> Many undocumented immigrants (60%) have been in the United States for at least ten years, and more than 20% have lived here for 20 years or more.<sup>21</sup> Similarly, even when only focusing on more recent arrivals, undocumented immigrants have been present in the United States

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<sup>16</sup> MIGRATION POL'Y INST., *supra* note 12 (combining the percentages of those who speak only English, and those who speak English well or very well).

<sup>17</sup> Passel & Krogstad, *supra* note 13 (providing 2021 demographic data regarding the undocumented immigrant population). Pew Research Center's estimate of unauthorized immigrants includes more than 2 million immigrants who have temporary permission to be in the United States. *Id.* (Some also have permission to work in the country.) These immigrants account for about 20% of our national estimate of 10.5 million unauthorized immigrants for 2021. *Id.* Although these immigrants have permission to be in the country, they could be subject to deportation if government policy changes. Other organizations and the federal government also include these immigrants in their estimates of the U.S. unauthorized immigrant population. See *Unauthorized Immigrant Population Profiles*, MIGRATION POL'Y INST., <https://www.migrationpolicy.org/programs/us-immigration-policy-program-data-hub/unauthorized-immigrant-population-profiles> (last visited Feb. 2, 2024); see generally *Estimates of the Unauthorized Immigrant Population Residing in the United States*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/ohss/topics/immigration/population-estimates/unauthorized-resident> (last visited Feb. 10, 2024).

<sup>18</sup> Passel & Krogstad, *supra* note 13.

<sup>19</sup> *Id.*

<sup>20</sup> Mark H. Lopez, Jeffrey S. Passel & D'Vera Cohn, *Key Facts About the Changing U.S. Unauthorized Immigrant Population*, PEW RSCH. CTR. (Apr. 13, 2021), <https://www.pewresearch.org/short-reads/2021/04/13/key-facts-about-the-changing-u-s-unauthorized-immigrant-population/>.

<sup>21</sup> See MIGRATION POL'Y INST., *supra* note 12.

for five to nine years (16%), and only about 20% have been here for fewer than five years.<sup>22</sup>

Because many undocumented immigrants have been in the country for more than a decade, they are increasingly likely to reside in mixed-immigration status households. “[N]early 22 million people, or 1 in every 15 U.S. residents, live in a mixed-[immigration] status household.”<sup>23</sup> Among undocumented immigrants who are married (about 45% of those age fifteen and older), approximately 41% had a U.S. citizen or legal permanent resident spouse.<sup>24</sup> Many undocumented immigrants are parents (41%) with at least one child under age eighteen in 2019.<sup>25</sup> Most of these parents (81%) had at least one child who is a U.S. citizen.<sup>26</sup> In 2018, 5.2 million children under age eighteen (7% of the total child population) lived with at least one undocumented immigrant parent, and most of these children (85%) were U.S. citizens.<sup>27</sup> Only about 1 million children in these households are undocumented.<sup>28</sup>

### *C. Where Do Undocumented Immigrants Live and What Do They Do for Work?*

Undocumented immigrants reside and work in every state and the District of Columbia.<sup>29</sup> States with the largest undocumented immigrant

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<sup>22</sup> *Id.*

<sup>23</sup> *Immigration Reform can Keep Millions of Mixed-Status Families Together*, FWD.US (Jan. 18, 2024), <https://www.fwd.us/news/mixed-status-families-1/> (describing a mixed-immigration household “as having at least one undocumented person (including those with protections such as Temporary Protected Status or Deferred Action for Childhood Arrivals) living with at least one non-undocumented person (including a U.S. citizen, green card holder, or other lawful temporary immigrant”).

<sup>24</sup> See MIGRATION POL’Y INST., *supra* note 12.

<sup>25</sup> See *id.*

<sup>26</sup> See *id.*

<sup>27</sup> See Randy Capps et al., *A Profile of U.S. Children with Unauthorized Immigrant Parents*, MIGRATION POL’Y INST. (Jan. 2016), <https://www.migrationpolicy.org/sites/default/files/publications/ChildrenofUnauthorized-FactSheet-FINAL.pdf>.

<sup>28</sup> *Id.*

<sup>29</sup> See *Unauthorized Immigrant Population Profiles*, MIGRATION POL’Y INST., <https://www.migrationpolicy.org/programs/us-immigration-policy-program-data-hub/unauthorized-immigrant-population-profiles> (last visited Feb. 2, 2024).

populations included California (1.9 million), Texas (1.6 million), Florida (900,000), New York (600,000), New Jersey (450,000), and Illinois (400,000).<sup>30</sup> Although these states have consistently had the highest number of undocumented immigrants since the 1990s and earlier, beginning in the 2000s, undocumented immigrants have been more broadly disseminated as they pursue economic opportunities across the country.<sup>31</sup>

Undocumented immigrants make up about 5% of the U.S. labor force even though they are only 3% of the population.<sup>32</sup> This is consistent with their demographics being disproportionately working-age and able-bodied men.<sup>33</sup> The majority of undocumented immigrants are between the ages of twenty-five and forty-four (55%) and are male (54%).<sup>34</sup> Almost all working age undocumented men participate in the paid work force (98%) as compared to their female counterparts (58%) many of whom work in unpaid childcare.<sup>35</sup> Overall undocumented immigrants (69%) participate in the labor force at higher rates than native-born (61%) and immigrant populations (64.7%) but are heavily concentrated in agriculture representing 44% of hired farmworkers.<sup>36</sup> Given their vulnerability, they are often underemployed and concentrated in construction (21%), leisure/hospitality services (8%), services, and manufacturing.<sup>37</sup> Nevada (9%) and Texas (8%) have the highest percentage of undocumented workers in their respective workforces.<sup>38</sup>

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<sup>30</sup> Passel & Krogstad, *supra* note 13 (providing 2021 demographic data regarding the undocumented immigrant population).

<sup>31</sup> *Id.* “In 2021, these six states were home to 56% of the nation’s unauthorized immigrants, down from 80% in 1990.” *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Undocumented Immigrants in the United States: Demographics and Socioeconomic Status*, THE HASTINGS CTR., <https://undocumented.thehastingscenter.org/issuebrief/demographics-and-socioeconomic-status/> (last visited Feb. 2, 2024).

<sup>34</sup> MIGRATION POL’Y INST., *supra* note 12.

<sup>35</sup> THE HASTINGS CTR., *supra* note 33 (citing working age undocumented immigrant statistics from 2008 among others).

<sup>36</sup> MIGRATION POL’Y INST., *supra* note 12.

<sup>37</sup> *Id.*

<sup>38</sup> Passel & Krogstad, *supra* note 13.



#### *D. Economic Profiles of Undocumented Households*

Even though undocumented immigrants are disproportionately abled-bodied younger males<sup>39</sup> and more likely to be working than their U.S. citizen counterparts, they are also disproportionately impoverished because of their shadow existence. Nevertheless, 43% of undocumented households live at or above 200% of the poverty level and 28% are homeowners.<sup>40</sup> However, the rate of impoverishment is appalling with 26% living below poverty thresholds.<sup>41</sup> Similarly, given barriers to employment and lack of employee benefits, the majority (53%) do not have health insurance.<sup>42</sup> As for most households, wealth begets wealth over time. Generally, immigrants who have been in the United States for a longer period of time have median wealth notably higher than immigrants who arrived more recently.<sup>43</sup>

Undocumented immigrants generally have lower education levels than their U.S. citizen counterparts.<sup>44</sup> However, since 2007 there has been a decrease in the percentage of the population without a high school degree (44%) and an increase in the percentage of the population with a college degree (17%).<sup>45</sup> Among undocumented immigrants ages twenty-five to sixty-four, only 53% have completed high school compared with 92% of U.S.-born

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<sup>39</sup> THE HASTINGS CTR., *supra* note 33 (“The undocumented immigrant population in the United States is disproportionately male. Men between the ages of eighteen and thirty-nine make up 35% of the undocumented immigrant population in the United States, compared with 14% of the U.S.-born population and 18% of the legal immigrant population. Compared with the U.S.-born population, the undocumented immigrant population includes few older people and children, excluding citizens or legal residents who are members of mixed-status families.”).

<sup>40</sup> MIGRATION POL’Y INST., *supra* note 12.

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

<sup>42</sup> *Id.*

<sup>43</sup> See Mohamad Moslimani, *Key Facts About the Wealth of Immigrant Households During the COVID-19 Pandemic*, PEW RSCH. CTR. (Dec. 4, 2023), <https://www.pewresearch.org/short-reads/2023/12/04/key-facts-about-the-wealth-of-immigrant-households-during-the-covid-19-pandemic> (“Immigrants who arrived in the U.S. before 1979 had a median wealth of \$261,700 in 2021—almost seven times the median wealth of immigrants who arrived in 2009 or later.”).

<sup>44</sup> THE HASTINGS CTR., *supra* note 33.

<sup>45</sup> Jeffrey S. Passel & D’Vera Cohn, *Undocumented Immigrants Are More Proficient in English and More Educated than a Decade Ago* (May 23, 2019), <https://www.pewresearch.org/short-reads/2019/05/23/u-s-undocumented-immigrants-are-more-proficient-in-english-more-educated-than-a-decade-ago/>; see also Passel & Krogstad, *supra* note 13.

adults.<sup>46</sup> Twenty-nine percent of these same undocumented immigrants have less than a ninth grade education compared with only 2% of their citizen-counterparts.<sup>47</sup> Despite not qualifying for federal assistance, including loans and grants, more than 408,000 undocumented students are enrolled in college, representing about 4.1% of undocumented immigrants and 1.9% of all college students.<sup>48</sup> Seventy-five percent of these students came to the United States at a young age and are Dreamers.<sup>49</sup> These students are ethnically diverse identifying as Hispanic (46%), Asian American Pacific Islander (27%), Black (14%), and white (10%).<sup>50</sup>

### III. TAX TREATMENT OF UNDOCUMENTED IMMIGRANTS

Undocumented immigrants are subject to and pay tens of billions of dollars in federal, state, and local taxes every year.<sup>51</sup> They pay about \$12 billion a year in state and local taxes,<sup>52</sup> \$16 billion in federal payroll taxes,<sup>53</sup>

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<sup>46</sup> See THE HASTINGS CTR., *supra* note 33.

<sup>47</sup> *Id.*

<sup>48</sup> *Undocumented Students in Higher Education: How Many Students Are in U.S. Colleges and Universities, and Who Are They?*, AM. IMMIGR. COUNCIL, [https://www.americanimmigrationcouncil.org/sites/default/files/research/undocumented\\_students\\_in\\_higher\\_education\\_2023.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/undocumented_students_in_higher_education_2023.pdf) (last updated Aug. 2, 2023).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Fact Sheet: Adding Up the Billions in Tax Dollars Paid By Undocumented Immigrants*, AM. IMMIGR. COUNCIL (Apr. 4, 2016), <https://www.americanimmigrationcouncil.org/research/adding-billions-tax-dollars-paid-undocumented-immigrants>; I.R.C. § 61 (gross income is broadly defined including income from whatever source derived); Treas. Reg. § 1.6012-1(b)(1)(i) (as amended in 2012).

<sup>52</sup> See Lisa Christensen Gee et al., *Undocumented Immigrants' State & Local Tax Contributions*, INST. ON TAX'N & ECON. POL'Y 1, 2 (Mar. 2, 2017), <https://itep.sfo2.digitaloceanspaces.com/immigration2017.pdf> (describing that even with a conservative estimate of 50% rate of income tax compliance the estimate of state and local tax contributions for 2017 was \$11.74 billion and that if these individuals were granted legal status their tax contributions would increase by \$2.18 billion a year).

<sup>53</sup> Annual excess contributions to the Social Security Trust Fund are about \$12 billion and to the Medicare Fund are about \$3.8 billion. See Stephen Goss et al., *Effects of Unauthorized Immigration on the Actuarial Status of the Social Security Trust Funds*, SOC. SEC. ADMIN. 1, 2 (Apr. 2013), <https://fiscalpolicy.org/wp-content/uploads/2017/02/Effects-of-Unauthorized-Immigration-on-the-Actuarial-of-the-Social-Security-Fund.pdf> (adding about \$100 billion over the last decade); *A Summary of the 2023 Annual Reports*, SOC. SEC. ADMIN. (2023), <https://www.ssa.gov/oact/TRSUM/>. Leah Zallman et al., *Unauthorized Immigrants Prolong the Life of Medicare's Trust Fund*, 31 J. GEN. INTERNAL MED. 122 (2016), <https://doi.org/10.1007/s11606-015-3418-z>. *Fact Sheet: Undocumented Immigrants and*

and tens of billions in federal income and other taxes annually.<sup>54</sup> Experts and scholars have noted that these fiscal contributions are windfalls exceeding outlays by billions of dollars annually especially with respect to Social Security and Medicare.<sup>55</sup>

Under federal tax laws, noncitizens are categorized as either “resident” or “nonresident aliens” predominately based upon whether the individual is a “lawful permanent resident”<sup>56</sup> or whether the individual has satisfied a “substantial presence test.”<sup>57</sup> The substantial presence test is dependent upon physical presence in the United States for more than 183 days counted over a three-year lookback period and weighting days in the earlier years at a lower fraction than more current years.<sup>58</sup> Because federal borders are not

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*Federal Health Care Benefits*, NAT’L IMMIGR. F. (Sept. 21, 2022), <https://immigrationforum.org/article/fact-sheet-undocumented-immigrants-and-federal-health-care-benefits/> (describing New American Economy research indicating that in 2018 undocumented immigrants contributed \$20.1 billion in federal taxes).

<sup>54</sup> See NAT’L TAXPAYER ADVOC., ANNUAL REPORT TO CONGRESS: VOL. 1, at 199 (2015), <https://perma.cc/BGP8-TTHX> (“In 2015, 4.4 million ITIN filers paid over \$5.5 billion in payroll and Medicare taxes and \$23.6 billion in total taxes.”); *Examining the Economic Contributions of Undocumented Immigrants by Country of Origin*, NEW AM. ECON. (Mar. 8, 2021), <https://research.newamericaneconomy.org/report/contributions-of-undocumented-immigrants-by-country/> (describing in Table 5 the \$9.163 billion in federal income taxes from the top five countries of origin among undocumented immigrants).

<sup>55</sup> Zallman et al., *supra* note 53, at 122, 122; see *Effects of Unauthorized Immigration on the Actuarial Status of the Social Security Trust Funds*, SOC. SEC. ADMIN. (2013), <https://fiscalpolicy.org/wp-content/uploads/2017/02/Effects-of-Unauthorized-Immigration-on-the-Actuarial-of-the-Social-Security-Fund.pdf> (estimating a net increase in the Social Security trust fund of \$12 billion in 2010 and expecting this net contribution amount to increase over time from 7 million unauthorized workers to 9.6 million in 2020).

<sup>56</sup> See I.R.C. § 7701(b)(1)(A)(i) (“lawfully admitted for permanent residence” individuals are characterized as “resident aliens” under the “green card test”).

<sup>57</sup> I.R.C. § 7701(b)(3) (setting forth the “substantial presence test” requiring that the noncitizen was present in the United States on at least thirty-one days during the current year, and the sum of the number of days for the current year and the two preceding years (weighted 1/3 for the prior year and 1/6 for the second preceding year) is equal to or greater than 183 days); see also *Substantial Presence Test*, IRS.GOV, <https://www.irs.gov/individuals/international-taxpayers/substantial-presence-test> (last visited Jan. 15, 2024).

<sup>58</sup> I.R.C. § 7701(b)(3) (setting forth the “substantial presence test” requiring that the noncitizen was present in the United States on at least thirty-one days during the current year, and the sum of the number of days for the current year and the two preceding years (weighted 1/3 for the prior year and 1/6 for the second preceding year) is equal to or greater than 183 days); *Substantial Presence Test*, *supra* note 57; *Topic No. 851: Resident and Nonresident Aliens*, IRS.GOV, <https://www.irs.gov/taxtopics/tc851> (last updated Jan. 12, 2024) (describing the weighting of days for the substantial presence test).

porous, undocumented immigrants readily satisfy the later test within their first or second year of residence and thereafter.

“Resident aliens” are generally taxed in the same manner as U.S. citizens, except that because they do not qualify for a SSN that authorizes work, they are not eligible for the EITC,<sup>59</sup> CTC,<sup>60</sup> or any pandemic relief payments.<sup>61</sup> Because undocumented and certain mixed immigration status households are not eligible for these antipoverty benefits, they often suffer a higher effective tax rate than their U.S. citizen counterparts.<sup>62</sup> I have described this penalty in my scholarship as the “illegal tax.”<sup>63</sup> Individuals who are not eligible to receive an SSN, because they do not have work authorization, including most resident and nonresident aliens, are required to use an ITIN when filing their tax returns.<sup>64</sup> ITINs are issued by the IRS and are for federal tax purposes only.<sup>65</sup> Even though ITINs are the TIN used by most “nonresident and resident aliens,” nonresident aliens are generally only subject to federal income tax on their U.S. source income.<sup>66</sup> By comparison, resident aliens are subject to federal income tax on their worldwide income.<sup>67</sup>

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<sup>59</sup> I.R.C. § 32(c)(1)(E) (requiring a valid SSN for taxpayers qualifying for the EITC or as qualifying children).

<sup>60</sup> I.R.C. § 24(h)(7) (requiring a valid SSN for qualifying children under the CTC).

<sup>61</sup> I.R.C. § 6428(a)–(b); *Mixed-Status Families Ineligible for CARES Act Federal Pandemic Stimulus Checks*, MIGRATION POL’Y INST. (May 2020), <https://www.migrationpolicy.org/content/mixed-status-families-ineligible-pandemic-stimulus-checks>.

<sup>62</sup> See generally *The Illegal Tax*, *supra* note 3, at 100.

<sup>63</sup> *Id.* at 95.

<sup>64</sup> See *Individual Taxpayer Identification Number*, IRS.GOV, <https://www.irs.gov/individuals/individual-taxpayer-identification-number> (last updated Jan. 4, 2024).

<sup>65</sup> I.R.C. § 6109(i); Treas. Reg. § 301.6109-1(d)(3)(i) (as amended in 2013) (defining an ITIN as a “taxpayer identifying number issued to an alien individual by the Internal Revenue Service, upon application, for use in connection with filing requirements under this title.”). See *Individual Taxpayer Identification Number*, *supra* note 64.

<sup>66</sup> *Taxation of Nonresident Aliens*, IRS.GOV, <https://www.irs.gov/individuals/international-taxpayers/taxation-of-nonresident-aliens> (last updated Feb. 8, 2024).

<sup>67</sup> *Topic No. 851: Resident and Nonresident Aliens*, *supra* note 58 (noting that resident aliens are subject to federal income tax on their worldwide income from all sources).

With this brief background and demographic framework, I am delighted to introduce the essays that broadly consider how tax systems can better serve all residents and workers and their families in America.

#### IV. CHANGING TAX MATTERS FOR UNDOCUMENTED IMMIGRANTS

##### A. Tax Administration

Dr. Jackie Vimo’s essay provides an overview of the exclusions and hurdles faced by undocumented immigrants in the nearly three decades since the inception of the ITIN in 1996.<sup>68</sup> Her essay includes a short introduction and brief history of ITINs and the related policy developments.<sup>69</sup> Vimo then describes national advocacy efforts during the COVID-19 pandemic to ensure ITIN taxpayers and their families were included in economic relief payments.<sup>70</sup> Dr. Vimo, a Senior Economic Justice Policy Analyst at the National Immigration Law Center, applies her deep and broad experience working on the frontlines with taxpayers, advocates, and legislators to explore more effective options for immigrants and their families.<sup>71</sup> She concludes her essay with a list of ITIN-focused administrative and legislative tax policy recommendations to create a fairer, more just economic system for undocumented taxpayers, their households, and communities.<sup>72</sup>

Ms. Gaby Pacheco, in her essay *A Beacon of Hope: Dreamers and Taxation*, focuses on a subset of undocumented immigrants commonly referred to as “Dreamers.”<sup>73</sup> Dreamers, also referred to as “DACA recipients,” are generally immigrant youth who qualify for the Development,

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<sup>68</sup> Jackie Vimo, *Advocating for ITINs*, 21 PITT. TAX REV. 169 (2024).

<sup>69</sup> *Id.* at 170–72.

<sup>70</sup> *Id.* at 178–82.

<sup>71</sup> NILC Staff, NAT’L IMMIGR. L. CTR., <https://www.nilc.org/about-us/nilc-staff/> (last visited Feb. 1, 2024). Established in 1979, the National Immigration Law Center (NILC) is one of the leading organizations in the United States exclusively dedicated to defending and advancing the rights of immigrants with low income.” *About Us*, NAT’L IMMIGR. L. CTR., <https://www.nilc.org/about-us> (last visited Feb. 1, 2024).

<sup>72</sup> Vimo, *supra* note 68, at 183–84.

<sup>73</sup> Gaby Pacheco, *A Beacon of Hope: Dreamers and Taxation*, 21 PITT. TAX REV. 187 (2024).

Relief, and Education for Alien Minors (DREAM) Act.<sup>74</sup> The latter have applied for and received Deferred Action for Childhood Arrivals (DACA) status.<sup>75</sup> DACA allows certain individuals who meet strict program requirements to request work authorization and deferred action on their removal.<sup>76</sup> While the majority of Dreamers are Latino, they are racially and culturally diverse coming from a multitude of countries. But as described above, citizen or not, work authorized or not, taxes are imposed on all, including Dreamers. Pacheco presents the intricate interplay between tax compliance, immigration, and the indomitable spirit of these Dreamers who, with unwavering determination, strive to forge their paths in the land of opportunities.<sup>77</sup> The author, a dedicated and tireless advocate, describes important considerations, concerns, and hope in this often-overlooked area of tax policy from lessons learned working on the frontlines with Dreamers.<sup>78</sup>

### *B. Toward More Inclusive Tax Laws*

The symposium issue next takes a turn from administrative process to substantive federal tax laws in three essays, including one from Professor Sarah Lora and two from experts at the Institute on Taxation and Economic Policy (ITEP) and the Urban Institute.

#### 1. Federal Tax Matters

Professor Sarah Lora's essay focuses on a specific tax law change that emerged under the Tax Cuts and Jobs Act of 2017 (TCJA) during the Trump

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<sup>74</sup> *The Dream Act: An Overview*, AM. IMMIGR. COUNCIL (Mar. 2021), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_dream\\_act\\_an\\_overview.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_dream_act_an_overview.pdf).

<sup>75</sup> *Deferred Action for Childhood Arrivals: Q&A Guide*, AM. IMMIGR. COUNCIL (Aug. 17, 2024), [https://www.americanimmigrationcouncil.org/sites/default/files/research/deferred\\_action\\_for\\_childhood\\_arrivals\\_qa\\_081712.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/deferred_action_for_childhood_arrivals_qa_081712.pdf).

<sup>76</sup> *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/DACA#:~:text=Consideration%20of%20Deferred%20Action%20for,USCIS> (last visited Feb. 1, 2024).

<sup>77</sup> Pacheco, *supra* note 73, at 188.

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

Administration.<sup>79</sup> This statutory tax law change excludes otherwise “qualifying children” in many immigrant households because they do not reside in the United States but rather reside in a bordering country.<sup>80</sup> Professor Lora argues that if Congress maintains the basic structure of the TCJA, which is scheduled to sunset after December 31, 2025, as it relates to sweeping changes made to the standard deduction, personal exemptions, the CTC, and the other dependent credit, then it should repeal this discriminatory requirement for U.S. residency.<sup>81</sup> Lora argues that the current exclusion undermines historic federal tax benefits granted to families with dependent children residing in U.S. bordering countries including Mexico and Canada.<sup>82</sup>

Similarly, scholars Marco Guzman and Emma Sifre from ITEP consider the burden of the exclusion of certain federal tax credits for undocumented immigrant households.<sup>83</sup> Guzman and Sifre analyze the costs of these exclusionary provisions by monetizing tax benefits under more inclusive EITCs and CTCs for undocumented immigrant households.<sup>84</sup> The essay estimates the billions of dollars of federal monetary benefits Congress has long denied undocumented immigrant households including the EITC (\$5.5 to \$9.2 billion annually) and the CTC (\$1.7 to \$2.9 billion annually).<sup>85</sup> The coauthors also determine the number of individuals and households who would benefit from the aggregate dollar amount of such expansions and average credit amounts on a state-by-state basis.<sup>86</sup> The essay also estimates the impact an expansion would have on household income using various participation rates based on real-world assumptions that reflect barriers faced by undocumented tax filers.<sup>87</sup> This data, combined with an overview of these

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<sup>79</sup> Sarah Lora, *Righting Tax Wrongs for Immigrants*, 21 PITT. TAX REV. 193 (2024); *see also* I.R.C. § 24(h)(4)(B).

<sup>80</sup> *See* 26 I.R.C. § 24(c) (defining qualifying child); *see also* 26 I.R.C. § 24(h)(4)(B).

<sup>81</sup> Lora, *supra* note 79, at 195.

<sup>82</sup> *Id.* at 196–98.

<sup>83</sup> Marco Guzman & Emma Sifre, *Improving Refundable Tax Credits by Making Them Immigrant-Inclusive*, 21 PITT. TAX REV. 205 (2024).

<sup>84</sup> *Id.* at 212.

<sup>85</sup> *Id.*, EITC at 212 and CTC at 215.

<sup>86</sup> *Id.* at 212–19.

<sup>87</sup> *Id.*

highly effective antipoverty tax credits, provides a menu of policy options available for the federal government and states to create more inclusive and just tax systems.

## 2. State Tax Matters

The last essay turns away from federal tax law to the myriad of state tax law issues challenging undocumented households and their local communities. As described above undocumented and mixed-immigration status families are often ineligible for federal social safety net programs, such as the EITC. State tax reforms have begun to fill this gap. The essay, coauthored by Aravind Boddupalli and Luisa Godinez-Puig of the Urban Institute, reviews the expansion of various state-level CTCs or EITCs in thirteen different states to make them inclusive of ITIN filers.<sup>88</sup> These tax credits have boosted the incomes of immigrant families by thousands of dollars each year.<sup>89</sup> However, many immigrant families remain beyond the reach of these tax credits because of various administrative barriers and lack of culturally competent information.<sup>90</sup> Because most inclusive credits were created or expanded in recent years, barriers to access exist lowering participation rates.<sup>91</sup> Outreach and education efforts targeting qualifying households in California, Colorado, Oregon and elsewhere may provide lessons and examples of success.<sup>92</sup> More quantitative and qualitative data from state governments on how many ITIN filers have accessed these tax credits, and which administrative rules and outreach practices have been most successful in connecting eligible families, is crucial.<sup>93</sup> As more states consider inclusive tax reforms, evaluating the successes and failures of existing programs is critical.

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<sup>88</sup> Aravind Boddupalli & Luisa Godinez-Puig, *A Social Safety Net Repair: Delivering State Tax Benefits to Immigrant Families*, 21 PITT. TAX REV. 225 (2024).

<sup>89</sup> *Id.* at 242.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 237.

<sup>92</sup> *Id.* at 241–42.

<sup>93</sup> *Id.* at 243.



## V. CONCLUSION

While the symposium essays that follow expand, explore, and reflect on the framework presented here, they each and all lend credence to the undeniable assessment that at the intersection of current immigration and tax laws is chaos. This was true when I first started on this journey almost twenty years ago, but the difference now is that generations of diverse, engaged, inspired, and motivated advocates, scholars, policymakers, students, Dreamers, and their allies are dreaming louder, prouder, and bigger and making positive differences. In late 2023, the IRS Advisory Council Public Report acknowledged that certain administrative issues for undocumented immigrants were burdensome, created hardships, and needed to be remedied to ensure taxpayer compliance.<sup>94</sup> The IRS Advisory Council's report details many recommendations including some previously made by the IRS National Taxpayer Advocate that together with the reforms discussed in this symposium issue if implemented will better serve our communities and tax systems.<sup>95</sup> Together America can “get the job done.”<sup>96</sup>

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<sup>94</sup> I.R.S. Pub. No. 5316, Internal Revenue Service Advisory Council: Public Report 163 (2023).

<sup>95</sup> See generally *Individual Taxpayer Identification Number (ITINs): IRS Processes for ITIN Applications, Deactivations, and Renewals Unduly Burden and Harm Taxpayers*, NAT'L TAXPAYER ADVOCATE (2016), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16\\_Volume1\\_MSP\\_18\\_ITINS.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16_Volume1_MSP_18_ITINS.pdf) (describing administrative issues faced by ITIN holder taxpayers as a result of the recent legislation and manual processing); see also I.R.S. Pub. No. 5316, Internal Revenue Service Advisory Council: Public Report 163 (2023).

<sup>96</sup> See *The Hamilton Mixtape: Immigrants (We Get the Job Done)*, YOUTUBE (June 28, 2017), [https://www.youtube.com/watch?v=6\\_35a7sn6ds](https://www.youtube.com/watch?v=6_35a7sn6ds); see Louis Peitzman, *The Story Behind the “Immigrants (We Get the Job Done)” Video from “The Hamilton Mixtape,”* BUZZFEEDNEWS (June 28, 2017, 6:56 PM), <https://www.buzzfeednews.com/article/louispeitzman/the-story-behind-the-immigrants-we-get-the-job-done-video> (“It’s really astonishing that in a country founded by immigrants, ‘immigrant’ has somehow become a bad word.”).