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-ARTICLE-

Taxation Inequality and Undocumented Immigrants

By Luis Larrea

I. INTRODUCTION

Many Americans believe that undocumented immigrants exploit the United States' economy.¹ Not only is such a belief completely false, but it flies in the face of the contributions made, and the minimal benefits received, by undocumented immigrants at federal, state, and local levels of a fundamentally unfair overall United States tax system.²

The truth is that, in most cases, undocumented immigrants are taxed in the same manner as similarly situated documented immigrants and United States citizens.³ Moreover, in most cases, under the United States tax system, undocumented immigrants pay a higher effective tax rate than other taxable groups, and they are denied the tax credits available to similarly situated documented immigrants and United States citizens.⁴ At the same time, despite their contributions, undocumented immigrants and their families retain few government benefits and far fewer benefits than other classes under the overall United States tax system.⁵

In fact, “every empirical study” of undocumented immigrants’ impact on the overall United States tax system indicates that undocumented immigrants contribute more in taxes than they cost in social services.⁶ More succinctly, “every study that provides dollar estimates shows that when the sum of the tax contributions to city, state and federal government are allowed for, those tax payments vastly exceed the cost of the services used, by a factor of perhaps five, ten or more.”⁷

The truth is that the imposition of nearly all federal, state and local taxes on undocumented immigrants, combined with the special tax burdens specifically imposed on undocumented immigrants because of their status (such as ineligibility for tax credits), and added to the denial of nearly all federal, state, and local benefits to undocumented immigrants, has

¹ Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and*

² The phrase “overall United States tax system” will refer to the United States tax system at the federal, state, and local levels for the remainder of the paper.

³ Lipman, *supra* note 1, at 7.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 2 (citing Peter L. Reich, *Public Benefits for Undocumented Aliens: State Law Into the Breach Once More*, 21 N.M. L. REV. 219, 244-246 (1991)).

⁷ Francine J. Lipman, *The “ILLEGAL” Tax*, 11 CONN. PUB. INT. L.J. 93, 106 (2011) (citing JULIAN L. SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* 295 (1989)).

created a tax system that provides a fiscal windfall to the United States.⁸

The purpose of this paper is to provide a broad analysis of the prejudicial treatment of undocumented immigrants under the overall United States taxation and benefit systems, concentrating predominantly at the federal level, but also including state and local treatment. Consideration of this prejudicial treatment traces both the taxes paid and benefits received by undocumented immigrants; a separate analysis will follow for each. Moreover, this paper will contrast the treatment of undocumented immigrants with the treatment of other classes under the overall United States tax system, as well as analyze the disproportion between the contributions undocumented immigrant taxpayers make to government programs and the benefits undocumented immigrants receive from those government programs. This paper will explain this information using the laws of the overall United States tax system and statistical information to display the practical application of these laws. Through this broad analysis, a clear picture will emerge of the inequality of the overall United States tax system as it applies to undocumented immigrants.

Part II will examine the major taxes paid by undocumented immigrants at federal, state, and local levels. This examination will begin with the federal taxes paid by undocumented immigrant taxpayers, which make up the largest proportion of taxes paid by undocumented immigrants. For federal taxes, I will explain how undocumented immigrants are treated under federal tax laws and the procedure that the federal government follows in taxing undocumented immigrants. I will then provide statistics and further information about the two main federal taxes assessed on undocumented immigrants: income taxes and payroll taxes. This federal tax analysis will be followed by information and statistics regarding the large state and local taxes assessed on undocumented immigrants: state income taxes and various consumption taxes.

Part III will explore the principal government benefits, including tax credits and programs, denied to undocumented immigrants. Again, this will begin at the federal level, with an analysis of the federal tax credits and programs denied to undocumented immigrants. For federal tax credits, I will discuss one of the major tax credits, the Earned Income Tax Credit (“EITC”), denied to undocumented immigrants. This discussion will precede an analysis of the

⁸ Lipman, *The “ILLEGAL” Tax*, *supra* note 7, at 106 (citing Reich, *supra* note 6, at 244-246); Lipman, *supra* note 1, at 7.

federal programs funded by payroll taxes that are denied to undocumented immigrants, as well as other federal programs that are denied to undocumented immigrants under the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”). An analysis of the state and local government benefits available to undocumented immigrants will follow.

Part IV will begin by providing an analysis of the principle issues in the overall United States tax system outlined in Parts II and III with regard to undocumented immigrants. This discussion will then propose three common-sense reforms to improve the inequitable treatment of undocumented immigrant taxpayers under the overall United States tax system.

II. TAXES PAID BY UNDOCUMENTED IMMIGRANTS

The cumulative tax payment contributions of undocumented immigrants to the coffers of the overall United States tax system are nothing less than profound. In general, undocumented immigrants are subject to and pay taxes just like United States citizens and documented immigrants.⁹ Both the overall United States tax system and benefit programs, and American citizens, rely on undocumented immigrants for revenue and fiscal support.¹⁰ In terms of magnitude, “[t]he uncontroverted truth is that undocumented immigrants pay tens of billions of dollars in taxes each year to federal, state and local governments.”¹¹ Moreover, as a result of increased compliance efforts by the overall United States tax system, and an increasing number of undocumented immigrants, the magnitude of these tax payments has increased dramatically over recent decades.¹² Further, evidence suggests that these factors will continue to increase the amount of these taxes in the future.¹³ These billions of dollars paid to United States coffers each year come prominently through federal taxes, the largest of these federal taxes being income and payroll taxes.¹⁴ Other large tax contributions come from the state and local levels; the two major

⁹ Lipman, *The “ILLEGAL” Tax*, *supra* note 7, at 107.

¹⁰ *Id.* at 97.

¹¹ *Id.* at 96.

¹² *Id.* at 105.

¹³ *Id.* at 97.

¹⁴ Lipman, *supra* note 1, at 5 (citing LOUISE AUERHAHN & BOB BROWNSTEIN, WORKING PARTNERSHIPS USA, THE ECONOMIC EFFECTS OF IMMIGRATION IN SANTA CLARA COUNTY AND CALIFORNIA 12 (2004), available at http://wpusa.org/Publication/wpusa_immig.pdf; JEFFREY S. PASSEL & REBECCA L. CLARK, THE URBAN INSTITUTE, IMMIGRANTS IN NEW YORK: THEIR LEGAL STATUS, INCOMES, AND TAXES (1998); JEFFREY S. PASSEL & REBECCA L. CLARK, THE URBAN INSTITUTE, TAXES PAID BY IMMIGRANTS IN ILLINOIS 34-35 (January 1996); REBECCA L. CLARK

areas being state income taxes and various state and local consumption taxes, including sales, excise, and property taxes.¹⁵

A. FEDERAL TAXES

Compared to the overall United States tax system, federal taxes make up the largest proportion of revenue derived from undocumented immigrants.¹⁶ Understanding the treatment of undocumented immigrants under federal law and the federal procedure for the collection of taxes from undocumented immigrants is important to comprehending the reforms needed in the federal tax system and the federal taxes that are assessed on undocumented immigrants.¹⁷ The greatest sources of federal tax revenue derived from undocumented immigrants are federal income and payroll taxes.¹⁸

1. Legal Treatment

Our laws have subjected undocumented immigrants to federal taxes in the same manner as documented immigrants and United States citizens since the enactment of the Revenue Act of 1913.¹⁹ Under the United States federal tax system, as reflected in the Internal Revenue Code (“IRC”), all United States citizens and non-citizens, given “residency status” as “resident aliens” based on physical presence in the United States, whether documented or undocumented, are subject to federal income and payroll taxation.²⁰

An individual attains residency status and classification as a “resident alien” if that

& JEFFREY S. PASSEL, THE URBAN INSTITUTE, HOW MUCH DO IMMIGRANTS PAY IN TAXES? EVIDENCE FROM LOS ANGELES COUNTY 4 (August 1993); REBECCA L. CLARK ET AL., THE URBAN INSTITUTE, FISCAL IMPACTS OF UNDOCUMENTED ALIENS: SELECTED ESTIMATES FOR SEVEN STATES 132 (September 1994) (“...each year undocumented immigrants add billions of dollars in sales, excise, property, income and payroll taxes, including Social Security, Medicare and unemployment taxes, to federal, state, and local coffers.”)).

¹⁵ *Id.*

¹⁶ *See infra* Part II.A.3-4; *infra* Part II.B.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 18.

²⁰ Leo P. Martinez and Jennifer M. Martinez, *The Internal Revenue Code and Latino Realities: A Critical Perspective*, 22 U. FLA. J.L. & PUB. POL’Y 377, 380 (2011) (citing I.R.C. § 1 (2011) (imposing the federal income tax on all “individuals”); Treas. Reg. § 1.1-1(b) (2011) (describing individuals subject to tax including resident aliens)); Cynthia Blum, *Rethinking Tax Compliance of Unauthorized Workers After Immigration Reform*, 21 GEO. IMMIGR. L.J. 595, 596-597 (2007) (citing I.R.C. § 7701(b)(1)(A)(i)-(ii) (2000); Lipman, *supra* note 1, at 19).

individual meets the qualifications of the “substantial presence test.”²¹ The “substantial presence test” requires an individual to be “physically present in the United States for at least 31 days during the current year, and at least 183 days during the current year and prior two years.”²² Most undocumented immigrants residing in the United States meet the requirements of the “substantial presence test” and are classified as “resident aliens” for tax purposes, although there are exceptions to that general rule.²³ An individual’s classification as a “resident alien” begins on the first day of the individual’s physical presence in the United States, and will continue until the individual becomes a United States citizen or leaves the United States for a period of time long enough to fail the substantial presence test.²⁴

Thus, an undocumented immigrant is a “resident alien” of the United States for tax purposes if the undocumented immigrant meets the residency requirements of the “substantial presence test,” which, generally, undocumented immigrants are able to do.²⁵ Therefore, the majority of undocumented immigrants are subject to United States federal income and payroll taxes in the same manner as documented immigrants and United States citizens.²⁶

2. Procedure

i. Legal Procedure

Under the IRC, every taxpayer who files a tax return or other form must have a unique and permanent identifying number.²⁷ For most non-business taxpayers, Social Security Numbers (“SSN”s) issued by the Social Security Administration (“SSA”) serve as a taxpayer’s permanent identification number.²⁸ As late as 1996, the SSA began limiting its issuance of SSNs to individuals who were United States citizens and immigrants authorized for employment in the

²¹ Lipman, *supra* note 1, at 19 (citing I.R.C. § 7701(b)(1)(A)(ii), (b)(3)(A) (2006)).

²² *Id.* (citing I.R.C. § 7701(b)(3)(A) (2006)).

²³ *Id.*

²⁴ *Id.* (citing I.R.C. § 7701(b)(2)(A)(iii) (2006)).

²⁵ *Id.* at 20.

²⁶ *See id.*

²⁷ Blum, *supra* note 20, at 597 (citing I.R.C. § 6109(a) (2000)); Lipman, *supra* note 1, at 19.

²⁸ Blum, *supra* note 20, at 597 (citing I.R.C. § 6109(d) (2000)); STAFF OF JOINT COMM. ON TAX’N, PRESENT LAW AND BACKGROUND RELATING TO INDIVIDUAL TAXPAYER IDENTIFICATION NUMBERS 3 (“ITINS”) (March 5, 2004)); *see also* Lipman *supra* note 1, at 20 (citing Treas. Reg. § 301.6109-1(a)(1)(ii)(A) (2006)).

United States.²⁹ To accommodate the fulfillment of an undocumented immigrant's obligation to file a tax return and pay taxes, the Internal Revenue Service ("IRS") established a procedure for undocumented immigrants ineligible to receive a SSN to obtain an Individual Taxpayer Identification Number ("ITIN").³⁰

An ITIN is a unique nine-digit number, like an SSN, but with a slightly different number configuration.³¹ The number is intended for tax purposes only and does not affect immigration status or authorize an undocumented immigrant to work in the United States.³² The difficulty with the use of ITINs by undocumented immigrants is that, although ITINs can be used for income tax withholding, ITINs cannot be used for federal payroll tax withholding or other SSA purposes.³³ Moreover, employers are required to pay payroll taxes and provide an SSN to the IRS for wages paid to each employee.³⁴ This creates a situation in which employers, desperate for workers, and undocumented immigrants, desperate for wages, either avoid the system completely through unreported wages or "comply" with income and payroll tax requirements using valid ITINs for income taxes and fraudulently obtained SSNs for payroll taxes.³⁵

ii. Unreported Wages

Fortunately, undocumented immigrants generally choose to pay federal income and payroll taxes through reporting of wages. Unfortunately, undocumented immigrants generally choose to comply with the IRS through valid ITINs and fraudulently obtained SSNs.³⁶ Undocumented immigrants understand that filing income tax returns is an important step towards their naturalization.³⁷ Immigration laws require a record of tax payment for at least five years

²⁹ Lipman, *supra* note 1, at 19.

³⁰ Blum, *supra* note 20, at 598 (citing Treas. Reg. § 301.6109-1(d)(3)(iii) (2006)); *see also* Lipman, *supra* note 1, at 22-23 (citing Paula N. Singer & Linda Dodd-Major, *Identification Numbers and U.S. Government Compliance Initiatives*, 104 TAX NOTES 1429, 1432 (Sept. 20, 2004)).

³¹ Lipman, *supra* note 1, at 22; Lipman, *The "ILLEGAL" Tax*, *supra* note 7, at 112.

³² Lipman, *The "ILLEGAL" Tax*, *supra* note 7, at 112; Lipman, *supra* note 1, at 23.

³³ Lipman, *supra* note 1, at 23; Lipman, *The "ILLEGAL" Tax*, *supra* note 7, at 112.

³⁴ Lipman, *supra* note 1, at 23.

³⁵ *Id.*

³⁶ Lipman, *supra* note 1, at 23.

³⁷ *Id.* at 25 (citing Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law, and Current Prospects for Change*, 18 LAW & INEQ. J. 271, 295-298 (Summer 2000)).

prior to naturalization, which creates a climate where undocumented immigrants “go out of their way to pay taxes.”³⁸ Because of this, undocumented immigrants usually report their wages. Accordingly, the regulation of undocumented immigrants’ wages is possible.³⁹

It is important to clarify that either income or payroll taxes may count towards an undocumented immigrant’s naturalization requirements.⁴⁰ However, a record of reported income taxes is easier for an undocumented immigrant to use for naturalization purposes because valid ITINs are easier for undocumented immigrants to obtain than valid SSNs for the reasons discussed above.⁴¹

In addition, under certain circumstances, the implications of benefits funded by payroll taxes motivate undocumented immigrants to file tax returns instead of accepting payment in the form of unreported wages. If a former undocumented immigrant obtains work authorization and a valid SSN, he or she can apply for some benefits funded by payroll taxes.⁴² However, the former undocumented immigrant must also have forty quarters of Social Security covered earnings to qualify for these benefits, which can accrue only if the former undocumented immigrant at one point attained work authorization.⁴³ Thus, undocumented immigrants are motivated to report their wages to enable their covered earnings to accrue toward the requirements necessary to receive benefits funded by payroll taxes. Part III of this article elaborates on benefits funded by payroll taxes.

iii. Procedure Statistics

Following the explanation of the legal procedure for the taxation of undocumented immigrants explained above, this paper will now provide statistical information to illustrate the practical application of these laws on the federal tax system. In March of 2005, an estimated 7.2

³⁸ Erin E. Stefonick, *The Alienability of Alien Suffrage: Taxation Without Representation in 2009*, 10 FLA. COASTAL L. REV. 691, 703 (2009) (citing Harper-Ho, *supra* note 38, at 295-296).

³⁹ Blum, *supra* note 20, at 600-601 (citing Eduardo Porter, *Here Illegally, Working Hard and Paying Taxes*, N.Y. TIMES, June 19, 2006, at A1).

⁴⁰ See Stefonick, *supra* note 39, at 703.

⁴¹ See Lipman, *supra* note 7, at 112; Lipman, *supra* note 1, at 20-25.

⁴² Lipman, *supra* note 1, 25 (citing DAWN NUSCHLER & ALISON SISKIN, CONG. RESEARCH SERV., RL 32004, SOCIAL SECURITY BENEFITS FOR NONCITIZENS: CURRENT POLICY AND LEGISLATION 3-4 (2005)).

⁴³ *Id.*

million undocumented immigrants resided in the United States,⁴⁴ and more than 50 percent,⁴⁵ perhaps even 60 percent, or at least 3.6 million of the undocumented immigrants, were employed in jobs where income and payroll taxes were withheld from their pay and reported on Forms W-2⁴⁶.⁴⁷ Moreover, it was estimated for the taxable year of 2004 there were 7.9 million Forms W-2 without a valid name and SSN number match, including undocumented immigrants and foreign investors, with \$53 billion in wages reported on these Forms W-2.⁴⁸

Another estimate by the SSA in 2006 noted that approximately 75 percent of undocumented immigrants and their employers paid Social Security and Medicare taxes.⁴⁹ The SSA further estimated that in 2011 the percentage of undocumented immigrants paying federal payroll taxes was greater than 75 percent because of a government focus on employer compliance.⁵⁰

In 2010, more than three million tax returns were filed with ITINs, the number used by individuals like undocumented immigrants and foreign investors who do not qualify for SSNs,⁵¹ and the IRS received more than 1.6 million new ITIN applications in 2010.⁵² Moreover, from

⁴⁴ Blum, *supra* note 20, at 599 (citing JEFFREY S. PASSEL, PEW HISPANIC CENTER, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. p. ii (March 7, 2006), available at <http://pewhispanic.org/files/reports/61.pdf>).

⁴⁵ *Id.* (citing RANDY CAPPS, ET AL., COMMUNITY FOUNDATION FOR THE NATIONAL CAPITAL REGION, CIVIC CONTRIBUTIONS: TAXES PAID BY IMMIGRANTS IN THE WASHINGTON, D.C., METROPOLITAN AREA 36 (May 2006), available at http://www.urban.org/UploadedPDF/411338_civic_contributions.pdf).

⁴⁶ A “Form W-2” is a United States federal tax form issued by employers stating how much an employee was paid in a year.

⁴⁷ Blum, *supra* note 20, at 599.

⁴⁸ *Id.* (citing *Everson Testifies on Tax Administration in Immigration Context*, 2006 T.N.T. 144-44 (July 26, 2006)).

⁴⁹ Lipman, *The “ILLEGAL” Tax*, *supra* note 7, at 103 (citing 152 CONG. REC. S4742 (daily ed. May 18, 2006); HENRY LOPEZ ET AL., CTR. FOR COMPARATIVE IMMIGRATION STUDIES, IMPACTS OF BORDER ENFORCEMENT ON MEXICAN MIGRATION: THE VIEW FROM SENDING COMMUNITIES 89 (Wayne A. Cornelius & Jessica M. Lewis eds., 2007)).

⁵⁰ *Id.*

⁵¹ Lipman, *The “ILLEGAL” Tax*, *supra*, note 7 at 97-98 (citing TREASURY INSPECTOR GEN. FOR TAX ADMIN., RECOVERY ACT: INDIVIDUALS WHO ARE NOT AUTHORIZED TO WORK IN THE UNITED STATES WERE PAID \$4.2 BILLION IN REFUNDABLE CREDITS 4 (2011), available at www.treasury.gov/tigta/auditreports/2011reports/201141061fr.pdf).

⁵² *Id.* at 98

2005 to 2006 there was a thirty percent increase in the number of ITINs issued to undocumented immigrants, which arguably resulted in significant federal revenue growth.⁵³

iv. Procedure Conclusion

A substantial number of undocumented immigrants pay federal income taxes through legitimate ITINs issued by the federal government. However, ITINs cannot be used to pay payroll taxes, which results in a system rampant with fraudulent SSNs created by employers and employees to pay mandatory payroll taxes for undocumented immigrants. Reported wages are an important step towards undocumented immigrants' ultimate goal of becoming naturalized United States citizens, which mitigates the potential problem of unreported wages within the federal tax system. Thus, the predominant federal procedural problem with the taxation of undocumented immigrants is the regulation of payroll taxes paid by undocumented immigrants—not unreported taxes.

Reform is necessary to remove the rampant use of fraudulent SSNs so that these payments are properly tracked and recorded. Furthermore, as discussed in Part III, the poor regulation of taxes paid by undocumented immigrants has created a system in which undocumented immigrants are not credited for the large contributions they make to the federal tax system, nor are they provided with equitable benefits.

I will now further explore federal taxes by providing practical statistical and other information about the federal income and payroll taxes actually paid by undocumented immigrants.

3. Income Taxes Paid

Understanding the structure of federal income taxes is an important component of understanding the contributions that undocumented immigrants make to the overall United States tax system and, especially, the federal tax system. However, federal income tax contributions by undocumented immigrants are not nearly as complicated and large as those made by undocumented immigrants to the federal payroll system. The most important aspects to understand about federal income taxes paid by undocumented immigrants are the rates at which undocumented immigrants pay federal income taxes and statistical information on the monetary value or magnitude of these payments.

⁵³ *Id.*

i. Income Tax Rates

As discussed above, based on the application of the IRC, undocumented immigrants living in the United States are taxed in the same manner as documented immigrants and United States citizens with regard to federal income taxes.⁵⁴ Thus, undocumented immigrants pay income taxes under the same rate structure as documented immigrants and United States citizens.

Federal income tax rates in the United States under the IRC are generally progressive.⁵⁵ Progressive tax rates increase with the level of income because the marginal value of a dollar at the higher level of income is less valuable than a dollar of poverty level income.⁵⁶ The effect of this change is that taxes represent a lower percentage of income for lower-income earners than for higher-income earners. Progressive tax rates are more favorable to undocumented immigrants because the majority of undocumented immigrants are lower-income earners.⁵⁷ The negative implications of regressive federal tax rates on undocumented immigrants will be discussed below in Section 4 with regard to payroll taxes paid.

ii. Income Tax Statistics

In terms of gross income taxes paid by undocumented immigrants, the Commissioner of the IRS estimated that undocumented immigrants paid \$50 billion in federal income taxes in the eight-year period from 1996 through 2003.⁵⁸ At an average of \$6.25 billion per year⁵⁹, this payment of only income taxes is comparable to the IRS's estimated total tax payment by undocumented immigrants in 2003 of \$38.8 billion.⁶⁰

4. Payroll Taxes Paid

Federal payroll taxes make up the federal government's largest tax revenue source

⁵⁴ Blum, *supra* note 20, at 596-597; Lipman, *supra* note 1, at 18. *See also* Martinez, *supra* note 20, at 380-381.

⁵⁵ Lipman, *The "ILLEGAL" Tax*, *supra* note 7, at 103.

⁵⁶ *Id.*

⁵⁷ *See id.* at 100-101, 1.

⁵⁸ *Id.* at 97 (citing Miriam Jordan, *Even Workers in U.S. Illegally Pay Tax Man*, WALL ST. J., Apr. 4, 2007, available at http://www.azeir.org/pdf/2007_0404_wsj_immigration-taxes.pdf).

⁵⁹ *Id.*

⁶⁰ Jacqueline Wolfert, *Reality vs. Rhetoric: Lorzano v. Hazelton and the State and Local Tax Contributions Made by Undocumented Immigrants*, 6 PITT. TAX REV. 83, 88-89 (2008) (citing *Illegal Immigration: Hearing Before Commonwealth of Pennsylvania H. Republican Policy Comm.* (July 26, 2006)).

derived from undocumented immigrants. The predominant payroll taxes collected by the federal government are Medicare and Social Security taxes.⁶¹ As with federal income taxes, the most important aspects to understand about federal payroll taxes paid by undocumented immigrants are the rates at which undocumented immigrants pay federal payroll taxes and statistical information on the monetary value or magnitude of these payments.

i. Payroll Tax Rates

Undocumented immigrants and their employers each pay Social Security and Medicare payroll taxes at rates of 7.65 percent on all wages.⁶² Social Security taxes are subject to a wage cap at \$106,800 as of 2011, but the cap well exceeds the average wages for undocumented immigrants.⁶³ Thus, poverty-level undocumented immigrants pay payroll Medicare and Social Security taxes at a minimum rate of 7.65 percent.⁶⁴

Undocumented immigrants may be subject to Medicare and Social Security taxes at a rate greater than 7.65 percent because many experts believe the burden of payroll taxes required to be paid by employers is borne by employees.⁶⁵ All workers subject to United States federal payroll Medicare and Social Security taxes who are self-employed must pay both the employer's and the employee's taxes for an aggregate tax rate of 15.3 percent.⁶⁶ Accordingly, based on burden shifting and self-employment, many experts believe that much of undocumented immigrants' income is subject to an effective wage tax rate on Social Security and Medicare payroll taxes of 15.3 percent.⁶⁷

Additionally, federal payroll taxes are generally regressive as compared to federal income

⁶¹ Lipman, *The "ILLEGAL" Tax*, *supra* note 7, at 102-103 (citing Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296, 3309 (2010)).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Lipman, *supra* note 1, at 36.

⁶⁵ Lipman, *The "ILLEGAL" Tax*, *supra* note 7, at 103 (citing JOHN A. BRITAIN, BROOKINGS INST., *THE PAYROLL TAX FOR SOCIAL SECURITY* 13 (Brookings Inst. eds., 1972); JONATHAN BARRY FORMAN, *MAKING AMERICA WORK* 67-68 (Urban Inst. Press eds., 2006)).

⁶⁶ Lipman, *The "ILLEGAL" Tax*, *supra* note 7, at 103 (citing JOHN A. BRITAIN, BROOKINGS INST., *THE PAYROLL TAX FOR SOCIAL SECURITY* 13 (Brookings Inst. eds., 1972)).

⁶⁷ *Id.*; JONATHAN BARRY FORMAN, *MAKING AMERICA WORK* 67-68 (Urban Inst. Press eds., 2006).

taxes, which are progressive.⁶⁸ Whereas federal income tax rates increase with the level of income of the taxpayer, federal payroll tax rates remain the same regardless of the taxpayer's level of income up to the wage cap, \$106,800 in 2011, at which point no further taxes are collected.⁶⁹ The wage cap well exceeds the average wages for undocumented immigrants, but does apply to many wage earners subject to federal Social Security taxes.⁷⁰ Thus, payroll taxes do not follow the theory outlined in Section 3 that the marginal value of a dollar at higher levels of income is less valuable than a dollar of poverty level income with different spending corresponding with the marginal value of a dollar at the two levels. Therefore, regressive federal payroll taxes represent a greater percentage of income for lower-income earners than higher-income earners.⁷¹

In addition to federal Medicare and Social Security taxes, undocumented immigrants pay federal unemployment and disability payroll taxes.⁷²

ii. Payroll Tax Statistics

In terms of federal tax revenue derived from undocumented immigrants for federal payroll taxes, the total monetary value of the contributions is astounding. The most specific and comprehensive statistical information is available for Social Security contributions. In 2003, the federal government collected an estimated \$7 billion, or approximately one percent of overall revenue, in Social Security taxes from 7.5 million undocumented immigrants with mismatched SSNs, and their employers.⁷³ Overall, Social Security tax revenue from undocumented immigrants was estimated to have tripled between 1996 and 2006.⁷⁴ In 2011, undocumented immigrants contributed an estimate of more than \$12 billion annually in Social Security taxes on tens of billions of dollars in wages, and more than \$835 million in wages in total have been subject to Social Security through 2007.⁷⁵ With regard to total Social Security contributions, in 2010 the Inspector General of the SSA estimated that undocumented immigrants and their

⁶⁸ Lipman, *The "ILLEGAL" Tax*, *supra* note 7, at 103.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 102.

⁷³ Lipman, *supra* note 1, at 24. *See also* Stefonic, *supra* note 39, at 698.

⁷⁴ *Id.*

⁷⁵ *Id.* at 125.

employers in all previous years had paid between \$120 and \$240 billion in Social Security taxes.⁷⁶

Medicare tax information is also estimated with Social Security taxes. In 2007, it was estimated that undocumented immigrants paid more than \$12 million dollars in Social Security and Medicare taxes annually⁷⁷ and it has been estimated that Social Security and Medicare tax contributions more than tripled between 1994 and 2004.⁷⁸

Unemployment tax information is estimated with Medicare and has been assessed on hundreds of billions of dollars in wages.⁷⁹ The Inspector General of the SSA estimated that undocumented immigrants and their employers were assessed Medicare and unemployment taxes on \$533.5 billion in wages in the eight-year period from 2000 to 2007.⁸⁰ In total, in 2011 it was estimated that Medicare and Unemployment taxes in all previous years had been assessed on at least \$1,107.5 billion of undocumented immigrant wages.⁸¹

The total federal payroll tax contributions made by undocumented immigrants and their employers are quite remarkable. The SSA holds approximately \$420 billion from the earnings of documented and undocumented immigrants who are not in a position to claim benefits,⁸² partly because of the harsh benefit restrictions discussed below in Part III. These funds are eventually

⁷⁶ *Id.* at 97 (citing Edward Schumacher-Matos, Op-Ed., *How Illegal Immigrants Are Helping Social Security*, WASH. POST (Sept. 3, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/02/AR2010090202673.html>).

⁷⁷ *Id.*

⁷⁸ *Id.* (citing Alan Zarembo, *Garment Laborers Say Bush Guest-Worker Plan an Ill Fit*, L.A. TIMES (Feb. 8, 2004), <http://articles.latimes.com/2004/feb/08/local/me-immigrants8>).

⁷⁹ *Id.* (citing Mary Johnson, *The Growing Cost of Illegal Immigration to Social Security: Unprecedented Growth in Social Security's "Earnings Suspense File"*, THE SENIOR CITIZENS LEAGUE (June 2010), <http://seniorsleague.org/2011/the-growing-cost-of-illegal-immigration-to-social-security>).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Jacqueline Wolfert, *Reality vs. Rhetoric: Lorzano v. Hazelton and the State and Local Tax Contributions Made by Undocumented Immigrants*, 6 PITT. TAX REV. 83, 89 (2008) (citing *Illegal Immigration: Hearing Before Commonwealth of Pennsylvania H. Republican Policy Comm.* (July 26, 2006)).

transferred to the Treasury Department as tax revenue.⁸³

Overall, the IRS estimated that undocumented immigrants made a total tax contribution from payroll taxes, income taxes, and other sources of \$38.8 billion in 2003.⁸⁴

The federal government's payroll tax revenues have increased rapidly in recent years and will only continue to increase in the future. As previously stated, Social Security tax revenue from undocumented immigrants tripled between 1996 and 2006,⁸⁵ and Social Security and Medicare tax contributions more than tripled between 1994 and 2004.⁸⁶ All immigrants are projected to contribute a net benefit to Social Security of almost \$500 billion from 1998-2022.⁸⁷ Furthermore, from 2007 to 2082 it is estimated that all new immigrants will provide a net benefit of approximately \$611 billion at present value to the Social Security system.⁸⁸

iii. Payroll Taxes Paid Conclusion

Undocumented immigrants are, at a minimum, subjected to Social Security and Medicare taxes at a rate of 15.3 percent, and, in some cases, at an effective wage tax rate of 15.3 percent. Federal payroll taxes are unfair to undocumented immigrants because the taxes are not only regressive, but they actually represent a greater percentage of income for lower-income earning undocumented immigrants than for other higher-income earning United States federal taxpayers. Finally, undocumented immigrants contribute billions of dollars in federal payroll taxes each year—a figure which will increase exponentially in the future.

⁸³ *Id.* (citing GORDON H. HANSON, THE ECONOMIC LOGIC OF ILLEGAL IMMIGRATION 19, 26 (2007) available at <http://www.cfr.org/content/publications/attachments/ImmigrationCSR26.pdf>).

⁸⁴ *Id.* at 88-89 (citing *Illegal Immigration: Hearing Before Commonwealth of Pennsylvania H. Republican Policy Comm.* (July 26, 2006)).

⁸⁵ Lipman, *supra* note 1, at 24.

⁸⁶ Lipman, *The "ILLEGAL" Tax*, *supra* note 7, at 97 (citing Alan Zarembo, *Garment Laborers Say Bush Guest-Worker Plan an Ill Fit*, L.A. TIMES, (Feb. 8, 2004), <http://articles.latimes.com/2004/feb/08/local/me-immigrants8>.)

⁸⁷ Lipman, *supra* note 1, at 12 (citing LOUISE AUERHAHN & BOB BROWNSTEIN, WORKING PARTNERSHIPS USA, THE ECONOMIC EFFECTS OF IMMIGRATION IN SANTA CLARA COUNTY AND CALIFORNIA 12 (2004) available at http://wpusa.org/Publication/wpusa_immig.pdf).

⁸⁸ Lipman, *The "ILLEGAL" Tax*, *supra* note 7, at 97 (citing PROPOSAL TO STRIP WORKERS OF SOCIAL SECURITY EARNINGS BASED ON PRIOR EMPLOYMENT STATUS: BAD FOR THE SYSTEM AND AN AFFRONT TO OUR VALUES, Nat'l Immigr. L. Ctr., (2007), http://v2011.nilc.org/immlawpolicy/CIR/ensign_ss_amdmt_2007-02-28.pdf).

B. STATE AND LOCAL TAXES

The tax payment contributions of undocumented immigrants are not limited to those made on the federal level; these tax payment contributions also include state and local contributions. The largest state and local tax payment contributions by undocumented immigrants are those derived from state income taxes and various consumption taxes.

Although the information available for state income tax and various consumption tax contributions by undocumented immigrants is not quite as comprehensive as that for federal taxes, the purpose of including an analysis of these taxes is to provide a full analysis of the treatment of undocumented immigrants under the overall United States tax system. This analysis will further illustrate the large contributions undocumented immigrants make to the overall United States tax system and the many different sources of those contributions. Moreover, this analysis provides further clarity on the disparity between the tax contributions undocumented immigrants make to the overall United States tax system and the limited benefits available to undocumented immigrants, elaborated on in Part III.

1. State Income Taxes

Income tax contributions made by undocumented immigrants are not limited to those made on the federal level. Undocumented immigrants are subject to applicable state and local income taxes in the same manner as documented immigrants and United States citizens, much like with federal taxes.⁸⁹ These taxes are assessed if the undocumented immigrants reside in or earn income in a state or local jurisdiction with such taxes.⁹⁰ State and local income tax rates vary by jurisdiction and the overall monetary value and compliance rates for these contributions are difficult to track and/or estimate. However, undocumented immigrants are subject to these taxes and undocumented immigrant state income tax contributions add to the total contributions of undocumented immigrants to the overall United States tax system.

2. Consumption Taxes

State and local governments assess consumption taxes by various means. Undocumented immigrants are subject to consumption taxes by living, working, eating and shopping in the

⁸⁹ *Id.* at 99-100 (citing STATE OF CAL. FRANCHISE TAX BD., GUIDELINES FOR DETERMINING RESIDENT STATUS 2009 2-4 (2009)).

⁹⁰ *Id.*

United States, all activities that undocumented immigrants do routinely.⁹¹ Sales, use, and excise consumption taxes are assessed on undocumented immigrants when they purchase goods or services.⁹² State and local property taxes are assessed on undocumented immigrants' real property.⁹³

Much like income and payroll taxes, state and local consumption taxes do not distinguish between undocumented immigrants, documented immigrants, and United States citizens.⁹⁴ Therefore, undocumented immigrants pay consumption taxes in the same manner, and at the same rates, as documented immigrants and United States citizens.⁹⁵

Consumption taxes, like payroll taxes and unlike income taxes, are generally regressive. Because undocumented immigrants have low levels of income, (an average family of undocumented immigrants earned \$36,000 in 2007) they spend most, if not all, of their income on goods that are subject to consumption taxes.⁹⁶ Thus, undocumented immigrants pay a higher percentage of their income in consumption taxes than higher-income United States taxpayers.⁹⁷

In terms of tax revenue, consumption taxes generate a substantial amount of money for state and local coffers. In 2007, it was estimated that there were more than ten million undocumented immigrants in the United States,⁹⁸ comprising nearly seven million families with

⁹¹ *Id.* at 98.

⁹² *Id.* See also Wolfert, *supra* note 85, at 90 (citing GORDON H. HANSON, THE ECONOMIC LOGIC OF ILLEGAL IMMIGRATION 19, 26 (2007) available at <http://www.cfr.org/content/publications/attachments/ImmigrationCSR26.pdf>).

⁹³ Lipman, *The "ILLEGAL" Tax*, *supra* note 7, at 98.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 99 (citing JEFFREY S. PASSEL & D'VERA COHN, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES, PEW HISPANIC CTR. 16 (2009), available at <http://pewhispanic.org/files/reports/107.pdf>). See also, Minn. Stat. § 297A.67 (2012) (exempting some basic purchases from consumption taxes).

⁹⁷ Lipman, *The "ILLEGAL" Tax*, *supra* note 7, at 99 (citing The Numbers, Tax Policy Center. Urban-Brookings Tax Policy Ctr. (Nov. 10, 2009), <http://www.taxpolicycenter.org/numbers/displayatab.cfm?DocID=2478>).

⁹⁸ *Id.* at 98-99 (citing MICHAEL HOEFER ET AL., DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION IN THE UNITED STATES: JANUARY 1 (2009), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf).

average family earnings of \$36,000.⁹⁹ Based on this information, one can extrapolate that undocumented immigrants have paid billions of dollars in consumption taxes and will continue to pay billions of dollars in consumption taxes.¹⁰⁰

It is important to note that undocumented immigrants also pay federal consumption taxes.¹⁰¹ However, the purpose of this section was to highlight some of the large state and local tax contributions made by undocumented immigrants.

III. BENEFITS PROVIDED FOR UNDOCUMENTED IMMIGRANTS

The benefits provided to undocumented immigrants under the overall United States tax system are fundamentally unfair. As discussed above, undocumented immigrants make profound contributions to the overall United States tax system, and, in most cases, are taxed similarly to documented immigrants and United States citizens. However, undocumented immigrants are denied most of the government benefits provided to documented immigrants and United States citizens. The major benefits denied to undocumented immigrants are at the federal level, where undocumented immigrants pay most of their taxes. These major benefits include: income tax credits, benefits programs funded by payroll taxes, and a long list of major programs denied to undocumented immigrants under the PRWORA. This discussion will also provide an analysis of the state and local benefits available to undocumented immigrant taxpayers to provide a comprehensive analysis of the benefits available to undocumented immigrants under the overall United States tax system.

A. FEDERAL BENEFITS

Undocumented immigrants are treated unfairly and are denied the benefits available to other classes under the federal tax system. The major federal benefits denied to undocumented immigrants are income tax credits, federal programs funded by payroll taxes, and several important programs denied to undocumented immigrants under the PRWORA.

⁹⁹ *Id.* at 99 (citing JEFFREY S. PASSEL & D'VERA COHN, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES, PEW HISPANIC CTR. 16 (2009), available at <http://pewhispanic.org/files/reports/107.pdf>).

¹⁰⁰ *See id.* (explaining that it can be extrapolated that billions of dollars in consumption taxes paid through federal, state, and local consumption taxes; however, also inferring that most consumption taxes are assessed at the state and local levels).

¹⁰¹ *Id.* at 98-99.

1. Income Tax Credits

Federal tax credits are a major federal benefit for United States taxpayers. Tax credits are established under the IRC to benefit taxpayers for a variety of reasons and purposes. One of the principal tax credits targeted to benefit low-income working families, a characteristic that encompasses most undocumented immigrant families, is the EITC.¹⁰²

i. Background Information

The EITC was established in 1975 as a workforce approach to government assistance that would exempt low-income families from income taxes and give them a rebate of their Social Security taxes.¹⁰³ The EITC has been widely successful and is considered the largest cash assistance program and the most successful antipoverty program in the United States for working poor families, reaching more individuals than more traditional financial justice programs.¹⁰⁴

The EITC provided a cash payment to taxpayers of up to \$4,400 in 2005¹⁰⁵ and \$5,751 in 2011.¹⁰⁶ The amount of the cash payment varies based on the taxpayer's income level and number of qualifying children.¹⁰⁷ The cash payment ensures that working-poor families pay little or no income or payroll taxes and, in many cases, provides a meaningful wage-subsidy cash-refund to low-income working families¹⁰⁸ for basic necessities such as housing, utilities, food, and basic household appliances.¹⁰⁹

ii. Income Tax Credit Statistics

The EITC has been described as “encourag[ing] work and lift[ing] millions of taxpayers

¹⁰² *Infra* Part III. A.1.

¹⁰³ Lipman, *The “ILLEGAL” Tax*, *supra* note 7, at 109 (citing SAUL D. HOFFMAN & LAURENCE S. SEIDMAN, W.E. UPJOHN INST. FOR EMP'T RESEARCH, HELPING WORKING FAMILIES: THE EARNED INCOME TAX CREDIT 12 (2003)).

¹⁰⁴ *Id.*

¹⁰⁵ Lipman, *supra* note 1, at 37.

¹⁰⁶ Lipman, *The “ILLEGAL” Tax*, *supra* note 7, at 110.

¹⁰⁷ *Id.* at 110-111; Lipman, *supra* note 1, at 37-38.

¹⁰⁸ Lipman, *The “ILLEGAL” Tax*, *supra* note 7, at 110 (citing Rev. Proc. 2011-2, 2011-2 I.R.B. 299); Lipman, *supra* note 1, at 37.

¹⁰⁹ Lipman, *The “ILLEGAL” Tax*, *supra* note 7, at 110 (citing DAVID K. SHIPLER, THE WORKING POOR: INVISIBLE IN AMERICA 13 (2004)); Lipman, *supra* note 1, at 37 (citing ROBERT GREENSTEIN, CTR. ON BUDGET AND POLICY PRIORITIES, THE EARNED INCOME TAX CREDIT: BOOSTING EMPLOYMENT, AIDING THE WORKING POOR 1 (2005), *available at* <http://www.cbpp.org/7-19-05eic.pdf>).

out of poverty”¹¹⁰ and “lift[ing] millions of families out of poverty, including millions of children, each year.”¹¹¹ In 2003, more than twenty-two million taxpayers received the EITC.¹¹² In 2010, approximately 20.1 million households with children received an average EITC credit of \$2,661, in excess of \$53 billion.¹¹³ In 2006, it was estimated that the EITC lifts almost three million children out of poverty each year¹¹⁴ and in 2011 it was estimated that without the EITC the number of children living in poverty would increase by one-third.¹¹⁵ Moreover, the “EITC has played a critical role in bringing more single mothers into the workforce.”¹¹⁶

iii. Application to Undocumented Immigrants

The EITC is denied to undocumented immigrants in its entirety and in a blanket fashion. In 1996, Congress enacted into law the PRWORA,¹¹⁷ which included unprecedented restrictions on federal benefits for immigrants.¹¹⁸ Among the long list of benefit restrictions, which will be further discussed later in Part III, Congress decided that, “individuals who are not authorized to work in the United States should be denied EITC benefits.”¹¹⁹ Congress enacted this restriction by amending the IRC to require that a taxpayer provide a valid SSN for themselves, their spouse

¹¹⁰ Lipman, *supra* note 1, at 37.

¹¹¹ Lipman, *The “ILLEGAL” Tax*, *supra* note 7, at 110 (citing CTR. ON BUDGET AND POLICY PRIORITIES, POLICY BASICS: THE EARNED INCOME TAX CREDIT (2011), available at <http://www.cbpp.org/cms/index.cfm?fa=view&id=2505>).

¹¹² Lipman, *supra* note 1, at 37.

¹¹³ Lipman, *The “ILLEGAL” Tax*, *supra* note 7, at 110 (citing ELAINE MAAG ET AL., A REFERENCE MANUAL FOR CHILD TAX BENEFITS, URBAN-BROOKINGS TAX POLICY CTR. (Apr. 2011), available at <http://www.taxpolicycenter.org/uploadedpdf/412329-child-tax-benefits.pdf>).

¹¹⁴ Lipman, *supra* note 1, at 37.

¹¹⁵ Lipman, *The “ILLEGAL” Tax*, *supra* note 7, at 110 (citing CTR. ON BUDGET AND POLICY PRIORITIES, POLICY BASICS: THE EARNED INCOME TAX CREDIT (2011), available at <http://www.cbpp.org/cms/?fa=view&id=2505>).

¹¹⁶ *Id.* at 109-110 (citing STEVE HOLT, THE EARNED INCOME TAX CREDIT AT AGE 30: WHAT WE KNOW, Brookings Inst., 1, 14 (2006), available at <http://www.brookings.edu>).

¹¹⁷ *Id.* at 111 (citing Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105).

¹¹⁸ *Id.*; Lipman, *supra* note 1, at 39 (citing AM. IMMIGR. LAWYERS ASS’N, *Immigrant Eligibility for Public Benefits*, in IMMIGRATION AND NATIONALITY LAW HANDBOOK 775, 759 (2005-06)).

¹¹⁹ Lipman, *The “ILLEGAL” Tax*, *supra* note 7, at 111 (citing STAFF OF J. COMM. ON TAXATION, 104TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 104TH CONGRESS 394); Lipman, *supra* note 1, at 39 (STAFF OF J. COMM. ON TAXATION, 104TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 104TH CONGRESS 394).

if married, and each qualified child in order to receive EITC benefits.¹²⁰ By requiring an SSN, EITC benefits were denied not only to undocumented immigrant taxpayers, but also to legally present and legally working immigrant federal taxpayer families.¹²¹ Moreover, it is important to note that the denial of EITC benefits to non-SSN holding documented and undocumented immigrant taxpayers further entrenches undocumented immigrant taxpayers in a position of paying a higher effective rate than other taxpayers despite being composed mainly of low-income working families, while also denying undocumented immigrants the refundable cash subsidy portion of the EITC.¹²²

The purpose Congress stated for denying EITC benefits to non-SSN holding documented and undocumented immigrants was that it wanted to remove incentives for unauthorized work.¹²³ However, Congress's real purpose was economic.¹²⁴ By denying EITC benefits to non-SSN holding undocumented and documented immigrants, it was estimated that Congress increased federal fiscal year budget receipts by more than \$2.8 billion from 1997 through 2006.¹²⁵

iv. Income Tax Credits Conclusion

As previously stated, the EITC is a principal federal tax credit targeted to benefit low-income working families. It is considered the largest cash assistance program, and most successful antipoverty program in America for working poor families. Moreover, it lifts millions of taxpayers out of poverty each year. However, the EITC is entirely denied to undocumented immigrant taxpayers, which are mainly low-income working families, in a blanket fashion. This further entrenches undocumented immigrant taxpayers into a position of paying a higher effective tax rate than other taxpayers in the overall United States tax system, while also denying undocumented immigrants the refundable cash subsidy portion of the EITC.

¹²⁰ Lipman, *The "ILLEGAL" Tax*, *supra* note 7, at 111 (citing I.R.C. § 32(c) (2006)); Lipman, *supra* note 1, at 39 (citing The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 451, 110 Stat. 2105, 2276 (1996) (codified at I.R.C. § 32(c)).

¹²¹ Lipman, *The "ILLEGAL" Tax*, *supra* note 7, at 112; Lipman, *supra* note 1, at 39.

¹²² See Lipman, *supra* note 1, at 7.

¹²³ Lipman, *The "ILLEGAL" Tax*, *supra* note 7, at 100-101; Lipman, *supra* note 1, at 40.

¹²⁴ Lipman, *supra* note 1, at 40 (citing AM. IMMIGR. LAWYERS ASS'N, *Immigrant Eligibility for Public Benefits*, in IMMIGRATION & NATIONALITY LAW HANDBOOK 775, 759 (2005-2006)).

¹²⁵ *Id.* (citing STAFF OF JOINT COMM. ON TAXATION, 104TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 104TH CONGRESS 392-395).

2. Federal Programs funded by Payroll Taxes

As discussed in Part II, undocumented immigrants make billions of dollars in contributions to federal programs funded by payroll taxes each year. Federal programs funded by payroll taxes are generally designed so that there is a rough proportionality between the amount a taxpayer pays into the programs and the amount the taxpayer receives in benefits from the programs. This is not the case for undocumented immigrant taxpayers, who are denied almost all payroll tax benefits, despite paying billions of dollars in contributions into the programs.

i. Social Security Program:

a. Background Information

The Social Security payroll tax program¹²⁶ was established by the United States federal government over 75 years ago as a progressive financial justice program to provide income security to United States taxpayers.¹²⁷ Today, Social Security is “the largest and most successful financial justice program in the United States.”¹²⁸ It provides elderly United States taxpayers with a secure and inflation-adjusted retirement income.¹²⁹

b. Social Security Program Statistics

Social Security provides critical financial benefits to tens of millions of United States taxpayers every month.¹³⁰ In 2011, it was estimated that Social Security paid out \$782 billion to 62 million United States taxpayers annually with average benefits of almost \$14,000 per year.¹³¹ Further, in 2011, it was estimated that Social Security presently lifted more than thirteen million senior citizens and one million children out of poverty,¹³² and that without Social Security almost

¹²⁶ Also referred to as “Old-Age, Survivors, and Disability Insurance” (“OASDI”).

¹²⁷ Lipman, *The “ILLEGAL” Tax*, *supra* note 7, at 123.

¹²⁸ *Id.*

¹²⁹ *Id.* at 104.

¹³⁰ *Id.* at 123.

¹³¹ *Id.* See Press Release, Rep. Sam Johnson, *Johnson Takes the Ways and Means Social Security Helm* (Jan. 6, 2011), <http://www.samjohnson.house.gov>. See also *Average Monthly Social Security Benefit for a Retired Worker*, Social Security Online, <http://ssa-custhelp.ssa.gov> (last visited Oct. 28, 2013) (the average monthly benefit is \$1,230).

¹³² *Id.* (citing PAUL N. VAN DE WATER & ARLOC SHERMAN, SOCIAL SECURITY KEEPS 20 MILLION AMERICANS OUT OF POVERTY: A STATE-BY-STATE ANALYSIS, CTR. ON BUDGET & POLICY PRIORITIES 1, 1-2 (2009), <http://www.cbpp.org/files/8-11-10socsec.pdf>).

one-half of all senior citizens would live in poverty.¹³³

c. Social Security Program Rates

Moreover, the Social Security benefits formula ensures that Social Security benefits are progressive, even though Social Security tax rates are regressive.¹³⁴ All United States taxpayer workers over the age of 62 generally are entitled to Social Security benefits if they have worked in covered employment for at least forty quarters, which is the equivalent of ten years.¹³⁵ The numerical benefits formula itself uses averages and earnings histories to ensure that Social Security benefits are progressive.¹³⁶ In fact, “[t]he 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.”¹³⁷ Thus, Social Security benefits provide a meaningful and progressive government benefit to low-income United States taxpayers.

d. Social Security Program Application to Undocumented Immigrants

Unfortunately, Social Security does not provide a meaningful and progressive government benefit to low-income undocumented immigrant United States taxpayers. Social Security benefits are only available to United States taxpayers who are “legally present” in the United States and have obtained work authorization with an assigned SSN.¹³⁸ In 2004, Congress enacted the Social Security Protection Act of 2004, which requires a noncitizen who files for Social Security benefits based on a SSN assigned on or after January 1, 2004, to have work authorization at the time the SSN is assigned, or later.¹³⁹ This changed the law in place prior to 2004, which allowed individuals who were “legally present” in the United States for any reason, including being a recognized visitor, being recognized tourist or attaining a student visa, eligibility for Social Security benefits.¹⁴⁰ Thus, United States taxpayers who happen to be

¹³³ *Id.* See POLICY BASICS: TOP TEN FACTS ABOUT SOCIAL SECURITY, CTR. ON BUDGET & POLICY PRIORITIES (Nov. 6, 2012), http://www.cbpp.org/files/PolicyBasics_SocSec-TopTen.pdf.

¹³⁴ *Id.* at 124.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 125.

¹³⁸ *Id.*

¹³⁹ *Id.* (citing Social Security Act of 2004, Pub. L. No. 108-203, § 211, 118 Stat. 493, 518 (2004)).

¹⁴⁰ *Id.*

undocumented immigrants are categorically denied Social Security benefits by being required to be “legally present” in United States with work authorization and a valid SSN.

Adding to this categorical denial of Social Security benefits to undocumented immigrants, if a former undocumented immigrant later becomes “legally present” in the United States with work authorization and a valid SSN, he or she is presented with additional difficulties in qualifying for Social Security benefits. As discussed in Part II, to qualify for Social Security benefits, the former undocumented immigrant also must provide forty-quarters of Social Security covered wages to the SSA.¹⁴¹ Social Security covered wages can accrue if the former undocumented immigrant, at one point, attained work authorization regardless of work status during the earning period.¹⁴² However, the difficulty is that the former undocumented immigrant must provide satisfactory documentation to the Social Security Administration evidencing his or her earning history; this proves to be a burden as the SSA will likely not have an accurate record of the former undocumented immigrant’s earnings history without the former undocumented immigrant having had a valid SSN during that period.¹⁴³

Moreover, the former undocumented immigrant would likely be unable to use any fraudulently-obtained SSN to evidence Social Security covered wages because it is a felony to falsely use an SSN, carrying a penalty of up to \$5,000 and five years in prison.¹⁴⁴ Also, although it should be noted that the SSA currently has a policy of assisting and not prosecuting undocumented immigrants, the SSA’s policy of non-prosecution is subject to change at any moment because the SSA is charged with maintaining correct earnings records.¹⁴⁵

Thus, even if a former undocumented immigrant were to become eligible to apply for Social Security benefits by becoming “legally present” in the United States and obtaining work authorization, many legal barriers and risks stand in the way of that undocumented immigrant qualifying for the life-changing Social Security benefits that he or she should have become

¹⁴¹ Lipman, *supra* note 1, 25 n.182 (citing DAWN NUSCHLER & ALISON SISKIN, CONG. RESEARCH SERV., RL 32004, SOCIAL SECURITY BENEFITS FOR NONCITIZENS: CURRENT POLICY AND LEGISLATION 3-4 (2005)).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* (citing 42 U.S.C. § 408(a) (2006)).

¹⁴⁵ *Id.* (citing OFFICE OF THE INSPECTOR GENERAL, CONG. RESPONSE REP., A-03-03-23053, SOCIAL SECURITY ADMINISTRATION BENEFITS RELATED TO UNAUTHORIZED WORK 4-5 (2003), <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-03-03-23053.pdf>).

eligible for through all of the time that he or she spent working and paying taxes.¹⁴⁶

e. Social Security Program Conclusion

Social Security is the largest and most successful financial justice program in the United States and Social Security provides a meaningful and progressive government benefit to low-income United States taxpayers. However, Social Security does not provide a meaningful and progressive government benefit to low-income undocumented immigrant United States taxpayers through categorical denial. Moreover, even when former undocumented immigrants meet the eligibility requirements for Social Security benefits by becoming “legally present” in the United States and obtaining work authorization, many legal barriers and risks stand in the way of the former undocumented immigrants receiving life-changing Social Security benefits for all the time they spent working and paying Social Security taxes.

ii. Medicare Program

Medicare provides health insurance coverage to elderly United States taxpayers starting at age 65,¹⁴⁷ and health insurance coverage to disabled United States taxpayers.¹⁴⁸ Medicare is not available to undocumented immigrants. Like Social Security, Medicare benefits are only available to United States taxpayers who are “legally present” in the United States and have obtained work authorization and a valid SSN.¹⁴⁹ Moreover, as with Social Security, former undocumented immigrants who are eligible for Medicare benefits have difficulties obtaining Medicare benefits because of requirement that the undocumented immigrant prove that he or she has worked in covered employment for at least forty quarters, which is the equivalent of ten years.¹⁵⁰

Thus, Medicare provides health insurance coverage to elderly United States taxpayers starting at age 65, and health insurance coverage to disabled United States taxpayers. However, Medicare does not provide these benefits to taxpayers who are undocumented immigrants, and the program presents the same challenges as Social Security does to former undocumented immigrants regarding when they are eligible to apply for benefits and when they qualify for

¹⁴⁶ *Id.* at 125.

¹⁴⁷ See Peter L. Reich, *Public Benefits for Undocumented Aliens: State Law into the Breach Once More*, 21 N.M.L. REV. 219, 232 (1991) (citing 42 U.S.C.A. §§ 1395-1395zz (Supp.1991)).

¹⁴⁸ Reich, *supra* note 150, at 232 (citing 42 U.S.C.A. §§ 1395-1395zz (Supp.1991)).

¹⁴⁹ Lipman, *The “ILLEGAL” Tax*, *supra* note 7, at 125.

¹⁵⁰ *Id.* at 126.

benefits.

3. Federal Programs denied under the PRWORA

In addition to denying the benefit of the EITC benefits to undocumented immigrants as discussed above in Section 1, the PRWORA denies undocumented immigrants the benefits of many important federal programs, creating unprecedented government benefit restrictions for undocumented immigrant taxpayers.

i. Medicaid

a. Medicaid Background Information

The largest federal benefit program denied to undocumented immigrant taxpayers under the PRWORA is Medicaid. Medicaid provides medical care to qualifying low-income United States taxpayers.¹⁵¹ The funding for Medicaid is derived from both state and federal sources; Medicaid is described as a “co-operative federal/state cost-sharing program designed to enable participating states to furnish medical assistance to persons whose income and resources are insufficient to meet the costs of necessary medical care and services.”¹⁵² The cost-sharing approach of Medicaid comes with federal restrictions for states to receive federal funding.¹⁵³ These restrictions involve which taxpayers and which services a state may or may not cover under Medicaid.¹⁵⁴

The federal Medicaid statute creates four distinct groups of eligibility: (1) individuals that states must cover, described as mandatory categorically needy; (2) various groups that states have the option of covering, described as categorically needy; (3) certain individuals who fail to meet the income requirements whom the state may nonetheless choose to cover, described as optional medically needy; and (4) individuals the state is prohibited from covering, described as ineligible.¹⁵⁵ Every individual falls into one of the four categories based on the unique

¹⁵¹ Reich, *supra* note 151, at 232 (citing 42 U.S.C.A. §§ 1396-1396f (1988)).

¹⁵² Elizabeth R. Chesler, *Denying Undocumented Immigrants Access to Medicaid: A Denial of their Equal Protection Rights?*, 17 B.U. PUB. INT. L.J. 255, 258 (2008) (quoting *DeJesus v. Perales*, 770 F.2d 316, 318 (2d Cir. 1985)). See Reich, *supra* note 150, at 232 (citing 42 U.S.C.A. §§ 1396–1396f (1988)).

¹⁵³ Chesler, *supra* note 155, at 258 (citing 42 U.S.C. § 1396a(a)(10) (2000)).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 258-259.

characteristics of the individual including age, income, disability, and number of children.¹⁵⁶

b. Medicaid Application to Undocumented Immigrants

Prior to the passage of the PRWORA, undocumented immigrants were not technically eligible for Medicaid coverage.¹⁵⁷ However, a hypothetical former undocumented immigrant had the opportunity to later become eligible for Medicaid coverage by attaining the status of an alien permanently residing under color of law¹⁵⁸ or a recent immigrant.¹⁵⁹ Moreover, necessary health services were more available to undocumented immigrants because “publicly-funded health care providers and practitioners customarily provided necessary health services regardless of immigration status.”¹⁶⁰

The enactment of the PRWORA removed any discretion a state had to provide Medicaid coverage to undocumented immigrant taxpayers and removed the possibility that a hypothetical former undocumented immigrant could later become eligible for Medicaid coverage by attaining the status of an alien permanently residing under color of law or as a recent immigrant. Under the PRWORA, undocumented immigrants are permanently and without exception classified as “ineligible” within the Medicaid group categorization framework.¹⁶¹ Moreover, the PRWORA classified immigrants as either “qualified” or “unqualified” for federal benefits,¹⁶² and adopted a narrow definition of “qualified” immigrants that excluded aliens permanently residing under color of law and recent immigrants¹⁶³.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 260.

¹⁵⁸ An alien permanently residing under color of law is a term used in 42 U.S.C. § 1614(a)(1)(B) of the Social Security Act and was interpreted in *Holley v. Lavine*, 553 F.2d 845 (2d Cir. 1985), to include an alien lawfully admitted to permanent residence or otherwise permanently residing in the United States under color of law. “The necessary implication of the definition of ‘qualified alien’ [in the PRWORA] is that the PRUCOL (Permanently Residing Under Color of Law) doctrine from *Holley* is abolished.” Michael J. Sheridan, *The New Affidavit of Support and Other 1996 Amendments to Immigration and Welfare Provisions Designed To Prevent Aliens From Becoming Public Charges*, 31 CREIGHTON L. REV. 741, 746 (1998).

¹⁵⁹ Chesler, *supra* note 155, at 259.

¹⁶⁰ *Id.* (citing Julia Field Costich, *Legislating a Public Health Nightmare: The Anti-Immigrant Provisions of the ‘Contract with America’ Congress*, 90 KY. L.J. 1043, 1047 (2001–2002)).

¹⁶¹ *Id.*

¹⁶² *Id.* (citing 8 U.S.C. § 1611(a) (2000)).

¹⁶³ *Id.* (citing 8 U.S.C. § 1641 (2000)).

In relation to the provision of necessary health services to undocumented immigrants, the PRWORA reduced available services to emergency and certain public interest health services. Under the PRWORA, “states must provide undocumented immigrants with (1) emergency medical aid, (2) immunizations, and (3) testing and treatment of symptoms of communicable diseases.”¹⁶⁴ States may only use Medicaid funds for these emergency medical services¹⁶⁵ and any other health care services, such as preventative care, prenatal care, or treatment for chronic diseases, must be provided through state and local funds.¹⁶⁶

It is important to note that as a result of the laws restricting Medicare and Medicaid coverage discussed above, federally-funded health services are largely foreclosed to undocumented immigrant taxpayers, with the exception of Medicaid emergency care.¹⁶⁷ Thus, of the approximately seven million¹⁶⁸ to ten million¹⁶⁹ undocumented immigrants living in the United States, as of 2006, the majority are uninsured.¹⁷⁰

ii. Other Federal Benefits Denied under the PRWORA

Two additional principle government programs denied to undocumented immigrants under PRWORA are Supplemental Security Income (“SSI”) and Food Stamps.¹⁷¹ SSI is a federally funded need-based program that provides inflation adjusted cash assistance to low-income persons who are aged, blind, or disabled.¹⁷² Prior to PRWORA, legal permanent aliens, as well as aliens permanently residing under color of law, were generally eligible for SSI

¹⁶⁴ *Id.* (citations omitted).

¹⁶⁵ *Id.* at 260 (citing NATIONAL CONFERENCE OF STATE LEGISLATURES, THE IMMIGRANT POLICY PROJECT: MEDICAL ASSISTANCE & HEALTH BENEFITS (1997), <http://www.ncsl.org/programs/immig/MedIB.htm>)).

¹⁶⁶ *Id.* (citing 8 U.S.C. § 1621(d) (2000)).

¹⁶⁷ Reich, *supra* note 150, at 233. See Chesler, *supra* note 155, at 260.

¹⁶⁸ Chesler, *supra* note 155, at 260 (citing Terry Frieden, *INS: 7 Million Illegal Immigrants in United States*, CNN, Feb. 1, 2003, <http://www.cnn.com/2003/US/01/31/illegal.immigration>).

¹⁶⁹ *Id.* (citing Andrea B. Staiti et al., *Stretching the Safety Net to Serve Undocumented Immigrants: Community Responses to Health Needs*, CENTER FOR STUDYING HEALTH SYS. CHANGE: ISSUE BRIEF 104, Feb. 2006, at 1, <http://www.hschange.com/CONTENT/818/818.pdf>).

¹⁷⁰ *Id.*

¹⁷¹ Presently referred to as “The Supplemental Nutrition Assistance Program.” See 8 U.S.C. §§ 2011–2036a (2013).

¹⁷² Steven M. Dawson, *The Promise of Opportunity and Very Little More: An Analysis of the New Welfare Law’s Denial of Federal Public Benefits to Most Legal Immigrants*, 41 ST. LOUIS U. L.J. 1053, 1056–57 (1997).

benefits.¹⁷³ Food Stamps are a need-based program that helps individuals purchase food.¹⁷⁴ Prior to the PRWORA, non-United States citizens qualified for Food Stamps if they were legal resident aliens, refugees, parolees, or granted withholding of deportation.¹⁷⁵

As discussed above in Section 3.i.b., the PRWORA narrowly defined the subset of immigrants eligible to receive public benefits.¹⁷⁶ The PRWORA classified aliens as either “qualified” or “unqualified” for federal benefits,¹⁷⁷ and adopted a narrow definition of “qualified” aliens that excluded those permanently residing under color of law, recent immigrants, and undocumented immigrants.¹⁷⁸ Through these restrictions, the PRWORA barred “qualified aliens,” both current and future, from receiving Supplemental Security Income (“SSI”) and Food Stamps.¹⁷⁹ Further, current and future “qualified” legal immigrants do not become eligible for SSI and Food Stamps under the PRWORA until they become citizens.¹⁸⁰

B. STATE AND LOCAL BENEFITS

As with taxes, the government benefits available to or denied to undocumented immigrant taxpayers are not limited to those made on the federal level but include state and local benefits. A comprehensive analysis of the benefits available to undocumented immigrants under the overall United States tax system therefore requires an analysis of state and local benefits. As discussed above in Section A.3.i., with regard to Medicaid benefits, state benefits are often intertwined with federal benefits based on shared-funding approaches, and major state benefits must be evaluated through an analysis of federal funding restrictions. Additionally, state and local governments are required to provide specific benefits to undocumented immigrant taxpayers.

It is important to keep in mind that this a broad overview of these benefits to supplement

¹⁷³ *Id.* at 1057.

¹⁷⁴ *Id.* at 1058.

¹⁷⁵ *Id.*

¹⁷⁶ Chesler, *supra* note 155, at 259.

¹⁷⁷ *Id.* (citing 8 U.S.C. § 1611(a) (2000)).

¹⁷⁸ *Id.* (citing 8 U.S.C. § 1641 (2000)).

¹⁷⁹ Dawson, *supra* note 175, at 1068 (citing Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 402(a), 8 U.S.C.A. § 1641(b) (1996)).

¹⁸⁰ *Id.* (citing Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 402(a)(1)).

the other information in the paper and that state and local government benefits vary greatly from jurisdiction to jurisdiction.

1. Federal and State Funded Benefits

As discussed above, under the PRWORA, states must provide undocumented immigrants with (1) emergency medical aid, (2) immunizations, and (3) testing and treatment of symptoms of communicable diseases.¹⁸¹ States are limited to using Medicaid funds for emergency medical aid; however, in some instances, states have been given latitude to define “emergency” somewhat expansively.¹⁸² However, if states wish to provide any other health care services, such as preventive care, prenatal care, or treatment for chronic diseases, state legislatures must enact laws to affirmatively allow such treatment outside of federal funding and Medicare coverage¹⁸³ and, to date, no states have passed such laws.¹⁸⁴ States are required under federal law to provide emergency disaster relief to undocumented immigrant taxpayers using federal and state funding.¹⁸⁵

2. State and Locally Funded Benefits

State and local governments provide undocumented immigrants with basic education and law enforcement services with or without additional federal funding.¹⁸⁶ In fact, the federal government mandates “that state and local government provide certain services to individuals, regardless of their immigration status or ability to pay, in order for those states or localities to participate in some of its assistance programs [including public education and health services].”¹⁸⁷ Judicial decisions “also restrict the authority of state and local governments to avoid or constrain the cost of providing services to unauthorized immigrants who reside in their

¹⁸¹ Chesler, *supra* note 155, at 259–260.

¹⁸² *Id.* at 260.

¹⁸³ *Id.* (citing 8 U.S.C. § 1621(d) (2000)).

¹⁸⁴ *Id.*

¹⁸⁵ Dawson, *supra* note 175, at 1071 (citing Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 422(b)).

¹⁸⁶ Wolfert, *supra* note 85, at 89–90 (citing CONG. BUDGET OFFICE, CONG. OF THE UNITED STATES, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS 1 (2007)).

¹⁸⁷ *Id.* at 90 (quoting CONG. BUDGET OFFICE, CONG. OF THE UNITED STATES, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS 1 (2007)).

jurisdictions.”¹⁸⁸

IV. ANALYSIS AND REFORM

The taxes paid by undocumented immigrants analyzed in Part II and the benefits available to undocumented immigrants analyzed in Part III present several issues with the treatment of undocumented immigrants in the United States. This section will outline these issues and then provide suggestions of legal reforms with the aim of treating undocumented immigrants more equitably in the United States.

A. OVERVIEW OF ISSUES

There is not a predominant issue with the payment of taxes by undocumented immigrants. Undocumented immigrants have paid and will continue to pay a substantial amount of taxes into the overall United States tax system.¹⁸⁹ In relation to federal taxes, the federal tax system is designed so that reported wages by undocumented immigrants are treated in the same manner as documented immigrants and United States citizens through residency requirements that tax these differing classes of taxpayers in the same manner.¹⁹⁰ The potential problem of unreported federal income taxes is mitigated because reported wages are an important step towards undocumented immigrants’ ultimate goal of becoming naturalized United States citizens, and undocumented immigrants can pay income taxes through ITINs without risk of immigration issues.¹⁹¹ Federal payroll taxes are reported along with income taxes and are required to be reported by employers for each employee.¹⁹² Moreover, statistical information provides practical support that undocumented immigrants comply with and pay billions of dollars in federal taxes each year.¹⁹³

With regard to state and local taxes, undocumented immigrants pay state and local income taxes for the same reasons that undocumented immigrants pay federal income taxes. Additionally, undocumented immigrants unavoidably pay billions of dollars in consumption

¹⁸⁸ *Id.* (quoting CONG. BUDGET OFFICE, CONG. OF THE UNITED STATES, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS 1 (2007)).

¹⁸⁹ *Supra* Part II.

¹⁹⁰ *Supra* Part II.A.1. *See supra* Part II.

¹⁹¹ *Supra* Part II.A.2. *See supra* Part II.

¹⁹² *Supra* Part II.A.2. *See supra* Part II.

¹⁹³ *Supra* Part II.A.3.ii; Part II.A.4.ii at 15–18. *See supra* Part II.A.

taxes each year by residing in the United States.¹⁹⁴

There is a predominant issue with the government benefits provided to undocumented immigrants. Undocumented immigrants are categorically denied benefits from programs funded by payroll taxes,¹⁹⁵ despite their large payroll tax contributions.¹⁹⁶ An issue that could possibly be traced to the fact that undocumented immigrants are not properly credited for their payroll tax contributions is that the rampant use of fraudulent SSNs prevents the contributions from being appropriately tracked and recorded.¹⁹⁷ Undocumented immigrants are also denied EITCs in a blanket fashion under PRWORA, the denial of which further entrenches undocumented immigrant taxpayers in a position of paying a higher effective tax rate than other taxpayers, despite being composed mainly of low-income working families, while also denying undocumented immigrants the refundable cash subsidy portion of the EITC.¹⁹⁸ Moreover, the PRWORA created other unprecedented government benefit restrictions for undocumented immigrant taxpayers with regard to Medicaid, Food Stamps, and SSI.¹⁹⁹

As discussed in Part III, legislators have sometimes justified these prejudicial laws as removing incentives for unauthorized work.²⁰⁰ However, as long as the overall United States tax system continues its windfall of collecting billions of dollars in taxes from undocumented immigrants,²⁰¹ any such justification is unrealistic and plainly unacceptable. These laws are the result of undocumented immigrant stigmatization, a disempowered undocumented immigrant population, and economic incentives to the government budget,²⁰² and they must be reformed.

B. SPECIFIC PROPOSALS FOR REFORM

The problems analyzed above can be addressed through common sense reforms to the laws governing the overall United States tax system. These reforms include: (1) federal payroll tax procedure reform accompanied with payroll tax benefit reform, (2) EITC benefit reform, and

¹⁹⁴ *Supra* Part II.B. *See supra* Part II.

¹⁹⁵ *Supra* Part III.A.2.

¹⁹⁶ *Supra* Part II.A.4.

¹⁹⁷ *Supra* Part II.A.2.

¹⁹⁸ *Supra* Part III.A.1.

¹⁹⁹ *Supra* Part III.A.3.

²⁰⁰ *Supra* Part III.A.1.iii.

²⁰¹ *See supra* Part II.

²⁰² *Supra* Part III.A.1.iii.

(3) other PRWORA reform.

1. Federal Payroll Tax Procedure Reform and Payroll Tax Benefit Reform

i. Federal Payroll Tax Procedure Reform

The simplest way to improve upon the federal payroll tax system is to issue undocumented immigrants SSNs. Such a reform is not far-fetched; prior to 1986, the IRS and SSA managed to keep internal records regarding undocumented immigrants while issuing SSNs to undocumented immigrants.²⁰³ Through such reform, the government would remove the widespread use of fraudulently obtained SSNs, which was not apparent in the tax system prior to 1986.²⁰⁴

Under such a system, if a hypothetical former undocumented immigrant later becomes eligible to apply for Social Security benefits, by becoming “legally present” in the United States and obtaining work authorization, it will be easier for him or her to qualify for Social Security benefits. With a SSN the undocumented immigrant would likely have a more accurate record of his or her earning history to prove the necessary forty-quarters of Social Security covered wages to qualify for benefits.²⁰⁵

It should be noted that the creation of a separate ITIN number for undocumented immigrants was an acknowledgment by the IRS that undocumented immigrants work and will continue to work in the United States,²⁰⁶ and issuing undocumented immigrants SSNs will simply improve the regulation of these acknowledged workers.

Moreover, a more regulated system may overcome some of the stigmatization and disempowerment issues that have created unequal tax treatment for undocumented immigrants by creating a more transparent system that reveals undocumented immigrant taxpayers’ contributions.

ii. Payroll Tax Benefit Reform

A more equitable opportunity for undocumented immigrants to receive benefits from programs funded by payroll taxes can be achieved if restrictions on the provision of benefits from these programs are eased. As discussed in Part III, prior to 2004 undocumented immigrants

²⁰³ Stefonick, *supra* note 39, at 705.

²⁰⁴ Lipman, *supra* note 1, at 21.

²⁰⁵ *Id.* at 25.

²⁰⁶ *Id.* at 22.

that later became “legally present” in the United States for any reason, including being a recognized visitor, recognized tourist, or attaining a student visa, were eligible to receive benefits from programs funded by payroll taxes, regardless of their work authorization status at the time their SSN was assigned.²⁰⁷ Under current law, non-citizens who apply for benefits from programs funded by payroll taxes are required to have work authorization at the time they are assigned a SSN, or some later time, in order to receive benefits.²⁰⁸ By returning to the previous law, former undocumented immigrants will have an easier time qualifying for programs funded by payroll taxes since they will not be required to have work authorization at the time they are assigned a SSN or some later time to receive benefits.²⁰⁹ Thus, such a system would provide a more equitable opportunity for undocumented immigrants to receive benefits from programs funded by payroll taxes by easing restrictions on the provision of benefits from the programs.

2. EITC Benefit Reform

EITC reform to ease restrictions on the eligibility of undocumented immigrants would mitigate the regressive rates at which undocumented immigrant taxpayers are assessed payroll taxes, while also providing undocumented immigrants a refundable cash subsidy. Under current PRWORA restrictions, as discussed in Part III, EITC benefits are denied to individuals who are not authorized to work in the United States with a SSN, including “legally present” and legally working immigrant federal taxpayer families.²¹⁰ Prior to the PRWORA, a former undocumented immigrant that had become “legally present” in the United States was able to file a tax return claiming the EITC by stating that a TIN had been applied for.²¹¹ Returning to the law in place prior to the PRWORA would create a greater opportunity for undocumented immigrant taxpayers to one day obtain EITC benefits. Thus, working-poor former undocumented immigrant families would have an easier path to paying little or no income or payroll taxes, mitigating regressive rates, and, in many cases, being provided with a meaningful wage subsidy cash refund.

²⁰⁷ *Supra* Part III.A.2.i.d.; *Supra* Part III.A.2.ii.

²⁰⁸ *Supra* Part III.A.2.i.d.; *Supra* Part III.A.2.ii.

²⁰⁹ *Supra* Part III.A.2.i.d.; *Supra* Part III.A.2.ii.

²¹⁰ *Supra* Part III.A.1.iii.

²¹¹ Lipman, *supra* note 1, at 39–40.

3. Other PRWORA Reform

Beyond removing restrictions under the PRWORA for EITC, the unprecedented government benefit restrictions of the PRWORA need to be removed for Medicaid, SSI, and food stamps to better equate the taxes paid by undocumented immigrants with the benefits available to those undocumented immigrants.

i. Medicaid

Common sense Medicaid reform involves two aspects: relaxing the restrictions for immigrants to qualify for general Medicaid coverage and broadening the automatic coverage available to undocumented immigrants.

a. Relaxing Restrictions

Under the PRWORA, undocumented immigrants, immigrants permanently residing under color of law, and recent immigrants are denied Medicaid coverage.²¹² Prior to the PRWORA, Medicaid coverage was available to immigrants permanently residing under color of law.²¹³ Returning to the previous application of Medicaid would enable undocumented immigrants to obtain Medicaid coverage more easily and would improve the disproportionate balance of taxes and benefits for undocumented immigrants.

b. Broadening Automatic Coverage

As discussed in Part III, prior to the PRWORA, “publicly-funded health care providers and practitioners customarily provided necessary health services regardless of immigration status.”²¹⁴ Under the PRWORA, automatic coverage is limited to: (1) emergency medical aid, (2) immunizations, and (3) testing and treatment of symptoms of communicable diseases.²¹⁵ A return to the provision of automatic necessary health services for undocumented would improve the United States’ tax system inequitable treatment of undocumented immigrant taxpayers.

ii. Other PRWORA Reform

As with Medicaid, SSI and Food Stamps are denied to immigrants permanently residing under color of law under PRWORA.²¹⁶ Again, returning to the previous versions of SSI and

²¹² *Supra* Part III.A.3.i.b.

²¹³ *Supra* Part III.A.3.i.b.

²¹⁴ *Supra* Part III.A.3.i.b.

²¹⁵ *Supra* Part III.A.3.i.b.

²¹⁶ *Supra* Part III.A.3.ii.

Food Stamps laws by providing such benefits to immigrants permanently residing under color of law²¹⁷ would provide undocumented immigrants with an easier pathway to obtaining SSI and Food Stamps benefits and improve the disproportionate balance of taxes and benefits for undocumented immigrants.

V. CONCLUSION

It is important to note that broadening the benefits available to undocumented immigrants would increase government spending, making reform difficult. However, the point of this paper is to highlight the large contributions of undocumented immigrants to the overall United States tax system and to emphasize that these contributions would be more transparent under a better regulated system where undocumented immigrants are issued SSNs.

As this paper has shown, undocumented immigrants are treated inequitably under the overall United States tax and benefits systems. This is apparent in light of the disproportion between the contributions undocumented immigrant taxpayers make to the overall United States tax system and the government benefits denied to undocumented immigrants, as well as through the prejudicial treatment of undocumented immigrants compared to other classes of taxpayers. These issues can be improved upon through common sense reforms to the regulation of undocumented immigrant contributions and restrictions on government benefits available to undocumented immigrants.

²¹⁷ *Supra* Part III.A.3.ii.