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Taxation of Undocumented Immigrants: The Uneasy Connection Between Regulating the Undocumented Immigrant and Fostering Illegal Activity

*Nneka Obiokoye**

ABSTRACT

The volume of illegal immigration to the United States has been a raging issue in recent years, posing a significant issue for debates during the 2016 presidential election and an important policy concern for the Trump administration. Indeed, this issue was arguably the strongest point of contention among the 2016 presidential candidates and may have largely influenced the results of that election. While the recent increase in terrorist activity accounts for some of the controversy, a large part of the problem is that the average American believes that undocumented immigrants have a parasitical effect on the economy. In other words, they believe that immigrants take away from socio-economic infrastructure—such as welfare, health care, and education benefits—without contributing to society. Factual evidence tends to suggest otherwise, as statistics show that undocumented immigrants do, in fact, contribute a significant amount of federal and state revenue in taxes.

This article seeks to correct some of the negative perceptions held by the general public pertaining to undocumented immigrants, by drawing attention to four major points. First, contrary to popular belief, undocumented immigrants pay taxes. Indeed, as this article will show, in many instances, undocumented immigrants pay a higher rate of tax than U.S. citizens because the burden of tax on such people tends to outweigh the benefits received. Second, undocumented immigrants are human beings with the same needs and desires as every other human. Therefore, laws and policies that tend to make it impossible for such people to provide basic necessities for themselves and their loved ones are not only unfair in the general sense, but they also compel such individuals to engage in illegal activity to provide those necessities. Accordingly, this article argues that the interplay of immigration and employment laws have the effect of forcing these individuals into a cycle of illegal activity out of necessity, whilst enabling better-situated people to exploit them. Third, laws aimed at undocumented immigrants often affect American citizens. This is because

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most undocumented families contain children or dependent relatives who are U.S. citizens. Therefore, laws which are unjust or unfair to undocumented immigrants are often also unjust and unfair to U.S. citizen members of such families. Finally, this article focuses on the interplay between tax and immigration laws that have potentially resulted in a legal and regulatory scheme which is driving undocumented immigrants to engage in illegal activity, as a matter of necessity.

As its overarching theme, this article considers the issues raised above through the lens of signaling—an important component of tax compliance behavior. Signaling is used in this context to refer to norm-inducing behavior, particularly those acts or omissions by individuals or the government that incentivizes people to pay or not to pay taxes. This article argues that policies and laws seeking to integrate undocumented immigrants into the larger society are more beneficial to the tax system and the economy as a whole than a zero-tolerance strategy. Since government behavior has a signaling effect that influences tax compliance, this article argues that the government can achieve more constructive results in tax and immigration law enforcement while simultaneously discouraging illegal activity if it adopts positive signaling in its laws and enforcement strategies.

I. INTRODUCTION

Silvia is the first of six children.¹ Born in a rural village in India, she migrated to the United States in 2010 on a student visa to pursue an associate degree in paralegal studies. Sylvia remained in the United States since then, even though her visa expired. Silvia's degree is not advanced enough to enable her to obtain work authorization or any extension of her immigration documents on her own. Six years after her original entry, Silvia's savings are exhausted. Without work authorization or access to unemployment benefits, she has no idea how she will earn a living. She does not dare go home, for she will likely not be permitted to re-enter the United States. Yet, she cannot afford to remain for much longer without some form of income.

Aisha is in a similar position as Silvia.² However, Aisha is a high school dropout who immigrated to the United States from Libya with her husband, Philip, and her son, Moussa, on non-immigrant visas. They immigrated with hopes that they could somehow rectify their immigration status and make life easier for their family. At the time of their migration, things were difficult in Libya, with a high rate of inflation, and frequent violent clashes between pro-government groups and the resistance. While in the United States, Aisha had twin children, Michael and Mardea. Michael and Mardea are both United States citizens,³ although the rest of their family remains undocumented with long expired non-immigrant visas.

Aisha and Silvia are prototypes of the average undocumented immigrant.⁴ An undocumented immigrant is a person who is in the United States without lawful permission, possibly because they overstayed their non-immigrant visa or entered the United States either without travel documents or with falsified documents.⁵ The Pew Research Center estimates there are about 11 million undocumented immigrants in the United States as of 2014.⁶

In the ideal tax world, where every person is held accountable for the purposes of taxation, all 11 million undocumented immigrants would pay taxes.⁷ In the ideal legal world, where all laws are enforced, none of the 11 million would pay any taxes because all 11 million would be detained, deported, or forced into a state of hiding where they would be outside the reach of law enforcement.⁸ Assume that, like the

1. Silvia is a hypothetical person used for imagery purposes only.

2. Aisha is a hypothetical person used for imagery purposes only.

3. See U.S. CONST. amend. XIV, § 1.

4. Jie Zong, Jeanne Batalova & Jeffrey Hallock, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL'Y INST. (Feb. 8, 2018), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#Demographic>.

5. CONG. RESEARCH SERV., R42628, ABILITY OF UNAUTHORIZED ALIENS TO CLAIM REFUNDABLE TAX CREDITS 4 (2012) [hereinafter ABILITY OF UNAUTHORIZED ALIENS].

6. Jeffrey S. Passel & D'Vera Cohn, *Overall Number of U.S. Unauthorized Immigrants Holds Steady Since 2009*, PEW RES. CTR. (Sept. 20, 2016), <http://www.pewhispanic.org/2016/09/20/overall-number-of-u-s-unauthorized-immigrants-holds-steady-since-2009/>.

7. This is a fictitious idea created for analogy purposes and to enhance the reader's understanding of the article.

8. This is a fictitious idea created for analogy purposes and to enhance the reader's understanding of the article.

United States, the government of such ideal tax world largely relies on self-reporting⁹ for tax collection, and audit rates are similarly low among lower income brackets. The interplay of tax and immigration laws in the ideal legal world would disincentivize undocumented immigrants from paying taxes, either because of the increased risk of apprehension or merely because tax payment would be of no real benefit.¹⁰ Popular opinion in the United States currently assumes this “ideal legal world” scenario.¹¹ Fortunately, in the United States, the real world is a cross between the ideal tax world and the ideal legal world. Current United States tax laws enable all persons to remit their taxes regardless of immigration status, although immigration laws may still affect a person’s willingness to do so.¹²

Part II of this article considers the basic incidence of taxation on the undocumented immigrant. That part will provide the necessary background for this article’s argument that undocumented immigrants not only pay taxes, but have a higher rate of compliance than other people, despite their relatively low audit rate in the U.S.¹³ Part III will consider compliance issues arising in connection with the taxation of undocumented immigrants, signaling considerations affecting such compliance, and the effect of federal agency cooperation on such compliance.

Part IV will examine some of the possible tax and social security revenue benefits enjoyed by undocumented immigrants to determine whether such benefits outweigh the economic burden of federal tax. Part V will delve into efficiency and fairness considerations raised by the “Undocumented Immigrant Tax,” a term used to describe the additional tax on undocumented immigrants occurring as a result of the imbalance between the burden and the benefits created by the tax system.¹⁴

Finally, Part VI will consider the connection between taxation of undocumented immigrants and illegal activity. In other words, do current tax and immigration laws increase illegal activity on the part of undocumented immigrants and people with whom they relate?

II. TAXING THE IMMIGRANT

The following subparts will examine the extent to which undocumented immigrants are taxed, how such taxes are reported, and how compliance is enforced. Among other things, these subparts will show that, contrary to public opinion, undocumented immigrants contribute a significant amount in federal and state taxes even when they do not have traditional incentives to do so.

9. See, e.g., I.R.C. § 6011 (2018); Alan H. Plumley, *The Impact of the IRS on Voluntary Tax Compliance: Preliminary Empirical Results*, IRS NAT’L HEADQUARTERS OFF. OF RES. (2002), <https://www.irs.gov/pub/irs-soi/irsvtc.pdf>; J.T. Manhire, *What Does Voluntary Tax Compliance Mean?: A Government Perspective*, 164 U. PA. L. REV. ONLINE 11, 15 (2015), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1154&context=penn_law_review_online.

10. See Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1783 (2000) (discussing how social norms affect compliance with tax laws).

11. Alexia Fernández Campbell, *Undocumented Immigrants Pay Billions of Dollars in Federal Taxes Each Year*, VOX, <https://www.vox.com/2018/4/13/17229018/undocumented-immigrants-pay-taxes> (last updated Oct. 25, 2018, 2:15 PM).

12. See Part III.D.i.

13. See Posner, *supra* note 10, at 1783–84.

14. See *infra* Part V.

A. Income Taxes

When economists discuss the incidence of taxation, they refer to the person who bears the true burden of a tax and is worse off due to its imposition.¹⁵ Therefore, with respect to the personal income tax, the worker bears the direct burden.¹⁶ Recall the “ideal tax world” and “ideal legal world” analogies raised above. The ideal tax world looks to maximize revenue with the least amount of deadweight loss.¹⁷ This means that the ideal tax world would seek to impose some sort of tax status on all persons, regardless of their immigrant status. This would enable the tax system to capture, to the highest extent possible, all income within its borders.¹⁸ In this ideal tax world, both Aisha and Sylvia would immediately become subject to income taxes on any earned income, regardless of the source. However, they will not necessarily benefit from any credits or allowances under ideal tax world laws unless such credits or allowances are not tied to immigration status or documents.

Current United States federal income tax laws are fashioned to reflect the concept of the ideal tax world with respect to taxation regardless of immigration status.¹⁹ Accordingly, the Internal Revenue Code²⁰ (“the Code”) imposes taxation on *all* persons present in the United States, regardless of their immigration status.²¹ The only personal distinction made by the Code is its treatment of resident and non-resident aliens.²² A resident alien is a person who is either recognized as a United States resident by virtue of permanent residency classification²³ or as anyone who has resided in the United States for a given period of time based on the substantial

15. DANIEL N. SHAVIRO, *DECODING THE U.S. CORPORATE TAX* 59 (Kathleen Courrier et al. eds., 2009).

16. See Daniel S. Goldberg, *E-Tax: Fundamental Tax Reform and the Transition to A Currency-Free Economy*, 20 VA. TAX REV. 1, 13 (2000) (discussing how workers bear the cost of tax incidence).

17. LAURIE L. MALMAN ET AL., *THE INDIVIDUAL TAX BASE: CASES, PROBLEMS AND POLICIES IN FEDERAL TAXATION* 9, 11 (2d ed. 2002). This occurs when a tax imposed on goods or services causes a negative change in behavior (usually a reduction in demand for such goods or services) and a resultant loss in productive output, and the net receipts to the government (as a result of that tax) is smaller than the loss in productive output. For instance, if the government imposes a tax on oranges that makes people stop buying oranges, neither the orange sellers, nor the people who stopped buying oranges, nor the government will benefit since there will be no receipts in taxes due to the lack of a market for oranges. See also Julia Kagen, *Deadweight Loss of Taxation*, INVESTOPEDIA, <https://www.investopedia.com/terms/d/deadweight-loss-of-taxation.asp> (last updated May 2, 2018).

18. Thomas D. Griffith, *Should “Tax Norms” Be Abandoned? Rethinking Tax Policy Analysis and the Taxation of Personal Injury Recoveries*, 1993 WIS. L. REV. 1115, 1151 (1993) (most tax scholars have adopted the Haigs-Simon definition of income. Under the Haig-Simons formulation, economic “income is defined as the sum of an individual’s consumption plus change in wealth during a specified period.”); Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1909 n.9 (1987). However, most tax systems are unable to strictly enforce this definition of income, because of the administrative difficulty of tracking all aspects of income. Particularly where they are negligible, where public policy dictates against taxation, or where such income cannot easily be measured in monetary terms. See *id.* at 1909–10.

19. I.R.C. § 6012 (2018) (the Federal Income Tax Code requires that returns with respect to income taxes shall be made by “every individual having for the taxable year gross income”); see also I.R.C. § 6011(b) (2018); I.R.C. § 7701(b)(1)(A)–(B) (2018).

20. I.R.C. § 26 (2012).

21. See I.R.C. § 6011(a); I.R.C. § 7701(b)(1)(A)–(B).

22. I.R.C. § 7701(b)(1)(A)–(B).

23. This is also known as the “green card.” See *Green Card*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/greencard> (last updated Feb. 22, 2018).

presence test.²⁴ A non-resident alien is any other person who cannot be taxed as a resident.²⁵ Both resident and non-resident aliens are subject to federal taxation; the only distinction is that the former is taxed on their worldwide income, while the latter is generally taxed only on United States source income.²⁶

Given that most undocumented immigrants intend to remain in the United States permanently,²⁷ it is safe to say that, if tax laws are applied as intended, every undocumented immigrant will be taxed as a resident alien.²⁸

Now, consider Silvia, from above. If United States tax laws are applied as intended, Silvia will be taxed on all of her earnings, regardless of her immigration status.²⁹ This means that if Silvia earns a salary, some part of it will be subject to withholding,³⁰ and, at the end of the tax year, Silvia will file a return and claim any refunds due to excess withholding.³¹ If Silvia starts up her own business, she will also have to file a tax return for her business earnings.³²

The data on the amount of actual federal income tax collected from undocumented immigrants is sparse due to the Internal Revenue Service's ("IRS") data sharing restrictions.³³ However, the Office of the Chief Actuary of the Social Security Administration ("OCACT") estimates that there were "about 3.1 million undocumented immigrants working and paying social security taxes in the United States in 2010."³⁴ Assuming that income tax is also withheld from the same

24. I.R.C. § 7701(b)(1)(A), (b)(3) (stating that a person is a resident alien under the substantial presence test "if such individual was present in the United States on at least 31 days during the calendar year, and" for at least 183 days during the current year and the 2 preceding calendar years. In computing the 183-day period, a formula is used which calculates all qualifying days of the present year, one-third of the qualifying days of the preceding year, and one-sixth for the second preceding year).

25. I.R.C. § 7701(b)(1)(B).

26. *Id.*; see also *Taxation of Nonresident Aliens*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/taxation-of-nonresident-aliens-1> (last updated June 5, 2018).

27. James Bachmeier & Jennifer Van Hook, *Profile of the Unauthorized Population: United States*, MIGRATION POLICY INST. (2014), <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US> (showing that as of 2014, about 66% of the adult unauthorized population had been in the U.S. for at least a decade, with a median of 13.6 years; one-third of undocumented immigrants 15 and older lives with at least one child who is a United States citizen by birth; and slightly more than 30% own homes); see also Jens Manuel Krogstad, Jeffrey S. Passel & D'Vera Cohn, *5 Facts about Illegal Immigration in the U.S.*, PEW RES. CTR. (Apr. 27, 2017), <http://www.pewresearch.org/fact-tank/2017/04/27/5-facts-about-illegal-immigration-in-the-u-s/>; Vivian Yee, Kenan Davis & Jugal K. Patel, *Here's the Reality About Illegal Immigrants in the United States*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/interactive/2017/03/06/us/politics/undocumented-illegal-immigrants.html>.

28. Because they will have passed the substantial presence test. See Yee, Davis & Patel, *supra* note 27; see also *4 Tax Laws that Affect Immigrants*, E-FILE.COM, <https://www.e-file.com/faq/immigration-and-taxes.php> (last visited Oct. 25, 2018) (stating that "[w]hen immigrants file taxes with the IRS, they must report their worldwide income.").

29. See Joey Palacios, *Immigrants in the U.S. Illegally Pay Taxes and File Returns Without Fear of Deportation*, KWBU MARKETPLACE (Apr. 15, 2015), <http://www.kwbu.org/post/immigrants-us-illegally-pay-taxes-and-file-returns-without-fear-deportation#stream/0> (stating that "[r]egardless of citizenship status, the IRS requires everyone earning income in the United States to report it."). See generally I.R.C. § 61(a) (2017).

30. I.R.C. § 3402 (2017).

31. I.R.C. § 6401 (2017); I.R.C. § 6511 (2018).

32. I.R.C. § 61(a)(2).

33. See I.R.C. § 6103 (2018); I.R.C. § 6108 (1976).

34. Stephen Goss et al., *Effects of Unauthorized Immigration on the Actuarial Status of the Social Security Trust Funds*, SOC. SEC. ADMIN. ACTUARIAL NOTE NUMBER 151, 3 (Apr. 2013), https://www.ssa.gov/oact/NOTES/pdf_notes/note151.pdf.

paychecks,³⁵ then roughly 3.1 million undocumented immigrants paid federal income tax in 2010. State and local taxes attributable to the undocumented immigrant population are estimated at \$11.64 billion a year.³⁶ “This includes more than \$6.9 billion in sales and excise taxes, \$3.6 billion in property taxes, and just under \$1.1 billion in personal income taxes.”³⁷ “Contributions range from almost \$2.2 million in Montana to more than \$3.1 billion in California.”³⁸

While this article primarily focuses on federal income and payroll tax contributions from undocumented immigrants, the above statistics are instructive. They suggest that in the real world, undocumented immigrants pay both federal and state taxes, which contributes a substantial amount to the government’s revenue on all levels. In addition, as will be seen in Part IV, a large portion of income and payroll taxes withheld at source are unclaimed by the applicable undocumented immigrants due to the compliance issues. Accordingly, it seems that the above statistics underrepresent the actual extent of undocumented immigrant tax contributions to the United States economy. Similar considerations with respect to payroll taxes are discussed below.

B. Payroll Taxes

In much the same way that they bear the incidence of income tax,³⁹ workers bear the direct cost of income and employee payroll taxes withheld at source,⁴⁰ as they are both directly related to compensation.⁴¹ Some argue that workers bear the burden of employer contributions to payroll taxes, since it is likely that these costs are indirectly passed on to workers through a reduction in wages.⁴²

Like income taxes, payroll taxes are means by which funds are pooled into federal and state coffers for use in funding socio-economic infrastructure.⁴³ Contrary to its name, payroll taxes are not limited to employees. These taxes and contributions are structured such that both employers and employees contribute a percentage of the said levies.⁴⁴ In this regard, a self-employed person would be required to contribute both the employer’s and the employee’s portion of the taxes.⁴⁵

35. See *Tax Withholding for Individuals*, INTERNAL REVENUE SERV. (Apr. 12, 2018), <https://www.irs.gov/individuals/employees/tax-withholding> [hereinafter *Tax Withholding for Individuals*] (noting that some employees “can claim exemption from” income tax withholding, but not payroll tax withholding, by showing that (1) “for the prior year, [they] had a right to a refund of all federal income tax withheld because [they] had no tax liability” and (2) “for the current year, [they] expect a refund of all federal income tax withheld because [they] expect to have no tax liability.”).

36. Lisa Christensen Gee et al., *Undocumented Immigrants’ State & Local Tax Contributions*, INST. ON TAX’N & ECON. POL’Y 1, <https://itep.org/wp-content/uploads/immigration2016.pdf> (last updated Feb. 2016).

37. *Id.* at 2.

38. *Id.* at 1.

39. See *supra* Part II.A; see also Goldberg, *supra* note 16.

40. This means that tax is deducted from the employee’s paycheck before the employee receives payment, and directly remitted to the government by the employer. See *Tax Withholding for Individuals*, *supra* note 35.

41. See Kyle Pomerleau, *A Comparison of the Tax Burden on Labor in the OECD*, TAX FOUND. (June 19, 2014), <http://taxfoundation.org/article/comparison-tax-burden-labor-oecd>.

42. *Id.*

43. *Id.* Such as Social Security, Medicare, Medicaid and food stamps.

44. I.R.C. § 3101 (2018).

45. *Id.*

The Federal Insurance Contributions Act (“FICA”) is the primary payroll tax statute.⁴⁶ The FICA imposes a 7.65% tax on all employment wages,⁴⁷ which is required to be withheld at source.⁴⁸ Revenue realized from FICA contributions is applied towards Medicare, social security, and similar benefits.⁴⁹ As previously mentioned, many economists believe that the incidence of employer contributions to payroll taxes falls on the employee.⁵⁰ This means that in addition to the 7.65% tax on their wages, employees bear the burden of the employer’s portion of the payroll tax by indirectly contributing the additional 7.65% tax levied on their employers on the same wages.⁵¹ Assuming this is true, then employees, including undocumented immigrants, pay an effective payroll tax rate of 15.3%.⁵² Undocumented immigrants who own their own businesses will also pay the same 15.3% rate as self-employment taxes.⁵³ Due to restrictions under the Immigration and Nationality Act (“INA”), many undocumented immigrants like Sylvia will end up paying the full 15.3% rate, since they are less likely to find traditional white or blue-collar employment, and are forced to set up cash-based businesses to avoid the relevant work authorization requirements.⁵⁴

The OCACT estimates that “the average amount of” social security taxable earnings from undocumented immigrants, as of 2010, was “about 80[%] of the average level for all workers,”⁵⁵ and that roughly \$13 billion was collected in payroll taxes from unauthorized immigrant workers and their employers.⁵⁶ The OCACT also “estimate[s] that the excess of tax revenue paid to the [social security] Trust Funds over benefits paid from these funds based on earnings of unauthorized workers [in 2010, was] about \$12 billion.”⁵⁷ This means that as of 2010, undocumented immigrants contributed about \$13 billion to payroll taxes, but only claimed \$1 billion in benefits.⁵⁸

There are various reasons why the amount of payroll taxes contributed by these immigrants will exceed benefits collected, and these are discussed in Part V. However, if this trend continues, as predicted by the OCACT, undocumented immigrant workers will continue to have a net positive effect on the United States economy.⁵⁹

46. *Id.*

47. See Amanda Dixon, *All About the FICA Tax*, SMARTASSET (Nov. 16, 2018), <https://smartasset.com/taxes/all-about-the-fica-tax>; see also § 3101 (requiring an additional tax of 0.9% is imposed on wages exceeding 200,000 for single taxpayers and \$250,000 for married filing jointly).

48. I.R.C. § 3102 (2010).

49. § 3101.

50. Pomerleau, *supra* note 41.

51. See I.R.C. § 3111 (2018) (requiring employers to pay an aggregate of 7.65% tax on the wages of each employee); see also Dixon, *supra* note 47.

52. Francine J. Lipman, *The “Illegal” Tax*, 11 CONN. PUB. INT. L.J. 93, 103 (2011).

53. I.R.C. § 1401 (2014) (requiring an additional 0.9% tax on self-employment income above \$200,000 for single taxpayers and \$250,000 for married taxpayers).

54. The Immigration and Reform Control Act requires proof of work authorization in order to secure employment. See 8 U.S.C. § 1324a (2004).

55. Goss et al., *supra* note 34, at 3.

56. Gee et al., *supra* note 36, at 2–3.

57. Goss et al., *supra* note 34, at 2.

58. Alexia Fernández Campbell, *The Truth About Undocumented Immigrants and Taxes*, ATLANTIC (Sept. 12, 2016), <https://www.theatlantic.com/business/archive/2016/09/undocumented-immigrants-and-taxes/499604/>.

59. Goss et al., *supra* note 34, at 3.

The next part considers how federal agencies enforce tax obligations on undocumented immigrants, as well as some of the problems and normative considerations associated with the current compliance system.

III. COMPLIANCE

Having examined the incidence of federal taxation on undocumented immigrants, the next step is to consider how the relevant taxes are collected. The first subpart will consider self-reporting and employee withholding as an important means of tax enforcement within the United States, and how such compliance mechanisms play out with respect to the undocumented immigrant population. Subsequently, this article focuses on signaling—an important element of tax compliance—and discusses how government policies and interagency cooperation could affect compliance on the part of undocumented immigrant taxpayers.

A. Self-Reporting

The United States federal tax system primarily relies on self-reporting for tax enforcement, and the tax audit is the principal method of ensuring compliance.⁶⁰ However, as most scholars on compliance have noted, the audit rate in the United States is actually very low and decreases significantly at lower income levels.⁶¹ For instance, in 2015 the IRS audited 0.8% of individual income tax returns, with a significant part of that number being returns with income above \$1,000,000.⁶² In 2016, the IRS reported an audit rate of 0.6%, a 0.28% drop from the previous year.⁶³

In view of the low audit rate, one would assume that undocumented immigrants would have little or no motivation to report their income. However, the following statistics suggest that they do report their income. In 2005, 1.55 million people filed tax returns using an Individual Tax Identification Number (“ITIN”), a number assigned to foreign nationals and other people who do not have a social security number (“SSN”).⁶⁴ In 2010, over 3 million tax returns were filed using an ITIN.⁶⁵ While these numbers could reflect other categories of people who are not necessarily undocumented immigrants, the IRS and other government entities recognize that undocumented immigrants make up a substantial portion of ITIN users.⁶⁶ In addition, the actual number of undocumented immigrant filings could be larger, as these statistics do not capture the population of undocumented immigrants who paid their

60. Posner, *supra* note 10, at 1783–84; *see also* I.R.C. § 6303 (1976).

61. *Chances for a Tax Audit Have Rarely Been this Low*, CNBC, <https://www.cnbc.com/2017/03/06/chances-for-a-tax-audit-have-rarely-been-this-low.html> (last updated Mar. 6, 2017, 9:18 AM).

62. Scott Greenberg, *The IRS Audited 1.2 Million Households in 2015*, TAX FOUND. (Mar. 31, 2016), <https://taxfoundation.org/irs-audited-12-million-households-2015/>.

63. *See* INTERNAL REVENUE SERV., 2016 IRS DATABOOK 21 (2016), <https://www.irs.gov/pub/irs-soi/16databk.pdf>.

64. ABILITY OF UNAUTHORIZED ALIENS, *supra* note 5, at 1.

65. *Id.*

66. *See* Laura E. Hill & Hans P. Johnson, *Unauthorized Immigrants in California: Estimates for Counties*, PUB. POL’Y INST. CAL. 10–11 (July 2011), http://www.ppic.org/content/pubs/report/R_711LHR.pdf; Associated Press, *Illegal Immigrants Filing Taxes More Than Ever*, NBC NEWS (April 13, 2007, 6:37 AM), http://www.nbcnews.com/id/18077009/ns/business-personal_finance/t/illegal-immigrants-filing-taxes-more-ever/#.W7yWs9Mvz-Y.

taxes through other means, like using a SSN obtained under an expired non-immigrant visa.⁶⁷

Accordingly, despite the small audit numbers for low income earners—the category most undocumented immigrants fall into—undocumented immigrants tend to have a high rate of compliance.⁶⁸ One of the reasons for such compliance is fear of the consequences of a tax audit⁶⁹—particularly, fear of civil or criminal prosecution that could lead to deportation.⁷⁰

Another reason for the high rate of compliance is that failure to comply with tax laws is considered by the courts to be a substantial factor that weighs against an immigrant in deportation hearings.⁷¹ For instance, in *Kawashima v. Holder*, the United States Supreme Court upheld a removal order for resident aliens Akio and Fusako Kawashima based on prior convictions for “willfully making and subscribing a false tax return” and “aiding and assisting in the preparation of a false tax return.”⁷² In its opinion, the Court noted that, because both crimes relied on deceit, they were deportable offenses.⁷³ An important fact of the *Kawashima* case was that it involved a loss to the government of \$10,000 or more, which made it an aggravated felony, and therefore a deportable offense.⁷⁴ However, even if the loss to the government is smaller, failing to file or falsifying income on a tax return is still a felony under the Code.⁷⁵ In any case, such tax behavior amounts to fraud or deceit and, therefore, is a crime involving “moral turpitude” for which deportation is permitted.⁷⁶

Compliance with tax laws is also an important factor considered by immigration authorities for the purpose of determining eligibility to convert from undocumented to documented immigrant status.⁷⁷ For instance, immigrants who intend to become citizens of the United States through naturalization are required to show,

67. See Hill & Johnson, *supra* note 66, at 11; see also Goss et al., *supra* note 34.

68. *Impact of Unauthorized Immigrants on the Budgets of State and Local Governments*, CONG. BUDGET OFF 6–7 (Dec. 2007), <https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/12-6-immigration.pdf>.

69. See I.R.C. § 7201 (1982) (providing that the penalty for tax evasion is a fine of “not more than \$100,000 (\$500,000 in the case of a corporation), or imprisonment for not more than 5 years, or both, together with the costs of prosecution.”).

70. See 8 U.S.C. § 1227 (2008) (setting out various grounds for deportation, including crimes involving fraud or moral turpitude).

71. *Id.*; see *Carty v. Ashcroft*, 395 F.3d 1081, 1085 (9th Cir. 2005) (holding that “willful failure to file a tax return, with the intent to evade taxes, involves fraud, and thus constitutes a crime of moral turpitude,” which could subject an alien to removal). See, e.g., *Kawashima v. Holder*, 565 U.S. 478, 480 (2012) (holding that individuals who commit tax crimes may be subject to deportation); *Jordan v. De George*, 341 U.S. 223, 232 (1951) (stating that crimes involving fraud inherently involve “moral turpitude”).

72. 565 U.S. at 484.

73. *Id.* at 484–85.

74. *Id.* at 484; see also 8 U.S.C. § 1101(a)(43)(M)(i)–(ii) (2014) (defining an “aggravated felony” as a “felony described in [§] 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds \$10,000.”).

75. 26 U.S.C. § 7201 (1982).

76. *Carty*, 395 F.3d at 1085.

77. See Tessa Davis, *The Tax-Immigration Nexus*, 94 DENVER L. R. 195, 217 (2017) (this would apply for instance, to an undocumented immigrant who marries a citizen or permanent resident; or otherwise qualifies for legal documentation through an employer or other filing for applicable visas and work authorization). See also CONG. RES. SERV., *supra* note 5, at 8 (noting that there was a 246% increase in tax reporting by undocumented immigrants when reform bills were introduced in “the 2000s that would have required [undocumented immigrants] to demonstrate that they had paid taxes if they sought legalization or ‘amnesty.’”).

among other things, that they have filed their tax returns in the preceding five years.⁷⁸ The Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”),⁷⁹ which was rescinded in 2017, and the Deferred Action for Childhood Arrivals (“DACA”),⁸⁰ established by executive action under the office of the Secretary of Homeland Security,⁸¹ are good examples of policies that condition deferred action,⁸² or relief from deportation, to undocumented immigrants on compliance with laws—including tax laws.

To request consideration for deferred action under DAPA, an undocumented immigrant is required to show the following:

- As of November 20, 2014, he/she is the parent of a U.S. citizen or lawful permanent resident;
- He/she has continuously resided in the U.S. since before January 1, 2010;
- He/she has been physically present in the U.S. on the date of the memorandum (November 20, 2014) and when applying for relief;
- He/she has no lawful immigration status on that date;
- He/she does not fall within the Secretary’s enforcement priorities,⁸³ and

78. *Applying for Citizenship? What to Know and Bring to Your Naturalization Interview*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Oct. 21, 2013), <https://www.uscis.gov/archive/blog/2013/10/applying-for-citizenship-what-to-know>. See U.S. CITIZENSHIP & IMMIGR. SERVICES, FORM N-400, APPLICATION FOR NATURALIZATION PART 12, §§ 6–8, <https://www.uscis.gov/n-400>.

79. *The Obama Administration’s DAPA and Expanded DACA Programs*, NAT’L IMMIGR. L. CTR., <https://www.nilc.org/issues/immigration-reform-and-executive-actions/dapa-and-expanded-daca-programs/> [hereinafter NAT’L IMMIGR. L. CTR.] (last updated Mar. 2, 2015); U.S. DEPT. HOMELAND SECURITY, RESCISSION OF MEMORANDUM PROVIDING FOR DEFERRED ACTION FOR PARENTS OF AMERICANS AND LAWFUL PERMANENT RESIDENTS (“DAPA”) (2017), <https://www.dhs.gov/news/2017/06/15/rescission-memorandum-providing-deferred-action-parents-americans-and-lawful>.

80. *Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (July 24, 2017), <https://www.ice.gov/daca>.

81. DAPA in particular was considered a landmark executive action under the Obama administration. See Jessica A. Schulberg, *President Obama’s DAPA Executive Action: Ephemeral or Enduring?*, 57 ARIZ. L. REV. 623, 624 (2015).

82. NAT’L IMMIGR. L. CTR., *supra* note 79.

83. Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Leon Rodriguez, Dir., U.S. Dep’t of Homeland Sec., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf’t, & R. Gil Kerlikowske, Comm’r, U.S. Customs & Border Prot. 4 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf; see also Memorandum from John Morton, Dir. U.S. Immigration & Customs Enf’t (Mar. 2, 2011), <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> (the Memorandum sets out three levels or priority for removal of aliens including: conviction for a felony or aggravated felony (classified as highest priority); three or more misdemeanors, or a significant misdemeanor (defined specifically for this purpose as domestic violence, sexual abuse or exploitation) (mid priority); and aliens who have been issued a final order of removal on or after January 1, 2014 (lowest priority)).

- There are no other factors that, in the exercise of discretion, make the grant of deferred action inappropriate.⁸⁴

Similarly, applicants under DACA and the DACA expansion⁸⁵ are required to show that they have satisfied the following:

- He/she came to the United States under the age of 16;
- He/she has continuously resided in the United States for at least five years preceding the date of the memorandum and is present in the United States on the date of the memorandum (June 15, 2012);
- He/she is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- He/she has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety;⁸⁶ and
- He/she is not above the age of 30.⁸⁷

As seen above, both DACA and DAPA condition eligibility for deferred action on the applicant's exclusion from the "enforcement priorities."⁸⁸ Because tax evasion is a felony under the Code⁸⁹ and an aggravated felony under the INA⁹⁰ (in cases where the loss to the government is \$10,000 or more), any undocumented immigrant convicted of either offense would necessarily fall within the highest enforcement priority and thereby would become ineligible for deferred action under DAPA or DACA.⁹¹ Unfortunately, the DAPA program was never implemented due to a federal court injunction⁹² and a United States Supreme Court deadlock on the issue,

84. Johnson, *supra* note 83, at 4.

85. *Id.* at 3 (the DAPA Memorandum sought to expand the category of people eligible for deferred action under DACA).

86. Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., & John Morton, Dir., U.S. Immigration & Customs Enf't 1 (June 15, 2012), <https://www.dhs.gov/publication/memorandum-deferred-action-process-young-people-who-are-low-enforcement-priorities>; *see also* Johnson, *supra* note 83 (these are also set out in the enforcement priorities).

87. Napolitano, *supra* note 86, at 1.

88. Johnson, *supra* note 83, at 3.

89. I.R.C. § 7201 (1982).

90. 8 U.S.C. § 1101(a)(43)(M)(ii) (2014).

91. *See* Morton, *supra* note 83, at 1–2 (making the removal of aliens convicted of any felony the highest priority for removal); *Kawashima v. Holder*, 565 U.S. 478, 484–85 (2012) (noting that offenses carrying losses of more than \$10,000 rise to the level of aggravated felony); 8 U.S.C. § 1101(a)(43)(M)(i).

92. *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

which served to affirm the decision of the lower court.⁹³ Subsequently, in 2017, the current administration issued a formal statement rescinding the DAPA program altogether.⁹⁴ The DACA program, on the other hand, seems to have been preserved in its old form without the expansion provided in the executive order establishing DAPA,⁹⁵ although the current government appears to be taking steps towards extinguishing the program altogether.⁹⁶ However, until the DACA program is completely proscribed, beneficiaries of the program would still need to show compliance with laws—including tax laws—in order to qualify for work authorization or extensions of existing work authorizations.⁹⁷

Evidence of tax compliance is often required by immigration authorities to show “good moral character” in adjustment of status processes, naturalization proceedings, and proceedings relating to cancellation of removal.⁹⁸ For instance, the Second Circuit has held that filing amended income tax returns during a cancellation of removal proceeding may not mitigate the negative impression caused by previously filing an inaccurate return.⁹⁹ Because of this, undocumented immigrants, particularly small business owners, engage in self-reporting as a sign of good faith compliance with the law.¹⁰⁰

Another strong incentive for tax compliance is that banks and other financial institutions require applicants to show proof of tax payment to obtain financing.¹⁰¹ Many undocumented immigrants, like most people, will want to eventually own their own home and purchase personal property, most of which will require some

93. *United States v. Texas*, 136 S. Ct. 2271, 2272, *reh'g denied*, 137 S. Ct. 285 (2016); *see also Consideration of Deferred Action for Childhood Arrivals (DACA)*, US CITIZENSHIP & IMMIGR. SERVICES 12 (Feb. 14, 2018), <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca> [hereinafter *DACA Information*].

94. *See* Memorandum from John F. Kelly, Sec’y, U.S. Dep’t of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigration Services, Thomas D. Homan, Acting Dir., U.S. Immigration & Customs Enf’t, Joseph B. Maher, Acting Gen. Couns., & Kevin K. McAleenan, Acting Comm’r, U.S. Customs & Border Prot. 2 (June 15, 2017), <https://www.dhs.gov/sites/default/files/publications/DAPA%20Cancellation%20Memo.pdf>; *see also* Daniel M. Kowalski, *DHS Sec. Kelly Rescinds DAPA Memo, Leaves DACA Alone...For Now*, LEXISNEXIS: LEGAL NEWSROOM (June 16, 2017), <https://www.lexisnexis.com/LegalNewsRoom/immigration/b/immigration-law-blog/posts/dhs-sec-kelly-rescinds-dapa-memo-leaves-daca-alone-for-now>; Josh Gerstein, *Trump Won’t Alter Status of Current Dreamers*, POLITICO (June 15, 2017, 11:06 PM), <http://www.politico.com/story/2017/06/15/trump-immigration-dreamers-status-239621>.

95. Kelly, *supra* note 94, at 2.

96. *See DACA Information, supra* note 93.

97. *See Frequently Asked Questions: Rescission of Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”)*, U.S. DEPT. HOMELAND SEC. (June 15, 2017), <https://www.dhs.gov/news/2017/06/15/frequently-asked-questions-rescission-memorandum-providing-deferred-action-parents>.

98. *See also Immigration and Taxation*, INTERNAL REVENUE SERV. (2014), <https://www.irs.gov/pub/irs-utl/20-Immigration%20and%20Taxation.pdf> [hereinafter *IRS Presentation*]; *see, e.g., Dominguez-Capistran v. Gonzales*, 413 F.3d 808, 811 n.1 (8th Cir. 2005).

99. *See, e.g., Sumbundu v. Holder*, 602 F.3d 47, 51 (2d Cir. 2010).

100. *See* Maria Sacchetti, *Undocumented and Paying Taxes, They Seek a Foothold in the American Dream*, WASH. POST (Mar. 11, 2017), https://www.washingtonpost.com/local/social-issues/undocumented-and-paying-taxes-they-seek-a-foothold-in-the-american-dream/2017/03/11/bc6a8760-0436-11e7-ad5b-d22680e18d10_story.html?utm_term=.4afeeb46025; Octavio Blanco, *Why Undocumented Immigrants Pay Taxes*, CNN (Apr. 19, 2017, 6:06 AM), <https://money.cnn.com/2017/04/19/news/economy/undocumented-immigrant-taxes/index.html>.

101. *See, e.g., John Kuo, 7 Documents You Need When Applying for a Home Loan*, CREDIT KARMA (Apr. 20, 2017), <https://www.creditkarma.com/home-loans/i/home-loan-documents>; *What Documents Are Part of the Mortgage Process?*, U.S. BANK, <https://www.usbank.com/home-loans/mortgage/first-time-home-buyers/mortgage-process.html> (last visited Oct. 6, 2018) [hereinafter *U.S. BANK*].

form of financing. However, the extent to which undocumented immigrants may actually obtain financing will be limited by other factors,¹⁰² and such individuals will need to take the necessary steps to ensure compliance with tax laws in order to obtain the records required for such financing.¹⁰³

A final incentive for undocumented immigrants to self-report is that refundable tax credits are generally only claimed by persons who file their income tax returns.¹⁰⁴ Certain credits, such as the Additional Child Tax Credit,¹⁰⁵ remain available to undocumented immigrants. Although, the availability of these credits is substantially restricted for undocumented immigrants under relevant sections of the Code¹⁰⁶ and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.¹⁰⁷ The desire to claim these available credits could serve as another strong incentive for undocumented immigrants to self-report.

B. Employee Withholding

A significant degree of compliance with United States tax laws is procured through the employee tax withholding system; employers withhold applicable income and payroll taxes at source, and employees file an income tax return at the end of the fiscal year to either pay any shortfalls in tax, or to receive surpluses in withheld income.¹⁰⁸ Current trends support over-withholding of income, because most taxpayers prefer to receive a refund rather than preserve an obligation to make up shortfalls.¹⁰⁹

In this regard, Sylvia would be subject to withholding if she somehow procured a job after her non-immigrant documents expired by using a SSN obtained as a student on F1 status.¹¹⁰ Likewise, if Aisha establishes her own house cleaning business, for example, she would be subject to withholdings to the extent that she is employed by any person who is under a requirement to withhold taxes and remit them directly to the IRS.

102. See Kuo, *supra* note 101 (including having a credit history or a guarantor).

103. *Id.*

104. See Ryan Yergensen, *Childcare Credits Versus Deduction: An Efficiency Analysis*, 22 TEX. REV. L. & POL. 571, 589 (2018). Cf. Lily L. Batchelder et al., *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 33 (2006) (refundable tax credits offset the tax liabilities of a taxpayer, and include a “refundable [component,] meaning that the tax payer may be paid in cash when there is no federal income tax liability to offset.”).

105. I.R.C. § 24 (2018) (establishing a refundable tax credit for parents of children below the age of 17 at certain income levels).

106. I.R.C. § 32(c)(1)(D) (2018); I.R.C. § 36(d)(1) (2010).

107. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, §§ 401(a), 431, 110 Stat. 2105.

108. I.R.C. § 3402 (2017).

109. See Adam Shell, *Workers Overwithholding: Tax Refunds Could Jump 26% Next Year*, *New Report Claims*, USA TODAY (June 15, 2018, 8:49 AM), <https://www.usatoday.com/story/money/taxes/2018/06/15/overwithholding-tax-refunds-could-jump-26-next-year-report/704515002/> (stating that roughly 75% of US workers make a habit of having too much of their pay withheld from their paychecks); see also Mitchell Hartman, *Why Do People Overpay Their Taxes, Then Get Refunds?*, MARKETPLACE (Apr. 13, 2015, 3:34 PM), <https://www.marketplace.org/2015/04/13/economy/ive-always-wondered/why-do-people-overpay-their-taxes-then-get-refunds>.

110. See *Students and Employment*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/working-united-states/students-and-exchange-visitors/students-and-employment> (last visited Oct. 27, 2018) (the F1 Student Visa is a non-immigrant visa held by international students, which permits its holder to procure certain forms of employment).

Based on IRS and OCACT statistics, a substantial amount of tax paid by undocumented immigrants is remitted through the employee withholding system.¹¹¹ In 2010, OCACT estimated that: 600,000 immigrant workers had temporary work authorized at some point in the past and had overstayed the term of their visas; 700,000 unauthorized workers obtained fraudulent birth certificates at some point in the past, and these birth certificates allowed the workers to get a SSN; and 1.8 million other immigrants worked and used a SSN that did not match their name.¹¹² However, as the paragraphs below indicate, the interplay between immigration and tax laws make this method of tax collection complicated for undocumented immigrants, and may have a negative impact on such persons' ability to collect social security benefits or refunds of surplus taxes.

C. Signaling as an Important Normative Consideration for Tax Compliance

An often-ignored motivation for compliance with tax laws is the signaling effect of such compliance. Undocumented immigrants who are questioned about why they pay taxes respond that they wish to be seen as law-abiding members of the community.¹¹³ In other words, these individuals believe that compliance with tax laws signals that they are "good" members of society, which helps them assimilate better within its structure.¹¹⁴ Compliance is therefore something connected to their reputation as law-abiding members of the society, as opposed to merely being predicated by a desire to obey the law.

Signaling behavior can emanate from taxpayers or from the government. When it emanates from the taxpayer, signaling is usually connected to their need to achieve a certain reputation within their society.¹¹⁵ On the other hand, when signaling is considered in connection with government or quasi-government action, it relates to actions by applicable institutions that encourage positive or negative tax compliance behavior on the part of the taxpayer.¹¹⁶

Signaling is particularly important for undocumented immigrants who form part of the "underground economy," a term of art used to describe persons who receive all payments for goods and services in cash to avoid certain legal and regulatory reporting requirements and taxation.¹¹⁷ Because individuals in the underground economy have already taken affirmative steps to avoid regulation and taxation, the government would need to take additional steps to ensure that income earned by such individuals is actively brought into tax revenue.¹¹⁸

In his article on tax compliance, Judge Richard Posner considers the characteristics and effects of the signaling theory on tax compliance, noting that this could

111. See Gee et al., *supra* note 36, at 4; Goss et al., *supra* note 34, at 3.

112. Goss et al., *supra* note 34, at 2, 4.

113. See Blanco, *supra* note 100.

114. *Id.*

115. See Posner, *supra* note 10, at 1806.

116. *Id.* at 1792.

117. See George L. Priest, *The Ambiguous Moral Foundations of the Underground Economy*, 103 *YALE L.J.* 2259 (1994).

118. *Id.* at 2273 (arguing that underground economies serve a moral purpose of increasing economic opportunities for the poor and other victims of discrimination).

be a reason for tax compliance in the United States despite the small audit and prosecution rates for tax offenses.¹¹⁹ In this regard, Posner defines social norms as “equilibrium-signaling behavior,” arguing that tax compliance is a social norm used by members of society to signal that they are of a “good type” with whom association is desirable.¹²⁰ He further suggests that the government should encourage such norms through certain signals that indicate its willingness to be fair to taxpayers, such as guaranteeing confidentiality of taxpayer information and providing procedural safeguards for tax audits and litigation.¹²¹ In other words, taxpayers would be inclined to conform to social norms relating to tax compliance if it appears the government treats them equally across the board.¹²² This idea appears to explain the reputational character of tax compliance among undocumented immigrants and the high value placed on confidential tax reporting, to the extent that it enables them to continue this practice.¹²³

Undocumented immigrants arguably have a stronger incentive to signal compliance with tax laws than other people, because they feel more pressure to seek acceptance within their immediate community.¹²⁴ For this reason, undocumented immigrants who purchase a home, lease a commercial space, or buy personal property that is easily observable by members of their community indirectly signal that they have complied with all applicable legal and regulatory requirements. To put it in a more picturesque form, the individual in question might as well be walking around saying to their neighbors, “Look, I pay my taxes. I am a law-abiding citizen. That is how I qualified for the loan that financed this home, etc.” Similarly, because receiving a tax refund signals that taxes have been paid, the fact that an undocumented immigrant can discuss their refund with their neighbor indicates that they are conforming to the social norms of their society.

Even where such positive signaling behavior is not warranted by the need to show commitment within their immediate community, the considerations discussed above, regarding tax compliance as an important factor for granting legal immigrant status or deferred action, are arguably signals by the government which invite compliance with tax laws. Likewise, when banks and other commercial or quasi-government institutions only request evidence of tax compliance, and opt to forgo additional inquiry into immigration status, those institutions send a signal. This message tells people that irregularities in immigration status could be overlooked if the applicant pays their taxes.¹²⁵ Further, as discussed in more detail below,¹²⁶ the IRS provides similar signals by (1) keeping taxpayers’ identities confidential, even from

119. See Posner, *supra* note 10, at 1783–84.

120. *Id.* at 1788–1800 (good types are associated with low discount rates; the willingness to sacrifice short term gains for long term benefits).

121. *Id.* at 1792–99.

122. *Id.*

123. *Taxpayer Bill of Rights*, INTERNAL REVENUE SERV., <https://www.irs.gov/pub/irs-pdf/p5170.pdf> (last visited Oct. 27, 2018) (in 2014, the IRS adopted the “Tax Payer Bill of Rights” culled from provisions of the Code. Among other things, the Bill of Rights guarantees privacy, confidentiality and due process in audit proceedings).

124. See, e.g., Blanco, *supra* note 100.

125. See, e.g., U.S. BANK, *supra* note 101 (certain lenders may require a credit score, personal identifying information and W-2 or I-9 tax forms as proof of employment or income and forego requesting for valid visas or immigration documents); Rohit Mittal, *Personal Loans for Non-Citizens & Nonresidents in the USA*, STILT, <https://www.stilt.com/blog/2018/01/non-us-resident-loan/> (last visited Oct. 27, 2018).

126. See *infra* Part III.D.

immigration authorities, and (2) recognizing that refundable credits are not government benefits, except where expressly indicated by law.¹²⁷

Negative government signals, such as refusing to grant any form of confidentiality in tax reporting, could reduce compliance. In that case, just like the ideal legal world scenario discussed above, people like Sylvia and Aisha would be motivated to consume as many resources as possible and avoid any interaction with government authorities, including the IRS, for fear of apprehension and removal. In other words, if undocumented immigrants feel that there are no real incentives for good behavior, they may consider it more beneficial to adopt behavioral patterns that maximize short term gains (including tax evasion) at a higher cost to society.¹²⁸

In the next sub-part, this article considers whether there is a connection between filing taxes and immigration enforcement, while keeping in mind the overarching discussion above regarding the effect of government signaling on tax compliance.

D. Interagency Cooperation: Is there a Connection Between Filing Taxes and Immigration Enforcement?

This part concludes the analysis of compliance issues and the significance of signaling. In the succeeding paragraphs, this article will examine the extent to which filings with the relevant federal tax enforcement agencies and communications between such agencies may result in immigration enforcement against undocumented immigrants. In other words, when an undocumented immigrant files their taxes, would this trigger closer immigration scrutiny? Accordingly, the disclosure obligations and limitations of the IRS, which administers federal income taxes, and the Social Security Administration (“SSA”), which administers FICA (payroll) taxes, will be examined in turn.

i. Internal Revenue Service

The IRS is under a legal obligation not to disclose identifying information regarding any taxpayer without his or her consent.¹²⁹ In fact, to ensure an increase in undocumented taxpayer confidence, with respect to keeping personal information confidential, the IRS has issued the following guidance on taxes filed using non-conforming SSNs:

[I]f the individual has used someone else’s social security number to obtain employment, that SSN should be reflected on the Form W-2 the employer issues to that individual. So long as the individual uses his or her ITIN to properly report the wages that are reflected on the Form W-2 and pay the tax associated with that income, the individual has not violated the internal revenue laws.¹³⁰

127. See IRS Presentation, *supra* note 98, at 3–4, 45.

128. See, e.g., Posner, *supra* note 10, at 1786 (regarding Posner’s analysis of the “prisoner’s dilemma”).

129. 26 U.S.C. § 6103 (2018).

130. Memorandum from Susan L. Hartford, Tech. Advisor to the Special Counsel, I.R.S. to Nina E. Olson, Nat’l Taxpayer Advoc. 2 (June 21, 2010), https://www.irs.gov/pub/lanoa/pmta_2010-21.pdf

This is consistent with past IRS confidentiality practices that have indicated the IRS will not prosecute anyone who reports illegally earned income on their tax returns, although they may still face criminal liability under other laws.¹³¹ It also lends credence to the IRS's understanding, although not formally stated, that signaling is a strong factor in ensuring tax compliance, particularly on the part of undocumented immigrants.¹³²

There are some exceptions to the rule regarding taxpayer confidentiality. The most notable exception is the IRS's obligation to disclose tax return information to "law enforcement agencies who are investigate[ng] and prosecute[ng] non-tax criminal laws."¹³³ This means that while undocumented immigrant taxpayers would not ordinarily attract immigration scrutiny by merely filing their tax returns, information filed with the IRS by undocumented immigrants who have committed a non-tax related criminal offense may still be discovered by immigration authorities.¹³⁴

Another important exception to IRS confidentiality rules is that the IRS may disclose information relating to payroll taxes and income taxes to the SSA.¹³⁵ However, as discussed below, employees of the SSA who receive this information are required to keep it confidential in the same way that the IRS would.¹³⁶

It seems as though the IRS has adopted the correct stance with respect to ensuring undocumented taxpayer compliance through positive signaling. However, whether this stance will continue under the present regime, given the current push for stronger immigration enforcement in all federal agencies, is unclear.¹³⁷

ii. Social Security Administration

The SSA does not have the same confidentiality obligations as the IRS with respect to information in its custody. In fact, under the INA, the SSA is required to disclose the identity and location of aliens to the Department of Homeland Security ("DHS") and the United States Citizen and Immigrations Services ("USCIS").¹³⁸ However, different restrictions apply depending on whether the information is classified as tax or non-tax information.¹³⁹ Non-tax information may be disclosed upon

(however, the same guidance notes that an individual who provides the employer with false identification documents to obtain employment has violated 18 U.S.C. § 1028(a)(1) (2006)).

131. See, e.g., TEX. BUS. & COM. CODE ANN. § 521.051(a) (2009); 18 U.S.C. § 1028.

132. See IRS Presentation, *supra* note 98, at 20.

133. I.R.C. § 6103(i)(1) (2018); see also *Disclosure Laws*, INTERNAL REVENUE SERV., <https://www.irs.gov/government-entities/federal-state-local-governments/disclosure-laws> [hereinafter *Disclosure Laws*] (last updated Nov. 29, 2018) (summarizing applicable IRS disclosure laws).

134. § 6103(i)(1); see also *Disclosure Laws*, *supra* note 133.

135. § 6103(l)(1) (providing that return information related to taxes imposed under Chapters 2, 21, and 24 may be disclosed to the SSA as needed to carry out its responsibilities under the Social Security Act. Chapter 2 relates to self-employment income and does not normally concern employers. Chapter 21 concerns social security and Medicare (FICA) tax. Chapter 24 deals with income tax withholding).

136. SOCIAL SECURITY ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM, GN 03313.095, DISCLOSURE TO THE DEPARTMENT OF HOMELAND SECURITY (DHS) (Dec. 2, 2016), <http://policy.ssa.gov/poms.nsf/lnx/0203313095> [hereinafter POMS].

137. Amanda Sakuma, *Donald Trump's Plan to Outsource Immigration Enforcement to Local Cops*, ATLANTIC (Feb. 18, 2017), <https://www.theatlantic.com/politics/archive/2017/02/trump-immigration-enforcement/517071/>.

138. 8 U.S.C. § 1360(b) (1996).

139. POMS, *supra* note 136.

a written request from DHS or USCIS.¹⁴⁰ Tax information,¹⁴¹ on the other hand, is more restricted and may only be disclosed if the taxpayer in question earned income on a non-work SSN.¹⁴² In that case, the SSA may disclose the reported earnings, the name, and the address of the taxpayer and the person who reported the earnings.¹⁴³ These disclosure requirements are presumably aimed at addressing the issue of social security misuse. It is not clear whether the SSA will voluntarily disclose information on returns based on falsified or non-matching SSNs issued for work purposes,¹⁴⁴ although it would seem that this information may be procured upon request by the Attorney General of the United States.¹⁴⁵

In view of the foregoing, it appears that disclosing a taxpayer's immigration information is more likely to occur under the SSA rather than the IRS, which means that undocumented immigrants subject to employer withholdings are more likely than others to face immigration scrutiny on account of FICA tax filings. Nevertheless, it is difficult to say with confidence that the likelihood of exposure will substantially reduce the possibility that these individuals will pay taxes or file annual returns, particularly when such taxes are withheld at source. In any case, a taxpayer whose FICA taxes are withheld at source may consider it advantageous at that point to file an annual return in order to benefit from any available refundable tax credit. All things considered, the above discussion supports the proposition that, in circumstances where taxpayer autonomy is an integral part of tax compliance, positive signaling by the government that discourages immigration enforcement solely on account of tax reporting goes a long way in securing an undocumented taxpayer's compliance.

The next part of this article discusses the extent to which undocumented immigrants receive benefits under applicable laws, with an emphasis on social security, Medicare, Medicaid, and refundable tax credits, respectively. This article also discusses the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA").¹⁴⁶ An examination of Medicare and Medicaid benefits will illustrate how this law substantially circumscribes undocumented immigrants' access to benefits under various laws.

140. *Id.* (non-tax information is defined as information on the social security card or application, such as social security numbers, date of birth, place of birth, or address information. A request for such information must be written and must state that the individual about whom the information is sought is an alien. If DHS or USCIS does not state that the subject individual is an alien, the identity and location information, and if it is located in SSA records, it may be disclosed if SSA records indicate the individual was an alien when he/she last received a social security card).

141. *Id.* (information such as names and addresses included in wage reports submitted to SSA by employers and self-employed individuals are considered tax return information and are restricted from disclosure unless the taxpayer in question has made earnings under a social security number that was not issued for work).

142. 8 U.S.C. § 1360(c).

143. *Id.* (pre-1997 earnings may only be disclosed with the consent of the IRS and at the discretion of the SSA. However, the SSA is required to provide annual returns of post-1997 earnings to the DHS and USCIS).

144. *Id.* § 1360(b) (the extent of disclosure is governed by the Privacy Act routine use exception).

145. *Id.*

146. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

IV. RECEIVING THE BENEFITS OF TAXATION

As noted earlier, income tax and payroll tax revenues are usually allocated, at least in part, to the socioeconomic functions of government. Social security, Medicare, and Medicaid are some of the benefits that are directly derived from taxation.¹⁴⁷ Refundable credits are another class of quasi-benefits that qualifying taxpayers may claim, particularly in instances where the credits have a welfare purpose and could potentially result in zero or negative tax liability.¹⁴⁸ However, as this article will show below, most of these benefits are outside the reach of the undocumented immigrant because they are usually tied to legal immigration status, work authorization, or both.

A. Social Security

The current social security system benefits people who have already retired, people who are disabled, survivors of workers who have died, and dependents of beneficiaries.¹⁴⁹ Social security benefits are generally funded from the revenue derived from payroll taxes, which are deposited into applicable trust funds¹⁵⁰ and paid out to eligible individuals. To establish eligibility, a taxpayer must submit certain qualifying documents, including proof of United States citizenship or lawful immigration status and a SSN.¹⁵¹

Because most undocumented immigrants will have neither a SSN nor a document evidencing lawful immigration status, they will be excluded from claiming these benefits even though they may have contributed towards them. While current taxpayers do not immediately receive benefits, unless they are disabled or are survivors of deceased workers,¹⁵² payments towards social security are credited to each person's earnings record by the SSA for the purpose of establishing eligibility and determining the amount of benefits to which they are entitled.¹⁵³ This means that earnings by undocumented immigrants which are not properly allocated to their earnings records will not count towards their eligibility for benefits.

Notwithstanding, certain classes of undocumented immigrants may still be eligible for benefits, such as: “[(1)] individuals who began receiving benefits before 1997 and never obtained authorization to work; [(2)] individuals who never obtained authorization to work, received a SSN before 2004, and now live abroad;

147. SOCIAL SECURITY ADMIN., UNDERSTANDING THE BENEFITS (2018), <https://www.ssa.gov/pubs/EN-05-10024.pdf> [hereinafter UNDERSTANDING THE BENEFITS].

148. Such as the Earned Income Tax Credit (EITC). See I.R.C. § 32 (2018).

149. SOCIAL SECURITY ADMIN., RETIREMENT BENEFITS (2018), <https://www.ssa.gov/pubs/EN-05-10035.pdf>.

150. Such as the Old-Age and Survivors Insurance (“OASI”) and the Disability Insurance (“DI”) Trust Funds. See *Old-Age & Survivors Insurance Trust Fund*, SOCIAL SECURITY ADMIN., <https://www.ssa.gov/oact/progdata/describeoasi.html> (last visited Oct. 28, 2018); *Disability Insurance Trust Fund*, SOCIAL SECURITY ADMIN., <https://www.ssa.gov/oact/progdata/describedi.html> (last visited Oct. 28, 2018).

151. UNDERSTANDING THE BENEFITS, *supra* note 147, at 5.

152. And even then, eligibility for benefits may be restricted by the tax payer's own eligibility, or that of a deceased spouse or parent. See Michael Doran, *Intergenerational Equity in Fiscal Policy Reform*, 61 TAX L. REV. 241, 246 (2008).

153. UNDERSTANDING THE BENEFITS, *supra* note 147, at 2–3.

[(3)] individuals who currently have authorization to work but did not have authorization while previously residing within the United States”; [(4)] those who received a SSN on account of a non-immigrant visa which has now expired; and [(5)] those who “obtained a SSN through illegitimate means.”¹⁵⁴ In each of these cases, however, the requirement to document ownership of reported taxable earnings is still a high hurdle, and meeting this requirement seems to be the exception and not the rule.

As indicated above, approximately “3.1 million undocumented immigrants [re-mitted payroll] taxes in 2010.”¹⁵⁵ However, a large percentage of this number was unable to receive the benefits of the earnings, because (1) claiming such earnings might have triggered immigration scrutiny,¹⁵⁶ (2) the relevant earnings may have been credited to someone else’s record,¹⁵⁷ or (3) they may have been credited to the Earnings Suspense File (where the name and SSN do not match).¹⁵⁸ Unclaimed income that is credited to the Earning Suspense File will be recycled into the general social security revenue and allocated to the applicable socioeconomic infrastructure.¹⁵⁹

Since suspended wages can affect a person’s eligibility for—and the amount of—social security benefits, a substantial number of undocumented immigrants who pay social security taxes will receive little or no social security benefits in return.¹⁶⁰ For instance, if Aisha or her husband Philip apply for a job, they will likely be asked to provide SSNs for employment authorization verification. Since they will not have valid SSNs, Aisha and Philip may resort to providing an ITIN or falsified, stolen, or borrowed SSNs. In any of these scenarios, none of Aisha or Philip’s FICA contributions will count towards their respective earnings record. Rather, such contributions will be moved to the Earnings Suspense File and will be treated as regular government revenue if left unclaimed. Considering that, as of 2016, at least “two-thirds of undocumented immigrants” have been in the United States for more than a decade, these numbers begin to add up considerably.¹⁶¹

154. Goss et al., *supra* note 34, at 2–3.

155. *Id.* at 3.

156. *See supra* Part III.

157. This might occur when the social security number and the name submitted to the employer match the Social Security Administration’s records of that particular individual, but they are not a match to the undocumented immigrant that submits that information to their employer. *See* OFFICE OF THE INSPECTOR GEN. OF THE SOCIAL SEC. ADMIN., Report No. A-03-15-50058, STATUS OF THE SOCIAL SECURITY ADMINISTRATION’S EARNINGS SUSPENSE FILE (2015), <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-03-15-50058.pdf>.

158. *Id.* (this Report discloses that the “SSA posted to the ESF about 37 million (95[%]) W-2s representing \$351 billion in wages for [tax years] 2008 to 2012 because the name and SSN combinations did not match SSA’s records.” Three percent of the W-2s were suspended because SSA’s records showed number holders disclaimed the wages, were deceased, or were minor children. “The remaining [two] percent of suspended W-2s included invalid SSNs that resembled an [ITIN] issued by the” IRS. The Report also notes that a name and SSN mismatch “can occur for such reasons as the (1) wage earners changed their names and did not notify SSA; (2) employers reported the name and social security number incorrectly; or (3) individuals deliberately used a social security number that did not belong to them.” An individual may disclaim wages where such individual fraudulently used someone else’s documents and obtained a social security number with that person’s number).

159. Martin H. Bosworth, *The Earnings Suspense File: Social Security’s “Secret Stash”*, CONSUMER AFFAIRS, https://www.consumeraffairs.com/news04/2006/02/ss_secret_stash.html (last visited Oct. 28, 2018).

160. Goss et al., *supra* note 34, at 5.

161. *The Truth about America’s Illegal Immigrants*, WEEK (Sept. 24, 2016), <http://theweek.com/articles/650402/truth-about-americas-illegal-immigrants>.

B. Medicare and Medicaid

As mentioned briefly in the foregoing parts, federal taxes are used to fund Medicare and Medicaid—initiatives that target poor persons, disabled persons, and persons who have reached retirement age.¹⁶² Unfortunately, much like other benefits discussed in this article, undocumented immigrants are ineligible for Medicare, Medicaid, and even food stamps.¹⁶³

i. The Personal Responsibility and Work Opportunity Reconciliation Act

The PRWORA is the foundational statute under which Medicare and Medicaid benefits are denied to undocumented immigrants.¹⁶⁴ Among other things, the PRWORA expressly provides that any alien who is not a “qualified alien”¹⁶⁵ “is not eligible for any federal public benefit.”¹⁶⁶ A similar restriction is placed on eligibility for state and local public benefits under any state statute.¹⁶⁷ As one would expect, undocumented aliens are not included in the definition of qualified aliens.¹⁶⁸

State and local “public benefits” are defined as follows:

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and

(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any

162. See 42 U.S.C. § 1396b(v) (2018).

163. *Id.* In addition to restricting Medicaid access to certain classes of immigrants, this statute conditions state eligibility for Medicaid funding on the restriction of access to Medicaid to individuals who lawfully reside in the United States. Note that the subsequent expansion of Medicaid under the Affordable Care Act continues to be subject to this restriction pertaining to undocumented aliens. Several states including New York, Indiana, and Illinois have adopted statutes which do not permit undocumented immigrants to obtain healthcare under Medicaid, except in emergency situations. See *Greenery Rehab. Grp., Inc. v. Sabol*, 841 F. Supp. 58 (N.D. N.Y. 1993).

164. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105. See Elizabeth R. Chesler, *Denying Undocumented Immigrants Access to Medicaid: A Denial of Their Equal Protection Rights?*, 17 B.U. PUB. INT. L.J. 255, 259 (2008).

165. See 8 U.S.C. § 1641 (2008).

166. 8 U.S.C. § 1611 (1998) (maintaining certain exceptions for enumerated emergency benefits).

167. 8 U.S.C. § 1621 (1998).

168. See 8 U.S.C. § 1641 (defining “qualified alien” as

[A]n alien who, at the time the alien applies for, receives, or attempts to receive a Federal public benefit, is—

- (1) an alien who is lawfully admitted for permanent residence under the Immigration and Nationality Act,
- (2) an alien who is granted asylum under section 208 of such Act,
- (3) a refugee who is admitted to the United States under section 207 of such Act,
- (4) an alien who is paroled into the United States under section 212(d)(5) of such Act for a period of at least 1 year,
- (5) an alien whose deportation is being withheld under section 243(h) of such Act,
- (6) an alien who is granted conditional entry pursuant to section 203(a)(7) of such Act, or
- (7) an alien who is a Cuban and Haitian entrant (as defined in section 501(e) of the Refugee Education Assistance Act of 1980)).

other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.¹⁶⁹

“Federal public benefits” include the following:

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and

(B) any retirement, welfare, health, disability, public or assisted housing, post secondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.¹⁷⁰

In addition to Medicare and Medicaid, the PRWORA also prevents undocumented immigrants from claiming other forms of federal aid, such as food stamps,¹⁷¹ Supplemental Security Income, and Temporary Assistance for Needy Families.¹⁷² Finally, the PRWORA requires states that receive federal grants for certain social services to provide “names, addresses, and other identifying details of [undocumented immigrants to the] Immigration and Naturalization Service.”¹⁷³ A similar obligation is imposed on public housing agencies that provide aid under federal housing programs.¹⁷⁴ These provisions make it unlikely that undocumented immigrants will seek federal or state welfare benefits, even when they are not expressly excluded. However, as discussed next, refundable tax credits are treated somewhat differently from the other benefits discussed so far.

C. Refundable Tax Credits

Generally, refundable tax credits are not considered to be federal benefits.¹⁷⁵ This means that except where expressly prohibited by law, the IRS will offer tax credits to all eligible persons regardless of their immigrant status.¹⁷⁶ The IRS has

169. 8 U.S.C. § 1621.

170. 8 U.S.C. § 1611.

171. 8 U.S.C. § 1621. Though it may be available to minor children. *See* 8 U.S.C. § 1641; *see also* Gabrielle Lessard, *Reflections on the 20th Anniversary of the Personal Responsibility and Work Opportunity Reconciliation Act*, NAT'L IMMIGR. L. CTR. (Aug. 22, 2016), <https://www.nilc.org/news/torch/8-22-16/>.

172. 8 U.S.C. § 1611(c); *see also* 8 U.S.C. § 1612 (2008).

173. 42 U.S.C. § 611(a) (1996).

174. 42 U.S.C. § 1437y (1997).

175. *See* IRS Presentation, *supra* note 98, at 7; *see also* ABILITY OF UNAUTHORIZED ALIENS, *supra* note 5, at 8.

176. *See, e.g.*, I.R.C. § 37 (2008); I.R.C. § 6401 (2017); Brooks Jackson, *Tax Credits for Illegal Immigrants*, FACTCHECK.ORG (May 11, 2012), <https://www.factcheck.org/2012/05/tax-credits-for-illegal-immigrants/>.

repeatedly affirmed its stance on granting access to refundable credits to undocumented immigrants, noting that:¹⁷⁷ (1) the purpose of refundable credits is to assist poor, working families who pay taxes, and denying them these credits would deprive them access to support; and (2) within families where parents or heads of household are undocumented immigrants, there may be up to 4 million children who are United States citizens by birth who would be denied rightful benefits if the credits were declined.¹⁷⁸ As such, undocumented immigrants are not generally restricted from claiming refundable tax credits.

However, the PRWORA amended the Code to provide that the EITC—a refundable tax credit that could be used to offset tax obligations and which includes a positive payment component regardless of tax liability—is not available to persons who do not possess a SSN.¹⁷⁹ While the EITC has been widely praised as a success story in welfare reform, undocumented immigrants will not enjoy this benefit.¹⁸⁰ For similar reasons, undocumented immigrants were unable to claim the 2008 Economic Stimulus Tax credit¹⁸¹ and the Making Work Pay credit.¹⁸²

A notable tax credit that would be available to undocumented immigrants is the Additional Child Tax Credit (“ACTC”), which is the refundable portion of the Child Tax Credit available to families with children below age 17.¹⁸³ However, there has been a strong push to prevent undocumented immigrants from claiming the ACTC.¹⁸⁴ “In a letter to President Trump dated February 11, 2017, [U.S.] Representative Luke Messer, R-Ind., asked Trump to issue an executive order directing the Treasury Department to prohibit the [IRS] from allowing individuals to file for the Child Tax Credit or the [ACTC] without an” SSN.¹⁸⁵ “Most Americans are astonished to learn that each year billions of taxpayer dollars are given out to people who are in our country illegally,” Messer said in a written statement.¹⁸⁶ Messer also introduced legislation H.R.363 that, if passed, would require those individuals applying for child tax credit deductions to include in their tax returns a valid SSN for the parent, as well as their children.¹⁸⁷

The high number of ACTC claims by undocumented immigrants could be explained by the fact that undocumented immigrants tend to be younger than the U.S. population overall and are more likely to be in the child-bearing and child-rearing

177. See, e.g., IRS Presentation, *supra* note 98.

178. See *id.* at 9.

179. See I.R.C. § 32(c)(1)(D), (m) (2018) (including for spouses and children who do not possess social security numbers).

180. For a more comprehensive analysis of the EITC, see Ann L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533 (1995).

181. I.R.C. § 6428(e)(3)(A) (repealed 2014).

182. I.R.C. § 36A(d)(1)(A)(i) (repealed 2014).

183. *Id.*

184. See TREASURY INSPECTOR GEN. FOR TAX ADMIN., No. 2011-41-061, INDIVIDUALS WHO ARE NOT AUTHORIZED TO WORK IN THE UNITED STATES WERE PAID \$4.2 BILLION IN REFUNDABLE CREDITS (2011), <https://www.treasury.gov/tigta/auditreports/2011reports/201141061fr.pdf> [hereinafter TIGTA REPORT].

185. Dean DeChiaro, *Messer Asks Trump to Block Tax Loophole for Illegal Immigrants*, CQ ROLL CALL, Feb. 14, 2017, 2017 CQIMMRPT 0088; see also Press Release, U.S. Congressman Luke Messer, Rep. Messer Pushes to Eliminate Tax Credits for Illegal Immigrants: Says Proposal Should be Part of Tax Cut Package (Oct. 4, 2017), <https://messenger.house.gov/news/documentsingle.aspx?DocumentID=647>.

186. DeChiaro, *supra* note 185.

187. Child Tax Credit Integrity Preservation Act of 2017, H.R. 363, 115th Cong (2017).

years; nearly half (about 46%) of unauthorized adults are parents of minor children.¹⁸⁸ More importantly, if one considers that a significant portion of the households headed by unauthorized aliens may have United States citizen children, as well as spouses who may be legal permanent residents, then the validity of the concerns underlying the push to eliminate this credit for undocumented immigrants begins to be called into question.¹⁸⁹

In 2010, the Pew Hispanic Center estimated that “at least 9 million people [were] in ‘mixed-status’ families that included at least one unauthorized adult alien and at least one U.S.-born child.”¹⁹⁰ “Along with the approximately 1 million unauthorized [aliens] who are [minor] children,” Pew researchers estimated that 4.5 million minor children have been born in the United States to a family in which at least one parent was an unauthorized alien.¹⁹¹ Further, data collected in 2013 by the Census Bureau’s American Community Survey showed that a total of 5.1 million U.S.-born children were living with an undocumented parent.¹⁹² Applying this to the hypothetical example using Aisha’s household, if one considers that Michael and Mardea are both United States citizens in a family headed by undocumented parents, Aisha and Philip, equity and fairness considerations begin once again to come into play. In other words, is it fair or equitable to take away benefits from undocumented immigrants when such denial would ultimately mean deprivation to American citizens?

A recent amendment to the Code appears to have addressed this problem by requiring the ACTC be claimed only with respect to children who have SSNs.¹⁹³ As of yet, there is no indication that the parents of such children would also need to furnish *their own* SSNs in order to claim the credit.¹⁹⁴ As noted above, the push continues towards preventing undocumented *parents* from claiming such credits, even where their children would otherwise qualify.¹⁹⁵

In any case, a sizeable number of undocumented immigrants will be unable to claim any tax credits or refunds on excess taxes withheld, because they either did not have a valid SSN at the time of withholding and the statute of limitations passed, or because they lack the necessary documents required to obtain an ITIN before the end of the limitations period.¹⁹⁶ Other undocumented taxpayers will forgo filing tax returns to claim refunds, because they fear deportation, particularly when such taxpayers obtain employment using false or borrowed SSNs, or SSNs issued under

188. Paul Taylor et al., *Unauthorized Immigrants: Length of Residency, Patterns of Parenthood*, PEW RES. CTR. (Dec. 1, 2011), <http://www.pewhispanic.org/2011/12/01/unauthorized-immigrants-length-of-residency-patterns-of-parenthood/>.

189. *Id.*

190. *Id.*

191. *Id.*

192. Robert Warren, *US-Born Children of Undocumented Residents: Numbers and Characteristics In 2013*, CTR. FOR MIGRATION STUD. (Sept. 28, 2015), <http://cmsny.org/publications/warren-usbornchildren/>.

193. Budget Fiscal Year, 2018, Pub. L. No. 115-97, § 11022, 131 Stat. 2054 (2017).

194. I.R.C. § 24(h)(7) (2018).

195. *See, e.g.*, Taylor et al., *supra* note 188; Warren, *supra* note 192.

196. *See infra* Part VI for a discussion on the ITIN and social security number as forms of tax identification. *See also* DEBRA HOLLAND, TAXPAYER ADVOC. SERV., INDIVIDUAL TAXPAYER IDENTIFICATION NUMBERS: ITIN APPLICATION PROCEDURES BURDEN TAXPAYERS AND CREATE A BARRIER TO RETURN FILING 216–20 (2013), <http://www.taxpayeradvocate.irs.gov/2013-Annual-Report/downloads/INDIVIDUAL-TAXPAYER-IDENTIFICATION-NUMBERS-ITIN-Application-Procedures-Burden-Taxpayers-and-Create-a-Barrier-to-Return-Filing.pdf>.

expired visas or work authorizations.¹⁹⁷ These taxpayers will consequently pay more taxes than what they owe, and, if no return is filed to claim an outstanding refund within three years, the money becomes the property of the United States Treasury.¹⁹⁸

Because undocumented immigrants are usually in the lower income brackets,¹⁹⁹ their inability to claim applicable tax credits and refunds results in a higher effective rate of tax on such immigrants than that imposed on other members of the society. This higher tax rate is sometimes referred to as the “Undocumented Immigrant Tax.”²⁰⁰ The next part of this article briefly considers efficiency and fairness issues raised by the Undocumented Immigrant Tax, as well as its effect on compliance.

V. BENEFITS VS. BURDENS: EFFICIENCY AND FAIRNESS CONSIDERATIONS FOR THE UNDOCUMENTED IMMIGRANT TAX

The Undocumented Immigrant Tax is an undesirable tax for efficiency, equity, and fairness reasons. A tax system is inefficient if it causes people to change their behavior in order to avoid taxation, without any corresponding benefit to the government.²⁰¹ In other words, the efficiency of a tax system is directly related to the amount of deadweight loss that it causes.²⁰² The United States’ current tax system may appear to be efficient if undocumented immigrants’ willingness to pay taxes is thought of as inelastic,²⁰³ notwithstanding the extent of their tax burden. However, this may not always be the case, as elasticity within groups is often tied to the extent of their understanding and perceived sense of fairness of the tax system.²⁰⁴

197. See Sean Severe, *Here’s What’ll Happen to the Economy if We Deport Undocumented Immigrants*, FORTUNE (Sept. 8, 2017), <http://fortune.com/2017/09/08/trump-undocumented-immigrants-daca/>; I.R.C. § 7201 (1982) (providing that the penalty for tax evasion is a fine of “not more than \$100,000 (\$500,000 in the case of a corporation), or imprisonment for not more than 5 years, or both, together with the costs of prosecution.”).

198. INTERNAL REVENUE SERV., DOES THE IRS HAVE MONEY WAITING FOR YOU?, <https://www.irs.gov/uac/does-the-irs-have-money-waiting-for-you> (last updated Aug. 28, 2011).

199. See *Immigrants in the United States: A Profile of America’s Foreign-Born Population*, CTR. FOR IMMIGR. STUD., <https://cis.org/Immigrants-United-States-Profile-Americas-ForeignBorn-Population-0> (last visited Oct. 4, 2018).

200. Lipman, *supra* note 52, at 96 (suggesting that undocumented immigrants’ inability to claim social security and Medicare benefits while paying regressive payroll taxes, is another aspect of the Undocumented Immigrant Tax).

201. See MALMAN ET AL., *supra* note 17, at 9. This result is known as a “deadweight loss.” See *Deadweight Loss*, INVESTOPEdia, <https://www.investopedia.com/terms/d/deadweightloss.asp> (last visited Oct. 29, 2018) [hereinafter *Deadweight Loss*].

202. See *Deadweight Loss*, *supra* note 201.

203. MALMAN ET AL., *supra* note 17, at 9 (elasticity in relation to tax compliance means a taxpayer’s ability to change his/her behavior in response to changes in taxes. The idea is that people may substitute a certain activity for something else as the costs of that activity increases. If an activity is highly elastic, a change in the cost of the activity will result in larger substitutions. On the other hand, if an activity is rather inelastic, a change in the cost of the activity will result in small substitutions or no substitutions of that activity. Thus, a taxpayer is inelastic if he or she does not change his/her behavior despite changes in taxes or tax laws). See Yergensen, *supra* note 104, at 581–82.

204. MALMAN ET AL., *supra* note 17, at 9.

Horizontal equity in tax policy means treating equally situated persons the same.²⁰⁵ Vertical equity, on the other hand, exists when tax laws differentiate appropriately among unequals, conventionally thought to require people with greater utility or income to bear greater net tax burdens.²⁰⁶ A tax system is usually considered to be fair when horizontal and vertical equity are reflected in existing law, although this test is often subjective in nature.²⁰⁷ This means that taxpayers will likely consider a law to be unfair where they believe that they are treated differently from other equally situated people. The Undocumented Immigrant Tax embodies such unfairness, as it results in certain people bearing a higher tax burden than other similarly situated persons.²⁰⁸ Indeed, considering that undocumented immigrants are more likely to fall within the lowest income brackets, issues of unfairness become even more pronounced.²⁰⁹ When the least well-off members of society end up paying the highest taxes, this embodies the much-cited paradox in George Orwell's *Animal Farm* that "some animals are more equal than others."²¹⁰

A tax system that imposes equal taxes on similarly situated persons—but does not provide equal benefits for the same classes of people—could cause those denied access to benefits to change their behavior in response to a perceived sense of "unfairness." If one imagines a scenario where all undocumented immigrants were made aware of the actual audit rate, as well as the statistical probability of criminal prosecution for tax evasion, it is possible that more undocumented immigrants would change their behavior in favor of noncompliance. This response would lead to deadweight loss.

Further, because signaling is an important aspect of compliance, unequal treatment of undocumented immigrants compared to similarly situated taxpayers indicates unfairness. This would be a negative signal which would disincentivize undocumented immigrants from compliance by reinforcing a sense of inequality and uncertainty regarding their position in the society.²¹¹

Finally, the Undocumented Immigrant Tax fails to consider that some undocumented immigrant families include members who are U.S. citizens,²¹² and so denying benefits to undocumented immigrant families would, in some cases, deny benefits to United States citizens. For instance, as mentioned above, Mardea and Michael are hypothetical United States citizens who are dependents of undocumented immigrants. This means that any benefit denied to Aisha and Philip, including any difficulty in procuring employment and the absence of a clear path towards legalization, would also impact their United States citizen children. Accordingly, the Undocumented Immigrant Tax is, in some cases, a tax on both undocumented immigrants and United States citizens. Again, this raises issues of fairness, because certain United States citizens are treated differently from others in similar economic positions.

205. Boris I. Bittker, *Equity, Efficiency, and Income Tax Theory: Do Misallocations Drive Out Inequities?*, 16 SAN DIEGO L. REV. 735 (1979).

206. *Id.* at 735–36.

207. *Id.* at 735.

208. See Lipman, *supra* note 52, at 96; see also Luis Larrea, *Taxation Inequality and Undocumented Immigrants*, 5 WM MITCHELL L. RAZA J. 2, 18 (2013).

209. See Lipman, *supra* note 52, at 99.

210. GEORGE ORWELL, *ANIMAL FARM* 112 (1945).

211. See generally Posner, *supra* note 10, at 1819.

212. This includes children born to these individuals in the United States. See ABILITY OF UNAUTHORIZED ALIENS, *supra* note 5, at 5.

In view of the above, changes to current eligibility requirements for benefits²¹³ are warranted to eliminate all or part of the Undocumented Immigrant Tax. With this in mind, the next part of this article focuses on the connection between the taxation of undocumented immigrants and illegal activity. In other words, are tax and immigration laws compelling these immigrants to engage in illegal activity?

VI. TAXATION, IMMIGRATION ENFORCEMENT, AND ILLEGAL ACTIVITY: A TENUOUS CONNECTION

In this part, this article examines the connection between the requirements of tax and immigration laws and illegal activity. Particularly, this part focuses on the negative effects and general legal compliance challenges that arise when ITINs and SSNs are used to restrict government benefits and keep employment out of the reach of undocumented immigrants.

A. Problems with Establishing Legal Identity for Tax Purposes

This section provides an overview of the ITIN and SSN as instruments for establishing legal identity for tax and employment purposes. Building on that foundation, the difficulties that undocumented aliens face in order to procure an ITIN or SSN will then be considered, along with the possibility that such difficulties will cause undocumented persons to resort to illegal activity as a matter of necessity.

i. The Individual Tax Identification Number

The ITIN is a nine-digit number assigned for the purposes of federal income tax administration.²¹⁴ The ITIN cannot be used after obtaining a SSN, and it does not confer immigration status or work authorization.²¹⁵ Before 1996, SSNs were assigned to taxpayers for administrative purposes—regardless of authorization to work—and temporary ITINs were assigned to taxpayers awaiting the issuance of a SSN.²¹⁶ After 1996, as part of the move to restrict unauthorized immigrants from accessing federal benefits, the SSA stopped issuing SSNs to immigrants without work authorization.²¹⁷ Immigrants who do not qualify for SSNs are now issued permanent ITINs for tax administrative purposes.²¹⁸

In view of the foregoing, the ITIN is the most frequent form of legal identification used by undocumented immigrants for tax remittance.²¹⁹ However, ITIN pro-

213. This is particularly true concerning benefits administered through the Code, which are arguably more directly connected to taxation. See Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 6 (2006).

214. *Id.* at 22. See *Individual Taxpayer Identification Number*, INTERNAL REVENUE SER., <https://www.irs.gov/individuals/individual-taxpayer-identification-number> (last updated Oct. 3, 2018).

215. See ABILITY OF UNAUTHORIZED ALIENS, *supra* note 5, at 1.

216. *Id.* at 8.

217. *Id.*

218. *Id.*

219. *Id.*

urement is not particularly easy, especially for individuals who do not have complete foreign status documentation.²²⁰ ITINs are difficult to procure for the following reasons:

- (a) long wait times for ITIN processing with an increased number being rejected or suspended due to IRS work force capacity limitations; (b) requirements that ITIN filers submit a physical copy of their tax return together with the ITIN application to prove that the taxpayer has a valid filing requirement; and (c) the requirement that ITIN applicants provide original immigration documents or proof of foreign citizenship to support applications.²²¹

These onerous requirements result in undocumented taxpayers forgoing the filing of a joint return, claiming exemptions, or filing with an incorrect filing status because their spouses and dependents cannot obtain ITINs before the return filing date.²²² Some undocumented taxpayers may forgo filing taxes altogether because of the difficulty of obtaining an ITIN, particularly since a number of these individuals will face undue hardship from not having their original documents for an extended period.²²³ Not having original documents could subject such immigrants to the risk of fines and incarceration in some locations,²²⁴ and they also face the costs of obtaining duplicates if lost.²²⁵

The underground economy serves many undocumented immigrants who are unable to secure regular employment and who prefer cash payments to avoid the reporting issues described above and apprehension by immigration authorities.²²⁶ Note, however, that individuals who avoid direct taxation through the underground economy do not necessarily avoid taxation altogether, as they are still taxed on their consumption through sales tax and other indirect taxes. Furthermore, as noted earlier, some undocumented immigrants working in the underground economy may, due to their need to signal within their immediate community, subsequently file tax returns and remit outstanding taxes once they obtain documentation allowing them to do so.²²⁷

220. For example, immigrants who enter the U.S. surreptitiously, without visas or permission. Lipman, *supra* note 52, at 101.

221. *Id.* at 121.

222. *See id.* at 119–32.

223. *Id.* at 121 (the filing process can cause these immigrants to be without their identification documents for extended periods of time, often for many months).

224. *See Arizona v. United States*, 567 U.S. 387, 411–15 (2012) (striking down a preliminary injunction against an Arizona statute which required state officers to make a “reasonable attempt . . . to determine the immigration status of any person they stop, detain, or arrest on some other legitimate basis if reasonable suspicion exists that the person is an alien and is unlawfully present in the United States” and to detain any person who is arrested until their immigration status is determined) (internal quotations omitted).

225. This is an observation based on the author’s personal interviews with persons who wish to remain confidential. *See, e.g.*, INTERNAL REVENUE SERV., REVISED APPLICATION STANDARDS FOR ITINs (2018), <https://www.irs.gov/individuals/revised-application-standards-for-itins> (for the purposes of proving identity and foreign status in order to obtain an ITIN, the Internal Revenue Service will accept only 13 types of documents, each with disparate costs of replacement).

226. *See Priest, supra* note 117, at 2282–83; *see also Campbell, supra* note 58.

227. *See supra* Part III.C (discussing signaling as an important aspect of tax compliance).

ii. The Social Security Number

Generally, a SSN is assigned only to citizens of the United States, Legal Permanent Residents, and other persons who have authorization to work under a valid non-immigrant visa or other legally protected status.²²⁸ In very limited cases, a SSN may be issued for non-work reasons.²²⁹

After 1986, the SSN became important for tax and employment purposes due to the passage of the Immigration Reform and Control Act (“IRCA”).²³⁰ This law makes it illegal to employ, or continue to employ, anyone who is not authorized to work in the United States.²³¹ The IRCA prescribes civil and criminal penalties for employers who procure or retain employees in derogation of the express language of the statute.²³² If strictly enforced, the IRCA would have the effect of preventing all undocumented immigrants from procuring employment in the United States. Since SSNs are usually only assigned to persons with authorization to work, the SSN is usually the first stop for employers seeking to verify prospective employees’ lawful authorization to work. In addition, the SSN is used by employers to remit income taxes and payroll tax withholdings.²³³ Unfortunately, for the undocumented immigrant seeking to earn a living, the realistic effect of the above requirements is that they must obtain a SSN through illegal means, furnish a false SSN, or work in the underground economy.²³⁴

Aside from the necessity created by the IRCA, the SSN has become increasingly important for claiming federal benefits such as social security and insurance benefits under the Affordable Care Act.²³⁵ In addition, certain refundable credits are available only to taxpayers who have SSNs.²³⁶ As indicated above, the difficulties caused by the requirement to obtain a SSN will have the effect of compelling a substantial number of undocumented immigrants—particularly those desperate for

228. SOCIAL SECURITY ADMIN., SOCIAL SECURITY NUMBER FOR NONCITIZENS (2018), <https://www.ssa.gov/pubs/EN-05-10096.pdf> (other legally protected statuses include refugees, asylees, and immigrants seeking protection from domestic violence, etc.).

229. SOCIAL SECURITY ADMIN., RM 10211.600, REQUESTS FOR AN SSN FROM AN ALIEN WITHOUT WORK AUTHORIZATION (2014), <https://secure.ssa.gov/poms.nsf/lnx/0110211600>. The only valid non-work reasons accepted by the SSA for issuing social security numbers are:

- (1) a Federal statute or regulation requires that the alien provide his or her social security number to get the particular benefit or service to which he or she has otherwise established entitlement; or
- (2) a state or local law requires the alien who is legally in the U.S. to provide his or her social security number to get public assistance benefits to which the alien has otherwise established entitlement and for which all other requirements have been met.

However, these applications are subject to very stringent requirements including that an applicant submit a letter from the applicable government agency, specifically identifying the alien and signed in wet ink by the government official. SSA also verifies the authority and rank of the issuing official, as well as the veracity of the letter issued. *See* POMS, *supra* note 136.

230. 8 U.S.C. § 1324a (2004).

231. *Id.*

232. *Id.* §§ 1324a(e)(4)(A), (f)(1).

233. ABILITY OF UNAUTHORIZED ALIENS, *supra* note 5, at 8.

234. Ronald W. Mortensen, *Illegal but not Undocumented-Identity Theft, Document Fraud, and Illegal Employment*, CTR. FOR IMMIGR. STUD. (June 19, 2009), <https://cis.org/Report/Illegal-Not-Undocumented>.

235. Patient Protection and Affordable Care Act of 2010, 42 U.S.C. § 18003 (2010) (the most notable provision in this regard is the Medicaid expansion which enables states to increase public access to Medicaid, but maintains the restriction imposed by the PRWORA).

236. ABILITY OF UNAUTHORIZED ALIENS, *supra* note 5, at 10 (such as the EITC).

employment—to either seek a SSN by any means, or to work in the underground economy and possibly engage in tax evasion as a matter of necessity.

As of 2010, the OCACT estimates that 1.8 million immigrants worked while using a SSN that did not match their name,²³⁷ and “3.9 million other immigrants worked in the underground economy.”²³⁸ These statistics are indicative of the fact that a substantial amount of revenue is lost to the underground economy as a result of the rigorous requirements to obtain a SSN. While there is an underlying policy reason behind these laws—to discourage unlawful immigration by making it difficult for undocumented immigrants to obtain employment and benefits—a careful analysis of these laws may find that the benefits of permitting undocumented immigrants, or a class of them, to procure employment without these rigorous requirements may well exceed its costs.

Apart from the evident effect of recapturing federal revenue, relaxing some of these requirements would: (1) benefit United States citizens in households headed by undocumented immigrants who would otherwise be unable to claim federal benefits on account of their immigrant status; (2) tackle issues of unfairness raised by the Undocumented Immigrant Tax; and (3) substantially remove any motivation for individuals to engage in the unlawful act of tax evasion. At the very least, relaxing these requirements will eliminate those instances where such illegal activity stems out of a basic necessity to survive, as opposed to a voluntary desire to circumvent the law.

Further, consider that some undocumented immigrants may be highly skilled professionals trying to escape hardships in their country of origin.²³⁹ These undocumented immigrants may be forced to take whatever jobs they can find for sustenance,²⁴⁰ and so relaxing the requirements regarding the procurement of work authorization and SSNs would result in at least a portion of these immigrants obtaining better employment. This will in turn reduce the burden on society by creating higher taxable incomes for such immigrants, reducing dependence on available emergency government benefits such as Medicaid, and most likely decreasing the number of undocumented immigrants who would otherwise be eligible for the ACTC due to their lower income bracket.

As stated above, a substantial number of undocumented immigrants will report their income, regardless of the means by which it is procured, as a signal of good faith compliance with the law.²⁴¹ The pertinent question considered in the subsequent parts, is whether the underlying illegal activity precipitated by the stringent regulation of such people could be justified against the benefit of such laws. An-

237. Goss et al., *supra* note 34, at 2. See ABILITY OF UNAUTHORIZED ALIENS, *supra* note 5, at 9 n.44 (“In tax year 2006, 3.8% of the W-2 forms received had a name and/or identifying number that did not match the SSA records.”).

238. Goss et al., *supra* note 34, at 2.

239. Julia Preston, *Immigrants Aren't Taking Americans' Jobs, New Study Finds*, N.Y. TIMES (Sept. 21, 2016), <https://www.nytimes.com/2016/09/22/us/immigrants-arent-taking-americans-jobs-new-study-finds.html>.

240. See Chris Huber et al., *Syrian Refugee Crisis: Facts, FAQs, and How to Help*, WORLD VISION, <https://www.worldvision.org/refugees-news-stories/syrian-refugee-crisis-facts> (last updated Nov. 19, 2018) (for instance, refugees fleeing the Syrian crisis into the United States will be classified as undocumented regardless of their skills or education until granted asylee or refugee status); see also Jason Richwine, *High-Skill Immigrants in Low-Skill Jobs*, CTR. FOR IMMIGR. STUD. (July 12, 2018), <https://cis.org/Report/HighSkill-Immigrants-LowSkill-Jobs>.

241. See *supra* Part III.C.

other equally important question is whether these restrictions frustrate the underlying policy behind the Code—to treat all individuals the same regardless of their immigration status.²⁴²

Current tax laws and IRS policies have attempted to create certain safe havens to enable undocumented immigrants to report their income without fear of reprisal.²⁴³ However, other reasons exist for reconsidering how tax and immigration laws interconnect to create a systemic disadvantage for undocumented immigrants compared to others.

B. *The Social Security Number as a Means of Immigration Control: Shield or Spade?*

When people think of work authorization requirements, particularly the need to keep SSNs out of undocumented immigrants' hands, the overall feeling is that of protection.²⁴⁴ It is a shield, so to speak, that keeps citizens and lawful residents safe from unwanted competition, and it preserves jobs while keeping government benefits in taxpayers' hands.²⁴⁵

However, as discussed above, many undocumented immigrants are taxpayers. More importantly, they are human beings with all the basic needs generic to the human race, such as food, clothing, shelter, and the need to provide financial support for loved ones.²⁴⁶ Therefore, an important point to consider is whether these laws are simultaneously condemning others to an unending cycle of illegal activity.

As mentioned above, one of the most notorious uses of the SSN is in employment verification.²⁴⁷ This means that at the starting point of the employment process, employers will request SSNs for tax reasons and to verify work authorization. The fact that undocumented immigrants are ordinarily excluded from obtaining SSNs or work authorization creates an avenue for the exploitation of such individuals.²⁴⁸ Thus, undocumented immigrants are often underpaid,²⁴⁹ denied workplace protections,²⁵⁰ and denied compensation for injuries suffered in the work place.²⁵¹ Opportunistic employers take advantage of their fear of deportation by denying them rights that are available to other people in the work place.²⁵² While courts have

242. See *supra* Part I for a discussion of how the Code reflects the “Ideal Tax World” scenario.

243. See, e.g., I.R.C. § 7213 (2016) (making unauthorized disclosure of federal tax return information a felony).

244. See, e.g., TIGTA REPORT, *supra* note 184, at 2.

245. *Id.*

246. Saul McLeod, *Maslow's Hierarchy of Needs*, SIMPLY PSYCHOL., <https://www.simplypsychology.org/simplypsychology.org-Maslows-Hierarchy-of-Needs.pdf> (last updated May 2018).

247. See *supra* Part VI.A.ii.

248. See, e.g., *Patel v. Quality Inn S.*, 846 F.2d 700, 701 (11th Cir. 1988).

249. *Id.* (sometimes below the minimum wage or not at all); see also Daniel Costa, *Employers Exploit Unauthorized Immigrants to Keep Wages Low*, N.Y. TIMES, <https://www.nytimes.com/roomfordebate/2015/09/03/is-immigration-really-a-problem-in-the-us/employers-exploit-unauthorized-immigrants-to-keep-wages-low> (last updated Sept. 3, 2015, 3:30 AM).

250. *Patel*, 846 F.2d at 701; see also *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 892 (1984); Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 347 (2001).

251. *Sure-Tan, Inc.*, 467 U.S. at 901; *Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338, 350, 812 N.Y.S.2d 416 (2006); *Asylum Co. v. D.C. Dep't of Employment Servs.*, 10 A.3d 619, 625 (D.C. 2010).

252. *Patel*, 846 F.2d at 701.

consistently held that these rights are equally available to undocumented employees,²⁵³ such abuses will continue as more undocumented immigrants would rather bear these abuses than seek relief through litigation or law enforcement, which may lead to deportation.²⁵⁴

These requirements also provide a favorable breeding ground for human trafficking and the underground slave trade, as undocumented immigrants are easy prey to predators offering employment in return for cash.²⁵⁵ Unfortunately, undocumented immigrants are also much less likely to report crimes against their person to law enforcement authorities for fear of deportation, which will create enforcement problems in these areas.²⁵⁶

Further, while there is technically no legal restriction for undocumented immigrants to own their own business, most traditional loans will require a valid SSN or proof of legal immigrant status in order to qualify.²⁵⁷ A similar requirement exists for credit card applications and mortgage loans from reputable banks.²⁵⁸ Where such loans are available, they are usually more costly.²⁵⁹ Therefore, in most cases, businesses owned by undocumented immigrants are limited to whatever size the individual can manage through loans from friends, family, or from usurious lending sources. Usurious lending services should be of greater concern, since desperation will force these individuals to accept whatever financing is available, regardless of the cost.²⁶⁰ Desperation will also hinder an undocumented immigrant from reporting usurious behavior, for fear of being given up to immigration authorities.

Once again, this raises a signaling problem. If unfair conditions exist that treat undocumented immigrants differently from American citizens, then such immigrants will not feel accepted within their community. In the long term, feeling unaccepted will erode the desire for undocumented immigrants to conform to social

253. *Id.* at 706. *But see* *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137 (2002) (holding that undocumented immigrants are not entitled to back pay regardless of work place violations, because this would be in conflict with the spirit of the IRCA). State courts have often distinguished *Hoffman* for the purposes of providing relief to undocumented immigrant workers, if relief can be based on state law grounds. *See, e.g., Balbuena*, 6 N.Y.3d at 347.

254. This information was gathered through interviews between the author and individuals who wish to remain confidential. *See, e.g.,* Nicole Horberg Decter et al., *The Rights of Hourly Immigrant Workers Under Massachusetts and Federal Wage and Hour Laws*, in MASS. WAGE AND HOURS HANDBOOK § 8.3 (5th ed. 2018), Westlaw MWHH MA-CLE 8-1.

255. *See, e.g.,* Susan Tiano, Billy James Uliarri & Carolina M. Ramos, *Human Trafficking on the US-Mexico Border: Is There a Nexus with Immigration Policies?*, FREEDOM FROM FEAR MAG., <http://f3magazine.unicri.it/?p=257> (last visited Oct. 29, 2018).

256. Frances Bernat, *Immigration and Crime*, OXFORD RES. ENCYCLOPEDIAS 1 (Apr. 2017), <http://criminology.oxfordre.com/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-93>.

257. *See* Caron Beesley, *How to Start a Business in the U.S. as a Foreign National*, U.S. SMALL BUS. ADMIN. (May 16, 2016), <https://www.slideshare.net/SDSBRASIL/sba-how-to-start-a-business-in-the-us-as-a-foreign-national-the-us-small-business-administration-sba-73969887>.

258. 24 C.F.R. § 201.22 (2018). Part of the reason for these restrictions on lending could be that banks are unwilling to lend to undocumented immigrants because they are considered to be flight risks; imposing a social security number and/or legal immigration documentation requirement effectively limits the type of potential applicants for loans.

259. Jana Kasperkevic, *The American Dream: How Undocumented Immigrants Buy Homes in the U.S.*, MARKETPLACE (Sept. 11, 2017, 7:03 AM), <https://www.marketplace.org/2017/09/08/economy/american-dream-how-undocumented-immigrants-buy-homes-us> (this could mean higher interest rates, higher down payments, higher APR ratios. Such loans also typically do not benefit from any government type subsidies such as the FHA, first time home buyer loan programs, or SBA subsidies).

260. Usury is a crime under federal law and various state criminal codes. *See, e.g.,* 12 U.S.C. § 86 (2018); TEX. FIN. CODE § 305.001(2017). *See* *Moncure v. Dermott*, 38 U.S. 345 (1839).

norms—of which tax compliance is an important part. Needless to say, tax evasion is itself a criminal offense.²⁶¹

Additionally, in the area of identity theft, as with any activity that confers economic advantage, demand fuels supply. Many undocumented immigrants have family members both within and outside the U.S. that need support. Because they will not be eligible for government benefits, such as food stamps, these people will resort to whatever means necessary to obtain employment in order to sustain their loved ones. Accordingly, people who may not otherwise be inclined to engage in illegal activity will seek out persons willing to assist them in procuring SSNs, in order to secure employment or financing to support their loved ones. Just like the demand for transplant organs has given rise to a booming human trafficking market in some parts of the world,²⁶² stringent restrictions on the ability of undocumented immigrants to procure lawful employment, without exceptions, will drive the demand for identity theft.

Finally, there seems to be some consensus that areas of the economy in which undocumented immigrants tend to work are areas of high demand.²⁶³ As a result, blue-collar employers are all too ready to ignore perceived problems with SSN verification in favor of procuring much needed labor.²⁶⁴ One could therefore argue that there is also a net increase in the number of employers who are forced to engage in illegal activity as a result of the indirect effect of these laws. For these employers, the reality is that the economic benefit and ready availability of much needed workers, including the increase in revenue represented by such earnings, would often outweigh the cost of trying to limit the ability of such workers to earn a livelihood.²⁶⁵

All of the above hardships call for the reconsideration of the processes and qualifications for obtaining SSNs. If SSNs were accessible to certain well-defined classes of undocumented immigrants, this would curtail many of the injustices described above and help a large number of people break out from the cycle of forced illegal activity. Further, just like the DAPA program, such initiatives would provide positive signaling to the undocumented immigrant community, which would encourage not just tax compliance, but also the desire to comply with other relevant social norms within their community.

VII. CONCLUSION

The analysis above discloses a number of important things. First, undocumented immigrants, as a whole, currently bring about a net benefit in tax revenue. Accordingly, federal action that tends to encourage this class of taxpayers to engage in greater self-reporting without fear of immigration reprisals will increase revenue

261. I.R.C. § 7201 (1982).

262. See Philip Perry, *What You Need to Know About Human Trafficking*, BIG THINK (Apr. 25, 2016), <https://bigthink.com/philip-perry/what-you-need-to-know-about-human-organ-trafficking>.

263. See, e.g., Travis Putnam Hill, *Big Employers No Strangers to Benefits of Cheap, Illegal Labor: Two Cases Illustrate How Big-Name Employers Benefit from Illegal Labor and Why Undocumented Workers are Easily Exploited*, TEX. TRIB. (Dec. 19, 2016, 12:00 AM), <https://www.texastribune.org/2016/12/19/big-name-businesses-exploit-immigrant-labor/>.

264. *Id.*

265. See, e.g., Philip E. Wolgin, *How Much Would It Cost to Deport All Undocumented Immigrants?*, NEWSWEEK (Aug. 19, 2015, 3:38 PM), <http://www.newsweek.com/how-much-would-it-cost-deport-all-undocumented-immigrants-364316>.

derived from taxation. Similarly, initiatives that aim to encourage gainful employment of undocumented immigrants, as opposed to suppressing job opportunities, would result in both an economic benefit of increased revenue and Gross Domestic Product (“GDP”) and a social benefit of reducing the incidence of illegal activity provoked by such laws. Assuming there is a relationship between the demand for labor supply in certain industries—such as construction—and the rate at which undocumented immigrants obtain employment using non-matching SSNs, then it could be concluded that undocumented immigrants serve the purpose of providing equilibrium in the workforce, thereby reducing the cost of labor across several industries.

Second, immigration reform that enables more undocumented immigrants to obtain work authorization, subject to compliance with other applicable laws, would serve a positive signaling purpose by showing these individuals that the government has a low discount rate, which will have the effect of reinforcing positive compliance behavior. Similarly, issuing work authorizations to more undocumented immigrants would induct those individuals into the mainstream of society and increase their desire to conform to mainstream social norms, including better tax reporting behavior.

If SSNs were accessible by certain well-defined classes of undocumented immigrants, this would also curtail the number of instances where people feel compelled to procure these numbers through unlawful means. This would thereby reduce incidents of fraud, identity theft, and other related criminal offenses that occur as a result of the current restrictions.²⁶⁶ Reliance on emergency medical services and benefits, such as the ACTC, would also be reduced by such policies. Similarly, there is currently a high incentive for undocumented entrepreneurs to take financing where they can find it and to leave usury unreported. Again, this results in a net increase in illegal lending activities which could be forestalled through more friendly immigration legislation and enforcement.

There is no doubt that stringent immigration enforcement, similar to the ideal legal world scenario, would eliminate some of the concerns associated with illegal immigration into the U.S. However, statistics indicate that such strategy would be costly to the U.S.—perhaps costlier than any benefit that could be derived from the same.²⁶⁷ Apart from driving the existing undocumented immigrant population to the underground economy, it is estimated that it would cost between \$400–600 billion for the DHS to remove all undocumented immigrants in the United States (more than 11.3 million people) over the next 20 years.²⁶⁸

Additionally, “The Bipartisan Policy Center [estimates] that deporting all unauthorized immigrants would shrink the labor force by 6.4% over the course of two decades.”²⁶⁹ Further, the American Action Forum estimates that this would decrease United States GDP “by a full \$1.6 trillion.”²⁷⁰ By contrast, “putting unauthorized immigrants on a pathway to citizenship—which two-thirds of Americans support—

266. See generally Immigration and Nationality Act, 8 U.S.C. § 1324c (1996) (the IRCA makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents).

267. Wolgin, *supra* note 265; see also Nicole Duran, *What’s the Cost of Deporting All Illegal Immigrants? It Depends*, WASH. EXAMINER (Aug. 18, 2018, 5:32 PM), <http://www.washingtonexaminer.com/whats-the-cost-of-deporting-all-illegal-immigrants-it-depends/article/2570423>.

268. Wolgin, *supra* note 265; Duran, *supra* note 267.

269. Wolgin, *supra* note 265.

270. *Id.*

would add . . . \$1.2 trillion to the GDP over a decade, increase the earnings of all Americans by \$625 billion, and create an average of 145,000 new jobs each year.²⁷¹

This article does not suggest that all undocumented immigrants should be unconditionally permitted to obtain work authorization in the United States. However, a more desirable approach to the problem of illegal immigration would be to combine stricter law enforcement at the borders with policies, such as DAPA, aimed at enabling undocumented immigrants already in the country²⁷² to obtain work authorization and SSNs if they comply with the requirements of then-existing tax and criminal laws. Apart from the significant signaling effect and the attendant tax compliance response that such initiatives tend to generate, such policies will give numerous displaced and disadvantaged undocumented immigrants, currently being forced into various levels of illegal activity, a real chance at integrating within the larger society. And, needless to say, the over 4 million United States citizen children who form part of this class will finally receive the protection that they deserve.²⁷³

Finally, fairness and equity considerations support continuing to allow undocumented immigrants to claim refundable tax credits (including the ACTC), since current tax laws purport to be neutral in classifying taxpayers, without regard to immigration status. As discussed in the preceding parts, tax laws that are perceived to be unfair have a negative signaling effect that invites non-compliance. Even more so, where such laws result in certain United States citizens (children of undocumented parents) being treated differently from other United States citizens in similar economic circumstances, solely on account of their parentage. Accordingly, a more thoughtful approach to tax and immigration legislation and policies is warranted, especially where such laws or policies have the additional effect of compelling undocumented immigrants to engage in illegal activity.

271. *Id.*

272. Who are not then subject to a final order of removal. See 8 C.F.R. § 1241.1 (2009).

273. See IRS Presentation, *supra* note 98, at 9.