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The Search for Tax Justice is a *Tax Notes State* series examining the inequities inherent in state and federal taxes.

In this installment, Jacqueline Laínez Flanagan, associate professor of law and director of the University of the District of Columbia's David A. Clarke School of Law Tax Clinic, discusses tax challenges faced by immigrants and responds to myths about the undocumented taxpayer community.

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Those of us who have served the undocumented taxpayer community have witnessed how closely tax return filings are connected with immigration petitions. Whenever there is some semblance of viable immigration reform, tax return filings surge. When programs like the Individual Taxpayer Identification Number program offered nearly unrestricted access to tax compliance, as was the case in the early 2000s, demand for tax services and personal income tax return filings among undocumented workers soared.

But many Americans are unaware of the ongoing tax contributions made by unauthorized immigrant workers, which by some estimates total nearly \$12 billion per year.¹

¹Tax contributions by immigrant workers are estimated at \$11.74 billion annually, with legalization estimated to increase these contributions by over \$2 billion per year. See Lisa Christensen Gee et al., "Undocumented Immigrants' State and Local Tax Contributions," Institute on Taxation and Economic Policy, at 2 (Mar. 2017).

Unauthorized immigrants working as statutory employees contribute to the Social Security Administration (SSA) system through payroll taxes, with over \$1.2 trillion accumulated in SSA's Earning Suspense File (ESF) as of 2012.² Notably, estimates indicate 50 percent of undocumented immigrant workers file personal income tax returns.³ The 50 percent tax filing rate is most likely due to the demonstrable level of risk involved, despite protections afforded by IRC section 6103, designed to prevent government agencies from disclosing taxpayer information subject to certain exceptions.⁴

Granting undocumented immigrant workers the dignity of formally recognizing their contributions to the economy and creating a legal pathway for those living in the shadows should not be polarizing. The question perhaps should be: How do we increase the political will in support of meaningful immigration reform?⁵ Perhaps the immigrant diaspora should be recognized as a necessity in a country that makes up less than 5 percent of the world's population and has an increasingly aging native population. Maybe the question should be: Are we adequately serving immigrants?

²See Social Security Administration, Office of the Inspector General FY 2017 Budget Justification, at 191 (2017). ("Per the latest available data, the [Earnings Suspense File (ESF)] had accumulated over \$1.2 trillion in wages and 333 million wage items for Tax Years 1937 through 2012. In Tax Year 2012 alone, [the Social Security Administration] posted 6.9 million wage items, representing \$71 billion, to the ESF.")

³There is no definitive government data source to confirm this estimate: "The best evidence suggests that at least 50 percent of undocumented immigrant households currently file income tax returns using Individual Identification Numbers (ITINs), and many who do not file income tax returns still have taxes deducted from their paychecks." Christensen Gee et al., *supra* note 1, at 3.

⁴See IRC section 6103 (2012).

⁵See Richard Bird, "Smart Tax Administration," The World Bank, at 2 (Oct. 2010), "Experience around the world demonstrates that the single most important ingredient for effective tax administration is clear recognition of its importance at high political levels and the willingness to support good administrative practices — even if it is politically difficult to do so."

In a recent law review article, “Reframing Taxigration,” I argue that economic considerations should ideally advance meaningful immigration reform, noting the current immigration system is neither efficiently addressing the need for migrant labor nor effectively stemming the tide of unlawful entries. My proposal for a way forward recommends systemic changes to increase tax compliance by directly connecting tax return filings with immigration benefits. This proposal revisits a component of previous immigration reform bills and makes tax compliance the architectural centerpiece of any potential future reform, recognizing key incentives inherent in our tax system.

Recent estimates note nearly 11 million undocumented immigrants reside in the United States, down from an estimated 12 million a decade ago.⁶ This represents roughly 3 percent of the U.S. population facing uneven tax and immigration policies.⁷ And most noncitizens living in the United States are typically within the working ages of 25 to 64.⁸ Interestingly, 62 percent of the undocumented population is individuals who arrived by plane and overstayed their temporary visa.⁹ These are important data points, given the ongoing vilification and dehumanization of the unauthorized population, including children.¹⁰

⁶ See Jose A. Del Real, “The Number of Undocumented Immigrants in the U.S. Has Dropped, A Study Says. Here Are 5 Takeaways,” *The New York Times*, Nov. 27, 2018 (citing Jeffrey S. Passel and D’Vera Cohn, “U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade,” Pew Research Center (Nov. 27, 2018); see also Passel, “Measuring Illegal Immigration: How Pew Research Center Counts Unauthorized Immigrants in the U.S.,” Pew Research Center (July 12, 2019); Jens Manuel Krogstad, Passel, and Cohn, “5 Facts About Illegal Immigration in the U.S.,” Pew Research Center (June 12, 2019).

⁷ See U.S. Census Bureau, “Quick Facts” (interactive table showing U.S. census estimates for U.S. population, with 327,167,434 people estimated for 2018).

⁸ See Congressional Budget Office, “How Changes in Immigration Policy Might Affect the Federal Budget,” at 8 (Jan. 2015).

⁹ See Robert Warren, “U.S. Undocumented Population Continued to Fall From 2016 to 2017, and Visa Overstays Significantly Exceeded Illegal Crossings for the Seventh Consecutive Year,” Center for Migration Studies (Jan. 16, 2019) (“Of the estimated 515,000 arrivals in 2016, a total of 320,000, or 62 percent, were overstays and 190,000, or 38 percent, were EWIs [Entries Without Inspection].”).

¹⁰ See generally Shani M. King, “Child Migrants and America’s Evolving Immigration Mission,” 32 *Harv. Hum. Rts. J.* 59 (2019) (asserting that political expedience, Cold War ideology, and xenophobia have long been the driving forces of U.S. immigration policy).

There are entire segments of the economy — particularly the service sector — in which immigrants and undocumented labor will continue to significantly contribute to economic growth. The native U.S. population is not replenishing the need for workers sufficiently enough to fuel sustained economic growth.¹¹ According to U.S. Department of Labor statistics, home health aides and other healthcare support occupations are the lowest paid jobs across the entire economic spectrum.¹² As with many low-paying, low-skilled jobs, immigrants fill many of these positions. A 2018 study using 2016 U.S. census data found that nearly a quarter of home health aides were born outside the United States, with most emigrating from the Caribbean and Central America.¹³ Further, as the effects of the COVID-19 pandemic continue to unfold, it will be instructive to observe how undocumented essential workers fare in terms of recognition for their contributions and their own access to quality medical care.^{14 15}

It is vital to correlate the fiscal effects of immigrant labor with the potential for increased, large-scale, government-sponsored benefits. For example, expanding the tax base to include all workers in the United States — regardless of immigration status — could increase our nation’s ability to sustain education and job training programs and to reposition native workers displaced not by migrant laborers, but by technological advancements and global economic shifts.

Viewed through an equity and fairness lens, undocumented workers shoulder more of a tax burden than they are given credit for regarding

¹¹ See Immigrant Tax Inquiry Group, “Perspectives on Immigration Reform Episode 2: The Numbers Tell the Story” (Mar. 7, 2019) (Interview of Tax Foundation economist Steve Entin).

¹² See *id.*

¹³ See Yash M. Patel et al., “Proportion of Non-U.S.-Born and Noncitizen Health Care Professionals in the United States in 2016,” 320 *J. Am. Med. Ass’n* 2265, 2266 (2018).

¹⁴ Lissandra Villa, “‘We’re Ignored Completely.’ Amid the Pandemic, Undocumented Immigrants Are Essential but Exposed,” *Time*, Apr. 17, 2020.

¹⁵ For example, the Families First Act omitted some immigrants — including Deferred Action for Childhood Arrivals program recipients and temporary protected status holders — from COVID-19-related testing and medical services. Manar Waheed and Avidah Moussavian, “COVID-19 Doesn’t Discriminate — Neither Should Congress’ Response,” American Civil Liberties Union (Apr. 2, 2020).

their contributions to both the U.S. tax and Social Security systems.¹⁶ Unauthorized workers contribute an estimated \$11.7 billion in state and local taxes,¹⁷ yet a segment of the U.S. populace seems unbowed by the net cost of removing all of them from the country,¹⁸ an effort estimated to require 20 years to fully execute and cost \$400 billion to \$600 billion — not to mention an anticipated economic contraction of over \$1 trillion.¹⁹ Some sort of immigration reform seems to be needed to bridge these polarized viewpoints, and it remains to be seen to what extent public opinion can be meaningfully swayed. A pathway to legalization would result in higher wages from more “on the books” income, estimated to yield \$2.2 billion in state and local tax revenue.²⁰

An instructive example is the Deferred Action for Childhood Arrivals program (DACA),²¹ which allowed youth who qualified for the program the right to become legally employed in the United

States.²² The result is an estimated 91 percent employment rate of DACA recipients, contributing approximately \$1.6 billion in taxes.²³ And as of this writing, an estimated 27,000 DACA recipients are working on the front lines of the coronavirus pandemic — including doctors, nurses, and paramedics.²⁴ It is significant that many of these medical workers are younger, often in their 20s, as opposed to the doctors and nurses called out of retirement to assist with coronavirus response efforts who comprise a higher risk group.²⁵

Reports indicate that current DACA holders, DACA-eligible youth, and temporary protected status (TPS) recipients collectively contributed over \$5.5 billion in 2017 taxes and held over \$25 billion in spending power.²⁶ DACA proponents note citizenship for DACA recipients would yield state and local contributions of about \$50 million.²⁷

Yet the economics of immigration reform is not a novel concept. University of Pennsylvania law professor Howard F. Chang has written extensively about immigration and economic policy, invoking economic analysis as an underlying rationale for more liberalized immigration.²⁸ Using an economic framework, Chang points to the value of labor, noting that a worker immigrating to the United States is generally paid more for their labor than in their homeland, and that “higher wages for the same worker mean that the worker produces more value in the country of immigration than in the country of emigration” — leading to an

¹⁶ This is particularly noteworthy when compared with the perennial data point in yearly IRS reports showing that corporations contribute less than 10 percent of annual revenues (e.g., 7.6 percent for tax year 2018) in the United States, compared with contributions of nearly 60 percent by U.S. individual taxpayers, including undocumented workers. See Charles P. Rettig et al., Pub. 55B, 2018 Internal Revenue Service Data Book, at 3 (2019).

¹⁷ See Dan Kosten, “Immigrants as Economic Contributors: Immigrant Tax Contributions and Spending Power,” National Immigration Forum (Sept. 6, 2018).

¹⁸ See Paul Bedard, “Border Surge Highest Since 2011, Each Illegal Immigrant Costs \$70,000, 7x Deportation Price,” *Washington Examiner*, Oct. 31, 2018. In the cost-benefit analysis, similar arguments against immigration frequently calculate “cost of immigration” simply by subtracting a percentage of money budgeted for governmental services from estimates of income tax paid by immigrants without consideration to any other economic factors or sources of revenue and expense. See generally, e.g., Matthew O’Brien, Spencer Raley, and Jack Martin, “The Fiscal Burden of Illegal Immigration,” Federation for American Immigration Reform, at 1 (2017). Most telling is the fact that these claimed costs of immigration are frequently synonymous with broader social welfare budgets allocated for the assistance of low-income individuals in general, regardless of nationality. See Bedard, *supra* (quoting Steven Camarota, director of research for the Center for Immigration Studies: “Those with low incomes as a group, regardless of legal status, use more in public services than they pay in taxes”).

¹⁹ Ben Gitis and Jacqueline Varas, “The Labor and Output Declines From Removing All Undocumented Immigrants,” American Action Forum (May 5, 2016). (“Fully enforcing current law toward all undocumented immigrants would take at least 20 years and cost the government \$400 billion to \$600 billion. . . . Most importantly, under both the 20-year and 2-year time frames, the U.S. economy would shrink by over \$1 trillion.”).

²⁰ Kosten, *supra* note 17.

²¹ See generally U.S. Department of Homeland Security, “Deferred Action for Childhood Arrivals (DACA)” (last published Feb. 1, 2021) (concisely setting out the origin and status of the program).

²² *Id.*

²³ Kosten, *supra* note 17.

²⁴ Maria Sacchetti, “‘Dreamers’ Risk Lives on Pandemic’s Front Lines While They Await a Decision on Their Own Futures,” *The Washington Post*, Apr. 11, 2020; see also Adam Liptak, “‘Dreamers’ Tell Supreme Court Ending DACA During Pandemic Would Be ‘Catastrophic,’” *The New York Times*, Mar. 27, 2020.

²⁵ See Sacchetti, *supra* note 24 (noting calls in Illinois for retired doctors and nurses to come forward, even though these individuals “would be at higher risk of complications if they become infected because of their ages”).

²⁶ New American Economy, “Overcoming the Odds: The Contributions of DACA-Eligible Immigrants and TPS Holders to the U.S. Economy,” at 2 (May 2019).

²⁷ Kosten, *supra* note 17.

²⁸ Howard F. Chang, “The Economics of Immigration Reform,” 52 *U.C. Davis L. Rev.* 111, 114-115 (2018).

anticipated labor flow toward the country that will pay or value the labor the most.²⁹ Reframing taxigration is offered as one potential vehicle toward creating a pathway to legalization.

Steve Entin, senior fellow emeritus at the Tax Foundation and former Treasury deputy assistant secretary for economic policy under Reagan, pointedly frames the benefits of legal immigration as economic: increasing tax revenue, our military power, and maintaining our status as a global leader by boosting our population.³⁰ Entin also cites the political “hot button” underpinning the immigration system and the potential for reform.³¹

In November 2019 I conducted a monthlong survey to ascertain if and how ITIN services had been affected since the 2016 election and recent ITIN administration changes resulting from the 2015 Protecting Americans From Tax Hikes (PATH) Act and the 2017 Tax Cuts and Jobs Act. The survey, which was shared on a national listserv inviting participation by low-income taxpayer clinic staff, yielded close to 50 responses.³² One question was: “Have you noticed a decrease in the demand for ITIN services within the last two years?” Interestingly, the responses were almost evenly distributed, with over one-third of respondents (35 percent) indicating “no,” over one-third (35 percent) choosing “unable to determine,” and slightly less than 30 percent responding affirmatively that they had noticed a decrease in the demand for ITIN services. A 2019 National Taxpayer Advocate report provides further illuminating data, citing sharp decreases in ITIN applications and tax return filings using ITINs, with the filing of only a quarter of the

expected number of ITIN renewals.³³ The report does not expressly attribute these steep declines to the 2016 presidential election, but the timing of ITIN application reductions, specifically the 2017 tax year, fuels speculation.³⁴ This potential chilling effect on voluntary tax compliance within the undocumented immigrant community is unsurprising but troubling.³⁵

As noted, recent tax reforms — especially the PATH Act and the TCJA — have enhanced the disparate treatment of undocumented workers, thus reducing tax return filing incentives.

Taken as a whole, the treatment of undocumented workers in the U.S. overlooks the tax system’s incentives to connect tax and revenue collection with immigration benefits. While doing so would increase costs because of the direct expenditures associated with increased wages and workers’ rights, this would be a positive development. It would help coax individuals from the shadows — from a partial existence in our society — and prevent them from being preyed upon by the most unscrupulous. Unfortunately, there are far too many instances of abuses committed against recent arrivals,

³³ The National Taxpayer Advocate Report to Congress is one of the few sources of data tracking for ITIN-filed returns. The 2015 report assessed ITIN issues as a serious problem that needed to be addressed. See National Taxpayer Advocate Service, “2015 Annual Report to Congress: Most Serious Problems — Earned Income Tax Credit: Audit Effectiveness” (2015). The 2019 Objectives Report highlighted additional efforts necessary to increase compliance: “Interim steps to expand outreach into new areas include the [ITIN] renewal effort, which included outreach to organizations working with ITIN communities, low-income taxpayer clinics, and others able to reach the affected taxpayers. The IRS developed and delivered outreach materials in seven languages to support the effort.” National Taxpayer Advocate Service, “Fiscal Year 2019 Objectives Report to Congress: Volume 2,” at 102 (2019) (hereinafter 2019 NTA Objectives).

³⁴ See 2019 NTA Objectives, *supra* note 33, at 140. (“Although the IRS projected it would receive 450,000 ITIN renewal applications for ITINs expiring in late 2016, it had received only 176,000 at the close of the filing season.”).

³⁵ Also, note that Treasury Inspector for General Tax Administration annual reports do not reflect a decrease in general filing compliance in corroboration with decreases in ITIN-filed returns. Results of the 2017 tax return filing season reported 139.6 million actual returns for the 2016 tax year compared with 138.9 million returns for the 2017 tax year. See TIGTA, Ref. No. 2018-40-012, “Results of the 2017 Filing Season,” at 5-6 (Jan. 31, 2018). Comparative filing statistics as of May 4, 2018, showed that for the 2018 filing season, 140.9 million returns were filed, reflecting a 1.4 percent increase over the previous year. See TIGTA, Ref. No. 2019-40-013, “Results of the 2018 Filing Season,” at 5-6 (2018). Again, these data sets do not track ITIN filers as a separate category, other than to make determinations relative to identity theft claims.

²⁹ *Id.*

³⁰ “Perspectives on Immigration Reform Episode 2,” *supra* note 9, at 4:42.

³¹ *Id.* at 3:59.

³² ITIN Services, Online Survey of LITCs, administered Nov. 7-Dec. 17, 2019 (on file with author). Ninety-eight percent of respondents indicated that they offered ITIN services, and nearly 40 percent offered aid in all three major areas of immigrant tax services, specifically: ITIN applications, tax controversy representation, and tax return preparation. *Id.*

including “notario” fraud³⁶ and other avenues that can mislead trusting and often unsophisticated new arrivals in the United States — most of whom are loath to go to the authorities to report crimes committed against them.³⁷ These are large-scale societal, even moral, issues.³⁸

For example, the Coronavirus Aid, Relief, and Economic Security Act excludes undocumented immigrant families from stimulus payments, which in many cases affects U.S. citizens within the family unit.³⁹ It was largely projected that the 2017 tax reform bill would negatively affect immigrant families, with changes slated to various family-based tax credits, especially the Child Tax Credit.⁴⁰ The concern was justified. Signed into law on December 22, 2017, the TCJA removed filing incentives for undocumented workers with children who possess an ITIN but not a Social Security number.⁴¹

It remains to be seen whether political narratives can overcome the casting of immigrants as the ever-dangerous “other” element in society, which appeals to darker, more ominous visions of a divided social order.⁴²

Local and national business leaders could conceivably also welcome the current state of immigration, in which few are eligible to legalize

their status³⁶ and thus possess less political power to implement change — including fairer wages.⁴³

And it is true that “some may oppose expanding protections for undocumented immigrants who file tax returns because such an action might symbolize governmental acquiescence of those immigrants’ place in society.”⁴⁴ Yet the government and general public have already acquiesced to immigrants’ place in society. Acquiescence was central to the creation of the IRS ITIN program, which is by itself an acknowledgment not only of the presence of undocumented workers, but their myriad economic contributions as well.

On the Senate floor in 2006, then-Sen. John McCain criticized pending efforts to prevent earned income tax credit claims by newly legalized immigrants should immigration reform succeed. It was not solely the content of his rhetoric that was striking, but the fact that throughout most of his extraordinary career, he was often willing to cross party lines to seek the best way forward to advance the promise of American ideals. Perhaps his legacy will reverberate in future congressional sessions as debates to bring forth meaningful reform continue.⁴⁵ ■

³⁶ See, e.g., Kati Daffan, “Notarios Are No Help With Immigration,” Federal Trade Commission: Consumer Information (Sept. 26, 2019) (“Time after time, we see stories of notarios who take people’s money and documents, make big promises, and then do nothing”); American Bar Association, “About Notario Fraud” (July 19, 2018).

³⁷ One interview broadcasted on “This American Life” provides an instructive example: Interview by Miki Meek, “ICE Capades,” *This American Life* (July 21, 2018) (brackets inserted to indicate superimposed translation from Spanish).

³⁸ CARES Act, S. 3548, 116th Cong. (2020).

³⁹ Meena Duerson, “This Woman and Her Kids Are U.S. Citizens — But They Can’t Get Any Coronavirus Stimulus Money,” *Vice News*, Apr. 16, 2020.

⁴⁰ Kenneth Megan, “Tax Reform Will Raise Costs for Many Immigrant Families,” Bipartisan Policy Center (Dec. 22, 2017).

⁴¹ *Id.*

⁴² See Ibrahim Hirsi, “Trump Administration’s ‘Public Charge’ Provision Has Roots in Colonial U.S.,” PRI (Dec. 19, 2018) (demonstrating the discriminatory roots of the phrase “public charge”); Margot Adler, “Immigration Study: ‘Second Generation’ Has Edge,” *National Public Radio* (Aug. 24, 2008) (noting ongoing questions as a result of difficulties in legal immigration); see also Center for Immigration Studies, “Historical Overview of Immigration Policy” (providing an overview of the history of immigration in the U.S.); Archie Bland, “Rats: The History of an Incendiary Cartoon Trope,” *The Guardian*, Nov. 18, 2015 (noting a history of using vermin to depict immigrants and refugees).

⁴³ See Howard F. Chang, “Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy,” 145 *U. Pa. L. Rev.* 1147, 1149 (1997) (“Immigration barriers interfere with the free flow of labor internationally. . . . For any given class of labor, residents of high-wage countries could gain by employing more immigrant labor, and residents of low-wage countries could gain by selling more of their labor to employers in high-wage countries.”).

⁴⁴ Hayes Holderness, “Weekly SSRN Tax Article Review and Roundup: Holderness Reviews Flanagan’s ‘Reframing Taxigration,’” *TaxProf Blog*, Dec. 13, 2019.

⁴⁵ See 152 Cong. Rec. S5136 (daily ed. May 25, 2006) (statement of McCain) (discussion of Comprehensive Immigration Reform Act of 2006). A striking excerpt from McCain’s comments follows: “The CBO and Joint Tax Committee estimate that bringing these legal immigrants into the federal tax system would substantially increase federal revenue collections overall. It is patently unfair to make them abide by our tax rules yet deny any legal workers equal treatment under these same rules. . . . Some of these amendments are sending a very troubling message to the American public about what direction we want our country to go. We need to be going forward and not backward. . . . These people are here to work, and they are doing jobs that most of us do not have the will to do. These are workers. They are not risking their lives to come into this country with the goal of freeloading off of us. They are here to earn a wage for the betterment of themselves and their families, the same reason our forebears came here to this country. They aren’t looking for a handout. They are looking for a chance, a chance for a better life. And they are willing to work harder than most of us to have just a few of the opportunities most of us take for granted.”