

# BEARING WITNESS TO ECONOMIC INJUSTICES OF UNDOCUMENTED IMMIGRANT FAMILIES: A NEW CLASS OF “UNDESERVING” POOR

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## I. INTRODUCTION: BEARING WITNESS

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

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

The Holocaust,<sup>1</sup> the intentional and premeditated genocide of Jews,<sup>2</sup> was the result of institutionalized racism. If America had not been the Promiseland for my family, my great-grandparents and grandparents likely would not have survived the Holocaust, and my parents would have never been born. And you would not be reading this Essay.

More than one hundred years later, immigrants still travel to America seeking work and a better life for their families. Although the percentage of immigrants to the total population is lower today than at the turn of the century, because of restrictive immigration policies millions of immigrants are living

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<sup>1</sup> The word "Holocaust" is Greek in origin and means literally that which is offered up or a burnt sacrifice. The term has acquired the secular meaning of a complete sacrifice or destruction, especially by fire, of a large number of human beings.

<sup>2</sup> While six million Jews were murdered in the Holocaust, Hitler's Final Solution also included the intentional murder of Gypsies, homosexuals, people with disabilities, Jehovah's Witnesses, and countless resisters of Nazism. See generally INA R. FRIEDMAN, *THE OTHER VICTIMS: FIRST-PERSON STORIES OF NON-JEWS PERSECUTED BY THE NAZIS* (1990).

and working in the United States without government authorization. The most commonly used term to describe these immigrants is “illegal aliens,” which “is racially loaded, ambiguous, imprecise, and pejorative.”<sup>3</sup>

The history of the Holocaust and other atrocities reveal that hateful words lead to hateful acts. Racist terms compromise any hope of thoughtful debate. In this Essay, I will use the term “undocumented immigrants” to refer to “people who presently possess no proof of any right to be present in the United States, whether or not they have been declared deportable by the U.S. government (and the vast majority have not).”<sup>4</sup> In addition, I will use the term “unauthorized workers” to describe people who are forbidden under the immigration laws to work for pay.<sup>5</sup>

Since 1995, the average number of undocumented immigrants arriving in the United States has exceeded the average number of arrivals of documented immigrants.<sup>6</sup> In 2006, there were approximately twelve million undocumented immigrants residing in the United States, including more than seven million unauthorized workers, who comprise approximately 5% of the U.S. workforce.<sup>7</sup> Current immigration restrictions are impracticable and oppressive.

Oppressive restrictions on immigration seem “to derive from fear of (or distaste for) foreigners, especially foreigners of minority races or ethnic groups.”<sup>8</sup> More recently, undocumented immigrants (57% to 70%) originate predominately from the U.S.’s southern-border neighbor, Mexico.<sup>9</sup> Undocu-

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<sup>3</sup> Beth Lyon, *When More “Security” Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers*, 6 U. PA. J. LAB. & EMP. L. 571, 576 (2004) (citations omitted). In her article, Professor Lyon presents a thoughtful, comprehensive and necessary analysis about the appropriate terminology for non-U.S. citizens and their immigration status. *Id.* at 573-82.

<sup>4</sup> *Id.* at 581.

<sup>5</sup> *Id.* at 582. As Professor Lyon describes, the distinction between these terms “is important because although the two groups overlap numerically, personally, and politically, they are not co-terminous . . . . [I]mmigrants who are unauthorized to work are not all undocumented and those who are undocumented did not all enter the country illegally.” And there are many undocumented immigrants who do not work. *Id.* Professor Lyon prefers these terms because they are commonly used, relatively uncontroversial, “accurately convey the legal situation of the groups described,” and create a meaningful distinction. *Id.*

<sup>6</sup> See JEFFREY S. PASSEL, PEW HISPANIC CTR., UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 5-6 (2005), available at <http://pewhispanic.org/files/reports/46.pdf> [hereinafter PASSEL, NUMBERS AND CHARACTERISTICS] (determining that the number of undocumented immigrants is about ten million as of March 2004, increasing at a rate between 700,000 and 750,000 annually since 1995).

<sup>7</sup> CTR. FOR AM. PROGRESS, DON’T ABANDON COMPREHENSIVE IMMIGRATION REFORM (2006), [http://www.americanprogress.org/issues/2006/09/immigration\\_reform\\_memo.html](http://www.americanprogress.org/issues/2006/09/immigration_reform_memo.html) (urging Americans to push Congress to succeed rather than fail at comprehensive immigration reform and recounting the facts rather than the rhetoric on immigration).

<sup>8</sup> Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147, 1210-11 (1997).

<sup>9</sup> See Pia Orrenius & Madeline Zavodny, *Immigration Policy: What are the Consequences for an Amnesty for Undocumented Immigrants?*, 9 GEO. PUB. POL’Y REV. 21, 23 (2004) (finding that Mexico, the primary source country for undocumented immigrants, accounts for almost 70% of undocumented immigrants in 2000); B. LINDSAY LOWELL & ROBERTO SURO, PEW HISPANIC CTR., HOW MANY UNDOCUMENTED: THE NUMBERS BEHIND THE U.S.-MEXICO MIGRATION TALKS 6 (2002), available at <http://pewhispanic.org/files/reports/6.pdf> (noting that Mexicans have a long history of immigration to the U.S.); JEFFREY S. PASSEL,

mented immigrants also originate from Latin America (24%), Asia (9%), and Europe and Canada (6% combined).<sup>10</sup> The growing hostile reaction to immigration seems to be fueled by the rise in the number of immigrants of color. Deliberate race-based exclusion has existed in America since its inception.<sup>11</sup> Despite progress, pervasive and persistent racism continues to be a significant national tragedy.

Racism is the belief that racial differences produce an inherent superiority of a particular race. Racists believe that members of the “in-race” possess goodness and worth simply because of their race. Members of the “out-race” suffer a deficiency and corruptness that can never be remedied. Therefore, the ultimate logic of racism is genocide.<sup>12</sup>

The Holocaust is a horrific testament to this truth. Survivors of the Holocaust speak loudly and uniformly of one commandment: Never again: bear witness to injustice, racism, and hate and do what is necessary to prevent them. As Dr. Reverend Martin Luther King, Jr. proclaimed during the civil rights movement, “[i]njustice anywhere is a threat to justice everywhere . . .”<sup>13</sup> “To cure injustices, you must expose them before the light of human conscience and the bar of public opinion . . .”<sup>14</sup>

Survivors of the Holocaust feel a duty to bear witness for the dead and the living so that future generations are not deprived of the lessons of the past or ever have to suffer it as their future.<sup>15</sup> The American people and their repre-

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PEW HISPANIC CTR., ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION 1 (2005), available at <http://pewhispanic.org/files/reports/44.pdf> [hereinafter PASSEL, ESTIMATES] (discovering that the number of undocumented immigrants from Mexico is 5.9 million or 57% of the aggregate number as of March 2004, a percentage that has remained constant for the last decade).

<sup>10</sup> PASSEL, ESTIMATES, *supra* note 9, at 2; see also LOWELL & SURO, *supra* note 9, at 6.

<sup>11</sup> As a nation, we began by declaring that “all men are created equal.” We now practically read it “all men are created equal, except negroes.” When the Know-Nothings get control, it will read “all men are created equal, except negroes, and foreigners, and Catholics.” When it comes to this I should prefer emigrating to some country where they make no preten[s]e of loving liberty . . . where despotism can be taken pure, and without the base alloy of hypocri[s]y.

Letter from Abraham Lincoln to Joshua Speed (Aug. 24, 1855), in BORN FREE AND EQUAL: THE STORY OF LOYAL JAPANESE AMERICANS MANZANAR RELOCATION CENTER, INYO COUNTY, CALIFORNIA 9 (2001); see also KEVIN R. JOHNSON, THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS 16- 20 (2004) (describing the tragic history of racial exclusion in U.S. immigration laws).

<sup>12</sup> See MARTIN LUTHER KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? 70 (1967) (finding that in Western history, racists have used segregation, isolation, subordination, and deprivation as a substitute for the logical limit of extermination of the “out-races”).

<sup>13</sup> Letter from Martin Luther King, Jr. to Fellow Clergymen (April 16, 1963), available at <http://www.stanford.edu/group/King/frequentdocs/birmingham.pdf>.

<sup>14</sup> JOHN J. ANSBRO, MARTIN LUTHER KING, JR.: THE MAKING OF A MIND 244 (1982) (quoting from Dr. King’s 1965 interview with PLAYBOY magazine).

<sup>15</sup> Elie Wiesel, winner of the Presidential Medal of Freedom, the United States of America Congressional Gold Medal, the French Legion of Honor, the Nobel Peace Prize, and survivor of the Holocaust, has lived his commitment to forever “bear witness” to the unspeakable atrocities of the Holocaust. Professor Wiesel’s life has been “that of a witness who believes he has a moral obligation to try to prevent the enemy from enjoying one last victory by allowing his crimes to be erased from human memory.” ELIE WIESEL, NIGHT viii (Hill and Wang, 2006).

sentatives in Congress are wrestling to fix our broken immigration system. In the process, we must learn from the past and not repeat this country's tragic historical mistakes.

"The shameful treatment of Chinese immigrants by federal, state, and local governments (as well as by the public at large) in the 1800s represents a bitter underside to U.S. history."<sup>16</sup> In the late 1930s, President Roosevelt denied critical immigration opportunities for hundreds of thousands of Jews.<sup>17</sup> In 1942, he authorized the imprisonment of almost 120,000 people of Japanese ancestry, including more than 73,000 American citizens, in "permanent relocation centers."<sup>18</sup> A year later, President Roosevelt pronounced: "Americanism is not, and never was, a matter of race or ancestry."<sup>19</sup> Therefore, American institutions, policies, and actions should not be based upon race or ancestry.

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

My ancestors were the evil enemy who escaped the lethal wrath of the Nazis through the narrow window of open-door, U.S. immigration policy.

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<sup>16</sup> JOHNSON, *supra* note 11, at 17. In his insightful, scholarly, yet accessible book on U.S. immigration and civil rights, Professor Johnson demonstrates that the poem inscribed on the Statue of Liberty, "The New Colossus," while descriptive of much of the history of U.S. immigration, is inconsistent with the shameful treatment of "those categories of immigrants who share common characteristics with groups that are disfavored in this country." *Id.* at 2. Professor Johnson concludes that "those who are truly committed to racial justice in the United States cannot ignore the treatment of immigrants." *Id.* at 12.

<sup>17</sup> While the United States received about 100,000 Jewish immigrants until 1939, from 1933 until 1943 there were over 400,000 unfilled immigration quotas from countries subject to Hitler's persecution. MILTON MELTZER, *NEVER TO FORGET: THE JEWS OF THE HOLOCAUST* 45 (1976). See also Daniel J. Steinbock, *Refuge and Resistance: Casablanca's Lessons for Refugee Law*, 7 *GEO. IMMIGR. L.J.* 649, 678 (1993) (stating that social conditions in the United States between 1938 and 1941 "included a substantial amount of . . . anti-Semitism"). Other countries denied entry to hundreds of thousands of Jews as well, including Cuba when the government refused to honor entry to 930 Jews onboard the MS St. Louis. As the ship sat in Havana harbor within yards of the shore, a bribe of \$1,000,000 was solicited, but could not be raised within the twenty-four-hour deadline. Colombia, Chile, Paraguay, Argentina, and the United States either ignored requests for entry or explicitly denied it. Eventually, the MS St. Louis turned around and let its passengers off in Belgium, the Netherlands, England, and France. Most of these passengers, other than the 288 who disembarked in England, were murdered in the Holocaust. MICHAEL BERENBAUM, *THE WORLD MUST KNOW: THE HISTORY OF THE HOLOCAUST AS TOLD IN THE UNITED STATES HOLOCAUST MEMORIAL MUSEUM* 53-54 (1993) (describing the tragic journey of the MS St. Louis).

<sup>18</sup> On February 19, 1942, President Franklin D. Roosevelt signed Executive Order No. 9066 and authorized the removal of all Japanese from the west coast and their confinement in relocation camps. Prejudice against the Japanese was based on the idea that race, not citizenship, determined loyalty to the United States. The U.S. Supreme Court upheld this internment in its opinion in *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>19</sup> DANIEL S. DAVIS, *BEHIND BARBED WIRE* 100-01 (1982) (quoting President Franklin D. Roosevelt in early 1943).

Today when I hear broad proclamations of misinformation casting “illegal aliens”<sup>20</sup> as the scapegoat for all of the nation’s problems, I fear the intoxicating power of simple propaganda. I fear the strength of misguided frustration and hate. I fear the inability of the masses to see through the mendacity because of unjustifiable complexity and lack of transparency in our institutions.

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

I must bear witness.<sup>21</sup>

## II. U.S. SOCIAL WELFARE POLICY TOWARD UNDOCUMENTED IMMIGRANTS: “THE LESS THAN UNDESERVING” WORKING POOR

### A. Institutionalized Racism

American public policy has been forever defined by and institutionalized according to racial and ethnic hierarchies. For centuries, through systemic racial and ethnic inequality, America has abandoned people of color “to murder and mayhem in the streets, to substandard schools, to dilapidated housing, to inadequate health care, to a pervasive sense of hopelessness.”<sup>22</sup> In the early 1900s, termed the “Progressive Era,” U.S. and state governments established an unprecedented number of legislative and administrative actions intended to protect the social and economic rights of the “deserving” poor, that is, the White poor.<sup>23</sup> These actions were wrought with regressive civil rights policies that reflected and reinforced the subordinated status of people of color. The modern U.S. welfare state has evolved from this social and political landscape.<sup>24</sup>

<sup>20</sup> JOHNSON, *supra* note 11, at 156-57 (describing the term “illegal alien” as “the most damning terminology for noncitizens”).

<sup>21</sup> “The survivor must be a witness. He doesn’t have the right to hide behind a façade of false modesty. The easy way would be just to say nothing - but it’s been a long time since he took the easy way.” ELIE WIESEL, *AFTER THE DARKNESS: RELECTIONS ON THE HOLOCAUST* 9 (2002) (proving again the importance of bearing witness). With undeniable irony, on February 1, 2007, at a peace conference in San Francisco, Professor Wiesel, now a seventy-eight-year-old survivor, was assaulted by a young Holocaust denier. Matthai Chakko Kuruvila, *San Francisco: N.J. Man Sought in Wiesel Attack.*, FEB. 17, 2007, at B2. See also Press Release, *Statement on the Attack of Elie Wiesel*, Anti-Defamation League, Feb. 15, 2007, [http://www.adl.org/PresRele/ASUS\\_12/4978\\_83.htm](http://www.adl.org/PresRele/ASUS_12/4978_83.htm) (noting that “[b]earing witness to the Holocaust, Elie Wiesel, eloquently writes, speaks and teaches about the inhumanity of man and is the moral voice against it ever happening again, to anyone”).

<sup>22</sup> Tyrone A. Forman & Amanda E. Lewis, *Racial Apathy and Hurricane Katrina: The Social Anatomy of Prejudice in the Post-Civil Rights Era*, 3 DU BOIS REV. 175, 176 (2006) (quoting Illinois Senator Barack Obama).

<sup>23</sup> See DEBORAH E. WARD, *THE WHITE WELFARE STATE: THE RACIALIZATION OF U.S. WELFARE POLICY* 14-16 (2005).

<sup>24</sup> See generally *id.* Ward’s book provides “a powerful array of documentary and statistical evidence to reveal the mechanisms, centrality, and deep historical continuity of racial exclusion in modern ‘welfare’ provision in the United States.” Alice O’Connor, *Praise for the Book*, <http://www.press.umich.edu/titleDetailPraise.do?id=22210> (last visited June 4, 2007).

*B. The Racialization and Reconstruction of Welfare*

From their inception, government assistance programs sought “to impose White, middle-class norms on a population deemed worthy of assistance only if it embraced the superiority of this White middle-class culture.”<sup>25</sup> From 1911 through 1932, state-based mothers’ pension laws and aid programs preserved and protected White, middle-class women and their children, intentionally excluding African-Americans, non-White immigrants and the poor.

In 1935, Franklin D. Roosevelt federalized this institutionalized racism when he signed the Social Security Act into law and established a bifurcated U.S. welfare state: a national “social insurance” program for worthy retired workers and their dependents and public assistance programs for the remainder.<sup>26</sup> Deemed “deserving,” the Act did not subject the former beneficiaries to ANY exclusionary testing. And the latter remnants of society were subject to race-based scrutiny and means-testing to prove their need and their worthiness.<sup>27</sup> With the addition of Survivor’s Insurance in 1939, White widows and their precious children once again gained worthy status: intentionally segregated from the unfit and unworthy welfare recipients of color and added to the protection of the Social Security “insurance” system.<sup>28</sup>

As it became more and more difficult to exclude people of color from government assistance, the public image of “welfare” became increasingly negative and sated with racist stereotypes.<sup>29</sup> The portrait of the worthy and unfortunate respectable White widow and sympathetic fatherless children was replaced with the “welfare queen:” a Black, irresponsible, lazy, drug-addict mother who produced children out of wedlock for decades solely for the increased copious cash flow from the over-taxed taxpayers.<sup>30</sup>

Empirical evidence demonstrates that these stereotypes are grossly inaccurate and a 1962 study found that no outright cases of welfare fraud have been discovered.<sup>31</sup> Indeed, “African Americans have never represented a majority of those receiving welfare” despite their disproportionate poverty.<sup>32</sup> However, once people of color gained access to government assistance, the White public and media spun welfare into an overwhelming economic drain on society costing all Americans their limited financial resources. The intentional racialization of welfare accomplished the goal of its certain demise.

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<sup>25</sup> WARD, *supra* note 23, at 54. See also Joel F. Handler, “Ending Welfare As We Know It”: *The Win/Win Spin or the Stench of Victory*, 5 J. GENDER RACE & JUST. 131, 134 (2001) (“The cornerstone of U.S. welfare policy has always been to separate the ‘deserving’ poor from the ‘undeserving.’”); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform’s Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647, 1665-67 (noting that Americans were supportive of early welfare programs because the primary beneficiaries were “deserving” pitiable White widows who needed to care for their white fatherless children).

<sup>26</sup> WARD, *supra* note 23, at 98-99.

<sup>27</sup> *Id.* at 99-130 (describing the evolution of mothers’ pensions through the New Deal).

<sup>28</sup> See *id.* at 126; Onwuachi-Willig, *supra* note 25, at 1667-68.

<sup>29</sup> Onwuachi-Willig, *supra* note 25, at 1668-73.

<sup>30</sup> *Id.*

<sup>31</sup> ROBERT LIEBERMAN, *SHIFTING THE COLOR LINE: RACE AND THE AMERICAN WELFARE STATE* 161-62 (1998).

<sup>32</sup> WARD, *supra* note 23, at 9.

A Republican Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).<sup>33</sup> President Clinton, responding to an incensed and enraged White public, cut off the “free ride” for “undeserving welfare queens,” by signing the PRWORA into law. With the “end of welfare as we knew it,” work became the primary “new” remedy for poverty. Nevertheless, race remains the basis upon which the government provides the effective tools to secure work, such as education, training, and child care.

Since the implementation of the welfare-to-work program, studies have demonstrated that White welfare recipients are more likely than other ethnic groups to be encouraged to get an education and receive child care subsidies and less likely to be sanctioned for welfare policy violations.<sup>34</sup> These studies also indicate that White women are more likely to receive benefits for children born out of wedlock.<sup>35</sup> Today “[w]ell over 30 million Americans live below the federal poverty line, and while a majority of the poor are White, African Americans and Latinos constitute approximately twice the proportion of the country’s poor as they do of the population overall.”<sup>36</sup> With the increasing population of undocumented immigrants in the United States, American institutions have devised a new exclusionary category of “undeserving poor” who even are treated even less favorably: “The Less Than Undeserving Poor.”<sup>37</sup>

### C. *Welcome to America: Those With Gold Come Through Our Door*<sup>38</sup>

Despite the warm welcome to the poor inscribed on the Statue of Liberty, being poor in America today is a life fraught with daily insurmountable challenges.<sup>39</sup> Forever in fear of abuse of its social welfare systems, America has denied entry to the poor since colonial times.<sup>40</sup> Even today the “public charge exclusion” accounts for most initial substantive State Department visa denials.<sup>41</sup> Immigrants who enter legally, but later become public charges, are subject to deportation. However, because of aggressive use of the public charge exclusion and the chilling effect on seeking financial assistance, the U.S. has not deported many poor immigrants.<sup>42</sup>

<sup>33</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended at 8 U.S.C. § 1612 (2000)). Immigrant eligibility for food stamps is restored by 8 U.S.C. § 1612(a)(2)(D)(ii).

<sup>34</sup> WARD, *supra* note 23, at 145.

<sup>35</sup> *Id.*

<sup>36</sup> Forman & Lewis, *supra* note 22, at 176.

<sup>37</sup> See JOHNSON, *supra* note 11, at 93-96.

<sup>38</sup> “Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tossed to me. I lift my lamp beside the golden door.” Emma Lazarus, *The New Colossus*, in *THE POEMS OF EMMA LAZARUS*, vol. 1, at 2 (1889).

<sup>39</sup> For a captivating description of the working poor in America today, see DAVID K. SHIPLER, *THE WORKING POOR: INVISIBLE IN AMERICA* (2001).

<sup>40</sup> JOHNSON, *supra* note 11, at 93-96.

<sup>41</sup> *Id.* at 97 (recounting that 90% of initial visa denials in 1998 were due to the “public charge exclusion”).

<sup>42</sup> *Id.* at 91-93.

Poor lawful immigrants, as the “undeserving” poor in America, must try to survive with limited public benefits and the persistent fear of losing their lawful status because they are a “public charge.” Undocumented immigrant families, “the less than undeserving” poor, are ineligible for most public assistance programs, including meaningful tax relief, and therefore pay federal, state, and local income, property, excise, and sales taxes at exceptionally high effective marginal tax rates.

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

Similar to U.S. citizens, undocumented immigrant families are subject to federal, state, and local income, property, excise, and payroll taxes. However, consistent with U.S. welfare policy, the federal income tax system is designed to encourage work by providing that poverty level working families do not pay taxes.<sup>43</sup> The statutes deny this relief to undocumented immigrant families.<sup>44</sup>

*1. Anti-poverty Relief for Certain Working Poor Families Under the EITC*

In 1972, then-Governor Ronald Reagan, testifying before Congress regarding a workfare approach to government assistance, “suggested that the federal government should exempt low income families from income taxes and give them a rebate for their Social Security taxes.”<sup>45</sup> Several years later, Senator Russell Long, the conservative Democrat chairman of the Senate Finance Committee, and Congressman Al Ullman, the moderate chairman of the House Ways and Means Committee, were able to package the idea in a refundable tax credit and garner liberal support for the Earned Income Tax Credit (EITC).<sup>46</sup> Since it was developed and established in 1975 by conservative forces, the EITC has enjoyed strong support across the entire political spectrum for encouraging work over welfare.<sup>47</sup>

The EITC is the largest and most successful anti-poverty program in the United States for working poor families. “Research strongly confirms that the EITC has played a critical role in bringing more single mothers into the

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<sup>43</sup> See SAUL D. HOFFMAN & LAURENCE S. SEIDMAN, *HELPING WORKING FAMILIES: THE EARNED INCOME TAX CREDIT* 1-4 (2003); William Safire, *The 25% Solution*, N.Y. TIMES, Apr. 20, 1995, at A19 (commenting that most taxpayers believe that the poor should not pay any taxes, the middle class something, and the rich the highest percentage).

<sup>44</sup> For purposes of this Essay a family residing in the United States long enough to be subject to U.S. federal income taxes as a “resident alien” and in which not every member has a valid Social Security number will be described as an “undocumented immigrant family.”

<sup>45</sup> See HOFFMAN & SEIDMAN, *supra* note 43, at 12.

<sup>46</sup> *Id.* at 11-16 (recounting the conservative history and liberal support of the EITC).

<sup>47</sup> *Id.* at 14; ROBERT GREENSTEIN, CTR. ON BUDGET & POLICY PRIORITIES, *THE EARNED INCOME TAX CREDIT: BOOSTING EMPLOYMENT, AIDING THE WORKING POOR* 1 (2005), available at <http://www.cbpp.org/7-19-05eic.pdf> (describing the broad base of support for the EITC, including conservative economists and Presidents George H.W. Bush and William J. Clinton); Dorothy A. Brown, *The Tax Treatment of Children: Separate But Unequal*, 54 EMORY L.J. 755, 801 (2005) (President Clinton expanded the EITC in 1993 and commented that the EITC “reward[s] work over welfare . . . . Now that’s real welfare reform.”).

workforce.”<sup>48</sup> The EITC encourages work and lifts millions of taxpayers out of poverty, including almost three million children each year, more than any other social program.<sup>49</sup> Without the EITC, the number of children living in poverty would increase by 25%.<sup>50</sup>

The EITC is a refundable tax credit that provides cash refunds of up to \$4,716 (for 2007) to ensure that working poor families pay no taxes.<sup>51</sup> While designed to offset the burden of Social Security payroll taxes, the EITC in some cases provides a meaningful wage subsidy for low-income working families.<sup>52</sup> The EITC provides critical cash refunds “for basic necessities like housing, utilities, food, and basic household appliances.”<sup>53</sup> More than twenty-one million taxpayers, almost 17% of all taxpayers, received average EITCs of \$1,788, or in excess of \$38 billion in 2003.<sup>54</sup>

*a. Qualifying for the EITC*

Throughout its thirty-plus year history, the EITC has encouraged low-income families to work.<sup>55</sup> Accordingly, to qualify for the EITC, an individual and her spouse, if married, must have earned income within certain lower-earned income ranges.<sup>56</sup> The EITC and the earned income ranges are indexed for inflation annually and vary meaningfully with the number of qualifying children.<sup>57</sup> For tax year 2007, eligible individuals with two or more children may claim the maximum EITC of \$4,716 for earned income or adjusted gross income (AGI) levels of \$11,790 to \$15,390 (\$17,390 for married filing jointly). The EITC phases out completely at \$37,783 (\$39,783 for married filing jointly) of the greater of earned income or AGI.<sup>58</sup> Because the EITC is targeted for families, the maximum EITC benefits drop for eligible individuals with one

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<sup>48</sup> STEVE HOLT, THE BROOKINGS INST., THE EARNED INCOME TAX CREDIT AT AGE 30: WHAT WE KNOW 14 (2006), available at [http://www3.brookings.edu/metro/pubs/20060209\\_Holt.pdf](http://www3.brookings.edu/metro/pubs/20060209_Holt.pdf) (citing studies that find that the larger EITC was responsible for 84% of the difference in the employment rate increases between one-child and multi-child families; 60% of the increase in single mothers' work between 1984 and 1996 and 34% of the increase in employment among single mothers between 1993 and 1999).

<sup>49</sup> *Id.* at 13 (stating the 2003 statistics of 4.4 million lifted out of poverty, including 2.4 million children).

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

<sup>51</sup> I.R.C. § 32 (2000).

<sup>52</sup> See HOFFMAN & SEIDMAN, *supra* note 43, at 11; GREENSTEIN, *supra* note 47, at 1-3 (describing EITC basics and reporting that EITC expansions were responsible for more than one-half of the large increase in employment among single mothers between 1984 and 1996).

<sup>53</sup> GREENSTEIN, *supra* note 47, at 4. See also SHIPLER, *supra* note 39, at 13-14 (describing how the working poor use their EITC benefits to buy furniture, homes, and pay bills).

<sup>54</sup> ALAN BERUBE, THE BROOKINGS INST., THE NEW SAFETY NET: HOW THE TAX CODE HELPED LOW-INCOME WORKING FAMILIES DURING THE EARLY 2000s 1-2 (2006), available at [http://www3.brookings.edu/metro/pubs/eitc/20060209\\_newsafety.pdf](http://www3.brookings.edu/metro/pubs/eitc/20060209_newsafety.pdf).

<sup>55</sup> See HOFFMAN & SEIDMAN, *supra* note 43, at 11-16 (describing the history of the EITC's design and evolution).

<sup>56</sup> I.R.C. § 32(a)(1) (2000).

<sup>57</sup> *Id.* § 32(b)-(j).

<sup>58</sup> *Id.*

qualifying child (\$2,853) or no qualifying children (\$428).<sup>59</sup> And married taxpayers, with or without children, who file their tax returns separately will not receive any EITC.<sup>60</sup> The EITC is not intended to benefit low wage earners with above average investments so eligible individuals cannot have investment income in excess of \$2,900 per year.<sup>61</sup>

If an eligible individual does not have a qualifying child, she must satisfy several additional conditions.<sup>62</sup> She must: (1) have a principal place of abode in the United States for more than one-half of the tax year; (2) not be a dependent; and (3) be at least age twenty-five, but under age sixty-five (if married, only one spouse must satisfy the age requirement) as of the close of the tax year.<sup>63</sup>

Eligible individuals with one or more qualifying children meet the criteria for significantly greater EITC benefits than those without any qualifying children.<sup>64</sup> A qualifying child is defined under the uniform definition of a child for purposes of claiming a dependent.<sup>65</sup> Therefore, if a taxpayer has a dependent child, grandchild, brother, sister, niece, or nephew, the dependent likely will satisfy the requirements for a qualifying child under the EITC.<sup>66</sup> However, this is not the case for certain immigrant families.

*b. Congress Limits EITC Relief for Authorized Work*

In 1996, Congress enacted and President Clinton signed into law PRWORA, which included unprecedented restrictions on federal benefits for many immigrants.<sup>67</sup> Among the long list of benefit restrictions, Congress decided that “individuals who are not authorized to work in the United States”

<sup>59</sup> Rev. Proc. 2006-53, 2006-48 I.R.B. 996, § 2.07 (Nov. 27, 2006) (setting forth earned income credit amounts for 2007); I.R.C. § 32(a)(2).

<sup>60</sup> See I.R.C. § 32(d) (setting forth the requirement that married taxpayers must file a joint tax return to qualify for the credit). Moreover, nonresident aliens do not qualify for the credit unless they are married to a U.S. citizen or resident alien and they elect to have their worldwide income subject to U.S. income tax. See *id.* § 32(c)(1)(D) (providing that a nonresident alien may qualify if she will be treated as a resident alien for tax purposes due to an election under Section 6013(g) or (h)).

<sup>61</sup> See *id.* § 32(i) (describing the disqualifying investment income as interest (taxable and tax-exempt), dividends, net capital gains, net rents, net royalties, and net passive income).

<sup>62</sup> *Id.* § 32(c)(1)(A).

<sup>63</sup> *Id.* § 32(c)(1)(A)(ii).

<sup>64</sup> See Rev. Proc. 2006-53, 2006-48 I.R.B. 996, § 2.07.

<sup>65</sup> I.R.C. § 32(c)(3) (referring to section 152(c) to define a “qualifying child”). A “qualifying child” is generally defined under Section 152(c) of the Internal Revenue Code for this purpose as a child, grandchild, brother, sister, niece, or nephew who lives with the taxpayer for more than one-half of the tax year and is under age nineteen (twenty-four if a full-time student). In addition to satisfying the requirements under a uniform definition of a child, the dependent must live in United States for more than six months. *Id.* § 32(c)(3).

<sup>66</sup> The additional requirements for purposes of the EITC include that the “qualifying child” must live with the taxpayer in the United States and that the “qualifying child” must have a Social Security number. *Id.*

<sup>67</sup> Tanya Broder, *Immigrant Eligibility for Public Benefits*, in IMMIGRATION AND NATIONALITY LAW HANDBOOK, 2005-06 EDITION 759 (Gregory P. Adam et al. eds., Am. Immigration Lawyers Ass’n 2005) (describing impact of The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

should be denied EITC benefits.<sup>68</sup> To accomplish this goal, Congress amended the Internal Revenue Code (“Code”) to require that any taxpayer (and, if married, her spouse) and each qualified child must provide a valid Social Security number (“SSN”) (issued to individuals authorized to work in the United States) to receive any EITC benefits.<sup>69</sup>

SSNs have been issued to workers since the implementation of the 1935 Social Security Act.<sup>70</sup> The initial purpose of the number was to provide employers and the U.S. government with a means to report or track Social Security earnings for purposes of payroll tax and retirement benefits calculations.<sup>71</sup> In the 1960s, computerization caused the Internal Revenue Service (“IRS”) and private businesses to rely on SSNs as a method of accumulating, sorting, and tracking information.<sup>72</sup> Until the early 1980s, the government issued Social Security cards to unauthorized workers and only kept internal records regarding their status.<sup>73</sup> Beginning in 1982, Social Security cards issued to unauthorized workers were marked “Not Valid for Employment,” and temporarily authorized workers received cards marked “Valid Only With INS Authorization.”<sup>74</sup>

In an effort to stop employers from hiring unauthorized workers, Congress enacted the Immigration Reform and Control Act of 1986.<sup>75</sup> This Act, among other things, required employers to have all new employees prove their identity and work authorization with specific documents.<sup>76</sup> Congress listed the Social Security card as an acceptable document evidencing proof of work authorization.<sup>77</sup> As a result of this requirement, there has been widespread use of counterfeit Social Security cards among unauthorized workers, making “it more common and easier than ever for [unauthorized] workers to enter and function in the U.S. labor market.”<sup>78</sup>

<sup>68</sup> STAFF OF J. COMM. ON TAXATION, 104TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 104TH CONGRESS 394 (Comm. Print 1996).

<sup>69</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2276-77 (codified as amended at 8 U.S.C. § 1612 (2000)); I.R.C. § 32(c)(1)(E), (m); Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, § 205, 118 Stat. 1169, 1176 (2004); I.R.C. § 32(c), (m) (renumbering the clauses added by the 1996 Act). Specifically, the Code requires a SSN that is issued for reasons other than to apply for or receive benefits fully or partially funded with federal funds. *See id.* § 32(m) (finding that for this purpose the Taxpayer Identification Number (“TIN”) is an SSN issued pursuant to provisions other than “clause (II) (or that portion of clause (III) that relates to clause (II)) of section 205(c)(2)(B)(i) of the Social Security Act”).

<sup>70</sup> Paula N. Singer & Linda Dodd-Major, *Identification Numbers and U.S. Government Compliance Initiatives*, 104 TAX NOTES 1429, at 1429-30 (Sept. 20, 2004).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 1431.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* (noting that with the replacement of the INS with the Department of Homeland Security the new annotation is “Valid for Work Only with DHS Authorization”).

<sup>75</sup> *Id.* *See also* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101(a), 100 Stat. 3360-72; 8 U.S.C. § 1324(a) (2000) (setting forth matters related to employment of aliens).

<sup>76</sup> Singer & Dodd-Major, *supra* note 70, at 1431.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* *See also* Lyon, *supra* note 3, at 590 (finding that purchased or borrowed SSNs are easily obtained throughout the country and employers look the other way).

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

Undocumented immigrants are not authorized to work in the United States and, therefore, have not been eligible for a SSN since 1996.<sup>79</sup> In lieu of a SSN, undocumented immigrants must apply for and use an Individual Taxpayer Identification Number (“ITIN”) for all their tax filings.<sup>80</sup> Consequently, undocumented immigrant families cannot qualify for any EITC benefits.

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

a. *The SSN Requirement Denies EITC Benefits for Certain Immigrant Families in Which Every Member Is Legally Working and Present in the United States*

The requirement is too restrictive because it excludes families in which every adult is legally working and present in the United States from EITC benefits. Two legally present and working parents with a child without a SSN cannot receive any EITC benefits even if the child is not working. The Code precludes any EITC benefits for this obviously legally working and present family, including the lesser amount of EITC benefits available for eligible individuals without a qualifying child.<sup>81</sup> However, if the same family has at least

<sup>79</sup> See Singer & Dodd-Major, *supra* note 70, at 1430, 1432.

<sup>80</sup> The ITIN is “a nine-digit number resembling an SSN but starting with the number ‘9’ and having the number ‘7’ or ‘8’ as the fourth digit.” *Id.* at 1432. See Treas. Reg. § 301.6109-1(a) (2006). As late as 1996, the Social Security Administration (“SSA”) began limiting the individuals eligible to receive SSNs to: U.S. citizens, alien individuals legally admitted for permanent residence, and alien individuals admitted under another immigration category authorized for employment in the United States. Singer & Dodd-Major, *supra* note 70, at 1432. Qualifying taxpayers must apply for an ITIN using Form W-7, Application for Individual Taxpayer Identification Number, which requires taxpayer information, including the individual’s name, address, foreign tax identification number (if any), and specific reason for obtaining the ITIN. Treas. Reg. § 301.6109-1(d)(3). In addition, the IRS may prescribe that applicants provide documentary evidence to establish their alien status and identity. *Id.* Acceptable documentary evidence for this purpose may include items such as an original (or a certified copy of the original) passport, driver’s license, birth certificate, identity card, or immigration documentation. *Id.* Qualifying individuals must apply for and use their unique ITIN on all their tax filings after December 31, 1996. *Id.* § 301.6109-1(j). The ITINs are “for tax purposes only and don’t affect immigration status, authorize work in the U.S. or provide eligibility for Social Security benefits . . . .” I.R.S. News Release IR-2003-49 (Apr. 10, 2003).

<sup>81</sup> This hypothetical couple could be visiting faculty members admitted to the United States temporarily for authorized work. Each of these individuals would qualify for SSNs. However, the couple’s minor child would not be authorized to work and, therefore, would not qualify for a SSN. The couple would be required to file for an ITIN for their dependent

one child with a SSN and one or more children without a SSN, but with an ITIN, the family can qualify for EITC benefits for a married couple with one qualifying child.<sup>82</sup>

The requirement also denies EITC benefits to any U.S. citizen or authorized worker whose nonworking spouse has a valid ITIN, but no SSN.<sup>83</sup> The spouse could be legally present in the United States or a resident of another country (a nonresident alien for tax purposes) who elects to subject her otherwise nontaxable income to U.S. income tax by filing with her U.S. citizen or resident spouse. Even if the couple has one or more qualifying children who are U.S. citizens with SSNs, this legally present and working undocumented immigrant family will not qualify for any EITC benefits.<sup>84</sup>

If the family decides to file a married filing separate return so that all individuals on the EITC tax return have SSNs, they will not qualify for any EITC benefits. Married taxpayers cannot qualify for the EITC with a married filing separate tax return.<sup>85</sup> Only if the couple ends their marriage or never enters into marriage will crucial EITC benefits be available.<sup>86</sup> If, within the statute of limitations period, the spouse and/or child with an ITIN obtains a SSN, the family can amend the married filing separately tax returns and file a joint return. However, if either married filing separate return becomes the subject of certain tax controversies, they cannot amend the returns and file jointly and the opportunity for any EITC during those tax years is lost.<sup>87</sup>

*b. The SSN Requirement Does Not Preclude Workers Who Are Unauthorized from Receiving EITC Benefits*

The SSN requirement also permits families who have members that are working in the United States without authorization and without current documents to receive EITC benefits. For example, a taxpayer with a SSN that authorized work when issued, but that is no longer valid for employment, will qualify for EITC benefits. The provision requiring a SSN on the tax return

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child for tax filing purposes. As a result, the couple would not qualify for any EITC benefits, including EITC benefits for taxpayers without any qualifying children. *See* I.R.C. § 32(c)(1)(G) (2000).

<sup>82</sup> If we assume the same couple gives birth to a child while they are residing in the United States, the newborn would be a U.S. citizen and would qualify for a SSN. As a result, the couple would have one qualifying child and one non-qualifying child under the EITC. Given these circumstances, the couple could qualify for EITC benefits for a married couple with one qualifying child. *See id.*; I.R.C. § 32(m). If the same family has two children with SSNs and other children without SSNs, the family can qualify for the maximum amount of EITC benefits for a married couple with two or more qualifying children. *Id.*

<sup>83</sup> I.R.C. § 32(c)(1)(E)(ii), (c)(1)(F).

<sup>84</sup> *See id.*

<sup>85</sup> *See id.* § 32(d).

<sup>86</sup> This is not only inconsistent with Congress' targeted EITC recipients, but also inconsistent with the strong push for marriage as a cure for poverty. *See generally* Onwuachi-Willig, *supra* note 25, at 1660 (demonstrating that the current administration's policy of promoting marriage as a cure for poverty shifts the burden of poverty from the government to the welfare recipient analogous to the government's use of "marriage to financially and socially domesticate newly freed Blacks to ensure that the white public faced minimal responsibility for former slavers' economic security").

<sup>87</sup> *See* I.R.C. § 6013(b)(2)(B)-(D).

does not require that the SSN be currently valid for work or residence in the United States.<sup>88</sup> Literally, the provision only requires that the SSN not be issued to secure federal benefits.<sup>89</sup> Therefore, SSNs issued temporarily for work which are no longer valid, or SSNs issued to unauthorized workers before 1982 to secure state or local benefits are valid for EITC benefits, while SSNs initially issued to secure federal benefits but that are now work authorized are not.<sup>90</sup> The SSN requirement as stated and enforced does not assure that only authorized work qualifies for EITC benefits.

Ironically, the government permits EITC benefits to families retroactively for tax years in which they were working and/or present in the United States without government authorization.<sup>91</sup> If unauthorized workers, their spouses, or qualifying children obtain SSNs after a tax return is filed, the return can be amended merely to add the SSNs and retroactively claim EITC benefits.<sup>92</sup> The IRS has ruled that EITC benefits are retroactively available as long as the statute of limitations has not lapsed.<sup>93</sup> Therefore, once all members of the family have SSNs, EITC benefits are available even if during the tax year at issue no family members were authorized to work or even be in the United States.<sup>94</sup>

The SSN requirement does not accomplish Congress' stated intention of denying EITC benefits for unauthorized work. The requirement only calls for a SSN on the tax return, as filed or as timely amended, for the taxpayer and spouse, if any, and at least one of any children. The requirement does not ensure that the work upon which the credit is based be authorized.

In an effort to deny EITC benefits quickly and efficiently to "less than undeserving" poor working immigrant families, Congress has devised a poorly targeted clerical requirement. The SSN requirement categorizes the working poor in America into two separate groups: those that are holders of SSNs and those that are holders of ITINs or SSNs issued for federal benefits. The result is separate, unequal, and irrational tax treatment of hard-working poor undocumented immigrant families.<sup>95</sup>

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<sup>88</sup> See *id.* § 32(m).

<sup>89</sup> *Id.* (emphasis added).

<sup>90</sup> Broder, *supra* note 67, at 775.

<sup>91</sup> I.R.S. C. Couns. Adv. Mem. 200028034 (June 9, 2000) (finding that an individual otherwise eligible for the EITC without a valid SSN may claim the EITC on an amended return with a valid SSN subject to the lapsing of the statute of limitations); I.R.S. C. Couns. Adv. Mem. 200032013 (May 9, 2000) (finding the same with respect to a taxpayer who is not authorized to work, but later after becoming authorized obtains a valid SSN); I.R.S. C. Couns. Adv. Mem. 200126030 (May 15, 2001) (finding the same and noting that the SSN must be issued for an alien lawfully admitted to the United States and entitled to engage in U.S. employment).

<sup>92</sup> I.R.S. C. Couns. Adv. Mem. 200032013 (May 9, 2000); I.R.S. C. Couns. Adv. Mem. 200126030 (May 15, 2001).

<sup>93</sup> I.R.S. C. Couns. Adv. Mem. 200028034 (June 9, 2000).

<sup>94</sup> See I.R.S. C. Couns. Adv. Mem. 200032013 (May 9, 2000).

<sup>95</sup> See Kristina M. Oven, *The Immigrant First As Human: International Human Rights Principles and Catholic Doctrine As New Moral Guidelines for U.S. Immigration Policy*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 499, 502-05 (1999) (describing anti-immigrant sentiment and racism resulting in welfare reform because of the perception that undocumented immigrants come to the United States to take advantage of public assistance).

3. *Congress Can and Must Act Immediately to Remedy Its Unintentional(?) Race-Based Exclusion of Hard-Working Poor Undocumented Immigrant Families from Welfare*

The denial of critical EITC benefits to undocumented immigrant families merely because one family member does not have a SSN (even if she is not working or even present in the United States) is a glaring example of institutionalized xenophobia and racism. Congress could remedy this problem easily, by requiring that each working individual have a SSN authorizing the work qualifying the taxpayer for EITC benefits. This simple change would achieve the clearly-stated goal of only providing federal assistance for authorized work. This decade-old denial of EITC benefits has created a growing new class of “undeserving” poor in America: “the less than undeserving” poor. Sadly, it gets worse.

III. BEARING THE BURDEN WITHOUT ANY BENEFITS: UNAUTHORIZED WORKERS ARE REQUIRED TO PAY PAYROLL TAXES, BUT ARE NOT ELIGIBLE FOR SOCIAL SECURITY BENEFITS

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

Unauthorized workers and their employers must each pay Social Security payroll taxes of 7.65% on all wages for an aggregate tax of 15.3%. “Most economists believe that the burden of most payroll taxes paid by employers falls on the employees themselves.”<sup>96</sup> Therefore, undocumented immigrant working families likely bear an effective marginal tax rate of at least 15.3%. High income families will bear a significantly lower effective marginal tax rate from payroll taxes because their wages above \$97,500 (in 2007) and investment income are not subject to Social Security tax.<sup>97</sup> Clearly, payroll taxes are horribly regressive.

“When both income and payroll taxes are considered, the effective marginal tax rates on earned income can be extraordinarily high, especially on low-income workers with children.”<sup>98</sup> “Some of the very highest marginal effective tax rates are imposed on couples earning around \$30,000 a year.”<sup>99</sup> Hard-working, low-income families bear the onerous and unjust economic burden of effective marginal tax rates as high as 45% (and likely even higher if state sales, excise, property, and income taxes are added into the analysis).

The amount of Social Security taxes paid by unauthorized workers and their employers has been increasing steadily and is now in the billions of dollars annually. In 2003, the government collected an estimated seven billion dollars in Social Security and Medicare taxes, or approximately one percent of

<sup>96</sup> JONATHAN BARRY FORMAN, MAKING AMERICA WORK 67-68 (The Urban Institute 2006).

<sup>97</sup> The Medicare portion of Social Security taxes (1.45% for each the employee and the employer) is not capped at \$97,500 (in 2007) and is assessed on every dollar of wages without limitation.

<sup>98</sup> FORMAN, *supra* note 96, at 69-70.

<sup>99</sup> *Id.* at 69.

overall revenue, from 7.5 million workers and their employers with mismatched SSNs.<sup>100</sup> This dollar amount has more than tripled in the last decade.<sup>101</sup> While some of the mismatches are due to clerical errors, the majority exist because unauthorized workers do not qualify for SSNs.<sup>102</sup>

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

In addition to not qualifying for a SSN or EITC benefits, unauthorized workers and their families do not qualify for critical Social Security benefits. Social Security is the largest and most successful social welfare program in the United States. For more than seventy years, Social Security has provided critical financial benefits to tens of millions of individuals every month. Today, Social Security provides more than forty-eight million individuals with average benefits of about \$10,500 per year. While not means-tested, Social Security presently lifts about thirteen million senior citizens and one million children out of poverty. Without Social Security, almost one-half of all senior citizens would live in poverty. For 66% of all seniors, Social Security benefits comprise the majority of their income and for almost one-third of all seniors Social Security benefits comprise 90% or more of their income.

Senior citizens of color are less likely than White senior citizens to receive Social Security benefits or to have other income from private pensions or assets. Only 75% of Hispanics age sixty-five or older receive Social Security benefits. Of the Hispanic seniors receiving Social Security, 76% rely on Social Security for more than one-half of their retirement income and almost 50% rely on Social Security for most of their retirement income. Without Social Security benefits, almost one-third of all Hispanic seniors would live in poverty.

While Social Security taxes are terribly regressive, Social Security benefits are surprisingly progressive. The Social Security system is designed to redistribute meaningful financial resources from high wage earners to lower wage earners. The redistribution occurs through a very complicated and opaque benefits formula. The lack of transparency may be one secret to Social Security's success and its overwhelming public support. Although Social Security is not means-tested, it is a phenomenally successful, anti-poverty, government assistance program that bears none of the oppressive stigma of welfare. It is a program for the "deserving" poor and, of course, the middle class, rich, and super rich folks too.

*1. How the Social Security Retirement Benefit System Works*

Any and all workers over the age of sixty-two generally are entitled to Social Security retirement benefits if they have worked in covered employment for at least forty quarters (ten years). A retiree's monthly benefit is based upon

<sup>100</sup> See Alan Zarembo, *Garment Laborers Say Bush Guest-Worker Plan an Ill Fit*, L.A. TIMES, Feb. 8, 2004, at A1; see also Singer & Dodd-Major, *supra* note 70, at 1435 n.9 (reporting \$7 billion in Social Security payroll taxes and \$56.1 billion in wages in 2001 added to suspense accounts).

<sup>101</sup> See Zarembo, *supra* note 100.

<sup>102</sup> See *id.*; Singer & Dodd-Major, *supra* note 70, at 1431 (describing proliferation of false use of SSNs and Social Security cards).

her thirty-five-year earnings history (up to the maximum annual earnings cap, which is \$97,500 for 2007) through age sixty adjusted for wage inflation. The highest thirty-five years of wage-adjusted annual earnings are combined and divided by 420 (12 months x 35 years) to derive a monthly amount.

This monthly amount is then put into a formula to derive the retiree's monthly full retirement benefit. This formula is notably progressive. For a worker turning sixty-two in 2006, the monthly benefit equals 90% of the first \$656, plus 32% of the next \$3,299 (if any) plus 15% of any remaining amount.<sup>103</sup> This monthly benefit is decreased if a retiree starts her benefits before her full retirement age (sixty-five and eight months in 2006 and increasing to age sixty-seven by 2027) or increased if a retiree continues to work beyond her full retirement age.<sup>104</sup>

In addition to retiree benefits, Social Security provides monthly benefits for a retiree's dependents, spouse, and survivors.<sup>105</sup> A retiree's nonworking spouse can retire and receive a benefit derived solely from her spouse's benefit. This benefit is equal to 50% of the worker's benefit.<sup>106</sup> If the retiree dies leaving a surviving spouse, she is entitled to a monthly benefit equal to 100% of the retiree's benefit for her lifetime, and any dependents will also receive monthly benefits through age eighteen.<sup>107</sup>

The Social Security benefit formula ensures that lower-wage workers and their families will receive a critically higher return on their contributions than higher wage workers. The current Social Security system particularly favors married one-worker large families with low lifetime earnings. Immigrants benefit substantially from this formula because, on average, they have lower incomes, a higher incidence of disability, more children per family, and longer life expectancies.<sup>108</sup> One study by Harvard economists found that Hispanics enjoy a Social Security rate of return that is 35 to 60% higher than the rate of return for the general population.<sup>109</sup>

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

<sup>103</sup> FORMAN, *supra* note 96, at 187-88.

<sup>104</sup> *Id.*

<sup>105</sup> See SOC. SEC. ADMIN., SOCIAL SECURITY RETIREMENT BENEFITS 6-9 (2007), available at <http://www.ssa.gov/pubs/10035.pdf> (describing retirement benefits under the Social Security Retirement system).

<sup>106</sup> *Id.* at 7-9.

<sup>107</sup> See SOC. SEC. ADMIN., SOCIAL SECURITY SURVIVORS BENEFITS 6-7 (2006), available at <http://www.ssa.gov/pubs/10084.pdf> (describing survivor benefits under the Social Security Retirement system).

<sup>108</sup> See FERNANDO TORRES-GIL ET AL., CTR. ON BUDGET AND POLICY PRIORITIES, THE IMPORTANCE OF SOCIAL SECURITY TO THE HISPANIC COMMUNITY (2005), available at <http://www.cbpp.org/6-28-05socsec3.pdf> (an extensive discussion of these issues).

<sup>109</sup> JASON FURMAN, CTR. ON BUDGET AND POLICY PRIORITIES, TOP TEN FACTS ON 70TH ANNIVERSARY FOR SOCIAL SECURITY 4 (2005), available at <http://www.cbpp.org/8-11-05socsec.pdf>.

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

## 2. *How the Social Security Retirement System Doesn't Work*

Unauthorized workers, who pay billions of dollars of Social Security taxes each year on tens of billions of dollars of wages (one percent of total U.S. wages), will never qualify for these critical Social Security benefits unless they obtain work authorization and are legally present in the United States.<sup>110</sup> After President Bush signed the Social Security Protection Act of 2004 into law, a noncitizen who files for Social Security benefits based on a SSN assigned on or after January 1, 2004, is required to have work authorization at the time she receives her SSN or at some later time. Only if noncitizens receive work authorization and a valid SSN may they apply for Social Security benefits. However, the benefits will be based on all Social Security-covered earnings regardless of their work status during the earning period.<sup>111</sup> Notably, the retiree has the burden of proving her earnings history and only wages reported to the Social Security Administration (“SSA”), and not paid “under the table,” count toward the required forty quarters of earnings to qualify for Social Security benefits.

Because unauthorized workers do not have a SSN, the SSA will not have an accurate record of their earnings history. Accordingly, unauthorized workers must provide satisfactory documentation to the SSA evidencing their annual earnings history. Currently, the SSA has a policy of assisting, and not prosecuting these workers, because its charge is to maintain correct earnings records. However, this constructive policy is subject to change immediately. It is a felony to use a SSN falsely: carrying a penalty of up to \$5,000 and five years in prison. Even if unauthorized workers become legal residents with work authorization, many are too afraid to risk coming forward even to receive life-changing Social Security benefits for decades of work.

Because of the complexity and lack of transparency in the Social Security system, most U.S. citizens do not understand how their benefits accrue. Unauthorized workers, many of whom lack critical English language skills,<sup>112</sup> an

<sup>110</sup> See DAWN NUSCHLER & ALISON SISKIN, CONG. RESEARCH SERV., LIBRARY OF CONG., SOCIAL SECURITY BENEFITS FOR NONCITIZENS: CURRENT POLICY AND LEGISLATION 7-8 (2005) (noting that unless contrary to a totalization agreement or Section 202(t) of the Social Security Act (the alien nonpayment provision), noncitizens not lawfully present in the United States during any month may not receive Social Security benefits for such month).

<sup>111</sup> *Id.* at 3-4. After President Bush signed the Social Security Protection Act of 2004, Pub. L. No. 108-203, H.R. 743, § 211, 118 Stat. 518 (codified at 42 U.S.C.A. § 414 (West 2004)), into law, a noncitizen who files a Social Security benefits application based on a SSN assigned on or after January 1, 2004, is required to have work authorization at the time the SSN is assigned or at some later time. If the worker receives authorization at some point, all of her Social Security covered earnings would count toward her forty quarters of earnings of at least \$900 or \$3,600 per year (in 2004) insured status requirement.

<sup>112</sup> See CAPPS ET AL., URBAN INST., THE HEALTH AND WELL-BEING OF YOUNG CHILDREN OF IMMIGRANTS 17-20 (2004), available at [http://www.urban.org/UploadedPDF/311139\\_ChildrenImmigrants.pdf](http://www.urban.org/UploadedPDF/311139_ChildrenImmigrants.pdf) (finding “that immigrants who lack English proficiency and have lower educational attainment earn lower wages,” and that the “[l]ack of English proficiency

education,<sup>113</sup> and any familiarity with the U.S. tax and retirement systems, most likely are unaware that this substantial benefit is available to them. If they have ten years of covered wages and obtain work authorization, they have a lifetime of meaningful, anti-poverty family benefits awaiting them, amounting to hundreds of thousands of dollars. However, with long-term Social Security deficits looming on the horizon, Congress and its constituents are looking for increased Social Security contributions and decreased benefits. Not surprisingly, many members of Congress have found their cash cow in vulnerable and hard-working undocumented immigrant families who have no meaningful opportunity to object.

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

On May 18, 2006, the Senate narrowly defeated (50-49) Senator John Ensign's (R-NV) amendment to deny Social Security quarterly credits to legally present immigrant workers for work performed while the workers did not have a SSN authorizing employment but upon which the worker and her employer paid Social Security and Medicare taxes.<sup>114</sup> This is not the first time the Senate has considered this economic injustice. In 2003, the Senate Finance Committee considered a similar proposal, but the then SSA Commissioner stated that the proposal was not practicable.<sup>115</sup> The Commissioner stated in writing that the information regarding immigration status, necessary to implement any accurate adjudication of benefits under this proposal, does not exist.<sup>116</sup>

Denying Social Security benefits for work upon which taxes were paid would deter tax compliance for the millions of unauthorized workers and their employers. According to the SSA's Chief Actuary, three-quarters of unauthorized workers pay payroll taxes.<sup>117</sup> In 2003 these employers and their employees paid more than \$8.5 billion in payroll tax revenues as well as federal and state income tax withholding on \$50-60 billion of reported wages. Should the

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is also strongly associated with poverty, food insecurity, and other forms of economic hardship in immigrant families").

<sup>113</sup> See PASSEL, NUMBERS AND CHARACTERISTICS, *supra* note 6, at 23 (comparing the percentage of native-born (7%) and legal immigrants (25%) who have not completed high school and noting that 32% of unauthorized immigrants have less than a ninth grade education).

<sup>114</sup> 109 CONG. REC. S4739-47 (daily ed. May 18, 2006) (amendment 3985 to S. 2611 (Comprehensive Immigration Act of 2006) (introduced to the 109th Congress on May 15, 2006 and tabled on May 18, 2006)); 109 CONG. REC. S4563 (daily ed. May 15, 2006) (text of amendment).

<sup>115</sup> See H.R. 1631, 108th Cong. (2003) (proposing to amend Title II of the Social Security Act to exclude from creditable wages and self-employment income wages earned for services by aliens illegally performed in the United States and self-employment income derived from a trade or business illegally conducted in the United States).

<sup>116</sup> JONATHAN BLAZER, NAT'L IMMIGRATION LAW CTR., IMMIGRATION REFORM AND ACCESS TO PUBLIC BENEFITS: THE RETURN OF AN UNEASY COUPLING 3 (2006), available at [http://www.nilc.org/immlawpolicy/CIR/cirandbenefits\\_2006-5-15.pdf](http://www.nilc.org/immlawpolicy/CIR/cirandbenefits_2006-5-15.pdf).

<sup>117</sup> 109 CONG. REC. S4742 (daily ed. May 18, 2006) (statement of Senator Edward Kennedy, quoting Steven Goss, Social Security's chief actuary).

government implement this proposal, the unintended result might be that employers would choose to pay unauthorized workers cash “under the table” and forgo sending tax payments or any information to the IRS or SSA.<sup>118</sup>

This mean-spirited strategy comes at a significant cost to the U.S. government. The National Taxpayer Advocate has warned, “a change in tax compliance of even one percentage point equates to an annual loss of more than \$20 billion of revenue to the federal government.”<sup>119</sup> Moreover, “[o]ver the next 75 years, new immigrants will provide a net benefit of approximately \$611 billion in present value to the Social Security system.”<sup>120</sup> In short, this proposal is not only fundamentally unjust and un-American, it is poor fiscal policy that could undermine the continuation of the most successful social welfare program for White retirees and their families.

#### IV. INACTION IS NOT AN OPTION

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

As the debates in Congress and across this country continue, unauthorized workers will likely continue to pay regressive Social Security taxes and never receive otherwise available Social Security benefits for such years. And undocumented working poor immigrant families will pay taxes at a shockingly high effective marginal tax rate because they do not receive EITC benefits (even in some cases where every worker in the family is authorized to work). Although the public at large is unaware of the details of these economic injustices, it is incensed and outraged at the situation.

This fury is misguided. The public feels victimized and believes that undocumented immigrant families are reaping enormous windfalls. Restrictionists have focused the public’s attention and fueled its venom on inflammatory misinformation about undocumented immigrants.<sup>121</sup> Many Americans

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<sup>118</sup> See Singer & Dodd-Major, *supra* note 70, at 1432.

<sup>119</sup> *Id.* at 1432-33.

<sup>120</sup> NAT’L IMMIGRATION LAW CTR., PROPOSED ENSIGN AMENDMENT TO IMMIGRATION REFORM BILL WOULD STRIP IMMIGRANT WORKERS OF SOCIAL SECURITY EARNINGS: BAD FOR THE SYSTEM AND AN AFFRONT TO OUR VALUES (2007), <http://www.nilc.org/immigrationpolicy/CIR/cir015.htm>.

<sup>121</sup> Recent studies indicate that 68 or 74% of Americans believe that undocumented immigrants are a very or extremely serious problem. Fifty-two percent say “immigrants today are a burden on our country because they take our jobs, housing and health care.” When asked “Do you think illegal immigrants do more to strengthen the U.S. economy because they provide low-cost labor and they spend money, or do illegal immigrants do more to weaken the U.S. economy because they don’t all pay taxes but use public services?” seventy percent said weaken. RUY TEIXEIRA, CENTURY FOUND. AND CTR. FOR AM. PROGRESS, WHAT THE PUBLIC REALLY WANTS ON IMMIGRATION 2-3 (2006), available at <http://www.tcf.org/Publications/MediaPolitics/teixeira6-28-06.pdf>.

believe that undocumented immigrants do not pay any taxes and consume billions of dollars of government benefits annually.<sup>122</sup>

The exact opposite is true. Undocumented immigrants pay billions of dollars in taxes annually and do not qualify for most government benefits including EITC, Social Security, and Medicare. “[E]very empirical study of illegals’ economic impact demonstrates the opposite . . . : undocumented actually contribute more to public coffers in taxes than they cost in social services.”<sup>123</sup> Undocumented immigrants provide a fiscal windfall to America and may be the most fiscally beneficial of all immigrants.<sup>124</sup>

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

Undocumented immigrants have little or no recourse for economic injustice. Despite America’s historically strong opposition to taxation without representation, undocumented immigrants have not enjoyed the right to vote on any local, state, or federal tax for almost eighty years, except in rare and unusual cases.<sup>125</sup> Furthermore, because of their precarious immigration and economic status, undocumented immigrants are vulnerable to deportation and exploitation and are chilled from protesting any injustice. As a result, they suffer economic injustices daily, which translate into lower prices for countless

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<sup>122</sup> See Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 1-2 (2006) (citing numerous studies and surveys of support).

<sup>123</sup> Peter L. Reich, *Public Benefits for Undocumented Aliens: State Law into the Breach Once More*, 21 N.M. L. REV. 219, 243-46 (1991) (discussing the voluminous empirical literature supporting the “net economic benefit” of undocumented immigrants on the federal, state, and local economies).

<sup>124</sup> JULIAN L. SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* 295 (1989) (concluding that undocumented immigrants are a national fiscal asset after reviewing “every study that provides dollar estimates show[ing] that when the sum of the tax contributions to the city, state and federal government are allowed for, those payments vastly exceed the cost of services used, by a factor of perhaps five, ten or more”).

<sup>125</sup> The election of 1928 was the first national election in which no immigrant had the right to vote in any national, state, or local election. See Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQ. 271, 282, 295-14 (2000) (describing the fierce opposition to granting voting rights to undocumented (and documented) immigrants and finding the rare cases in which undocumented immigrants can vote in certain elections including school board elections in New York and city tax matters in Takoma Park, Maryland). “[M]ost scholars advocate extending [voting rights] to permanent residents who have met relevant residency requirements for the jurisdiction.” *Id.* at 306.

goods and services that are an everyday part of privileged life in America. The burden of speaking out loudly and clearly about these injustices therefore is ours.

Inaction is not an option, because taking its course is action. As German student resisters proclaimed against the Nazi regime: “Every people deserves the government it is willing to endure.”<sup>126</sup> “Nothing is so unworthy of a civilized people as allowing itself to be governed without opposition by an irresponsible clique that has yielded to base instinct.”<sup>127</sup>

## V. CONCLUSION

As a country of immigrants, we cannot forget that America’s success is due to the hard work, loyalty, and commitment of a melting pot of immigrants from across the globe.<sup>128</sup> The economic injustices described in this Essay are only two examples of too many. In addition to economic injustices, undocumented immigrant families suffer routine physical abuse as well. The death rate of enhanced security border crossings has tripled. The U.S.-Mexican border has become a private hunting ground for racist vigilantes who proudly proclaim themselves as loyal Americans taking border patrol into their own hands, which carry and use lethal military weapons.<sup>129</sup>

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

America’s past history reveals unspeakable persecutions. “But we can hope . . . that the recollection of the past can prevent its recurrence.”<sup>130</sup> As Ansel Adams, renowned photographer, so eloquently wrote in his book, *Born Free and Equal*, on the internment of nearly 120,000 people of Japanese ancestry from early 1942 through late 1945:

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<sup>126</sup> BERENBAUM, *supra* note 17, at 171 (quoting from correspondence that came to be known as the “White Rose Letters”).

<sup>127</sup> *Id.*

<sup>128</sup> “Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tossed to me. I lift my lamp beside the golden door.” Lazarus, *supra* note 37, vol. 1, at. 2. Emma Lazarus’s famous sonnet has come to symbolize the Statue of Liberty’s universal message of hope and freedom for immigrants coming to America and people seeking freedom around the world.

<sup>129</sup> For a disturbing and scathing critique of the chaos at the U.S.-Mexico border see a film by Jeremy Levine and Landon Van Soest, *WALKING THE LINE* (Two Headed Productions 2005), *information available at* <http://www.walkingthelinefilm.com> (last visited May 2, 2007).

<sup>130</sup> BERENBAUM, *supra* note 17, at xxi (recounting that Vice-President Walter Mondale invoked the failure of the United States to rescue Jews during the Holocaust at the Evian Conference at the International Conference on the Boat People resulting in outreach across the globe that allowed the boat people to rebuild their lives).

We, as citizens, can agitate for tolerance and fair play, but our agitation must be dynamic and persistent. It is easy for a “fair-weather lover of the Constitution” to “favor” tolerance, and mouth principles of democracy, but it is quite another thing to stand up against opposition and fight for principles.<sup>131</sup> It is our task to retain the individual as the foundation of society, irrespective of his race, color or religion.<sup>132</sup> We must be certain that, as the rights of the individual are the most sacred elements of our society, we will not allow passion, vengeance, hatred and racial antagonism to cloud the principles of universal justice and mercy [for all].<sup>133</sup>

It is a problem we must face and solve – no matter what the cost may be to our false dignity or imagined self-interest. Left unsolved, the cost will prove beyond computation.”<sup>134</sup>

We must bear witness.<sup>135</sup>

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<sup>131</sup> BORN FREE AND EQUAL, *supra* note 11, at 113.

<sup>132</sup> *Id.* at 118.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 115.

<sup>135</sup> “I have told you this story not to weaken you. But to strengthen you. Now it is up to you!” BERENBAUM, *supra* note 17, at xxi (quoting the words from a survivor of Sachsenhausen, a concentration camp).