INTERSECTIONAL DISCRIMINATION IN U VISA CERTIFICATION DENIALS: AN IRREMEDIABLE VIOLATION OF EQUAL PROTECTION?

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Through the U visa, the Immigration and Nationality Act offers a means to obtain legal immigration status for undocumented victims of domestic violence and other specified crimes who cooperate with law enforcement in the investigation or prosecution of those crimes. In order to apply for such a visa, a crime victim must obtain law enforcement certification that he or she has been, is being, or will be helpful to the investigation or prosecution of the crime. This Note argues that the Act's provision of discretion to local law enforcement officials in the decision of whether to grant U visa certification requests violates the Equal Protection Clause of the Fourteenth Amendment, at least as applied to battered undocumented Latina immigrants in Suffolk County, New York. The Note uses certification denials to critique the equal protection doctrine in the United States and to show how the Inter-American human rights system's conception of equal protection would better address the intersectional discrimination faced by undocumented victims of domestic violence. The Note discusses the ways in which interrelated forms of discrimination lead to unconstitutional denials of U visa certification requests. It then predicts the outcome of a potential suit based on the equal protection violation inherent in a discriminatory certification denial before domestic courts and before the Inter-American Commission on Human Rights. It argues that such a suit would have a much greater chance of success in the latter system. Finally, acknowledging the limited practical effect of a successful claim before the Commission, the Note proposes a domestic grassroots movement to more meaningfully address the intersectional discrimination that faces battered undocumented women.

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I. INTRODUCTION

One in four women will experience domestic violence in her lifetime.[1] In the United States, battered immigrant women are even more isolated than battered non-immigrant citizens;[2] and though the law has recognized their unique vulnerability, it has ultimately failed to protect them effectively. This Note argues that the Immigration and Nationality Act's provision of discretion to local law enforcement officials in decisions whether to grant or deny U Visa certification requests violates equal protection under the Fourteenth Amendment, at least as applied to battered undocumented Latina immigrants in Suffolk County, New York. The Note uses U visa certification denials to critique the equal protection

[1] PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T. OF JUST., EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 27 (2000), *available at* https://www.ncjrs.gov/pdffiles1/nij/181867.pdf.

[2] Leslye E. Orloff, Deeana Jain & Catherine F. Klein, *With No Place to Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 FAM. L.Q. 313, 314 (1995).

doctrine in the United States, and to show how the Inter-American regional human rights system's conception of equal protection, which focuses on the impact of laws rather than on the intentions that motivate their adoption, would better address the intersectional discrimination that undocumented victims of domestic violence face in the United States today.

Part II provides background information on the U visa, on the development of the equal protection doctrine in the United States, on judicial notions of official discretion, and on the tension between immigration law and equal protection. Part III discusses the different and interrelated forms of discrimination that undocumented battered Latina immigrants face, both in general and in Suffolk County, and which both manifest themselves in and lay the foundations for discriminatory U visa certification denials. It then presents a case study of Talia, an undocumented battered Latina U visa applicant in Suffolk County, applies the equal protection jurisprudence discussed in Part III to her case, and argues that she would be unlikely to prevail in domestic courts. Part IV explores the Inter-American human rights system and its equal protection jurisprudence, and argues that Talia would be more likely to prevail on an equal protection claim under this system. Part V presents a more expansive solution to the problems faced by battered undocumented women, and advocates for the organization of a domestic grassroots human rights movement to provide a more long-term solution to the intersectional discrimination faced by battered undocumented women.

II. BACKGROUND: U VISAS, EQUAL PROTECTION, IMMIGRATION, AND DISCRETION

The following section provides background information on the U Visa, equal protection jurisprudence, official discretion, and immigration law's interaction with equal protection. Part A explains what the U Visa is, and what certification entails. Part B discusses seminal equal protection cases and the evolution of the doctrine's stringent standards in the United States. Part C addresses the Supreme Court's approach to official discretion. Part D presents examples of cases that illustrate the complex interaction between immigration status and equal protection.

A. U Visas and Certification

In 2000, the Battered Immigrant Women Protection Act[3] (BIWPA) amended the Immigration and Nationality Act (INA), adding, *inter alia*, section 101(a)(15)(U).[4] This section created the U visa, a nonimmigrant visa for victims of "substantial physical or mental abuse" caused by any of a list of specified violent criminal acts,[5] including rape, torture, trafficking, incest, domestic violence, sexual

[3] Battered Immigrant Women Protection Act of 2000 of the Victims of Trafficking and Violence Protection Act of 2000, div. B, Violence Against Women Act of 2000, tit. V, Pub.L. 106–386, 114 Stat. 1464, (2000), amended by Violence Against Women and Department of Justice Reauthorization Act of 2005, tit. VIII, Pub.L. 109–162, 119 Stat. 2960 (2006), amended by Violence Against Women and Department of Justice Reauthorization Act—Technical Corrections, Pub.L. 109–271, 120 Stat. 750 (2006).

[4] INA § 101(a)(15)(U); 8 U.S.C. § 1101(a)(15)(U) (2012).

[5] *Id.* The four statutory eligibility requirements for the U visa are:

> (I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause (iii);
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> (II) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning criminal activity described in clause (iii);
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> (III) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii); and

assault, prostitution, and several other crimes. To qualify for the visa, victims must assist or have assisted law enforcement in the investigation or prosecution of a qualifying crime.

Under section 214(p) of the INA, a petition for a U visa must include a "certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating criminal activity . . . [or] by an official of the Service whose ability to provide such certification is not limited to information concerning immigration violations."[6] The certification must declare that the victim "has been helpful, is being helpful, or is likely to be helpful" in the investigation or prosecution of a qualifying crime.[7] Section 214(p) also mandates the issuance of work authorization to eligible immigrants,[8] and other BIWPA amendments to the INA present both the possibility of a waiver of inadmissibility[9] and certain measures to prevent findings of inadmissibility or deportation based on evidence provided by an applicant's abuser.[10]

According to the regulations promulgated by the Department of Homeland Security, in passing the legislation creating the U visa, "Congress intended to strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence" and other crimes and "to encourage law enforcement officials to better serve immigrant crime victims."[11] The regulations state that "[the term] 'investigation or prosecution' . . . refers to the detection or investigation of a qualifying crime or criminal activity . . . because the detection of criminal activity is within the scope of a law enforcement officer's investigative duties."[12] The regulations further state that their administering agency, United States Citizenship and Immigration Services (USCIS), believes that "Congress intended for individuals to be eligible for U nonimmigrant status at the very early stages of an investigation.[13] However, "alien victims who, after initiating cooperation, refuse to provide continuing assistance when reasonably requested" are ineligible for the visa.[14]

The regulations acknowledge both that the lack of legal immigration status can inhibit crime victims from coming forward to help law enforcement and that there is a consequent lack of protection for these victims.[15] It is clear, then, that the U visa was created not only to encourage participation with law enforcement, but also to extend a hand to some of the most vulnerable members of society. Indeed, the emphasis placed on crimes like domestic violence, involuntary servitude, and sex trafficking[16] signals the importance of this latter intent as a motivating force behind the legislation. However, despite this manifest intent to help these undocumented (and mostly female) victims, and despite the broadness of the requirements for participation with the investigation or prosecution of a qualifying crime, neither the

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> (IV) the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States.

Id.

[6] INA § 214(p); 8 U.S.C. § 1184(p) (2012).

[7] *Id.*

[8] *Id.*

[9] INA 212(d)(14); 8 U.S.C. § 1182(d)(14) (2012).

[10] 8 U.S.C. § 1367(a)(1)(E) (2012).

[11] New Classification for Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,015 (Sept. 17, 2007) (codified at 8 C.F.R. pt. 212).

[12] *Id.* at 53,020.

[13] *Id.* at 53,019.

[14] *Id.*

[15] *Id.* at 53,014.

[16] *Id.* at 53,015 ("The list of qualifying crimes represents the myriad types of behavior that can constitute domestic violence, sexual abuse, or trafficking, or are crimes of which vulnerable immigrants are often targeted as victims.").

statute itself nor the regulations provide for any kind of review of a certifying authority's decision whether or not to grant certification. Thus, the door is left wide open for discriminatory denials by local law enforcement, and the vulnerable victims the statute was meant to protect are left without recourse when these denials occur.[17]

B. Equal Protection

The following section lays out a brief history of cases that highlight some important points about the development of the equal protection doctrine as well as our jurisprudential view of the degree of protection that the government owes both people in general and immigrants in particular. It is necessary to understand this foundation in order to appreciate the near-impossibility of prevailing with an equal protection claim against local law enforcement denial of U visa certifications.

In *Washington v. Davis*, a case involving a claim that the application procedures of the Washington, D.C. police department were racially discriminatory, the Supreme Court ruled that discriminatory intent is necessary to prove a violation of the Equal Protection Clause of the Fourteenth Amendment.[18] The Court stated that evidence of disparate impact is sufficient to make out a prima facie case of discrimination, in which case the burden shifts to the government to rebut the presumption "by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result."[19] However, if the government can meet this burden, the official action will not be found to violate of the Equal Protection Clause "solely because it has a racially discriminatory impact."[20] In other words, disparate impact is relevant but insufficient on its own to prove an equal protection violation.

In *Village of Arlington Heights v. Metropolitan Housing Corp.*, the Supreme Court developed the holding of *Davis* through its consideration of the constitutionality of a zoning ordinance that effectively barred certain socioeconomic and ethnic groups from residing in a white neighborhood.[21] Because the ordinance was not discriminatory on its face, the Court applied the *Davis* disparate impact test instead of strict scrutiny in making its determination, and reaffirmed the burden-shifting rule.[22] Acknowledging the difficulty of establishing an invidious intent with regard to an official action that is not facially discriminatory,[23] the Court proposed a multifactorial balancing test that would include factors such as the degree of impact of the action on a protected group, the history of decisions made under the action, the events leading up to the particular decision in the case, "departures from the usual procedural

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[17] As mentioned above, the statute confers certification authority on any "Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating criminal activity . . . [or] . . . an official of the Service whose ability to provide such certification is not limited to information concerning immigration violations." INA § 214(p); 8 U.S.C. § 1184(p)(1) (2012). Therefore, victims may request certification from more than one official. As the case study on Talia will illustrate, however, this choice of officials may not be of much help when all the law enforcement officials in a locality follow the same policy or criteria in making certification decisions. Moreover, accessing the criminal justice system is particular difficult for undocumented victims, as discussed below. *See also* Orloff, *supra* note 2.

[18] Washington v. Davis, 426 U.S. 229, 239 (1976).

[19] *Id.* at 241 (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).

[20] *Id.* at 239.

[21] Vill. of Arlington Heights v. Metro. Hous. Corp., 429 U.S. 252 (1977).

[22] *Id.* at 265.

[23] *Id.* ("*Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one.").

sequence" of such an action, and the legislative or administrative history behind the action.[24] Toward the end of the opinion, however, the Court stated in a footnote that a claim might not prevail even if the balancing test revealed that race had indeed been a motivating factor behind the official action. Instead, the burden would then shift back to the governmental actor to show that the action would have been taken even without the racial motivation.[25] In other words, the Court indicated that a showing of systemic discriminatory intent is necessary in order for an equal protection claim to succeed. Under *Arlington Heights*, then, it appears that as long as governmental actors can come up with any plausible, legitimate reason for a discriminatory action, and a plaintiff cannot prove that an invidious intent pervaded their decision-making, it does not matter whether they in fact *wanted* to negatively impact a protected group.[26]

In *Personnel Administrator of Massachusetts v. Feeney*, the Court further clarified the meaning of the official "intent" required to prove an equal protection violation.[27] In reviewing the constitutionality of a civil service preference for veterans that negatively impacted female employees, the Court stated that even though the Massachusetts legislature could have foreseen that the preference would, as a practical matter, exclude women from higher-ranking positions in the civil service, a foreseeable disparate impact would not suffice to prove discriminatory intent. Under *Feeney*, the required intent must be more than "awareness of consequences" or even "volition;" rather, it must be an actual reason for the official action.[28]

These cases set a very high standard for a plaintiff to meet in order to prevail in an equal protection claim against the government. It is not enough to prove that official action or inaction has had an adverse and disparate impact on the protected class of which the plaintiff is a member. It is not enough to prove that the governmental actor was aware that this consequence might occur. It is not even enough to prove that animus existed and that the governmental actor wished for the negative result. Indeed, a plaintiff essentially must demonstrate that the action *would not have been taken* had it not been for the hostile motivation. The difficulty of making such a showing and its consequences for potential claimants who have been denied U visa certifications will be explored further below.

C. Equal Protection and Noncitizens

Equal protection under state law has a strange relationship to immigration status, both because of the nearly exclusive federal power over immigration and, in the context of undocumented immigrants, because of the complex questions involved in legally protecting those who have no legal status. The next few cases present some of the contradictions inherent in the equal protection doctrine as it applies to immigrants.

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[24] *Id.* at 267–68.

[25] *Id.* at 270 n.21 ("Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision.").

[26] This reading of the case law may sound blasé in light of the development of tiers of scrutiny with respect to protected classes, but it is certainly not in the context of undocumented immigrants, who, as will be explored below, have in recent years faced inordinate hostility from both private and governmental actors.

[27] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

[28] *Id.* at 279 ("'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

In *Graham v. Richardson*, the Supreme Court held that state laws denying welfare benefits to legal permanent residents or to aliens who had not resided for a certain number of years in the United States violated equal protection.[29] The Court applied strict scrutiny in reaching its decision, explaining that "[a]liens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."[30] It also asserted that state laws restricting aliens' eligibility for welfare benefits intruded on the federal government's constitutional power over immigration,[31] and stated firmly that federal policy mandated the equal legal treatment of aliens by all states in the protection of their persons and property.[32] In its application of strict scrutiny and in its reference to federal policy, the Court in *Graham* seemed to both acknowledge the vulnerability of noncitizens and take a protective stance toward their rights.

In *Mathews v. Diaz*, however, the Court cited *Graham* as support for its holding that a federal law that denied noncitizens access to welfare benefits did not violate equal protection because only "the political branches of the Federal government, rather than . . . the States or the Federal judiciary" could "regulate the conditions of entry and residence of aliens."[33] While the Court in *Graham* had emphasized that the Equal Protection Clause refers to "persons" and not to citizens,[34] here it stressed that "[t]he exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry."[35] While the two decisions are consistent, the contrast between the tones of the opinions is striking, and reveals the profound inadequacy of the law's supposedly equal protection of noncitizens. A doctrine of equal protection whose application is limited to the branches of government that have virtually no power over the regulation of the rights of such persons is a hollow doctrine indeed. If equal protection has any substantive meaning, it is difficult to understand how the same treatment can go unquestioned if meted out by the federal government and yet deemed unacceptable if meted out by states.

In *Plyler v. Doe*, the Court held that a state could not prohibit the children of undocumented immigrants from attending its public schools.[36] In rejecting Texas's argument that equal protection applied only to persons "within its jurisdiction," the Court stressed again that noncitizens, regardless of their immigration status, are "persons" for purposes of the Equal Protection Clauses of both the Fourteenth and the Fifth Amendments.[37] The Court employed expansive language indicating that noncitizens were entitled to equal protection simply by virtue of their presence within a state, regardless of their manner of entry or their immigration status.[38] Instead of applying strict scrutiny based on the

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[29] Graham v. Richardson, 403 U.S. 365, 376 (1971).

[30] *Id.* at 372 (quoting United States v. Carolene Prod. Co., 304 U.S. 144, 155–56, n. 4 (1938)).

[31] *Id.* at 378.

[32] *Id.* ("Congress has broadly declared as federal policy that lawfully admitted resident aliens who become public charges for causes arising after their entry are not subject to deportation, and that as long as they are here they are entitled to the full and equal benefit of all state laws for the security of persons and property.").

[33] Mathews v. Diaz, 426 U.S. 67, 84 (1976).

[34] *Graham*, 403 U.S. at 371 ("It has long been settled . . . that the term 'person' in [the context of the Fourteenth Amendment] encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside.").

[35] *Mathews*, 426 U.S. at 80.

[36] Plyler v. Doe, 457 U.S. 202 (1982).

[37] *Id.* at 213 ("To permit a State to employ the phrase 'within its jurisdiction' in order to identify subclasses of persons whom it would define as beyond its jurisdiction, thereby relieving itself of the obligation to assure that its laws are designed and applied equally to those persons, would undermine the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment. The Equal Protection Clause was intended to work nothing less than the abolition of all caste and invidious class based legislation.").

[38] *Id.* at 215 (stating that "the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State's territory. That a person's initial entry into

alienage of the children affected by the statute at issue, the Court applied rational basis review, finding that the children of undocumented immigrants were not a suspect class because undocumented status is not an immutable characteristic[39] (and that education was not a fundamental right[40]). Nevertheless, the Court determined that the statute furthered no "substantial state interest."[41] In making this determination, the Court emphasized that the statute burdened a subclass of undocumented immigrants who were present in the United States without fault,[42] and thus implicitly indicated that it might be permissible to penalize adult undocumented immigrants who had voluntarily entered the country unlawfully. Thus, while emphasizing the applicability of equal protection to undocumented immigrants, the decision indicates that this protection is somehow less than that due to legal inhabitants of the United States.

D. Law Enforcement Discretion

The difficulty of proving discrimination in the context of U visa certification denials is compounded by the absolute and unreviewable discretion granted to certifying agencies, since this discretion allows them to deny certification even to victims who meet the broad standards required to qualify for it. It is exceedingly difficult to prove systemic discriminatory intent, even under a disparate impact theory, when there is a policy of discretion at play that involves multiple, unrelated decision-makers.[43] Moreover, the Supreme Court appears to be particularly deferential to discretionary law enforcement decisions. For example, in the domestic violence context, the Court asserted in *Town of Castle Rock, Colorado v. Gonzales* that even mandatory legislative provisions clearly requiring enforcement of a restraining order against the abusive husband of a domestic violence victim were not, in fact, mandatory.[44] It noted the "well established tradition . . . [and] deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands."[45] In holding that the plaintiff did not have a property right in the enforcement of the restraining order, the Court ignored the fact that the legislation was enacted specifically to address problems of police discretion in the context of domestic violence.[46] The standards affirmed by these cases indicate the difficulty of overcoming the

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a State or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State's territorial perimeter. . . . And until he leaves the jurisdiction . . . he is entitled to the equal protection of the laws that a State may choose to establish.").

[39] *Id.* at 220.

[40] *Id.* at 221.

[41] *Id.* at 230.

[42] *Plyler*, 457 U.S. at 220 ("Of course, undocumented status is not irrelevant to any proper legislative goal. . . . But [the statute] is directed at children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children for their presence in the United States.").

[43] The extent of this difficulty is illustrated by the near-impossibility of proving systemic discriminatory intent even in the employment context under Title VII's more lenient disparate impact standard, which focuses on the effects of, rather than the intent underlying, discrimination. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the *barriers* operate invidiously to discriminate on the basis of racial or other impermissible classification . . . The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.") (emphasis added). For example, in 2011, the Supreme Court stated in *Wal-Mart Stores, Inc. v. Dukes* that a policy of allowing local supervisors to exercise discretion in employment decisions did not establish "a common mode of exercising discretion that pervades the entire company." Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2554–55 (2011).

[44] Town of Castle Rock, Colorado v. Gonzales, 545 U.S. 748 (2005).

[45] *Id.* at 760–61.

[46] *Id.* at 779 ("[T]he Court gives short shrift to the unique case of 'mandatory arrest' statutes in the domestic violence context. . . . Second, the Court's formalistic analysis fails to take seriously the fact that the Colorado statute at issue in this case was enacted for the benefit of a narrow class of persons who are beneficiaries of domestic restraining

presumption in favor of law enforcement discretion. This difficulty would be problematic in an equal protection claim based on discrimination leading to a U visa certification denial because it would be difficult to overcome the presumption with regard both to law enforcement responses to domestic violence and to the certification denials themselves.

III. EQUAL PROTECTION VIOLATIONS IN U VISA CERTIFICATION AND BEYOND, AND THE UNLIKELIHOOD OF REDRESS

The following section explores the interconnected forms of discrimination that battered Latina immigrants face in their interactions with law enforcement that lead to denials of their U visa certification requests. Part A introduces the concept of intersectionality and discusses the levels of discrimination against undocumented Latina immigrant victims of domestic violence. Part B discusses the presence and manifestations of this discrimination in Suffolk County, and Part C presents a case study of Talia, a battered Latina immigrant who was denied U visa certification in Suffolk County. Part D then applies the equal protection jurisprudence discussed in Part II, *supra*, to the case study, thereby illustrating the inadequacy of the doctrine to remedy the myriad forms of intersectional discrimination that lead to U visa certification denials.

A. Intersectional Discrimination: Race, Gender, Immigration, and Domestic Violence

In her work on intersectionality, Kimberlé Crenshaw has pointed out that identity politics tends to disregard the differences between people within broader groups[47] and that prevailing notions of discrimination conceive of single, isolated axes of subordination.[48] Crenshaw advances intersectionality as a challenge to the notion that race and gender are separate classifications that exist independently of one another, and encourages the expansion of this concept to address further interconnecting group categorizations.[49] Intersectionality is useful to address discrimination against Latina immigrant victims of domestic violence because these women face subordination and isolation on multiple levels.

An undocumented battered Latina immigrant in Suffolk County faces four interrelated but distinct forms of discrimination, based on her race, her gender, her citizenship status, and her status as a victim of domestic violence. These four forms of discrimination manifest themselves not only in her daily interactions with society,[50] but every time she interacts with law enforcement. While they come

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orders, and that the order at issue in this case was specifically intended to provide protection to respondent and her children") (Stevens, J., dissenting).

[47] Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN L. REV. 1241, 1242 (1991).

[48] Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989).

[49] Crenshaw, *supra* note 47, at 1244 n.9 (Elaborating on the concept of intersectionality, Crenshaw explains: "In mapping the intersections of race and gender, the concept does engage dominant assumptions that race and gender are essentially separate categories. By tracing the categories to their intersections, I hope to adopt a methodology that will ultimately disrupt the tendencies to see race and gender as exclusive or separable. While the primary intersections that I explore here are between race and gender, the concept can and should be expanded by factoring in issues such as class, sexual orientation, age, and color.").

[50] In discussing her research on battered women's shelters in Los Angeles, Crenshaw notes some of the other forms of oppression that accompany being a battered woman of color:

> The physical assault that leads women to these shelters is merely the most immediate manifestation of the subordination they experience. Many women who seek protection are unemployed or underemployed, and a good number of them are poor. Shelters serving these women cannot afford to address only the violence inflicted by the batterer; they must also confront the other multilayered and routinized forms of domination that converge in these women's lives, hindering their ability to create

together with striking clarity and devastating consequences when she is unjustly denied a U visa certification, they play themselves out in countless equal protection violations along the way. These abuses occur sometimes blatantly, through active manifestations of discrimination like racial profiling and sexual harassment; sometimes more subtly, through passive manifestations like the lack of police response or the denial of language access services; most profoundly, through the law's resistance to treating domestic violence as a crime in the first instance.

Racial profiling has been well documented, both in and out of New York State. However, interactions with police are usually analyzed one-dimensionally, in terms, for example, of police brutality against non-white males or gendered police brutality against white women.[51] Though police violence against women of color involves many of the same racist motivations that inspire the use of force against men of color, this form of brutality is necessarily gendered.[52] For example, immigrant Latinas are raped regularly by both law enforcement and Customs and Border Patrol agents along the Mexican-US border.[53] In 2001, there was a spate of traffic stops of Latinas in one community in Suffolk County during which police officers forced these women to engage in sexual activity.[54]

Racially related sexual harassment by law enforcement often occurs in the context of domestic violence, as well.[55] As a result, battered women of color are doubly vulnerable, both to their abusers and to the officers who are supposed to help them. Even in the absence of sexual harassment, however, minority and immigrant women face barriers to seeking help from the police in the context of domestic violence.

Society tends to fail to recognize the hurdles most battered women face, regardless of race. Too often, American popular consciousness blames domestic violence victims for having caused or tolerated the abuse, without realizing that many seemingly sensible strategies do not actually work to protect them.[56] Indeed, this ignorance is manifest in our justice system's failure to prosecute cases of domestic violence.[57] Many fail to consider the context in which these victims live, and the potential consequences of their efforts to "fight back" in the ways the general public considers reasonable.[58] And many fail to

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> alternatives to the abusive relationships that brought them to shelters in the first place. Many women of color, for example, are burdened by poverty, child care responsibilities, and the lack of job skills. These burdens, largely the consequence of gender and class oppression, are then compounded by the racially discriminatory employment and housing practices women of color often face, as well as by the disproportionately high unemployment among people of color that makes battered women of color less able to depend on the support of friends and relatives for temporary shelter.

Id. at 1245–46. While a full exploration of the scope of discrimination faced by battered undocumented Latina immigrants is outside the scope of this Note, it is useful to keep in mind the everyday backdrop of subordination that these women face, as police discrimination does not exist in a vacuum.

[51] Andrea J. Ritchie, *Law Enforcement Violence Against Women of Color*, in COLOR OF VIOLENCE, THE INCITE! ANTHOLOGY, 138–56, 156 (INCITE! Women of Color Against Violence ed., 2006).

[52] *Id.* at 148.

[53] *Id.* at 149.

[54] *Id.* at 146 ("In one case, instead of being issued a traffic citation, a woman was forced to walk home in her underwear. In two others, officers were alleged to have forced women to have sex with them after pulling them over for traffic infractions.").

[55] *Id.* at 150.

[56] MARY ANN DUTTON, EMPOWERING AND HEALING THE BATTERED WOMAN: A MODEL FOR ASSESSMENT AND INTERVENTION 7 (1992).

[57] *See, e.g.*, "Anne Tully," *Working Inside the System*, ON THE ISSUES, 44, 44–45 (Winter 1997) (explaining that "the mocking and victim-blaming continue behind closed doors, and rape and domestic violence cases are quietly dismissed, reduced, or plea-bargained down to insignificant charges. . . . Domestic violence . . . is outrageously underprosecuted."). The author's name is an alias.

[58] *Id.*

recognize that, sometimes, one of the least effective strategies at stopping battering is calling the police,[59] and that police often fail to take action to protect victims.[60]

As a society, we also fail to acknowledge that these difficulties are even more acute for women of color, like Latina immigrants. Indeed, the invisibility of women of color in the domestic violence movement has helped to exclude them both from mainstream narratives of battering and from the right to law enforcement protection that the movement advocates.[61] The lack of appropriate police response to protect these women has been noted on numerous occasions.[62] For example, even though New York State's Family Protection and Domestic Violence Intervention Act includes provisions requiring mandatory arrest in response to domestic disputes,[63] police officers have failed to fully comply with these provisions, especially when faced with low-income, non-white callers.[64] A fairly recent study on mandatory arrest in New York City found that cases in which no arrest occurred were more likely to involve Latina victims partnered with Latino abusers.[65] These cases were also more likely to involve stalking and prior domestic incident reports.[66] Thus, though police were twice as likely to make an arrest when there was a history of previous calls about domestic disturbances,[67] they were least likely to make an arrest when the incidents involved Latinos, even though many of these cases were extremely serious.[68]

It seems, then, that when a Latina woman is being battered by her abuser, especially in a place like Suffolk County, the choice of whether to call the police may seem especially unattractive: the responding officer may abuse her himself, or he may just leave her there alone with a violent and perhaps now even angrier man. If this woman is an immigrant, she is even more vulnerable, as law enforcement agencies like the Suffolk County Police Department may well be more concerned with her immigration status than with the harm that has been done to her.[69]

> Simply determining what efforts the battered woman has made to escape, avoid, or protect herself and her children is not adequate. It is also necessary to determine the effectiveness of those strategies for increasing the battered woman's safety. . . . In addition . . . it is important to look at other consequences that may result from her efforts. For example, a battered woman's choice to call the police may result in a neighbor's social ostracism, perhaps preventing their children from playing with hers. Staying home from work in order to hide injuries received in a battering may be a woman's effort to protect herself by keeping the abuse a secret; it may cost her her job. Finally, a battered woman's decision to remain quiet about the abuse in order not to risk embarrassing or further enraging her batterer may well result in increased social isolation in that she may be even less protected as few people may know of her situation.

Id.

[59] *Id.* at 43.

[60] *Id.* at 50 ("For example, was an arrest made, or after arrest, was the batterer released on bond within a few hours, only to return and continue the violent assault? . . . Many women report being afraid to begin a process, which, if aborted in the middle, may result in increased danger.").

[61] Ritchie, *supra* note 51, at 151.

[62] *See, e.g.*, Victoria Frye et al., *Dual Arrest and Other Unintended Consequences of Mandatory Arrest in New York City: A Brief Report*, 22 J. OF FAMILY VIOLENCE 397, 398 (2007); Ritchie, *supra* note 51, at 150; Evan Stark, *Mandatory Arrest of Batterers: A Reply to Its Critics*, *in* DO ARRESTS AND RESTRAINING ORDERS WORK?, 115–49, 144 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

[63] *See* N.Y. Crim. Proc. Law. Section 140.10 (4)(c) (McKinney Supp. 2001); *see also* Frye et al., *supra* note 62, at 399 n.1.

[64] Frye et al., *supra* note 62, at 402.

[65] *Id.* at 401.

[66] *Id.* at 402.

[67] *Id.* at 398.

[68] *Id.* at 401.

[69] Ritchie et al., *supra* note 51, at 151.

Indeed, undocumented battered immigrant women face even bigger hurdles than their counterparts who have legal status. On top of the fears that they share with other battered women, with battered women of color, and with battered immigrant women of color, many are afraid to communicate with law enforcement about the abuse to which they are subjected for fear of deportation, and most are also isolated within their private lives.[70] Many studies indicate that domestic violence is particularly prevalent in immigrant communities. For example, a New York City Department of Health study found that immigrant women were murdered by intimate partners at greater rates than any other group of women;[71] another study cited in a Department of Justice report found that sixty percent of immigrant Korean women had been battered by their husbands.[72] Immigrant women who encounter cultural and linguistic barriers in the United States are largely stereotyped by society, overlooked by the broader anti-domestic violence movement, and more likely than other women to be trapped by their abusers.[73] Moreover, few undocumented victims of even severe domestic violence are willing to contact the police,[74] and they report abuse at much lower rates than other victims.[75] In short, these women are marginalized on multiple levels because of the fear of deportation and consequent isolation that accompany being an undocumented immigrant in the United States and because of the fear and isolation that accompany violence at home.[76]

B. Intersectional Discrimination in Suffolk County

In Suffolk County, another form of discrimination by law enforcement occurs on a much more subtle, mundane, and pervasive level. While the Suffolk County Police Department has language access policies that offer basic Spanish-language instruction for employees and translation services for civilians, these policies are often not enforced, resulting in a denial of services to residents of limited English proficiency.[77] Often, officers are unaware of the policies, or no interpreters are available.[78] Some immigrant victims have reported going to the precinct and being told to come back later because there

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[70] Crenshaw, *supra* note 47, at 1248–49.

> [C]ultural barriers often . . . discourage immigrant women from reporting or escaping battering situations. . . . The typical immigrant spouse . . . may live '[i]n an extended family where several generations live together, there may be no privacy on the telephone, no opportunity to leave the house and no understanding of public phones.' As a consequence, many immigrant women are wholly dependent on their husbands as their link to the world outside their homes. . . . Many women who are now permanent residents continue to suffer abuse under threats of deportation by their husbands. . . . And . . . there are countless women married to undocumented workers (or who are themselves undocumented) who suffer in silence for fear that the security of their entire families will be jeopardized should they seek help or otherwise call attention to themselves.

Id. (citations omitted).

[71] N.Y.C. DEP'T HEALTH & MENTAL HYGIENE, FEMICIDE IN NEW YORK CITY: 1995–2002 (2004), *available at* http://www.nyc.gov/html/doh/downloads/pdf/ip/femicide1995-2002_report.pdf.

[72] PATRICIA TJADEN & NANCY THOENNES, *supra* note 1.

[73] Leslye E. Orloff et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 45 (2003).

[74] *Id.* at 43.

[75] *Id.* at 64.

[76] Jamie Rene Abrams, *Legal Protections for an Invisible Population: An Eligibility and Impact Analysis of U Visa Protections for Immigrant Victims of Domestic Violence*, 4 MOD. AM. 26, 26 (2008).

[77] Ted Hesson, *Suffolk Police Failing Residents*, LONG ISLAND WINS (Oct. 4, 2011), http://www.longislandwins.com/index.php/about_us/news_detail/suffolk_police_failing_residents/.

[78] James Brierton, *Immigrants' Rights Groups: Suffolk Police "Still Not Making" the Language Connection*, SMITHTOWN RADIO (Sept. 21, 2011).

was no one there to translate; other immigrant residents have recounted being laughed at by a commanding officer when they requested translation services.[79]

The animus against Latino immigrants in Suffolk County, not only on the part of residents but also on the part of law enforcement and government officials, is often blatant and has been well documented. In the aftermath of the 2008 murder of Marcelo Lucero, an Ecuadorian immigrant who was stabbed to death in Patchogue by teenage white supremacists who liked to target Latinos (an activity they liked to call "beaner-hopping"), the Southern Poverty Law Center (SPLC) wrote a report describing the violence that Latino immigrants face in Suffolk County and local law enforcement's complicity in the aggression.[80] They noted that Suffolk law enforcement minimized the Lucero incident, ignoring the nativist hostility that had been festering for years in the county.[81]

The report cites many incidents in which those in power have expressed their animosity toward Latino immigrants. One county legislator averred that undocumented residents in Suffolk had "better beware"; another threatened that if he witnessed Latino day laborers entering his community, "we'll be out with baseball bats"; and a third declared, "I would load my gun and start shooting." [82] Steve Levy, then-County Executive—the highest position in the local government—called the members of one immigrant advocacy organization who had criticized him "Communists" and "anarchists."[83]

Hostility is also manifest in the behavior of law enforcement on the ground. Immigrants told the SPLC that local police were either indifferent to their reports or actively participated in the harassment perpetrated against them.[84] They recounted regular incidents of racial profiling in traffic stops, unlawful searches and seizures, and more concern with their immigration status than with their reports of victimization.[85]

Incidentally, the report also offers some chilling statistics that suggest that what is happening in Suffolk County mirrors what is going on around the country:[86] a forty percent rise in anti-Latino hate crimes between 2003 and 2007, and more than a fifty percent rise in hate groups since 2000, due to the current climate of animosity against non-white undocumented immigrants.[87] Faced with numbers like this and the wave of anti-immigrant laws sweeping through numerous states in recent years,[88] it would be difficult to argue that Suffolk is an anomaly. However, for the purposes of this Note and of an equal protection claim, Suffolk County is a good example of a location where there are multiple indicia of discrimination by governmental actors.

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[79] *Id.*

[80] SOUTHERN POVERTY LAW CENTER, CLIMATE OF FEAR: LATINO IMMIGRANTS IN SUFFOLK COUNTY, N.Y. (2009).

[81] *Id.*

[82] *Id.* at 8, 25

[83] *Id.* at 5

[84] *Id.*

[85] *Id.*

[86] SOUTHERN POVERTY LAW CENTER, *supra* note 80.

[87] *Id.*

[88] In 2010 and 2011, only seven states did not pass any anti-immigrant bills. Ian Gordon & Tasneem Raja, *164 Anti-Immigration Laws Passed Since 2010? A MoJo Analysis*, MOTHER JONES, (March 2012), http://www.motherjones.com/politics/2012/03/anti-immigration-law-database. For the most successful of these laws, see Arizona's S.B. 1070 and its progeny, Alabama's H.B. 76, Georgia's H.B. 87, Indiana's S.B. 590, South Carolina's Act 69, and Utah's H.B. 497. All six of these laws have been challenged, with varying degrees of success. For more information see, e.g., *State Anti-Immigrant Laws*, ACLU, http://www.aclu.org/immigrants-rights/state-anti-immigrant-laws (last visited Apr. 17, 2013).

C. Talia: A Case Study in Intersectional Discrimination

Talia[89] had about a decade's worth of orders of protection against her abusive husband. Her file included a pile of police reports about an inch thick; there were others, she said, but she had once set them on fire in anger. Many of these reports included long statements detailing what her abuser had done to her and to her children. She had photos of her injuries, too. She also had records of consistently, dutifully filed taxes, and multiple affidavits from friends and employers attesting to how amazing a woman she was and how much she had suffered. In short, Talia seemed to be exactly the kind of person who would appeal to law enforcement, and who one would want the U visa to help.

Neither the Suffolk County Police Department nor the Suffolk County District Attorney's office thought so, though. They refused to grant Talia's certification request ostensibly because she had not obtained a criminal order of protection; all her orders had been from family court.[90] While on the surface, this approach to certification requests might appear to make sense—Talia technically did not cooperate with law enforcement in the investigation of a *crime*—such a policy runs counter to Congress's intent in creating the U visa. Moreover, it fails to account for the reasons *why* Talia never obtained a criminal order of protection or got involved in any criminal proceeding against her abuser, and it reflects the injustice of the law's failure to treat domestic violence as a crime like any other assault.

Indeed, while many of Talia's police reports contained lengthy descriptions of her abuser's attacks, some did not record what she tried to communicate, and none of them categorized these attacks as crimes. Moreover, Talia indicated that a sexist family court judge who presided over many of the proceedings against her husband was biased against her, and apparently did not take the abuse seriously. This failure to recognize the gravity of the violence manifested itself in the judge's continued granting of visitation rights to Talia's husband, even though he had both harmed Talia in their children's presence and harmed the children themselves.[91] Finally, Talia was unwilling to seek help from the criminal justice system because she was afraid that an unsuccessful prosecution would lead her abuser to retaliate and possibly kill her.

Talia felt that she had been discriminated against many times, as a Latina, as a woman, as an immigrant, and as a victim of domestic violence, both in her interactions with the police and in her encounters with the family court judge. Her case illustrates the layers and manifestations of discrimination that undocumented battered Latina immigrants face in their quest for protection. The discrimination she faced for so many years, culminating in the denial of her certification request, is exactly the kind of subordination that the principle of equal protection prohibits under international human rights law. The evolution of the equal protection doctrine in United States jurisprudence, however, has made it virtually impossible for plaintiffs to challenge this discrimination successfully. The following section discusses Talia's case in light of this jurisprudence.

D. What Would Happen if Talia Were to Bring an Equal Protection Claim?

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[89] The name has been changed. The facts of this case are shared here with permission.

[90] The reasons for the refusal to grant certification were related over the phone to Talia's attorney, who called both the department and the district attorney's office to inquire about the reasons for the refusal.

[91] Talia is not alone in this experience. Battered women in New York courts often have to meet a higher standard of credibility than their abusers, and some judges have been found to grant abusers access to their children without adequate consideration of the safety of the children or their mothers. N.Y. STATE JUDICIAL COMM. ON WOMEN IN THE COURTS, WOMEN IN THE COURTS: A WORK IN PROGRESS 10, 12 (2002), *available at* http://www.courts.state.ny.us/ip/womeninthecourts/womeninthecourts_report.pdf.

Battered Latina immigrants like Talia are adversely affected by their status as women, as domestic violence victims, as Latinas, and as undocumented immigrants; it is difficult to imagine a context in which all these levels of discrimination that they face are more clearly brought together than in the context of U visa certification denials. Still, despite the wealth of evidence of anti-immigrant sentiment among Suffolk County law enforcement, and of law enforcement discrimination against domestic violence victims and against women of color generally, it would be nearly impossible to prove a violation of equal protection in the refusal to grant one of these women certification. The improbability of prevailing on such a claim illustrates the gutting of the equal protection doctrine in the United States, and highlights the need for alternative routes to justice.

In light of the Suffolk County law enforcement policy of denying U visa certification to domestic violence victims who did not participate in criminal proceedings against their abusers, Talia would encounter colossal obstacles if she were to bring an equal protection claim against Suffolk County law enforcement. Any attempt to demonstrate the existence of a policy or practice of discrimination that pervaded all of her interactions with the police, with the family court system, and with the District Attorney's office and that led to the denial of her certification request would most likely fail to meet the requirements of the equal protection jurisprudence discussed in Part II.B, *infra*. The following section applies those cases to illustrate why she would be unlikely to prevail and notes the additional difficulties she would face in linking the discrimination she faced to domestic violence.

Under *Washington v. Davis*, Talia would have to prove that the denial of her certification was the result of intentional discrimination.[92] She could expound upon all the intersectional discrimination that had infected her interactions with the police and with the family court system, the negative effects of which culminated in the denial of her U visa certification request. All that information, however, would not only be insufficient to prove either that the police or that the family court affirmatively intended to discriminate against her, but it would certainly not show that the particular law enforcement officials who denied her certification request intended to discriminate against her. At best, it would illustrate the disparate impact she experienced as an undocumented Latina domestic violence victim. If the court were to find that her showing of disparate impact were sufficient to make out a *prima facie* case of discrimination, the burden would then shift to the defendant law enforcement officials to show that the negative results of her interactions with law enforcement that preceded the denial of her certification request were the result of neutral decision-making processes.[93] Given the Court's deference to police discretion,[94] it would probably not be difficult to make this rebuttal.

The court could then apply the *Village of Arlington Heights v. Metropolitan Housing Corp.* balancing test to determine whether Talia's account of intersectional discrimination could establish an invidious intent on the part of the defendant law enforcement officials, despite their facially neutral decisions.[95] Talia could bolster her case with existing statistics regarding police response to domestic incidents that require language access services.[96] Since there is an existing language access policy in place, however, she would then have to prove not only that this policy is not followed, but also that it is not followed based on pervasive animus. This showing would be exceedingly difficult to make. That a language services policy exists at all and that the police department maintains statistical records regarding its use both seem to indicate a willingness on the part of law enforcement to attend to the needs of immigrants, thus refuting the notion of a generalized policy of discrimination. Judicial deference to police discretion, even

[92] Washington v. Davis, 426 U.S. 229, 239 (1976).

[93] *Id.* at 241.

[94] *See* Town of Castle Rock, Colorado v. Gonzales, 545 U.S. 748 (2005).

[95] Vill. of Arlington Heights v. Metro. Hous. Corp., 429 U.S. 252, 265 (1977).

[96] The Suffolk County Police Department keeps records on which calls request language access services and documents the language requested. These records were requested and received by Talia's attorney.

regarding purportedly mandatory police action,[97] would make it difficult to prove intentional discrimination on the part of responding officers who responded to Talia's domestic incident calls. And, of course, the discretion mandated by the U visa provisions themselves would make it difficult to prove animus on the part of those who ultimately denied Talia's certification request, especially in light of their apparent and facially neutral policy of not granting certification to those who have not participated in a criminal proceeding.

Moreover, under *Feeney*,[98] the official intent that Talia would need ultimately to prove would have to be the reason for the certification denial, for the District Attorney's failure to take the initiative to prosecute her abuser, or for any failures on the part of responding officers to adequately document the content of her many police incident reports. In other words, even if she could show that law enforcement officials were aware of the discrimination she faced and that they harbored discriminatory feelings about undocumented Latina immigrant domestic violence victims, Talia would fail if she could not prove that awareness or those feelings were intentionally acted upon in the decision to deny her certification.

The fact that Talia is an undocumented immigrant makes it even more unlikely that she would prevail. If she were a legal immigrant, any discrimination against her based on her alienage would be subject to strict scrutiny under *Graham v. Richardson*.[99] Perversely, however, because she is an undocumented immigrant, such discrimination would be subject only to rational basis review under *Plyler v. Doe*.[100]

Finally, any discrimination that Talia faced as a victim of domestic violence would most likely be impossible to prove. In *DeShaney v. Winnebago County*, a mother and her son brought suit against local social services for failing to protect the son from his father's brutal beatings.[101] Though social services had received numerous complaints that the child was being abused, they failed to remove him from his father's care, until finally his father beat him so badly that the four-year-old was left with permanent and severe brain damage.[102] While the case involved a claim brought under the Due Process Clause of the Fourteenth Amendment, it sets out the limits of the government's willingness to actively protect its citizens and illustrates the difficulty of holding governmental actors accountable.[103] The Court held that the child's substantive due process right to bodily integrity had not been violated, because the state had not actually, affirmatively harmed him and because he had not been harmed while in the state's custody.[104] In other words, the Court ruled that the state has no positive duty to protect anyone whose liberty it has not itself restrained, even when it has notice that the person's constitutional rights are being

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[97] *See Town of Castle Rock*, 545 U.S. at 748.

[98] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

[99] Graham v. Richardson, 403 U.S. 365, 372 (1971).

[100] Plyler v. Doe, 457 U.S. 202, 220 (1982).

[101] DeShaney v. Winnebago Cnty., 489 U.S. 189 (1989).

[102] *Id.*

[103] *Id.*

[104] *Id.* at 189-90

> While certain 'special relationships' created or assumed by the State with respect to particular individuals may give rise to an affirmative duty, enforceable through the Due Process Clause, to provide adequate protection . . . the affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitations which it has imposed on his freedom to act on his own behalf, through imprisonment, institutionalization, or other similar restraint of personal liberty. No such duty existed here, for the harms petitioner suffered occurred not while the State was holding him in its custody, but while he was in the custody of his natural father, who was in no sense a state actor.

Id.

violated. Even though the state's department of social services was charged with protecting the child from domestic violence, it had no legal obligation to do so.

In light of *DeShaney*'s holding, the fact that police have discretion, particularly in domestic violence cases where legislation has made action mandatory,[105] and Talia's status as an undocumented immigrant, it is hard to rebut the proposition that the Suffolk County police officers who responded to her many, many calls ultimately owed her nothing. Thus, the failures of the legal system to protect Talia reveal multiple layers of discrimination even though under United States jurisprudence this is not considered an equal protection violation.

Today's equal protection doctrine is both mystifying and unacceptable because it callously ignores the reality of discrimination and completely flouts its underlying purposes. The next section explores why the Inter-American human rights standard is more in harmony with the underlying principles of the equal protection doctrine, and thus more likely to provide Talia with redress.

IV. EQUAL PROTECTION UNDER INTER-AMERICAN HUMAN RIGHTS LAW

The Inter-American human rights system focuses on the discriminatory impact of, rather than the intentions behind, the government's actions. Part A provides background information on the structure of this system and on the way complaints may be brought under it. Part B discusses some examples of equal protection claims that have prevailed before the Inter-American Commission and Court. Part C explores the possibilities of Talia's claim before the Commission in light of these decisions and the Inter-American human rights system's approach to equal protection.

A. The United States and the Inter-American System

In 1948, the newly founded Organization of American States (OAS) recognized the American Declaration of the Rights and Duties of Man, a nonbinding statement of principles that would form the basis of the Inter-American human rights system.[106] While the Declaration is not a treaty, both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights consider the obligations that it imposes on OAS member states to be binding.[107]

The OAS formed the Inter-American Commission on Human Rights in 1959 to promote human rights among its member states.[108] It authorized the Commission to consider communications brought by individuals, organizations, and states involving violations of the American Declaration.[109] Such consideration involves requesting information from member states, making recommendations, and annually publishing its views regarding the communications.[110]

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[105] *See* Town of Castle Rock, Colorado v. Gonzales, 545 U.S. 748 (2005).

[106] LOUIS HENKIN ET AL., HUMAN RIGHTS 568 (Louis Henkin et. al. eds., 2nd ed. 2009). The Inter-American system is one of three main regional human rights systems in the world that developed alongside that of the United Nations in the wake of World War II. *Id.* at 232. The other two are the European system, established by the European Convention for the Protection of Rights and Fundamental Freedoms, *see generally id.* at 622–75, and the African system, established by the African Charter on Human and Peoples' Rights, *see generally id.* at 675–98. One of the distinctive characteristics of the Inter-American system is its concern for vulnerable, disadvantaged populations; for example, the Inter-American Court has imposed an affirmative duty on governmental actors not only to "respect" but also to "ensure" the rights of members of these groups in their dealings with private actors. *Id.* at 589–90.

[107] *Id.* at 616–18.

[108] *Id.* at 568–69.

[109] *Id.* at 569.

[110] *Id.*

The OAS adopted the American Convention on Human Rights in 1969.[111] The Convention developed and restated the principles expressed in the American Declaration and made them binding on states parties. It also established the Inter-American Court of Human Rights, which has both advisory and contentious jurisdiction over cases of human rights violations (under the Declaration, the Convention, and other instruments) that may be referred to either by states parties or by the Commission.[112] Unlike the Declaration, the Convention is binding on states.[113]

Because the United States has signed but not ratified the Convention, its human rights practices are not subject to the Court's contentious jurisdiction, although the Court can review them under its advisory jurisdiction.[114] However, since the United States is a member of the OAS, individual complaints may be brought against it before the Commission.[115] And even though the Declaration has been generally superseded by the Convention, its terms are still in force with respect to countries, like the United States, that have not ratified the Convention.[116] In any event, the Declaration's utility as a source of rights lies in the fact that the Inter-American Commission has the power to hear petitions brought by individuals, organizations and states based on violations of the rights set out in the Declaration.[117] While the United States does not consider the decisions of the Commission to be binding, it considers the Declaration to be "a solemn moral and political statement" and responds seriously and thoroughly to complaints filed against it with the Commission.[118] And while the United States has for the most part resisted compliance with the Commission's decisions and recommendations, the views of the Commission may be used as a persuasive tool by advocacy groups.[119] The Commission thus provides a unique and powerful forum for undocumented immigrants both to make their voices heard on an international level and to raise awareness of their plight domestically.

In order for cases to reach the Commission, however, it is necessary to first exhaust domestic remedies.[120] Thus, Talia would have to try to bring her claim in American courts before undertaking litigation before the Commission.

B. Equal Protection Under the Inter-American System

Many of the rights listed in the Declaration are independently protected in the United States—for example, freedom from discrimination; individual rights such as the rights to privacy, freedom of expression and association, and freedom of religion; political rights such as the right to vote; and a wide array of procedural rights.[121] The right to equal protection under the law is a foundational principle of the Declaration, and one that would have a significantly stronger possibility of success before the Inter-American Commission than before a United States court.

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[111] *Id.*

[112] HENKIN ET AL., *supra* note 106, at 570–71.

[113] *Id.* at 569.

[114] *Id.* at 617.

[115] *Id.* at 618.

[116] *Id.*

[117] *Id.* at 569.

[118] HENKIN ET AL., *supra* note 106, at 619 (quoting Statement of Deputy Legal Adviser Alan J. Kreczko before the First Committee of the 29th OAS General Assembly, Washington, D.C., Nov. 14, 1989, at 3).

[119] Caroline Bettinger-Lopez, Jessica Gonzales v. United States: *An Emerging Model for Domestic Violence and Human Rights Advocacy in the United States*, 21 HARV. HUM. RTS. J. 183, 190 (2008).

[120] American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82, doc.6 rev.1 at 17 (1992).

[121] *Id.*

While equal protection violations in the United States require a showing of discriminatory intent against a protected class, under the Inter-American system (and human rights law generally), violations of equal protection occur when governmental actions have a disparate impact.[122] Such cases can be brought before the Commission whether or not a group that has been discriminated against falls into a traditionally protected class, and whether or not the discriminatory action was in violation of domestic law.[123] Indeed, equal protection claims against the United States have been successful before the Commission. For example, in *Dann v. United States*, the Commission determined that the United States had violated equal protection in the context of indigenous land rights.[124] And in *Lenahan (Gonzales) v. United States*, the plaintiff made out a successful disparate impact claim by situating the discrimination she faced in the larger context of a general, systemic lack of response on the part of law enforcement and the American judiciary to domestic violence in general.[125] These cases illustrate the fact that the Commission is a forum in which plaintiffs can successfully find judicial recognition of the discrimination they have faced. Though its decisions cannot force compliance on the part of the United States, continued instances of such recognition may help shape domestic public opinion and thereby lead to eventual legislative change. If nothing else, the Commission's recognition can at least provide a record of the discrimination and solace to those, like Talia, who have faced discrimination that has been, for all intents and purposes, sanctioned by the very system that was supposed to redress it.

1. Equal Protection and Domestic Violence: *Maria da Penha Maia Fernandes v. Brazil* and *Lenahan (Gonzales) v. United States*

The Inter-American Commission has taken a much more progressive view toward the relationship between the equal protection clause and domestic violence than have American courts. In *Maria da Penha Maia Fernandes v. Brazil*, the Inter-American Commission found that Brazil had violated a domestic violence victim's equal protection rights because of its failure to prosecute the perpetrator and its tolerance of such violence.[126] The Commission noted that the violence in this case formed "part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors" [127] and that such "general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence," since it communicates to society an unwillingness on the part of the state to effectively prohibit and punish the violence.[128] This case is noteworthy not only because it applied the concept of due diligence to establish state accountability for domestic violence,[129] but also because of the way in which it highlights the discriminatory aspect of domestic violence. It illustrates two of the facets of the discrimination that victims of domestic violence face when requesting U visa certification: their status as women[130] and their status as victims of domestic violence. While the state party in this case is Brazil, the Commission addressed its position regarding domestic violence in the United States in *Lenahan (Gonzales) v. United States*.

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[122] Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18 at 23 (Sept. 27, 2003), *available at* http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf.

[123] Caroline Bettinger-Lopez, *Human Rights at Home*, 40 COLUM. HUM. RTS. L. REV. 19, 33 (2008).

[124] Dann v. United States, Case 11.140, Inter-Am. Comm'n. H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. ¶ 171-72 (2002).

[125] Lenahan (Gonzales) v. United States, Case No. 12.626, Inter-Am. Comm'n. H.R., Report No. 80/11 (2011).

[126] Maria da Penha Maia Fernandes v. Brazil, Case 12.051, Inter-Am. Comm'n. H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 60 (2001).

[127] *Id.* at ¶ 56.

[128] *Id.*

[129] HENKIN ET AL., *supra* note 106, at 867.

[130] *Maria da Penha Maia Fernandes*, ¶ 47 (noting its own prior special report on Brazil that found "there was clear discrimination against women who were attacked" in the context of domestic violence).

In *Lenahan (Gonzales) v. United States*, the battered Latina plaintiff who lost in *Town of Castle Rock, Colorado v. Gonzales*, discussed in Part II.C., *supra*, successfully brought an equal protection claim against the United States before the Inter-American Commission. Her petition made out her disparate impact claim by situating the discrimination she faced in the larger context of a general, systemic lack of response on the part of law enforcement and the American judiciary to domestic violence in general. It also claimed that the standard of equal protection in U.S. law did not meet international standards. The Commission held that the United States' "systemic failure . . . to offer a coordinated and effective response to protect Jessica Lenahan and her daughters . . . constituted an act of discrimination, a breach of their obligation not to discriminate, and a violation of their right to equality before the law under Article II of the American Declaration."[131] The decision thus underscores the fact that the *DeShaney* standard violates human rights law. Moreover, by linking equal protection to the denial of legal process, *Gonzales* recognizes and articulates a conception of equal protection that would more accurately address the intersectional discrimination faced by domestic violence victims.[132]

2. Equal Protection and Undocumented Migrants: Juridical Condition and Rights of the Undocumented Migrants

The Inter-American human rights system also grants undocumented immigrants more expansive rights to equal protection. In its advisory opinion on the *Juridical Condition and Rights of the Undocumented Migrants*, the Inter-American Court ruled that equal protection is a fundamental, *jus cogens* norm of international law,[133] that "[s]tates must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of *de jure* or *de facto* discrimination[,]"[134] and that "the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights."[135] It further held that a state is responsible both for its own actions and for those "of third parties who act with its tolerance, acquiescence or negligence, or with the support of some State policy or directive that encourages the creation or maintenance of situations of discrimination."[136] It also ruled "[t]hat States may not subordinate or condition observance of the principle of equality before the law and non-discrimination to achieving their public policy goals . . . including those of a migratory character."[137] While states are free to distinguish between those legally and illegally present within their borders, or between those who are citizens and those who are not, such distinctions must exist within the bounds of respect for the fundamental human rights principle of nondiscrimination.[138]

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[131] Lenahan (Gonzales) v. United States, Case No. 12.626, Inter-Am. Comm'n. H.R., Report No. 80/11 (2011).

[132] *Id.* at ¶ 5. This holds that:

> the State failed to act with due diligence to protect Jessica Lenahan and [her daughters] Leslie, Katheryn and Rebecca Gonzales from domestic violence, *which violated the State's obligation not to discriminate and to provide for equal protection before the law under Article II of the American Declaration*. The State also failed to undertake reasonable measures to protect the life of Leslie, Katheryn and Rebecca Gonzales in violation of their right to life under Article I of the American Declaration, in conjunction with their right to special protection as girl-children under Article VII of the American Declaration. Finally, the Commission finds that the State violated the right to judicial protection of Jessica Lenahan and her next-of kin, under Article XVIII of the American Declaration.

(emphasis added).

[133] Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 27, 2003) at 99.

[134] *Id.*

[135] *Id.* at 105.

[136] *Id.* at 109.

[137] *Id.* at 114.

[138] *Id.* at 102.

The opinion distinguishes between "distinction" and "discrimination" to highlight the fact that while states can legally make distinctions between people present within their borders based on their citizenship status, any distinctions that are "not objective and reasonable" constitute discrimination, and are thus a violation of human rights.[139] This articulation of discrimination is important with respect to the discretion granted to law enforcement regarding U visa certification, because such discretion opens the door to the very subjective, discriminatory decision-making that is prohibited under the Inter-American system. Moreover, it conceives of equal protection for undocumented immigrants as a question of fundamental human rights independent of legal status, in contrast to the Supreme Court's approach in *Plyler v. Doe*.[140] Thus, a claim by an undocumented person before the Inter-American Commission would most likely be received without the reservations that it would face before a United States tribunal.

C. What Would Happen if Talia Were to Bring an Equal Protection Claim Under Inter-American Human Rights Law?

The Inter-American system's cases and opinions discussed above indicate that Talia would be much more likely to prevail on an equal protection claim before the Commission than in the United States, both because the Commission applies the disparate impact standard of equal protection violations, and because it recognizes that the lack of legal protection indicates the presence of discrimination. In light of the principles outlined in *Maria da Penha Maia Fernandes v. Brazil* and *Lenahan (Gonzales) v. United States*, Talia could successfully argue that she was penalized for law enforcement's failure to record the assaults that she reported as crimes and because of its failure to prosecute her abuser. She could argue that these were violations of her right to equal protection under the American Declaration. And in light of the Inter-American Court's opinion on the *Juridical Condition and Rights of the Undocumented Migrants*, the Commission might even find that the grant of discretion to law enforcement in U visa certification decisions itself violated Talia's right to equal protection because it allows law enforcement to make decisions that may not be based on "objective and reasonable" distinctions.

Equal protection standards are clearly more favorable to battered undocumented women under Inter-American human rights law than under United States law. Talia thus would be much more likely to receive recognition of the discrimination she faced at the hands of Suffolk County law enforcement before the Commission than she would in a domestic court. However, in the short term, her success before the Commission would most likely do little to improve the problems of discrimination faced by those similarly situated to her or to make it more likely that their U visa certification requests would be approved.

V. EXTRALEGAL STRATEGIES TO PROMOTE THE RIGHTS OF BATTERED UNDOCUMENTED WOMEN

Because the decisions of the Inter-American Commission are not binding on the United States and the reality that Talia's case, even if successful, would most likely not provide enduring change for other undocumented, battered Latina immigrants, the following section explores other ways that human rights law could be used.[141]

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[139] Juridical Condition and Rights of the Undocumented Migrants, *supra* note 133, at 95.

[140] Plyler v. Doe, 457 U.S. 202, 220 (1982).

[141] In many cases, it might also be impractical to make equal protection claims with the eventual plan of bringing them before the Inter-American Commission because it would be not only costly, but also ethically questionable to undertake litigation with the expectation (and even plan) that it would lose.

Even under the Inter-American system, litigation is a slow way of remedying systemic issues that have led to the problem of discriminatory decisions regarding U visa certifications. Moreover, successful claims do not guarantee that local, state, or federal governmental bodies in the United States will change any of the policies that have led to this problem. Therefore, this section argues for the creation of a movement for undocumented immigrant victims of domestic violence. While by no means presenting a comprehensive plan, the section suggests possible ways to lay the foundation for the movement and acknowledges some of the hurdles that such an undertaking would likely encounter.

A. Building Support From Within: Community-Based Organization

The first step in creating this movement would be to unite dispersed groups of these immigrants, across racial and gender lines, in part because the problems of battered Latinas are shared by battered women in other communities, and in part because there is no status with less bargaining power than being undocumented. For the purposes of uniting these groups, creating a climate in which they can find a voice, and building as broad a base of outside support as possible, advocates should begin to organize a campaign to address the diverse issues facing these immigrants with a two-pronged approach underneath the umbrella of human rights. First, shifting the bottom line of the dialogue about their rights from misguided notions that they are somehow less deserving of protection than those who are legally entitled to be in the United States or that they are responsible for what happened to them because they stayed with their abusers to the guiding principle that all human beings should have fundamental protections would not only make the idea of their rights one that most people would have a difficult time disputing, but could also be a powerful tool to unite diverse groups. Indeed, this basic principle—uniting people not by the illegality of their presence, or by their status as victims, but by their shared human dignity—should create the foundation for the unification of groups across the undocumented domestic violence victim population. Second, the burgeoning movement should appeal to domestic violence advocacy and immigrants' rights groups for support by elaborating some of the core specific rights that appear in human rights instruments like the Declaration of Independence. In addition to formulating a common guiding principle and increasing manpower, this two-pronged approach would use the particular rights emanating from that principle both to address a wide array of issues that affect different subgroups and to appeal to members of those subgroups in different, tailored ways.

Increasingly, lawyers in the United States have been employing human rights sources and arguments in their work, including in grassroots activism.[142] For example, in discussing the work of the Coalition of Immokalee Workers (CIW),[143] co-founder Greg Asbed claims that the CIW's movement was organized around a human rights framework because it "is the only framework that does not modify the notion of rights as a set of rights specific to a particular sector of our society . . . but as fundamental rights to be respected across our entire society."[144] He then discusses three key methods that the

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[142] Cynthia Soohoo, *Human Rights and the Transformation of the "Civil Rights" and "Civil Liberties" Lawyer, in* FROM CIVIL RIGHTS TO HUMAN RIGHTS 71, 72 (Cynthia Soohoo et al. eds., 2010).

[143] As its website explains:

> The CIW is a community-based organization of mainly Latino, Mayan Indian and Haitian immigrants working in low-wage jobs throughout the state of Florida . . . [that] strive[s] to build [its] strength as a community on a basis of reflection and analysis, constant attention to coalition-building across ethnic divisions, and an ongoing investment in leadership development[.]" *About CIW*, COALITION OF IMMOKALEE WORKERS, http://www.ciw-online.org/about.html (last visited May 4, 2013). The CIW has been recognized both nationally and internationally for its work in combatting human trafficking and involuntary servitude, in fighting the corporate food industry's exploitation of agricultural labor, and in raising the wages of farmworkers.

Id.

[144] Greg Asbed, *Coalition of Immokalee Workers:* "Golpear a Uno Es Golpear a Todos!" *To Beat One of Us Is to Beat Us All!, in* 3 BRINGING HUMAN RIGHTS HOME, VOL. THREE 1, 3 (Cynthia Soohoo et al., eds. 2008).

movement's organizers used to build participation: popular education, leadership development, and protest actions.[145]

Advocates who forge the beginnings of the undocumented domestic violence movement should also be willing to become a part of the communities of these immigrants and to work with, and not only on behalf of, their members.[146] These advocates should adopt the CIW's strategies within the greater framework of human rights. In this way, they could use them to appeal to as broad a base as possible. Adapting these tools to a broader movement for the rights of undocumented immigrant victims of domestic violence, however, raises the question of how exactly the activists could mobilize a dispersed population, many of whose members wish to remain invisible. Indeed, as noted earlier, these immigrants are doubly marginalized, because of the fear and isolation that accompany being both an undocumented immigrant in the United States and a victim of violence at home.[147] To work within these underground communities, advocates should first emphasize the CIW's first two tools—popular education and leadership development. Protest strategies should come into play later, after the core movement has already begun, and once it has gained support from outside organizations with overlapping interests.

Popular education and leadership development should take place both within discrete sectors with large numbers of undocumented female workers and within particular neighborhoods with high numbers of undocumented residents. By using these strategies on both fronts, the CIW model built on a foundation of human rights could unite different undocumented members of each subset first with one another, and then in turn with each member's particular cultural and residential community. Through the language of human rights, this cross-sectional approach could also create solidarity by uniting people whose rights have been violated, create a recognition of the abuse occurring within as an equally serious violation of a human dignity, and empower those who have been marginalized both within and outside their communities by involving them as necessary and equal participants in the movement.

Within particular interest groups, immigrants should be educated about their legal rights through "codes" like those employed by the CIW: stories, videos, songs, theatrical and visual enactments. As noted by Asbed, these forms of media would be useful in provoking reflection about community reality and sparking discussion about common problems.[148] However, while the CIW, in those media, was addressing a uniform group of Latino farmworkers, many subsets of undocumented immigrant domestic violence victims consist of members of distinct cultures and linguistic backgrounds. If, for example, one thinks of a sector such as the restaurant industry, where immigrants from all over the world find work, one can readily imagine the diverse group of attendance at such a group meeting. Popular education in this instance, by focusing on visual stimuli, would be a useful starting point for communicating common ground. And if such discussion emphasized the fundamental human rights that are shared by the different members of these groups, a collective consciousness of the problems these immigrants face could take shape on an even deeper level of shared injustice. Discussion should occur not only about the legal injustices the groups face, such as the lack of access to law enforcement protection, but also about more universal, profound infractions on the dignity and humanity of all members of the group.

Popular education under the umbrella of human rights could in turn be useful within particular residential communities of battered undocumented immigrants. By overlapping with the popular education occurring within the different subgroups with which members identify, the identification of

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[145] *Id.* at 7.

[146] *See, e.g.*, Gerald P. Lopez, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice, in* NEW PERSPECTIVES ON LAW, CULTURE, AND SOCIETY 169 (2002).

[147] Jamie Rene Abrams, *Legal Protections for an Invisible Population: An Eligibility and Impact Analysis of U Visa Protections for Immigrant Victims of Domestic Violence*, 4 MOD. AM. 26, 26 (2008).

[148] Asbed, *supra* note 143, at 8.

and discussion concerning common problems of the residential community through the language of human rights could nourish a more complex consciousness of community. Here the development of common ground should occur among members of groups who share interests concerning the neighborhoods in which they live and, in many instances, similar cultural backgrounds. Apart from the painful connection of domestic violence, the interaction of the two for popular education could create a chain of identification, linking members who identify with one another within a cultural and residential community to undocumented victims outside the community through members who share interests with them.

Leadership development could also occur within each type of community (that is, both within different cultural groups and within different neighborhoods). As in the CIW model, intensive workshops could take place, with lessons about communication strategies, about how to organize and run community meetings, and about how to use the Internet to reach out to potential supporters and to the media, and with a more in-depth study of domestic legal rights and the roots and law of human rights.[149] The emerging leaders would be those members of the community who chose to take on positions of responsibility. In this way, the advocates and activists who laid the foundations for the movement would recede to more supportive roles and avoid alienating members of the group who might perceive them as "others."[150] Moreover, having a core set of leaders composed of members of different cultural communities would be necessary to cast as broad a net as possible within the larger undocumented community, in order to ensure the continued participation of battered women who have been marginalized within the subsets of the community, and in order to appeal to as many outside groups as possible.

B. Reaching Out: Potential Bases of Support from Outside the Community

Getting support from established outside groups might well be essential to raise public awareness of the movement's existence and, in turn, to initiate successful protest actions, the CIW's third key method of activism. A variety of potential bases of support exist for undocumented immigrants' rights, with varying levels of overlap with the undocumented community's interests and membership, especially if these rights are framed within a human rights dimension. Obvious examples of these groups include immigrants' rights and anti-domestic violence organizations; less probable, but still conceivable, supporters might include religious activists, such as evangelical cause lawyers.

To build relationships with these groups, the movement's leaders should send delegates to attend their meetings and become involved in their work, as well as receive delegates from the other groups in turn.[151] In this way, the leaders could promote their agenda, ensure that their interests are represented, and perhaps influence the other groups to incorporate the human rights framework into their own efforts. The movement's leaders should also collaborate with members of these groups to plan protests and public hearings. Indeed, members of these other groups might be less likely to fear arrest and thus more likely to engage in protest, and their support might also encourage the movement's members to share their stories with a broader audience.

On the other hand, members of allied groups who have not suffered the particular rights abuses that battered undocumented women face may well be less inclined to risk arrest on their behalf. Even though the human rights framework can have broad appeal, the groups most likely to be willing to place

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[149] *Id.*

[150] *See* Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67 (2000).

[151] MATTHEW A. COLE, TRY THIS AT HOME! A DO-IT-YOURSELF GUIDE TO WINNING LESBIAN AND GAY CIVIL RIGHTS 135 (1996) (providing a number of grassroots organization strategies).

an emphasis on the rights of battered undocumented immigrants are those who identify with core defining characteristics of the group. Since even legal immigrants face discrimination and are vulnerable to racial profiling in part *because* of discriminatory attitudes toward undocumented immigrants, and since they might identify with undocumented members of their own nationalities or cultural backgrounds, the campaign may be most likely to get the strongest support from immigrants' rights organizations. Furthermore, advocates for these groups would have the experience of working with immigrant communities, and might thus have some understanding of the complexities of cross-cultural communication.[152] If so, they might be able to collaborate more effectively with the movement's leaders. In any event, these factors indicate that one plausible approach in seeking outside support would be to target direct action immigrants' rights organizations first before reaching out to the other groups.

Also, domestic violence advocacy groups might support the campaign if its members were to recognize the role of abuse within the community in disempowering their more marginalized constituents and were willing to advocate for their rights. Even though domestic violence organizations have sometimes tended to ignore undocumented victims,[153] a growing number have begun to include these victims in their advocacy efforts. A few have even begun to address their specific needs, such as SEPA Mujer, a community-based Latina rights organization in Suffolk County that works mostly with undocumented victims of domestic violence.[154] Organizations like SEPA Mujer could be a valuable resource to provide additional support for abused members of the broader movement, and would benefit from the publicity that would accompany participation in the campaign.

Religious groups might also be allies for the movement because their ideals might be compatible with the human rights framework. For example, lawyers at the Center for Law and Religious Freedom, an evangelical public interest firm, uniformly base their approaches to advocating for "equal access" to resources and facilities in order to evangelize universities on the biblical mandate to "do unto others as you would have them do unto you."[155] These lawyers have been tolerant of other groups' employment of this principle to achieve unrelated, even potentially conflicting aims.[156] A human rights approach that emphasizes basic, fundamental rights may appeal to these groups' religious convictions. On the other hand, framing human rights within any religious tradition could alienate members of the movement who do not belong to that tradition.

Indeed, support from any outside group, regardless of the prioritization of its concerns or of the degree to which its interests overlap or conflict with the movement's goals, might pose a threat to the unity of the movement. Tacking support for undocumented battered women's rights onto an agenda that prioritizes only one dimension of their concerns, such as immigration or gender equality, could run the risk of marginalizing these women within their own movement. For example, battered undocumented women seeking to participate within a broader outside movement whose aims overlap with their concerns might find themselves facing discrimination from within their own particular sub-community, as some transgender activists found when they sought to join the LGBT movement.[157] Alternatively, while seeking support from outside groups could be especially effective in framing the human rights concerns of the battered undocumented movement within the tradition or language of more widely

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[152] *See, e.g.*, Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001–2002).

[153] Orloff et al., *supra* note 73, at 45.

[154] *See Services for the Advancement of Women*, SEPA MUJER (Feb. 25, 2011), http://www.sepamujer.org.

[155] Kevin R. Den Dulk, *In Legal Culture but Not of It: The Role of Cause Lawyers in Evangelical Legal Mobilization, in* CAUSE LAWYERS AND SOCIAL MOVEMENTS 211 (Austin Sarat & Stuart A. Scheingold eds., 2006).

[156] *Id.*

[157] Phyllis Randolph Frye, *Facing Discrimination, Organizing for Freedom: The Transgender Community, in* CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 456 (2002).

accepted groups, such a strategy could alienate members of the movement who do not share those groups' concerns.

Many of the ideas discussed above are admittedly based on numerous implicit assumptions and untested hypotheses. They are explored here simply to outline briefly some extralegal strategies and some potential problems to consider in any future attempt to achieve meaningful protection for the rights of battered undocumented women.

VI. CONCLUSION

This Note endeavors to illustrate the limitations of the equal protection doctrine through its inability to redress the intersectional discrimination that results in the denial of U visa certification requests to undocumented Latina victims of domestic violence. It also argues that a human rights conceptualization of equal protection is better suited to provide justice for these women, and to remedy the myriad of interconnected forms of discrimination that all battered undocumented women face.

In light of the current climate of anti-immigrant fervor that has been erupting in recent years, not only in Suffolk County but across the United States,[158] it is reasonable to be skeptical of the potential either of international human rights litigation or of a domestic human rights movement for battered undocumented women to accomplish meaningful legal change. The real value of such efforts, however, lies in their potential to change the way people think about battered undocumented immigrant women—to analyze the intersections of discrimination that they face, to deconstruct the barriers between undocumented groups themselves, and to break down walls between the undocumented population and the rest of American society. In this way, such advocacy efforts can perhaps plant the seeds for legal change in subsequent generations.

Such an approach, while idealistic, is neither unprecedented, nor, this Note contends, unrealistic. Indeed, Karen Narasaki, the executive director of the Asian American Justice Center, claims that since the passage of anti-terrorism measures in the wake of September 11th, human rights approaches will be more effective than domestic legal avenues in achieving immigrants' rights.[159] She also argues that the language of human rights resonates more with youth today than it once did, and that immigrants are indeed beginning to think of their rights as fundamental rather than civil.[160] If she is correct, the nourishment of this burgeoning consciousness of human rights with regard to battered undocumented women may well bear future fruit. As California's Labor Commissioner Julie Su writes, "Human dignity must be the measure of what we recognize as legal rights."[161] This Note seeks to present some ideas that can help build a concrete foundation for the realization of this maxim.

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[158] *See supra* note 88. For the Obama administration's position on immigration reform, see *Immigration*, WHITEHOUSE.GOV, http://www.whitehouse.gov/issues/immigration (last visited May 8, 2013). For information on the most recent bipartisan efforts to address the issue, see Charles Schumer et al., *Bipartisan Framework for Comprehensive Immigration Reform*, *available at* http://www.c-span.org/uploadedFiles/Content/Documents/Bipartisan-Framework-For-Immigration-Reform.pdf. *See also* Ashley Parker, *Senators Call Their Bipartisan Immigration Plan a "Breakthrough,"* N.Y. TIMES (Jan. 28, 2013), http://www.nytimes.com/2013/01/29/us/politics/senators-unveil-bipartisan-immigration-principles.html.

[159] Soohoo, *supra* note 141, at 95.

[160] *Id.*

[161] Julie Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry*, 1 J. GENDER RACE & JUST. 405, 413 (1998).