

Fall 2011

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Recommended Citation

Lipman, Francine J., "The "ILLEGAL" Tax" (2011). *Connecticut Public Interest Law Journal*. 3.
<http://digitalcommons.uconn.edu/cpilj/3>

The “ILLEGAL” Tax

FRANCINE J. LIPMAN†

I. INTRODUCTION – “THE TRUTH WILL SET YOU FREE.”¹

“Illegals do NOT pay taxes.” As a law professor researching and writing about undocumented immigrants and their tax issues I see this comment in my email inbox and hear it during outreach efforts routinely. Every time I hear or read this or a similar comment, my whole body cringes. This short statement truly embodies the exploitation of the immigration debate.

While this statement is often delivered from mainstream individuals, its origin can be traced to extremist rhetoric. Anti-immigrant and anti-Latino extremists have used outright bigotry to frame the immigration debate to advance their own supremacist agenda. By positioning themselves as legitimate advocates against illegal immigration in America these groups have broadened their base and mainstreamed their message. These groups “are frequently quoted in the media, have been called to testify before Congress, and often hold meetings with lawmakers and other public figures.”² As a result, in many American communities immigrants live in fear and suffer a toxic environment in which hateful rhetoric targeting immigrants has become an acceptable part of daily news and discourse.³ How long will hate and prejudice thrive in America?

† Visiting Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. This Article is dedicated to expanding the community of everyday heroes among us that stand up for equality and justice for all by acting affirmatively against hateful acts of discrimination and intolerance. “Never doubt that a small group of thoughtful, committed citizens can change the world. Indeed, it is the only thing that ever has.” Margaret Mead *Sí, se puede*. César Chávez and Dolores Huerta, everyday heroes and co-founders of the United Farm Workers of America. See Sanjuana Martinez, *Sí se puede : el movimiento de los hispanos que cambiará a Estados Unidos* (Mexico, D.F. : Grijalbo 2006).

¹ *John* 8:32 (King James) (Jesus Christ in a conversation with his Jewish supporters) (“And ye shall know the truth, and the truth shall make you free.”). Others have stated the following about “the Truth;” “Truth is the breath of life to human society. It is the food of the immortal spirit.” Oliver Wendell Holmes, Sr., Address to the Medical Graduates of Harvard University (Mar. 10, 1858); *see also* Dr. Martin Luther King, Jr., Address at Grosse Pointe High School (Mar. 14, 1968) (“I still believe that freedom is the bonus you receive for telling the truth.”).

² *Immigrants Targeted: Extremists Move Into the Mainstream*, ANTI-DEFAMATION LEAGUE 1 (2007), http://www.adl.org/civil_rights/anti_immigrant/Immigrants%20Targeted%20UPDATE_2008.pdf.

³ *See, e.g.*, Trip Gabriel & Edward Wyatt, *At Rallies, 2 Candidates Deliver Blistering Attacks on Illegal Immigration*, N.Y. TIMES, Oct. 15, 2011 (Herman Cain supporting the use of “real guns with real bullets” and an electrified killer fence to stop illegal immigration); Ali Ismail, *Draconian Anti-Immigrant Law Stokes Fear Among Alabama’s Undocumented Population*, WORLD SOCIALIST WEB SITE (Oct. 10, 2011), www.wsws.org/articles/2011/oct2011/alab-o10.shtml (After the 2011 passage of anti-immigrant laws in the state of Alabama, University of California, Davis, Dean and Immigration Law Expert Kevin Johnson warned that “parents aren’t going to send students to schools because

Almost fifty years ago in 1965, on the steps of the State Capital in Montgomery, Alabama, Dr. Martin Luther King, Jr. asked a crowd of twenty-five thousand “How long will prejudice blind the visions of men, darken their understanding, and drive bright-eyed wisdom from her sacred throne?”⁴ The crowd, celebrating the completion of the five-day, fifty-mile march from Selma to Montgomery and their First Amendment Rights, encouraged Dr. King to “speak, speak.” And he did answering his own question with poetry, faith and optimism, “How long? Not long, because the arc of the moral universe is long, but it bends toward justice.”⁵ Following the many lessons of Dr. King’s passive resistance legacy, this Article confronts insidious vilification and arrant racism with facts, laws, and data.⁶

This Article will debunk the short, but maladroit statement that “illegals do NOT pay taxes.” First, calling a group of people “illegals” is hateful, “racially loaded, imprecise, and pejorative.”⁷ Scholars, and children, understand that language and discourse can contribute to vile acts including crime, abuse and other social problems.⁸ Historical and current

they’re going to be afraid of getting deported and it will chill them from executing a constitutional right. I think undocumented immigrant communities feel vulnerable and threatened, and are very fearful of ending up in deportation proceedings.”); Rena Havner Philips, *After Immigration Ruling at Foley School with Hispanic Population, Students Cry, Withdraw, No-Show*, PRESS-REGISTER, Sept. 30, 2011, available at http://blog.al.com/live/2011/09/foley_elementary_students_pare.html (“Many of the 223 Hispanic students at Foley Elementary came to school Thursday crying and afraid, said Principal Bill Lawrence. Nineteen of them withdrew, and another 39 were absent, Lawrence said, the day after a federal judge upheld Alabama’s strict new immigration law.”); Cristina Costantini, *Anti-Latino Hate Crimes Rise As Immigration Debate Intensifies*, HUFFINGTON POST, Oct. 18, 2011, www.huffingtonpost.com/2011/10/17/anti-latino-hate-crimes-rise-immigration_n_1015668.html (describing numerous violent hate crimes including several murders against Latinos); SOUTHERN POVERTY LAW CTR., CLIMATE OF FEAR, LATINO IMMIGRANTS IN SUFFOLK COUNTY, N.Y. 5, (Sept. 2009) (describing a growing national problem of violent hatred directed at all suspected undocumented immigrants, but especially Latinos); see also SOUTHERN POVERTY LAW CTR., UNDER SIEGE, LIFE FOR LOW-INCOME LATINOS IN THE SOUTH (2009) (describing hostility and discrimination as a staple for Latinos in the south).

⁴ Dr. Martin Luther King, Jr., “Our God Is Marching On!” speech in Birmingham, Alabama (March 25, 1965) (transcript available at <http://www.mlkonline.net/ourgod.html>).

⁵ *Id.*

⁶ See Dr. Martin Luther King, Jr., “The Other America” speech at Grosse Point High School (March 14, 1968) (“And I do not see how we will ever solve the turbulent problem of race confronting our nation until there is an honest confrontation with it and a willing search for the truth and a willingness to admit the truth when we discover it.”) (transcript available at www.gphistorical.org/mlk/mlkspeech/index.htm); (“We shall overcome because Carlisle is right. ‘No lie can live forever.’ We shall overcome because William Cullen Bryant is right. ‘Truth crushed to earth will rise again.’”); *Id.*

⁷ Beth Lyon, *When More “Security” Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers*, 6 U. PA. J. LAB. & EMP. L. 571, 576 (2004).

⁸ Carola Eyber, *Name-Calling Alienates Foreigners*, 2 CROSSINGS (S. Afr. Migration Project, Cape Town, South Africa), June 1998, available at <http://www.queensu.ca/samp/forms/crform.html>; see also Kevin R. Johnson, “Aliens” and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. MIAMI INTER-AM. L. REV. 263, 265–70 (1996–97); see also Irwin Colter, Op-Ed., *The Holocaust Did Not Begin In the Gas Chambers – It Began With Words*,

atrocities including the Holocaust, Darfur, and the murder of Matthew Shepard, are horrific examples of this intolerable truth. The term "illegals" is patently dehumanizing and inappropriate terminology, and its persistent use by extremists, as well as mainstream media and the general population, must stop now.⁹

Second, as a low-income taxpayer and human rights advocate, I understand that pervasive misunderstanding regarding undocumented immigrants evinces the frustration and fear that many Americans feel about the challenging state of the U.S. and global economies. Restrictionists feed this frustration and fear with inflammatory propaganda about undocumented immigrants and our tax systems. Because of overwhelming complexity and lack of transparency in these systems, it is easy to misrepresent and distort the facts, laws, and data. As a result, some Americans believe the absolutely irrational and self-delusional assertion that undocumented immigrants do not pay any taxes.¹⁰ This gross

JERUSALEM POST (Jan. 26, 2009), *available at* <http://www.jpost.com/Opinion/Op-EdContributors/Article.aspx?id=130741> (reaffirming that the lessons of the Holocaust are a commitment to never again be indifferent to racism, hate, injustice, or stand silently in the face of evil or ignorant to the plight of the vulnerable).

⁹ On July 7, 2011, the Treasury Inspector General for Tax Administration, TIGTA issued a report describing \$4.2 billion of refundable tax child tax credits paid to "individuals who are not authorized to work in the United States." TREASURY INSPECTOR GEN. FOR TAX ADMIN., RECOVERY ACT: INDIVIDUALS WHO ARE NOT AUTHORIZED TO WORK IN THE UNITED STATES WERE PAID \$4.2 BILLION IN REFUNDABLE CREDITS 4 (2011), *available at* www.treasury.gov/tigta/auditreports/2011reports/201141061fr.pdf. Shortly after the report was released, it went "viral" and the Internet was burning with hateful comments about "illegals" pocketing or "stealing" billions of dollars of taxpayer money. On September 8th, 2011 I searched "illegals \$4.2 billion tax credits" and retrieved more than 30,000 hits, including main stream media (Fox News, ABC "The View", Baltimore Sun, The Examiner, San Diego Union, Drudge) using the terms "illegals," "illegal aliens," "illegal immigrants," "illegal workers," etc. although the report never describes the taxpayers in this manner.

The child tax credit provides an annual tax subsidy of \$52 billion for almost 35 million families raising children and only 10 percent of the total expenditure goes to the lowest quintile (cash income of \$12,000 and below) of families while 25 percent (cash income of above \$12,000 – \$23,000), 27 percent (cash income of above \$23,000 – \$39,000), 28 percent (cash income above \$39,000 – \$66,000) and 10 percent (cash incomes above \$66,000) go to the next four income quintiles). Elaine Maag et al., *A Reference Manual for Child Tax Benefits*, URBAN-BROOKINGS TAX POLICY CTR. (Apr. 2011), www.taxpolicycenter.org/uploadedpdf/412329-child-tax-benefits.pdf. I find it interesting that the fact that unauthorized workers pay more than three times that amount into Social Security and Medicare taxes each year, or the fact that the highest quintile income Americans received \$52 billion in tax subsidy to raise their children, did not similarly go "viral."

¹⁰ See John Lantigua, *Illegal Immigrants Paying Taxes*, PALM BEACH POST (Apr. 25, 2010), <http://www.palmbeachpost.com/news/illegal-immigrants-paying-taxes-621300.html> (noting that frustrated and angry Americans commonly state that illegal aliens do not pay taxes despite paying billions of dollars in Social Security taxes every year); see also O'Reilly, *Dobbs Wrong That Undocumented Immigrants Don't Pay Taxes*, MEDIA MATTERS FOR AMERICA (Mar. 10, 2010), <http://mediamatters.org/research/201003100001> (Fox News' *The O'Reilly Factor* host Bill O'Reilly falsely asserted that the fact undocumented immigrants pay taxes is "crap" while his guest Lou Dobbs suggested they dodge taxes); *Quick Fact: Fox's Bolling Falsely Claims That "Illegals" Are "Not Paying Taxes"*, MEDIA MATTERS FOR AMERICA (May 2, 2010), <http://mediamatters.org/research/>

falsehood is counterproductive for the speaker, the subject, and the U.S. and global economies.

Finally, as a tax professor I am charged with teaching tax and these comments broadcast loudly and boldly how misinformed Americans are about our tax systems. The well-documented facts evidence that undocumented immigrants have paid hundreds of billions of dollars in taxes to date. In most cases undocumented immigrants pay more in tax each year than similarly situated U.S. citizens. This additional tax, which is exposed and labeled here as “the undocumented immigrant tax,” is the subject of this Article.

This Article will describe the depth and breadth of undocumented immigrants as a resource for tax payments made to government coffers across America. The depth and breadth will be evinced by describing the myriad of different federal, state, and local taxes undocumented immigrants are subject to and pay. Most notably, this Article will verify that undocumented immigrants not only pay the same taxes that U.S. citizens and documented residents pay, but in addition that they are subject to and pay what I am describing as “the undocumented immigrant tax.” The undocumented immigrant tax is effectively an additional tax burden, a surtax or tariff on undocumented immigrants and their families. As a result, not only do undocumented immigrants pay taxes, but they bear a greater tax burden than similarly situated U.S. citizens and documented residents.

A. Across America Undocumented Immigrants are Paying Billions in Taxes Each Year

The uncontroverted truth is that undocumented immigrants pay tens of billions of dollars in taxes each year to federal, state and local governments. These critical tax dollars are not paid to one government coffer, but rather to federal, state, and local government pocketbooks located across America. Undocumented immigrants reside in and pay taxes daily to state and local governments from Portland, Maine to San Diego, California and to countless state and local governments in the vast expanse of America in between.

201005020006 (reporting and correcting the inaccurate statement made by Fox News host Eric Bolling on May 1, 2010); *see also* Lydia Saad, *Americans Closely Divided Over Immigration Reform Priority*, GALLUP (July 6, 2010), <http://www.gallup.com/poll/141113/americans-closely-divided-immigration-reform-priority.aspx> (finding that 78, 63 and 50 percent of Republicans, Independents and Democrats, respectively, believe that undocumented immigrants cost taxpayers more than they contribute on the tax rolls); *see also* Ruy Teixeira, *What the Public Really Wants on Immigration*, CTR. FOR AM. PROGRESS 2 (June 27, 2006), <http://www.americanprogress.org/kf/teixeirajunepool-final.pdf>. (70 percent of the polled public agreed with the statement that undocumented immigrants weaken the U.S. economy because they do not all pay taxes, but use public services.)

Since they first arrived in this country, undocumented immigrants have paid and are expected to continue to pay hundreds of billions, perhaps trillions, of dollars in federal, state, and local taxes. Indeed our tax and social services systems, and American citizens, rely on undocumented immigrants for revenue and fiscal support. The Inspector General of the Social Security Administration has determined that undocumented immigrants and their employers have paid between \$120 and \$240 billion in Social Security taxes¹¹ in addition to Medicare and unemployment taxes on at least \$1,107.5 billion of unauthorized inflation adjusted wages (including \$533.5 billion in the eight year period from 2000 through 2007).¹² "Over the next 75 years, new immigrants will provide a net benefit of approximately \$611 billion in present value to the Social Security system."¹³ The Commissioner of the Internal Revenue Service recently estimated that undocumented immigrants have paid \$50 billion in federal income taxes in the eight year period from 1996 through 2003.¹⁴ Therefore, undocumented immigrants have paid hundreds of billions to the federal government just for federal income and wage taxes.

While these dollar amounts are significant, tax payments from undocumented immigrants have been and are continuing to increase. In the last decade, Social Security and Medicare taxes paid to the Social Security Administration by undocumented immigrants have more than tripled.¹⁵ In 2007, undocumented immigrants paid more than \$12 billion in Social Security and Medicare taxes.¹⁶ Holders of individual taxpayer identification numbers ("ITIN"), the number used by individuals, including undocumented immigrants and many foreign investors, who do not qualify

¹¹ Edward Schumacher-Matos, *How Illegal Immigrants Are Helping Social Security*, WASH. POST, Sept. 3, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/02/AR2010090202673.html> ("[B]y 2007, the Social Security trust fund had received a net benefit of somewhere between \$120 billion and \$240 billion from unauthorized immigrants.").

¹² If adjusted for inflation the cumulative wages represented \$835.3 billion would grow to \$1,107.5 billion by 2011. Mary Johnson, *The Growing Cost of Illegal Immigration to Social Security: Unprecedented Growth in Social Security's "Earnings Suspense File"*, THE SENIOR CITIZENS LEAGUE 3 (June 2010), http://www.seniorsleague.org/images/earnings_suspense_report.pdf.

¹³ *Proposal to Strip Workers of Social Security Earnings Based on Prior Employment Status: Bad for the System and an Affront to Our Values*, NAT'L IMMIGR. L. CTR., (2007), http://www.nilec.org/immigrationpolicy/CIR/ensign_ss_amdmt_2007-02-28.pdf; see also THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 297-354 (James P. Smith & Barry Edmondston eds., 1997) (noting that all immigrants in the United States pay on average \$80,000 more in taxes per capita than they receive during their lifetime).

¹⁴ Miriam Jordan, *Even Workers in U.S. Illegally Pay Tax Man*, WALL ST. J., Apr. 4, 2007, http://www.azeir.org/pdf/2007_0404_wsj_immigration-taxes.pdf.

¹⁵ Alan Zarembo, *Garment Laborers Say Bush Guest-Worker Plan an Ill Fit*, L.A. TIMES, Feb. 8, 2004, <http://articles.latimes.com/2004/feb/08/local/me-immigrants8>.

¹⁶ See Schumacher-Matos, *supra* note 11, ("[B]y 2007, the Social Security trust fund had received a net benefit of somewhere between \$120 billion and \$240 billion from unauthorized immigrants."); *At Tax Time, Illegal Immigrants Are Paying Too*, ASSOCIATED PRESS, Apr. 10, 2008, http://www.msnbc.msn.com/id/24054024/ns/business-personal_finance/t/tax-time-illegal-immigrants-are-paying-too/ (stating that the amount was \$9 billion in 2005).

for Social Security numbers (“SSN”), filed more than three million tax returns in 2010.¹⁷ Moreover, in 2010 the Internal Revenue Service received more than 1.6 million new ITIN applications.¹⁸ A 30 percent increase in ITINs issued to undocumented immigrants from 2005 to 2006 arguably resulted in significant federal revenue growth.¹⁹

B. Many Types of Taxes Paid by Undocumented Immigrants

Undocumented immigrants pay taxes everyday across America for the benefit of federal, state and local governments. In America taxes are assessed on transactions, income, property, and on accumulated wealth. Most Americans are very familiar with many of these transaction taxes because they witness and engage in these transactions daily. When one purchases goods, sales taxes often apply to the transaction and the consumer pays the taxes assessed to the seller. These taxes are assessed by state and local governments. Some goods and services, like alcohol, cigarettes, gasoline, tires, and utilities are also subject to excise taxes, which can be imposed by state, local and federal governments.

1. Federal, State and Local Consumption Taxes

Undocumented immigrants, who live, work, eat and shop in America, engage in consumption routinely. Not surprisingly, undocumented immigrants are not exempt from consumption taxes. As a result, undocumented immigrants, similar to American citizens and documented residents, are subject to and pay sales, use, and excises taxes when they purchase or use American goods and services. When an undocumented immigrant purchases food, clothing, books, shoes, gasoline, alcohol, and cigarettes she must pay any and all applicable federal, state and local sales, use, and excise taxes. In addition, undocumented immigrants are subject to and pay state and local property taxes.²⁰ These transactions, whether made by U.S. citizens, documented residents, or undocumented immigrants, are subject to taxes and require payments that enhance the pocketbooks of local, state, and federal governments.

There are more than ten million undocumented immigrants in this

¹⁷ TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 9, at 20 (setting forth filing statistics on ITIN tax returns for 2005–2010).

¹⁸ NAT’L TAXPAYER ADVOCATE, 2010 ANNUAL REPORT TO CONGRESS 319 (DEC. 31, 2010), <http://www.irs.gov/pub/irs-pdf/p2104.pdf>; *see also* *Illegal Immigrants Filing Taxes More Than Ever*, ASSOCIATED PRESS, Apr. 13, 2007, http://www.msnbc.msn.com/id/18077009/ns/business-tax_tactics/ [hereinafter *Illegal Immigrants Filing Taxes*].

¹⁹ *Illegal Immigrants Filing Taxes*, *supra* note 18. In 2006, the IRS issued 1.5 million new ITINs, the number used for federal income tax reporting by undocumented immigrants in lieu of a Social Security number, a 30 percent increase over 2005.

²⁰ *See* Randolph Capps & Michael E. Fix, *Undocumented Immigrants: Myths and Reality*, URBAN INST. (2005), http://www.urban.org/UploadedPDF/900898_undocumented_immigrants.pdf.

country²¹ comprising nearly seven million families with average family earnings in 2007 of \$36,000 (\$50,000 for U.S. born families).²² Because undocumented immigrants generally tend to have low levels of income and receive little government support, they spend most, if not all, of their income on goods that are often subject to consumption taxes.²³ Undocumented immigrant families, therefore, pay a higher percentage of their income in consumption taxes than U.S. citizens whose income tends to be higher.²⁴ As you have witnessed and can extrapolate from these numbers, undocumented immigrants have paid and will continue to pay billions of dollars in sales, use, excise, and property taxes as they consume goods and services across America.

2. Federal, State, and Local Income Taxes

In addition to paying federal, state, and local consumption taxes, undocumented immigrants, like American citizens and documented residents, are subject to and pay federal and any applicable state and local income taxes. The federal government has subjected non-U.S. citizens residing in the United States (with or without documents) to income tax since its enactment through the Revenue Act of 1913.²⁵ Undocumented

²¹ MICHAEL HOEFER ET AL., DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION IN THE UNITED STATES: JANUARY 2009, 1 (2009), available at www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf. The figure has decreased from approximately 12 million in March 2006 to 11.1 million in March 2010. Compare CONG. BUDGET OFFICE, *Preface to THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS* (2007), available at <http://www.cbo.gov/ftpdocs/87xx/doc8711/12-6-Immigration.pdf>, with Jeffrey S. Passel & D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010*, PEW HISPANIC CTR. 1 (2011), <http://pewhispanic.org/reports/report.php?ReportID=133.pdf>.

²² Jeffrey S. Passel & D'Vera Cohn, *A Portrait of Unauthorized immigrants in the United States*, PEW HISPANIC CTR. 16 (2009), <http://pewhispanic.org/files/reports/107.pdf>.

²³ *Id.* at iv-v (the 2007 median household income of unauthorized immigrants was \$36,000, well below the \$50,000 median household income for U.S.-born residents. In contrast to other immigrants, undocumented immigrants do not attain markedly higher incomes the longer they live in the United States. A third of the children of unauthorized immigrants and a fifth of adult unauthorized immigrants lives in poverty. This is nearly double the poverty rate for children of U.S.-born parents (18 percent) or for U.S.-born adults (10 percent). More than half of adult unauthorized immigrants (59 percent) had no health insurance during all of 2007. Among their children, nearly half of those who are unauthorized immigrants (45 percent) were uninsured and 25 percent of those who were born in the U.S. were uninsured); DEP'T OF HEALTH AND HUMAN SERVS., INFORMATION ON POVERTY AND INCOME STATISTICS: A SUMMARY OF 2011 CURRENT POPULATION DATA 5 (2011), available at <http://aspe.hhs.gov/poverty/11/ib.pdf> (developed more than 40 years ago, the official poverty measure is a specific dollar amount that varies by family size but is the same across the continental U.S. According to the 2011 federal poverty guidelines, the poverty level is \$22,314 for a family of four); see NANCY K. CAUTHEN & SARAH FASS, NAT'L CTR. FOR CHILDREN IN POVERTY, MEASURING POVERTY IN THE UNITED STATES (2008), available at http://www.nccp.org/publications/pub_825.html (describing the poverty threshold as the basic amount needed to make ends meet, that is, that at the poverty level of income all income must be spent on basic goods and services necessary for survival).

²⁴ *The Numbers*, TAX POLICY CENTER, URBAN-BROOKINGS TAX POLICY CTR. (NOV. 10, 2009), <http://www.taxpolicycenter.org/numbers/displaytab.cfm?DocID=2478>.

²⁵ Thomas St.G. Bissell, 907-3rd Tax Management, *U.S. Income Taxation of Nonresident Alien Individuals A1, A3* (2010).

immigrants are also subject to applicable state and local income taxes similar to U.S. citizens and documented immigrants if they reside in or earn income in a jurisdiction with such taxes.²⁶

While undocumented immigrants are subject to the same consumption and property tax rates as U.S. citizens and documented immigrants, this Article will also demonstrate that undocumented immigrants are subject to federal income taxes at a higher effective tax rate than similarly situated citizens and documented residents. Despite the shibboleth that undocumented immigrants are not subject to and do not pay income taxes, the truth is that they are and often at a higher effective tax rate than similarly situated U.S. citizens and documented immigrants.

Congress uses its plenary power to tax under the Constitution to write tax laws.²⁷ The higher effective tax rate suffered by undocumented immigrants is a direct result of tax laws written by members of Congress. This additional tax burden is a surtax or tariff borne by these taxpayers because of their immigration status.²⁸

Undocumented immigrants are subject to income taxes at a higher effective tax rate for a number of reasons. For example, undocumented immigrants (and their American citizen or documented spouses and children) do not qualify for the refundable earned income tax credit (“EITC”). This bipartisan supported annual credit, which for 2011 will be as great as \$5,751, is targeted to working poor families.²⁹ Even though most undocumented immigrant families are in this targeted group, they are statutorily denied this tax credit because of their immigration status.³⁰ Members of Congress deny this credit to working poor families who do not qualify for a SSN because they do not want to encourage unauthorized

²⁶ STATE OF CAL. FRANCHISE TAX BD., GUIDELINES FOR DETERMINING RESIDENT STATUS 2009 2–4 (2009) (a resident subject to California income tax is any individual who is present in California for other than a temporary or transitory period of time or who is domiciled in California, but temporarily or transitorily away). State income taxes, like federal income taxes, are imposed generally on individuals who are physically present in the region for a long enough period of time to be deemed “residents” under state law. *Id.* For example, in California, where approximately 2.6 million undocumented immigrants reside, or 25 percent of all undocumented immigrants in the United States. See Teresa Watanabe, *Illegal Immigrant Numbers Plunge*, L.A. TIMES, Feb. 10, 2011, <http://articles.latimes.com/2010/feb/11/local/la-me-immig11-2010feb11>.

²⁷ U.S. Const. art. I, § 8.

²⁸ See MAURICE SCHIFF, THE WORLD BANK DEV. RESEARCH GRP., LOVE THY NEIGHBOR: TRADE, MIGRATION AND SOCIAL CAPITAL 19–22 (2000), available at <http://www.netamericas.net/researchpapers/documents/schiff/schiff2.pdf> (discussion of optimal immigration theory presenting a model that incorporates an immigration tax).

²⁹ See *Preview of 2011 EITC Income Limits, Maximum Credit Amounts and Tax Law Updates*, INTERNAL REVENUE SERV. (last updated Jan. 3, 2011), <http://www.irs.gov/individuals/article/0,,id=233839,00.html>; I.R.S. Publ’n 596, Earned Income Credit (2010), available at <http://www.irs.gov/pub/irs-pdf/p596.pdf> (this 2010 figure is the maximum allowed for “three or more qualifying children”).

³⁰ I.R.C. § 32(c) (2006).

work.³¹

Another reason undocumented immigrants were subject to a higher income tax rate in 2008 was that undocumented immigrants (who were not married to members of the military) did not qualify for the 2008 economic stimulus tax credit. This refundable tax credit was up to \$600 per qualifying individual and \$300 per qualifying child. The tax credit was designed for low- and middle-income working families, most senior citizens, and certain veterans because they would be likely to spend the tax refund and stimulate the stalling U.S. economy. While the tax credit was basically a temporary tax rate cut, undocumented immigrants were specifically excluded as a result of Congressional response to last minute anti-immigrant outcries.³²

In addition to these two statutory exclusions, undocumented immigrants may be subject to a higher effective income tax rate because of more challenging reporting requirements. Many undocumented immigrants, like many U.S. citizens, pay their federal and state income taxes through wage withholding. Therefore, to receive a refund of any overpayment of their federal and state income taxes they are required to file tax returns requesting refunds. However, undocumented immigrants must file their tax returns with an ITIN because they do not qualify for a SSN. Because of the misperception of abuse of this number, obtaining an ITIN is not a simple task. Whereas a SSN is issued to all U.S. citizens immediately at birth, an ITIN must be obtained through an onerous application process requiring original identification documents, which might not be readily accessible.³³ In addition, because of lack of access to and intimidation by federal state and local income tax systems and government officials, millions of undocumented immigrants do not file tax returns. Therefore, these taxpayers have very likely overpaid their federal and state tax liabilities.³⁴

While the government can assess a tax deficiency (together with interest and penalties) at any time if a taxpayer has not filed her return,³⁵ tax refund claims generally must be filed within three years from the date

³¹ See DEPARTMENT OF TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2005 REVENUE PROPOSAL 88 (2004), available at <http://www.treasury.gov/resource-center/tax-policy/Documents/bluebk04.pdf>. Congressional intent is evinced in its enactment of the requirement for a SSN specifically valid for work. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 451, 110 Stat. 2105, 2276 (1996) (codified at I.R.C. § 32(c)).

³² Martin Kady II, *Lou Dobbs Alert: Illegal Immigrants May Get Rebates*, POLITICO (Jan. 30, 2008, 12:47 PM), http://www.politico.com/blogs/thecrypt/0108/Lou_Dobbs_alert_Illegal_immigrants_may_get_rebates.html#.

³³ Francine J. Lipman, *Bearing Witness to Economic Injustices of Undocumented Immigrant Families: A New Class of "Undeserving" Poor*, 7 Nev. L.J. 736, 747 (Summer 2007).

³⁴ See I.R.S. Publ'n 1304, 6 (2011), available at <http://www.irs.gov/pub/irs-soi/09inalcr.pdf> (setting forth the number of individual income tax returns that were overpaid).

³⁵ I.R.C. § 6501(c)(3) (2006).

of the filing deadline.³⁶ The government will deny tax refund claims made after the statute of limitations has expired.³⁷ Therefore, undocumented immigrant families who suffer numerous barriers to filing too often find themselves filing late and losing precious tax refunds.³⁸ If a past tax liability is owed, it will accrue interest and applicable penalties from the due date of the return. Time barred refunds cannot offset any tax, penalties and interest owed.³⁹ As a result of their lack of access to tax resources, undocumented immigrant families are more likely to lose tax refunds and be subject to interest and penalties on any tax deficiencies.

While the statutes of limitation bar any taxpayer refund claims after three years and do not bar the government's assessment of tax deficiencies at any time if a taxpayer fails to file her tax return, these rules apply to U.S. citizens as well as documented and undocumented immigrants. However, proposed immigration reform in 2006 would have denied undocumented immigrants from receiving any tax benefit from any overpayment of back taxes.⁴⁰ These tax overpayments could not even have been applied to any underpayment of back taxes. Moreover, the proposal would have denied undocumented immigrants from any tax benefit from any otherwise available tax credits.⁴¹ The denial of any tax credit or refund is unprecedented and irrational. This proposal if enacted would have dramatically raised the effective income tax rate for undocumented immigrants. These existing and proposed tax laws increase the effective tax rate for undocumented immigrants as compared to similarly situated U.S. citizens or documented immigrants. Therefore, not only are undocumented immigrant families subject to and paying federal and state income taxes, but many are paying income taxes at a notably higher effective tax rate.

3. *Employment and Self-Employment Taxes*

In addition to paying consumption and income taxes, unauthorized workers and their employers are subject to and pay Social Security and Medicare taxes and other federal and state employment taxes (e.g., unemployment, disability, etc.) on their wages and self-employment income. Unauthorized workers and their employers must each pay Social Security and Medicare taxes of 7.65 percent on all wages (Social Security tax is subject to a wage cap, but the cap of \$106,800 in 2011 well exceeds

³⁶ I.R.C. § 6511(a) (2006).

³⁷ I.R.C. § 6511(b)(1) (2006).

³⁸ See *infra* Parts II, E.2.-5.

³⁹ I.R.C. § 6511(h)(1) (2006) (stating that if the taxpayer can prove that they were financially disabled then during such period the statute of limitations would lapse); Rev. Proc. 99-21 (1999), available at <http://www.unclefed.com/Tax-Bulls/1999/rp99-21.pdf>.

⁴⁰ Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 245B(a)(1)(E)(i) (2006).

⁴¹ *Id.*

the average wages for unauthorized workers) for an aggregate tax rate of 15.3 percent.⁴² Most economists believe that the burden of payroll taxes paid by employers is born by employees.⁴³ All workers who are self-employed must pay the employer's and the employee's Social Security and Medicare taxes for an aggregate tax rate of 15.3 percent. Therefore, unauthorized workers, like all workers residing and working in the U.S., are subject to a 15.3 percent effective wage tax rate.

The Social Security Administration noted several years ago that approximately 75 percent of unauthorized workers and their employers pay Social Security and Medicare taxes.⁴⁴ Given the recent government focus on employer compliance with immigration laws, the current payroll tax compliance percentage most likely is greater than 75 percent. Therefore, most unauthorized workers are subject to and pay through automatic withholding a wage tax totaling approximately \$12 billion in 2007.⁴⁵

Wage taxes, like Social Security and Medicare taxes, are regressive as compared to income taxes which are generally progressive. Progressive tax rates generally increase with the level of income because the marginal value of a dollar at the higher level of income is less valuable than a dollar of poverty level income. Because Social Security taxes are imposed on wages and not interest, dividends, or capital gains, they are capped at a threshold wage base (\$106,800 in 2011; Medicare tax is uncapped for 2.9 percent of the aggregate tax of 15.3 percent),⁴⁶ wage taxes represent a greater percentage of income for lower income earners than higher income earners. As a result, the effective Social Security and Medicare tax rate for many undocumented immigrant families whose income is comprised only of wages is 15.3 percent. However, for a high-income family with wages above the threshold and interest, dividend and capital gain income, their effective Social Security and Medicare tax rate would be significantly lower.

While Social Security and Medicare taxes are regressive, Social

⁴² In 2011 Congress reduced the Social Security rate temporarily (for one year) for employees by 2 percent. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296, 3309 (2010).

⁴³ JOHN A. BRITTAIN, BROOKINGS INST., *THE PAYROLL TAX FOR SOCIAL SECURITY* 13 (Brookings Inst. eds., 1972); JONATHAN BARRY FORMAN, *MAKING AMERICA WORK* 67-68 (Urban Inst. Press eds., 2006).

⁴⁴ 152 Cong. Rec. S4742 (daily ed. May 18, 2006) (statement of Sen. Cornyn quoting Steven Gross, Social Security's chief actuary); HENRY LOPEZ ET AL., *CTR. FOR COMPARATIVE IMMIGRATION STUDIES, IMPACTS OF BORDER ENFORCEMENT ON MEXICAN MIGRATION: THE VIEW FROM SENDING COMMUNITIES* 89 (Wayne A. Cornelius & Jessica M. Lewis eds., 2007).

⁴⁵ See Schumacher-Matos, *supra* note 11 ("by 2007, the Social Security trust fund had received a net benefit of somewhere between \$120 billion and \$240 billion from unauthorized immigrants"); *At Tax Time, Illegal Immigrants Are Paying Too*, *supra* note 16 (stating that the amount was \$9 billion in 2005).

⁴⁶ See *Contribution and Benefit Base*, SOCIAL SECURITY ONLINE <http://www.ssa.gov/oact/cola/cbb.html> (last visited Nov. 11, 2011).

Security and Medicare benefits are notably progressive.⁴⁷ The Social Security system is designed to provide a safety net for retirement for low and middle-income workers and their families. To provide this safety net, the Social Security benefit formula redistributes financial resources from higher wage earners to lower wage earners. As a result, the Social Security benefit formula provides a higher return on wage tax contributions to lower wage earners than higher wage earners.⁴⁸ Moreover, every Social Security benefit qualifying recipient irrespective of their wage level receives health care insurance coverage through Medicare. Arguably, this health care coverage is more valuable to lower income retirees than higher income retirees who have or could pay for alternative coverage. Therefore, while Social Security and Medicare taxes are notably regressive resulting in higher effective tax rates for lower individuals than higher income individuals, the Social Security and Medicare benefits package corresponding to the tax payments is progressive.

However, unauthorized workers, who have paid between \$120 and \$240 billion in Social Security taxes through 2007 and who currently pay and are projected to pay even more in the future, will never qualify for these critical benefits unless they obtain work authorization and are legally present in the United States.⁴⁹ While U.S. citizens and authorized workers are subject to the same regressive taxes, they qualify for the priceless progressive benefits of a secure and inflation-adjusted retirement income and a lifetime of health insurance coverage starting at age 65. Undocumented immigrants who pay these taxes at the same regressive tax rate, however, do not receive any Social Security benefits or Medicare health benefits.⁵⁰ Therefore, undocumented immigrants effectively are

⁴⁷ See Francine J. Lipman & James E. Williamson, *Social Security Benefits Formula 101* ORANGE COUNTY LAWYER, May 2011 at 10; See Cong. Budget Office, *Is Social Security Progressive?* ECONOMIC AND BUDGET ISSUE BRIEF, Dec. 2006 at 1; NAT'L COUNCIL OF LA RAZA, *THE SOCIAL SECURITY PROGRAM AND REFORM: A LATINO PERSPECTIVE* 3 (2005).

⁴⁸ NAT'L COUNCIL OF LA RAZA, *supra* note 47, at 3.

⁴⁹ See FRANCINE LIPMAN, FRANCINE LIPMAN ON SOCIAL SECURITY RETIREMENT BENEFITS AND IMMIGRANTS 3 (Matthew Bender & Company, Inc. eds., 2007) (discussing the restrictions workers both eligible and ineligible face when attempting to receive monthly benefits).

⁵⁰ President Bush signed the Social Security Protection Act of 2004 into law in March 2004. Under the Act a noncitizen who files for Social Security retirement benefits based on an SSN assigned on or after January 1, 2004, is required to have work authorization at the time the SSN is assigned or at some later time to attain insured status. Only if the individual receives work authorization may she apply for Social Security benefits. If a retiree obtains work authorization, her filing will be based on all Social Security-covered earnings regardless of work status during the earnings period. But if an individual never receives authorization to work, none of her Social Security-covered earnings count toward eligibility for any benefits. A noncitizen who applies for Social Security retirement benefits based upon an SSN assigned before January 1, 2004, is not subject to the work-authorization requirement. All of the noncitizens Social Security-covered earnings count toward eligibility regardless of her work-authorization status. However, as indicated above, no monthly benefit can be paid for any month during which the retiree is not lawfully present in the United States or has been residing outside of the United States for more than six consecutive months.

subject to a significantly higher payroll tax burden than similarly situated U.S. citizens and authorized workers.

C. Undocumented Immigrants are a Fiscal Windfall to Americans from Sea to Shining Sea

There is no doubt that undocumented immigrants have paid, are paying and will continue to pay billions of dollars in federal, state, and local income, sales, use, property, payroll, and excise taxes every year.⁵¹ Because of increased compliance efforts by the government and an increasing number of immigrants, the magnitude of these payments has been increasing dramatically over the recent decades. While undocumented immigrants undeniably contribute billions of dollars to government coffers annually, they do not qualify for almost any federal public assistance programs.⁵² Generally, the only benefits federally required for undocumented immigrants are emergency medical care—which is subject to financial and category eligibility—and primary and secondary public education for children.⁵³ Even these minimal benefits are offset to some extent because most undocumented immigrants are adults who come to America to work and have already received their own primary and secondary education paid for by their home country. Therefore, even the costs of primary and secondary education, as required by the Supreme Court's decision in *Plyler v. Doe*⁵⁴, is arguably offset to some extent by the windfall of undocumented children's parents' educated status.

Some economists believe that immigrants are not the problem, but

Even if the foregoing hurdles are jumped, a retiree has the burden of proving her earnings history, and only wages that are reported to the SSA, not paid under the table, count toward the required forty quarters of earnings to qualify for Social Security benefits. Because unauthorized workers usually do not have an SSN, the SSA will not have an accurate record of their earnings history. Accordingly, retirees with unauthorized work must provide satisfactory documentation to the SSA of their annual earnings history. Currently, the SSA has a policy of assisting, and not prosecuting, these workers, because the SSA is charged with maintaining correct earnings records. However, this policy can be changed at any time. It is a felony to falsely use an SSN, carrying a penalty of up to \$5,000 and five years in prison.

Id. at 3.

⁵¹ Michele Waslin, *Assessing the Economic Impact of Immigration at the State and Local Level*, IMMIGR. POL'Y CTR., (2008), http://www.fiscalpolicy.org/publishedarticles2008/IPC_StateStudiesImmigration2007.pdf.

⁵² See Tanya Broder, *Immigrant Eligibility for Public Benefits*, in IMMIGRATION AND NATIONALITY LAW HANDBOOK (Gregory P. Adam, et al. eds., 2005).

⁵³ See generally Elizabeth R. Chesler, *Denying Undocumented Immigrants Access to Medicaid: A Denial of Their Equal Protection Rights?*, 17 B.U. PUB. INT. L.J. 255 (2008). Undocumented immigrants do not qualify for Social Security benefits, Medicare, Medicaid, Temporary Assistance for Needy Families, federal housing programs, food stamps, Supplemental Security Income, unemployment insurance, the EITC and most recently the Economic Stimulus Tax Credit.

⁵⁴ 457 U.S. 202 (1982).

rather are the solution to many domestic economic problems.⁵⁵ Julian Simon, renowned economist, has noted that “every study that provides dollar estimates shows that when the sum of the tax contributions to city, state and federal government are allowed for, those tax payments vastly exceed the cost of the services used, by a factor of perhaps five, ten or more.”⁵⁶ The denial of nearly all federal, state, and local benefits, with the imposition of all federal, state, and local taxes as well as additional tax burdens specifically imposed on undocumented immigrants because of their status makes undocumented immigrants a fiscal windfall.⁵⁷

D. No Simple Answers

“The trouble about man is twofold. He cannot learn truths which are too complicated; he forgets truths which are too simple.”⁵⁸

Despite decades of observable evidence to the contrary, 70 percent of Americans agreed with the statement that undocumented immigrants weaken our economy because they don’t all pay taxes, but use public services.⁵⁹ As a result of persistent propaganda casting “illegal aliens” as the scapegoat for all of the nation’s problems, most Americans believe they are bearing the burden of undocumented immigrants rather than enjoying the benefits of a low-cost, taxpaying labor force.

Because of increasing complexity and lack of transparency in our tax, immigration and other government systems, the public is increasingly more vulnerable to the persistent litany of misinformation by restrictionists.⁶⁰ In challenging times simple “sound-bite” answers are more palatable than truthfully complex multi-faceted responses. As our world becomes more and more complicated we must work harder and harder to understand these intricate interdisciplinary issues and educate ourselves and others. We must resist the temptation to accept the easy, but irrational answer. I fear we are losing this battle. Most Americans, many of whom are descendants of immigrants, believe illogically and against their own best interest that immigrants are the adversary and not the ally.

⁵⁵ See DOWELL MYERS, IMMIGRANTS AND BOOMERS: FORGING A NEW SOCIAL CONTRACT FOR THE FUTURE OF AMERICA 6–7 (2007).

⁵⁶ JULIAN L. SIMON, THE ECONOMIC CONSEQUENCES OF IMMIGRATION 295 (1989).

⁵⁷ Peter L. Reich, *Public Benefits for Undocumented Aliens: State Law Into the Breach Once More*, 21 N.M. L. REV. 219, 244–46 (1991).

⁵⁸ Rebecca West Quotation, BRAINYQUOTE.COM, <http://www.brainyquote.com/quotes/quotes/r/rebeccawes108172.html> (last visited Oct. 15, 2011).

⁵⁹ TEIXEIRA, *supra* note 10.

⁶⁰ See SOUTHERN POVERTY LAW CTR, UNDER SIEGE, LIFE FOR LOW-INCOME LATINOS IN THE SOUTH, *supra* note 3 (noting that the toxic immigration debate has “transformed the perception of Latino immigrants from that of valuable workers eager to help transform the city into a major financial center to a destructive force that has infiltrated the city”).

E. Exposure and Education Are the First Step

Alarmist propaganda must be countered with persistent education and dissemination of accurate and accessible information. In this Article, I plan to expose and explain the "undocumented immigrant tax." As described, undocumented immigrants are subject to and pay taxes just like U.S. citizens and documented immigrants. However, undocumented immigrants are subject to and pay a greater amount of taxes because Congress has imposed financial penalties on certain U.S. residents because they do not have documents that support their current residency status.

Section II of this Article will describe the composition of "the undocumented immigrant income tax." The additional income taxes as described briefly above include the denial of the EITC, a bipartisan supported refundable tax credit that rewards work for low-income families, and the denial of the 2008 economic stimulus tax credit for all undocumented immigrants (unless they are a current member of the armed forces or married to one). Another additional income tax was proposed by former Senator John Ensign of Nevada as part of comprehensive immigration reform. His proposal was to retroactively deny all otherwise available tax credits including tax overpayments to any undocumented immigrant requesting documents.⁶¹ While this additional income tax is the most significant and onerous it has fortunately not yet been passed into law. However, there is little doubt that this or similar concepts will be reintroduced when immigration reform is addressed in the future.

The final issue resulting in additional income tax burden for undocumented immigrants is procedural, but the procedure is required by statute. Undocumented immigrant families are overpaying their federal and state income tax liabilities because they have limited access to the requisite information needed for filing their tax returns. In addition, because of fear of deportation, undocumented immigrants are intimidated by government agencies and limit their interactions with them, especially when the interaction requires disclosure that makes them even more vulnerable.⁶² As a result, millions of undocumented immigrants do not prepare and file tax returns, thereby significantly overpaying their federal and state income taxes. Moreover, once they do get access to the resources necessary to file their tax returns their tax refunds may be barred by the statute of limitations, but any outstanding tax liabilities will be assessed together with interest and penalties; thereby, increasing their effective tax burden because of limited access to financial justice.

Section III of this Article will discuss the enormously regressive burden of employment, including self-employment, taxes on

⁶¹ *Proposal to Strip Workers of Social Security Earnings Based on Prior Immigration Status*, NAT'L IMMIGRATION LAW CTR. (Feb. 28, 2007), <http://www.nilc.org/ss-workers.html>.

⁶² See *infra* Part II.E.

undocumented immigrants. Undocumented immigrants have paid between \$120 and \$240 billion in Social Security, Medicare, unemployment, and disability wage taxes to federal and state governments to date, yet they do not qualify for any benefits under any of these critical safety net systems. This section will describe the current state of this regressive burden as well as recent proposals by former Senator John Ensign to increase this already onerous encumbrance for undocumented immigrants. Section IV of this Article will summarize these economic injustices so that one can better understand these issues and respond rationally and thoughtfully to those that misunderstand them, and so that one can make informed decisions regarding forthcoming immigration, tax, and social justice reform for all.

As Dr. King wrote so passionately to his fellow clergymen from the confines of the Birmingham City Jail:

Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects all indirectly. Never again can we afford to live with the narrow, provincial ‘outside agitator’ idea. Anyone who lives in the United States can never be considered an outsider anywhere in this country.⁶³

II. THE “ILLEGAL” TAX

A. A Constructive and Instructive Tax Analysis

Immigration, tax, and financial justice reform will demand constructive debates of the facts and issues. Debate demands words and instructive, rather than destructive, terminology. Because human history evinces that hateful words lead to hateful acts, this Article will use terms that are informative and further, rather than undermine, the discussion.⁶⁴ It will use the term “undocumented immigrants” to refer to “people who presently possess no proof of any right to be present in the United States, whether or not they have been declared deportable by the U.S. government (and the vast majority have not).”⁶⁵ This Article will use the term “unauthorized workers” to describe people who are forbidden under immigration laws to work for pay, which does not necessarily mean they are residing in the United States without documents. For purposes of this

⁶³ DR. MARTIN LUTHER KING, JR., LETTER FROM BIRMINGHAM CITY JAIL, IN A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 289, 290 (James M. Washington ed., 1986).

⁶⁴ MILTON MELTZER, NEVER TO FORGET: THE JEWS OF THE HOLOCAUST 45 (1976); MICHAEL BERENBAUM, THE WORLD MUST KNOW: THE HISTORY OF THE HOLOCAUST AS TOLD IN THE UNITED STATES HOLOCAUST MEMORIAL MUSEUM 18–25 (1993).

⁶⁵ Lyon, *supra* note 7, at 581.

Article a family residing in the United States long enough to be subject to U.S. federal income taxes and in which not every member has a valid SSN will be described as an "undocumented immigrant family."

B. The Denial of the EITC

Similar to U.S. citizens, undocumented immigrant families are subject to federal, state, and local income taxes. However, consistent with U.S. financial justice policy the federal income tax system, and many state income tax systems, are designed to encourage work by providing that poverty level working families receive antipoverty relief, which offsets their income and other tax burdens, through tax credits.⁶⁶ Undocumented immigrant families are excluded statutorily from the most significant component of this antipoverty relief. As a result, undocumented immigrant families bear a greater income tax burden than similarly situated U.S. citizens and documented residents.

1. Antipoverty Relief for Certain Working Poor Families under the EITC

In 1972, then-Governor Ronald Reagan, testifying before Congress regarding a workfare approach to government assistance, "suggested that the federal government should exempt low income families from income taxes and give them a rebate for their Social Security taxes."⁶⁷ Several years later, Senator Russell Long, the conservative Democrat chairman of the Senate Finance Committee, and Congressman Al Ullman, the moderate chairman of the House Ways and Means Committee, packaged the idea in a refundable tax credit and won liberal support for the EITC. Since it was developed and established in 1975 by conservative forces, the EITC has enjoyed bipartisan support for encouraging work.⁶⁸

The EITC, completely administered through the tax system, is the largest cash assistance and most successful antipoverty program in America for working poor families reaching more individuals than more traditional financial justice programs.⁶⁹ "Research strongly confirms that the EITC has played a critical role in bringing more single mothers into the

⁶⁶ William Safire, *The 25% Solution*, N.Y. TIMES, Apr. 20, 1995, <http://www.nytimes.com/1995/04/20/opinion/essay-the-25-solution.html>.

⁶⁷ SAUL D. HOFFMAN & LAURENCE S. SEIDMAN, W.E. UPJOHN INST. FOR EMP'T RESEARCH, HELPING WORKING FAMILIES: THE EARNED INCOME TAX CREDIT 12 (2003).

⁶⁸ Dorothy A. Brown, *The Tax Treatment of Children: Separate But Unequal*, 54 EMORY L.J. 755, 801 (2005).

⁶⁹ See ELAINE MAAG & ADAM CARASSO, TAX POLICY CTR., TAXATION AND THE FAMILY: WHAT IS THE EARNED INCOME TAX CREDIT? (2010), available at <http://taxpolicycenter.org/briefing-book/key-elements/family/eitc.cfm>; see LEONARD E. BURMAN & DEBORAH I. KOBES, TAX POLICY CTR., TAX NOTES: EITC REACHES MORE ELIGIBLE FAMILIES THAN TANF, FOOD STAMPS, (2003), available at <http://www.urban.org/publications/1000467.html>.

workforce.”⁷⁰ The EITC lifts millions of families out of poverty, including millions of children, each year.⁷¹ Without the EITC, the number of children living in poverty would increase by one-third.⁷²

The EITC is a refundable tax credit that provides cash payments of up to \$5,751 (for 2011) to ensure that working poor families pay little or no income or payroll taxes.⁷³ While initially designed to offset the burdens of income and payroll taxes, the EITC in some cases provides a meaningful wage subsidy for low-income working families.⁷⁴ The EITC provides critical cash refunds for basic necessities like housing, utilities, food, and basic household appliances.⁷⁵ In 2010, approximately 20.1 million households with children received an average EITC credit of \$2,661, an excess of \$53 billion.⁷⁶

a. Qualifying for the EITC

The EITC was designed by Congress to encourage low-income families to work. Accordingly, to qualify for the EITC an individual and her spouse, if married, must have earned income within certain lower-earned income ranges. The EITC and the earned income ranges are indexed for inflation annually and vary meaningfully with the number of qualifying children. For eligible individuals with three or more qualifying children, the maximum 2011 EITC is \$5,751 for income levels of less than \$43,998 (\$49,078 for “married filing jointly”).⁷⁷ Because the EITC is targeted for families, the maximum EITC benefits decrease for eligible individuals with two qualifying children (\$5,112), one qualifying child (\$3,094) and most significantly for taxpayers with no qualifying children (\$464).⁷⁸ Married taxpayers, with or without children, who file their tax return separately will not receive any EITC although they may have

⁷⁰ STEVE HOLT, THE EARNED INCOME TAX CREDIT AT AGE 30: WHAT WE KNOW, BROOKINGS INST., 1, 14 (2006), available at http://www.brookings.edu/~media/Files/rc/reports/2006/02childrenfamilies_holt/20060209_Holt.pdf.

⁷¹ CTR. ON BUDGET AND POLICY PRIORITIES, POLICY BASICS: THE EARNED INCOME TAX CREDIT (2011), available at <http://www.cbpp.org/cms/index.cfm?fa=view&id=2505> (stating that roughly 6 million people, including 3 million children, were lifted out of poverty by the EITC in 2009); MAAG ET AL., *supra* note 69 (stating that roughly 4 million people were lifted out of poverty by the EITC in 2006); ALAN BERUBE, THE NEW SAFETY NET: HOW THE TAX CODE HELPED LOW-INCOME WORKING FAMILIES DURING THE EARLY 2000S, BROOKINGS INST., 2–3 (2006), available at http://www.brookings.edu/~media/Files/rc/reports/2006/02childrenfamilies_berube/20060209_newsafety.pdf.

⁷² CTR. ON BUDGET AND POLICY PRIORITIES, *supra* note 71.

⁷³ Rev. Proc. 2011-2, 2011-2 I.R.B. 299.

⁷⁴ See Robert Greenstein, *The Earned Income Tax Credit: Boosting Employment, Aiding the Working Poor*, CTR. ON BUDGET AND POLICY PRIORITIES (Aug. 17, 2005), <http://www.cbpp.org/archiveSite/7-19-05eic.pdf>.

⁷⁵ DAVID K. SHIPLER, THE WORKING POOR: INVISIBLE IN AMERICA 13 (2004).

⁷⁶ MAAG et al., *supra* note 9; see CENTER ON BUDGET AND POLICY PRIORITIES *supra* note 71.

⁷⁷ Rev. Proc. 2011-2, *supra* note 73.

⁷⁸ *Id.*

otherwise qualified for thousands of dollars.⁷⁹ The EITC is not intended to benefit low wage earners with above average investments so eligible individuals cannot have investment income in excess of \$3,150 per year.⁸⁰

b. Congress Tries to Limit EITC Relief for Authorized Work Only

In 1996, Congress enacted and President Clinton signed into law the Personal Responsibility and Work Opportunity Reconciliation Act,⁸¹ which included unprecedented restrictions on federal benefits for many immigrants. Among the long list of benefit restrictions, Congress decided that "individuals who are not authorized to work in the United States" should be denied EITC benefits.⁸² To accomplish this goal, Congress amended the Internal Revenue Code to require that any taxpayer (and, if married, her spouse) and each qualified child must provide a valid SSN (issued to individuals authorized to work in the United States) to receive EITC benefits.⁸³

SSNs have been issued to workers since the implementation of the 1935 Social Security Act. The SSN numbering system was designed to provide a method for employers to report and the U.S. government to track Social Security earnings for purposes of payroll tax and retirement benefit calculations. In the 1960s computerization caused the Internal Revenue Service ("IRS") and private businesses to rely on SSNs as a method of accumulating, sorting, and tracking information relating to individuals.

For sixty years, the federal government issued SSNs to workers irrespective of their immigration status. As a result, there are numerous undocumented immigrants and unauthorized workers with valid SSNs that were issued to them by the Social Security Administration ("SSA"). Through the early 1980s the government only kept internal records regarding an unauthorized worker's immigration status. Beginning in 1982 Social Security cards issued to unauthorized workers were marked "Not Valid for Employment" and temporarily authorized workers received cards marked "Valid Only with INS Authorization."⁸⁴

⁷⁹ See I.R.S. Pub. 501, Filing Status, Married Filing Separately, Special Rules, http://www.irs.gov/publications/p501/ar02.html#en_US_2011_publink1000220762 (last visited Dec. 27, 2011).

⁸⁰ I.R.C. § 32(2)(i)(1) (2006) (describing the disqualifying investment income as interest, dividends, net capital gains, net rents, net royalties and net passive income).

⁸¹ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105.

⁸² STAFF OF J. COMM. ON TAXATION, 104TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 104TH CONGRESS 394 (Comm. Print 1996).

⁸³ I.R.C. § 32(e) (2006).

⁸⁴ Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 21 (2006).

In an effort to stop unauthorized workers from being hired, Congress enacted the Immigration Reform and Control Act of 1986. This Act, among other things, required employers to have all new employees prove their identity and work authorization with specific documents.⁸⁵ Congress listed a Social Security card as an acceptable document evidencing proof of work authorization.⁸⁶ As a result of this requirement, there has been widespread use of counterfeit Social Security cards among unauthorized workers making it “more common and easier than ever for [unauthorized] workers to enter and function in the U.S. labor market.”⁸⁷

As late as 1996, the SSA began limiting its issuance of SSNs to individuals who were U.S. citizens and immigrants authorized for employment in the United States. This limitation caused a problem for individuals who needed a taxpayer identification number for filing tax returns (for example, foreign investors). In response to this need, the IRS introduced a new taxpayer identification number for use by individuals who are not citizens or nationals of the United States and are not eligible for SSNs.⁸⁸ After December 31, 1996, individuals who do not qualify for a SSN, but have a tax filing requirement must apply for and use their ITIN on all their tax filings.⁸⁹ The ITIN, like a SSN, is a unique nine-digit number. The number is intended to be used for tax purposes only and does not affect immigration status, authorize work in the United States, or provide eligibility for Social Security benefits. Undocumented immigrants are not authorized to work in the United States and, therefore, are not eligible for a SSN. Unauthorized workers and undocumented immigrants must obtain an ITIN to file any required tax returns or to be listed as a dependent or spouse on any tax return.

c. Congress’ Denial of EITC Benefits for Unauthorized Work is Designed Poorly and Overbroad in its Application

The enactment of immigration reform in 1996 was intended to deny most federal benefits to undocumented immigrants including federal benefits for unauthorized work. The EITC, deemed a federal tax benefit, was amended to provide that every individual listed on a tax return had to have a valid SSN to qualify for any EITC relief.⁹⁰

This requirement is poorly designed as it denies EITC benefits to legally present and legally working immigrant families. Consistent with Congress’ intent, the SSN requirement will in most cases deny EITC

⁸⁵ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §101(b)(1) (1986).

⁸⁶ *Id.* at §101(b)(C)(1).

⁸⁷ Paula N. Singer & Linda Dodd-Major, *Identification Numbers and U.S. Government Compliance Initiatives*, 104 TAX NOTES 1429, 1431 (2004).

⁸⁸ Lipman, *supra* note 84, at 21.

⁸⁹ *Id.* at 21–22.

⁹⁰ I.R.C. § 32(e)(i) (2006).

benefits for unauthorized work; but, because it requires an SSN for both working and nonworking spouses if a taxpayer is married, it is overbroad. For example, the SSN requirement denies EITC benefits to U.S. citizens or authorized workers whose nonworking spouses have valid ITINs, but no SSN. The spouse could be legally present in the United States or a resident of another country. Even if the couple has one or more qualifying children who are U.S. citizens with SSNs, this legally present and working family will not qualify for any EITC benefits.⁹¹

If the family decides to file a married filing separate return so that all individuals on the tax return have SSNs, they will not qualify for any EITC. Married taxpayers cannot qualify for the EITC with a married filing separate tax return.⁹² Only if the couple ends their marriage or never enters into marriage, will crucial EITC benefits be available.⁹³ As a result, undocumented immigrants are faced with an effective federal income tax rate that is higher than the tax rate for a U.S. citizen family with the same characteristics.

C. *The Denial of the 2008 Economic Stimulus Tax Credit*

1. *How the 2008 Economic Stimulus Tax Credit Works*

The denial of EITC benefits meaningfully increases the effective income tax rate for undocumented immigrants and their families. In 2008 this relatively higher effective tax rate was even more pronounced due to the denial of the economic stimulus tax credit for undocumented immigrants. The 2008 economic stimulus tax credit was part of a \$170 billion bipartisan package passed by Congress in February 2008 with the intention of stimulating the stalling U.S. economy.⁹⁴ The \$600 per taxpayer one time tax credit was targeted to low and middle-income taxpayers. After weeks of debate the Democrats convinced the Republicans to extend the credit to certain non-taxpayers including the working poor, senior citizens collecting Social Security benefits, and disabled veterans collecting Veteran Administration benefits. However, anti-immigrant politicians and groups, including Federation for American Immigration Reform, former Congressman Tom Tancredo, and former Senator John Ensign convinced Congress to deny the credit to all undocumented immigrants and their families.⁹⁵

⁹¹ See *supra* notes 29–31 and accompanying text.

⁹² I.R.C. § 32(d) (2006) (setting forth the requirement that married taxpayers must file as married filing jointly to qualify for EITC benefits).

⁹³ See Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 87 (2005).

⁹⁴ Economic Stimulus Act of 2008, H.R. 5140, 110th Cong. (2008) (enacted); see Dawn Kopecki, *Bernanke Backs Calls for Quick Action*, BLOOMBERG BUSINESSWEEK, Jan. 17, 2008, http://www.businessweek.com/bwdaily/dnflash/content/jan2008/db20080117_873508.htm.

⁹⁵ FEDERATION FOR AMERICAN IMMIGRATION REFORM, *American Public Rejects Tax Rebates for*

The basic concept of the economic stimulus was a tax rate reduction in the lowest tax bracket thereby benefiting all taxpayers.⁹⁶ To achieve this goal, Congress effectively reduced the 10 percent income tax rate to zero for up to \$6,000 of taxable income for every taxpayer.⁹⁷ To achieve this rate reduction the stimulus was designed as a tax credit, a dollar for dollar tax reduction up to 10 percent of taxable income, or \$600, (\$6,000 x 10%) per taxpayer.⁹⁸ In addition to the basic tax credit, the package provided an additional tax credit of \$300 per qualifying child. The tax credit was designed for low- and middle-income taxpayers, and it phased out for higher income taxpayers (\$75,000 or more of adjusted gross income or \$150,000 or more, if married filing jointly) by 5 percent for any amount above these thresholds.⁹⁹

The economic stimulus package was targeted to low- and middle-income families because their economic circumstances would cause them to use these tax refunds promptly to purchase goods and services to stimulate the failing U.S. economy.¹⁰⁰ Congress designed the credit to be partially refundable to get the credit into the hands of needy senior citizens and the working poor who had insufficient income to generate any taxable income. Any individual with at least \$3,000 of any combination of earned income, Social Security benefits, and certain veterans' benefits qualified for a 10 percent, or \$300, refundable tax credit.¹⁰¹

Congress desperately wanted the tax credit to stimulate the economy as quickly as possible. To expedite the distribution of the 2008 tax credit, the credit was payable as soon as practicable in 2008 based upon filed 2007 tax returns.¹⁰² Those individuals who did not receive the full tax credit based upon their filed 2007 tax returns qualified for any remaining tax credit when they filed their 2008 tax return in 2009.¹⁰³ However, Congress voted to deny this tax rate reduction for undocumented immigrant working families based solely upon their immigration status.¹⁰⁴ Like the EITC, a legally working and present family could be denied the 2008 tax rate cut.

Illegal Aliens (Mar. 2008), www.fairus.org/site/DocServer/March08_NL.pdf?docID=5905.

⁹⁶ See *I.R.C.* § 6428 (2006).

⁹⁷ \$6,000 x 2 = \$12,000 of taxable income for married filing joint taxpayers.

⁹⁸ \$1,200 (for married filing jointly taxpayers) = \$12,000 x 10 percent.

⁹⁹ I.R.S., *Facts about the 2008 Stimulus Payments* (Feb. 15, 2008), <http://www.irs.gov/newsroom/article/0,,id=179095,00.html>.

¹⁰⁰ See *Options for Responding to Short-Term Economic Weakness: Hearing Before the Senate Comm. on Finance*, 110th Cong. 15 (2008) (statement of Peter R. Orszag, Director Congressional Budget Office), available at <http://www.cbo.gov/ftpdocs/89xx/doc8932/1-22-TestimonyEconStimulus.htm>.

¹⁰¹ \$3,000 x 10% = \$300.

¹⁰² See *Facts about the 2008 Stimulus Payments*, *supra* note 99.

¹⁰³ *Id.*

¹⁰⁴ 154 Cong. Rec. H495 (daily ed. Jan. 29, 2008) (statement of Rep. Campbell).

2. *How the 2008 Economic Stimulus Tax Credit Does Not Work*

To preclude undocumented immigrants from receiving the tax credit, Congress required that only individuals with a SSN would be eligible for the credit.¹⁰⁵ Similar to the EITC, married couples filing jointly had to provide a SSN for each spouse to qualify for any amount of credit. In addition, qualifying children had to have SSNs. ITINs were not acceptable in any circumstance to qualify for the tax credit. Similar to the SSN requirement under the EITC, Congress' requirement of a SSN denied the tax credit for most undocumented immigrants.¹⁰⁶

As a result of the SSN requirement, undocumented immigrants as well as their U.S. citizen spouses and children did not qualify for the 2008 economic stimulus tax credit unless they filed "married filing separately." While "married filing separately" filing status provided the opportunity for an economic stimulus tax credit for U.S. citizen and documented resident spouses and children who held a SSN this filing status would have under certain circumstances caused an aggregate tax increase for the family as well as any additional costs for preparing and filing two tax returns. However, this result in many cases was better than the absolute denial of the EITC for married filing separately tax filings.

After the SSN requirement was announced immigrant advocate groups noted that this requirement also disqualified hundreds of thousands of U.S. military personnel, foreign high-tech workers and other U.S. citizens and documented immigrants that were legally present or married to legally present spouses who did not hold SSNs because they were not eligible to work and were not working.¹⁰⁷ As a result, Congress acted to remedy this overzealous exclusion of undocumented immigrants, but only for a very select group of individuals ironically allowing this federal benefit for certain undocumented immigrants.

In June 2008, President Bush signed into law the Heroes Earnings Assistance and Relief Tax Act of 2008 ("HEART 2008").¹⁰⁸ This law included a provision that exempts married taxpayers who file a joint tax return from the SSN requirement for the 2008 economic stimulus tax credit if at least one of the filers was a current member of the Armed Forces.¹⁰⁹ Therefore, every member of the Armed Forces qualified for the 2008

¹⁰⁵ See Facts about the 2008 Stimulus Payments, *supra* note 99.

¹⁰⁶ *Id.*

¹⁰⁷ Teri Weaver and John Vandiver, *ITIN Ineligible for Special Rebate*, STARS AND STRIPES (Mar. 29, 2008), <http://www.military.com/news/article/itin-ineligible-for-special-rebate.html> (describing the denial of the 2008 advance economic stimulus payment for military families when one spouse does not have a SSN); Juliana Barbassa, *Rebate Excludes Many Taxpayers with Foreign Spouses*, USA TODAY (May 11, 2008), http://www.usatoday.com/money/economy/2008-05-11-3454211334_x.htm.

¹⁰⁸ Heroes Earnings Assistance and Relief Tax Act of 2008, H.R. 6081, 110th Cong. (2008) (enacted).

¹⁰⁹ I.R.C. § 6428(h)(3) (2006).

economic stimulus tax credit irrespective of their or their spouses' immigration status. Accordingly, undocumented immigrants married to members of the Armed Forces qualified for the tax credit. But legally present and nonworking immigrants who did not qualify for a SSN because they were not allowed to work did not qualify for the tax credit. Moreover, their U.S. citizen or legally present and working immigrant spouses had to file separate tax returns to qualify for the tax credit.

3. *The Denial of 2008 Economic Stimulus Tax Credit to Undocumented Immigrants is a Terrible and Unjust Precedent*

The denial of the 2008 economic stimulus tax credit was the first time that Congress denied a broad-based tax rate cut to U.S. residents based upon their immigration status.¹¹⁰ This statute is notably different than the denial of EITC benefits, which some might argue is a federal financial justice benefit paid through the income tax system. The 2008 tax credit was a one year tax rate cut. The denial of the tax cut for undocumented immigrants effectively introduced a tax surcharge or a stealth undocumented immigrant tax. This is a terrible and unjust precedent. Bishop John Wester, Chairman of the U.S. Conference of Catholic Bishops Committee on Migration, stated:

The decision to prohibit undocumented immigrants from receiving tax rebates in the stimulus bill highlights the injustice in our immigration system. It proves that these workers pay into the tax system and help support our economy. It also reveals the hypocrisy of our laws. With one hand our government attempts to deport these workers, but with the other it holds tight the taxes they pay into the system. . . . As a democratic and free nation protective of human rights, we cannot have it both ways.¹¹¹

D. *The Ensign Retroactive Denial of All Tax Credits and Overpayments for Undocumented Immigrants*

While the denial of the 2008 economic stimulus tax credit was the first

¹¹⁰ Similar advance payments of tax cuts in 2001 and 2003 might not have been initially distributed to individuals who did not hold a Social Security number but these tax cuts were not statutorily limited to individuals with a Social Security number. As a result, qualifying undocumented immigrants could enjoy the benefits of the 2001 tax rate cut and the 2003 increased child tax credit on their 2001 and 2003 income tax returns.

¹¹¹ *US Bishops Ask ICE to Assist Families, Communities After Immigration Raids*, CATHOLIC NEWS AGENCY (Feb. 17, 2008), www.catholicnewsagency.com/news/us_bishops_ask_ice_to_assist_families_communities_after_immigration_raids/.

denial of a tax rate reduction for undocumented immigrants, anti-immigrant politicians have been proposing bills that include even more dramatic undocumented immigrant tax surcharges. Former Republican Senator John Ensign of Nevada has made several egregious undocumented immigrant tax proposals including a sweeping and intolerant proposal passed by the Senate in May 2006.¹¹²

Senator Ensign's amendment to the Comprehensive Immigration Reform Act of 2006 would have denied any tax credits or tax refunds to any undocumented immigrant and her family for any taxable year prior to 2006.¹¹³ This denial effectively would have created a significant retroactive tax surcharge for undocumented immigrant families potentially amounting to thousands of dollars per family. As a result of this provision undocumented immigrants would be denied *all* tax credits that have been and would continue to be allowed to all U.S. citizens and documented residents including, without limitation, the child tax credit (presently up to \$1,000 per qualifying child), the child and dependent care credit (presently up to \$2,100 for two qualifying children), the American Opportunity tax credit (presently up to \$2,500 per student), the lifetime learning tax credit (presently up to \$2,000 per taxpayer), retirement savings tax credit (presently up to \$2,000 for married filing jointly), the adoption tax credit (presently up to \$13,170 per child) and the foreign tax credit. In addition, any tax refund of federal income tax withheld (potentially up to thousands of dollars) could never be refunded. Moreover, any overpayment or refund from one tax year could not be applied to a tax underpayment for another tax year.¹¹⁴

The proposed tax treatment of undocumented immigrants buried in the Comprehensive Immigration Reform Act of 2006 was unprecedented and grossly unjust. Congress created an egregious retroactive and irrational tax increase for millions of undocumented immigrants and their families. Fortunately, while these provisions made it into the bill they were not passed into law.

Given Congress' denial of the 2008 economic stimulus tax credit for undocumented immigrants, similarly devastating tax legislation may be passed into law in the future. Indeed, while not as comprehensive as the Ensign amendment, Congressman Sam Johnson (R-Texas) introduced H.R. 1956 in May 2011 to deny the child tax credit to "illegal immigrant" families because of their immigration status.¹¹⁵ And despite the decade

¹¹² S.AMDT. 4126, 109th Cong. (as submitted to the Senate, May 23, 2006 and passed on May 25, 2006 50-47).

¹¹³ See *supra* text accompanying note 61.

¹¹⁴ 152 CONG. REC. S5163 (daily ed. May 25, 2006) (statement of Sen. Ensign).

¹¹⁵ *JCT: Johnson Bill to End Tax Credit to Illegal Immigrants to Save Billion\$*, CONGRESSMAN SAM JOHNSON, <http://www.samjohnson.house.gov/News/DocumentSingle.aspx?DocumentID=257390> (last visited Sept. 17, 2011).

long allowance of the Additional Child Tax Credit for all lower-income families with children, including undocumented immigrant families, U.S. Senator Orrin Hatch (R-Utah), ranking member of the Senate Finance Committee, announced in September 2011 that he would be examining certain refundable tax credits for “unauthorized workers.”¹¹⁶ If undocumented immigrant families are denied the child tax credit, a subsidy for raising dependent children under age 17, millions of whom are U.S. citizens, their tax burden will increase by billions of dollars each year further increasing the undocumented immigrant tax.¹¹⁷

E. Intimidation of Tax Systems and Government Causes Overpayment of Income Taxes

Denials of the EITC and the economic stimulus tax credits have effectively created an undocumented immigrant income tax. Ensign’s proposed retroactive tax increases for undocumented immigrants applying for documents would have added significantly to this tax. Fortunately, if we are vigilant about future immigration reform and a just and rational tax system it will not be included in future immigration, tax, or financial justice reform. However in addition to the denials of the EITC and the 2008 economic stimulus tax credit, undocumented immigrants face another effective income tax increase. Because of an overly complex, intimidating and inaccessible tax system and a fear of the U.S. government, millions of undocumented immigrants do not file tax returns and, therefore, have overpaid their federal and state income tax liabilities. This inability to file for a refund meaningfully increases the undocumented immigrant income tax for millions of undocumented immigrants.

Wage earners pay their federal and state income taxes through routine tax withholdings. For low-income wage earners with dependents this generally results in an overpayment of federal and state income taxes. To obtain a refund of the overpayment of income taxes paid, refund claims must be made by filing annual federal and state income tax returns. If a taxpayer fails to file a federal tax return within three years of the due date of the tax return she has relinquished her refund and has effectively

¹¹⁶ Bernie Becker, *Hatch: Let’s Look at Unauthorized Workers, Tax Credits*, ON THE MONEY: THE HILL’S FINANCE & ECONOMY BLOG (Sept. 2, 2011, 12:55 PM), <http://www.thehill.com/blogs/on-the-money/domestic-taxes/179397-hatch-lets-look-at-unauthorized-workers-tax-credits?tmpo=component&print=18page=> (quoting the IRS spokeswoman as stating that the law has been clear for more than a decade that these credits do not depend upon work authorization status).

¹¹⁷ See TREASURY INSPECTOR GEN. FOR TAX ADMIN., INDIVIDUALS WHO ARE NOT AUTHORIZED TO WORK IN THE UNITED STATES WERE PAID \$4.2 BILLION IN REFUNDABLE CREDITS (2007), available at <http://www.treasury.gov/tigta/auditreports/2011reports/201141061fr.html>; see also Elaine Maag et al., *supra* note 9 (describing the child tax credit as a subsidy of \$52 billion for almost 35 million families raising children and demonstrating that only 10 percent of the total expenditures goes to the lowest quintile of families while 25 percent, 27 percent, 28 percent, and 10 percent go to the next four income quintiles).

overpaid her tax liabilities.¹¹⁸ These forgone tax refunds cannot be offset against unpaid tax liabilities, which the government can assess, together with accrued interest and penalties, at anytime if the taxpayer does not file a tax return.¹¹⁹

Because of vulnerable circumstances millions of undocumented immigrants do not file their tax returns claiming their legitimate tax refunds thereby increasing their undocumented immigrant tax. The vulnerable circumstances that preclude undocumented immigrants from filing tax returns include lack of education, English language skills, access, and fear of government officials because of increasing threats of deportation.¹²⁰

1. *Undocumented Immigrants Do Not File Because of Lack of Literacy Issues*

Lack of literacy seriously compromises any individual's capacity to file their tax return. Lack of literacy is a serious matter for undocumented immigrants. Forty-nine percent of undocumented immigrants have not completed high school and 32 percent have less than a ninth grade education.¹²¹ Limited education often accompanies limited English proficiency. Most undocumented immigrants lack critical English language skills.¹²² While the IRS has translated many of its tax forms and corresponding instructions into Spanish, tax preparation is challenging for most low-income individuals. Indeed, almost 70 percent of low-income EITC recipients use a paid tax preparer.¹²³

2. *Undocumented Immigrants Do Not File Because of Fear of Deportation*

Language barriers only enhance the high level of fear undocumented immigrants have of government officials and deportation. Because of fear of government officials and agencies, many undocumented immigrants do not access the very few available government benefits, including emergency medical care.¹²⁴ Similarly, the filing of a tax return which will

¹¹⁸ I.R.C. § 6511(a)-(b)(1) (2006).

¹¹⁹ I.R.C. § 6501(c)(3) (2006).

¹²⁰ See Jeffrey S. Passel, *Unauthorized Migrants: Numbers and Characteristics*, PEW HISPANIC CTR. 22-24 (2005), <http://pewhispanic.org/files/reports/46.pdf>.

¹²¹ *Id.* at 23.

¹²² Randy Capps et al., *A Profile of Low-Income Working Immigrant Families* 6, THE URBAN INST. (June 2005), http://www.urban.org/UploadedPDF/311206_B-67.pdf (legal status is also associated with limited English language skills and low education levels; undocumented immigrants are more likely to lack English proficiency).

¹²³ *Taxes and the Poor: Why do Low-Income Families Use Paid Tax Preparers?*, TAX POLICY CTR., <http://www.taxpolicycenter.org/briefing-book/key-elements/poor/paid-preparers.cfm> (last visited Sep. 16, 2011).

¹²⁴ See Svetlana Lebedinski, *EMTALA: Treatment of Undocumented Aliens and the Financial Burden it Places on Hospitals*, 7 J. L. SOC'Y 146, 148 (2005).

necessarily include the provision of personal information such as a mailing address and Form W2s (wage information forms which include the name and address of any employers) with incorrect SSNs to the federal and state governments is a staggering exercise at best.

The IRS interprets the filing of a tax return with an ITIN and a Form W2 with an incorrect SSN as an admission that the wage-earner was not authorized to work in the United States.¹²⁵ Alternatively, if the undocumented immigrant uses the invalid SSN to file her tax return the undocumented immigrant is committing document fraud. Not surprisingly, millions of undocumented immigrants are chilled from filing their tax returns even though it costs them their tax refunds.

3. *Undocumented Immigrants Do Not File Because of Lack of Access*

Even if undocumented immigrants marshal the courage to file tax returns, access to ITINs, the number required for every undocumented immigrant on the tax return, as well as basic tax forms, and instructions and competent tax preparers are limited. While the IRS is providing more Spanish language tax forms and instructions, and there are many free tax assistance programs, these tools are predominately available online.

Seventy-five percent of individuals with income below \$15,000 and greater than 60 percent of individuals with incomes between \$15,000 and \$25,000 do not use the Internet.¹²⁶ The statistics for Internet use among undocumented immigrants are likely lower than these. Moreover, due to the high cost of paper and the growth of the Internet, fewer and fewer public facilities distribute paper tax forms and instructions. While paper tax forms and instructions are available in IRS offices, these offices are located in federal government buildings with security guards at every entrance.

Visiting an IRS office or any government building can be very intimidating for undocumented immigrants. There have been isolated incidents where deportation proceedings were commenced for undocumented immigrants as a result of entering a federal building with an IRS office to apply for an ITIN.¹²⁷ Not surprisingly, these incidents, while isolated and loudly criticized by the National Taxpayer Advocate, do not encourage the ITIN application process. Undocumented immigrants cannot file a tax return without an ITIN.

¹²⁵ Cynthia Blum, *Rethinking Tax Compliance of Unauthorized Workers After Immigration Reform*, 21 GEO. IMMIGR. L.J. 595, 598 (Summer 2007).

¹²⁶ Letter from Jean Ann Fox, Consumer Federation of Am., Frank Torres, Consumers Union, Chi Chi Wu, Nat'l Consumer Law Ctr., & Edmund Mierzwinski, U.S. Pub. Interest Research Grp., to Paul J. Mamo, Internal Revenue Serv. (Sept. 4, 2002), available at <http://www.consumerfed.org/pdfs/irsletter090502.pdf>.

¹²⁷ Lipman, *supra* note 84, at 26 n.184.

4. *Undocumented Immigrants Do Not File Because of Difficulty of Obtaining an ITIN*

Even without considering the fear of deportation the ITIN application process is not simple. Because of public concern over the abuse of this identification number it has become an even slower and more cumbersome process. Qualifying taxpayers, spouses and each of their dependents must apply for an ITIN using Form W-7, Application for Individual Taxpayer Identification Number, which together with its instructions are eight pages long. The Form W-7 requires personal information including the individual's name, address, foreign tax identification number (if any), and specific reason for obtaining the ITIN. In addition, the IRS requires that applicants provide documentary evidence to establish their non-citizen status and identity. Acceptable documentary evidence for this purpose may include items such as an original (or a certified copy of the original) passport, driver's license, birth certificate, certain identity cards, or immigration documentation. Many undocumented immigrants are not able to obtain state driver's licenses or other picture identification because of their immigration status. Therefore, the only acceptable identification documents are often original passports and birth certificates, which most individuals are not going to relinquish through the mail.¹²⁸

To better focus the application process to tax filing, ITIN applications must generally be accompanied by a tax return. Therefore, ITIN applications are typically filed during tax season through a paper return. As a result, the IRS processing offices suffer a significant bottleneck from the labor-intensive demands of processing paper returns. The National Taxpayer Advocate has recognized this issue in her annual report to Congress in 2008 and 2010, noting that in 2010 the IRS received 1.6 million ITIN applications with 960,000 tax returns.¹²⁹ After an application is received the IRS requires four to six weeks or longer for processing the information. Indeed, the National Taxpayer Advocate has recognized that these returns represented \$500 million of refunds that were unduly delayed, up to eight months, by an inexplicably inadequate process.¹³⁰

The ITIN application process alone, requiring original documents or certified copies of original documents for each person listed on the tax return, increases the complexity for the first tax filing, which may undermine or even realistically preclude the opportunity to file a tax return. Given these onerous hurdles it is actually surprising that any

¹²⁸ See generally, INTERNAL REVENUE SERVICE, UNDERSTANDING YOUR IRS: INDIVIDUAL TAXPAYER IDENTIFICATION (2010), available at <http://www.irs.gov/pub/irs-pdf/p1915.pdf>.

¹²⁹ NAT'L TAXPAYER ADVOCATE, 2010 ANNUAL REPORT TO CONGRESS 319 (Dec. 31, 2010), available at <http://www.irs.gov/pub/irs-pdf/p2104.pdf>.

¹³⁰ *Id.*; see also NAT'L TAXPAYER ADVOCATE, 2008 ANNUAL REPORT TO CONGRESS 126-135 (Dec. 31, 2008), available at http://www.irs.gov/pub/irs-utl/08_tas_arc_intro_toc_msp.pdf.

undocumented immigrants are able to file income tax returns. However, it is not surprising that millions do not and instead overpay their federal and state tax liabilities and increase their undocumented immigrant income tax.¹³¹

III. THE UNDOCUMENTED IMMIGRANT WAGE TAXES

In addition to the undocumented immigrant income tax, undocumented immigrants bear an undocumented immigrant wage tax. This wage tax is due to the denial of any Social Security, Medicare, unemployment, and disability benefits, both federal and state, despite the onerous obligation to pay Social Security, Medicare and all other federal and state payroll taxes. In addition in 2009 and 2010 Congress enacted a Social Security tax rate cut that was not available to many undocumented immigrants.

A. *Bearing the Fiscal Burden of Social Security and Medicare Taxes*

Unauthorized workers and their employers must each pay Social Security taxes of 7.65 percent on all wages and net profits from self-employment for an aggregate tax of 15.3 percent. “Most economists believe that the burden of most payroll taxes paid by employers falls on the employees themselves.”¹³² Therefore, undocumented immigrant working families likely bear an effective wage tax rate of at least 15.3 percent. Higher income families will bear a significantly lower effective marginal wage tax rate because their wages above \$106,800 (in 2011) and investment income are not subject to Social Security tax. Accordingly, payroll taxes are particularly regressive.

“When both income and payroll taxes are considered, the effective marginal tax rates on earned income can be extraordinarily high, especially on low-income workers with children. . . . [s]ome of the very highest marginal effective tax rates are imposed on couples earning around \$30,000 a year.”¹³³ Effective marginal tax rates as high as 45 percent (and likely even higher if state and federal sales, excise, property, and income taxes are added into the analysis) on hard-working, low-income families are an onerous and unjust economic burden to bear.¹³⁴

The amount of Social Security taxes paid by unauthorized workers and their employers has steadily increased, and is now in the billions of

¹³¹ Larry J. Obhof, *The Irrationality of Enforcement? An Economic Analysis of U.S. Immigration Law*, 12 KAN. J.L. & PUB. POL’Y 163, 175 (2002–2003).

¹³² JONATHAN BARRY FORMAN, MAKING AMERICA WORK 67 (2006).

¹³³ *Id.* at 69.

¹³⁴ *Id.*

dollars.¹³⁵ While some of the mismatches are due to clerical errors, most exist because unauthorized workers do not qualify for a SSN.¹³⁶

B. Unauthorized Workers and their Families Do Not Qualify for Critically Progressive Social Security and Medicare Benefits

Social Security is the largest and most successful financial justice program in the United States. For more than seventy five years Social Security has provided critical financial benefits to tens of millions of individuals every month. Social Security presently pays out \$782 billion to 62 million individuals with average benefits of almost \$14,000 per year.¹³⁷ While not means-tested, Social Security presently lifts more than thirteen million senior citizens and one million children out of poverty.¹³⁸ Without Social Security, almost one-half of all senior citizens would live in poverty.¹³⁹ For 55 percent of all seniors Social Security benefits comprise the majority of their income and for 26 percent of all seniors Social Security benefits comprise 90 percent or more of their income.¹⁴⁰

Senior citizens of color are less likely than white senior citizen to receive Social Security benefits or to have other income from private pensions or assets. Only about 75 percent of Hispanics age sixty-five or older receive Social Security benefits.¹⁴¹ Of the Hispanic seniors receiving Social Security benefits, 76 percent rely on Social Security for more than one-half of their retirement income and almost 50 percent rely on Social Security for most of their retirement income.¹⁴² Without Social Security benefits 50 percent of all Hispanic seniors would live in poverty.¹⁴³

¹³⁵ See *supra* note 11 and accompanying text.

¹³⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, SOCIAL SECURITY: BETTER COORDINATION AMONG FEDERAL AGENCIES COULD REDUCE UNIDENTIFIED EARNINGS REPORTS 20–21 (2005), available at <http://www.gao.gov/new.items/d05154.pdf>; NAT'L COUNCIL OF LA RAZA, *supra* note 47, at 3.

¹³⁷ The total number of people drawing social security benefits is 62 million. See Press Release, Rep. Sam Johnson, Johnson Takes the Ways and Means Social Security Helm (Jan. 6, 2011), <http://www.samjohnson.house.gov/News/DocumentSingle.aspx?DocumentID=219185>. See also *Average Monthly Social Security Benefit for a Retired Worker*, SOCIAL SECURITY ONLINE., http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/13/~/average-monthly-social-security-benefit-for-a-retired-worker (last visited Sept. 19, 2011) (the average monthly benefit is \$1,177).

¹³⁸ Paul N. Van de Water & Arloc Sherman, *Social Security Keeps 20 Million Americans Out of Poverty: A State-By-State Analysis*, CTR. ON BUDGET & POLICY PRIORITIES 1, 1–2 (2009), <http://www.cbpp.org/files/8-11-10socsec.pdf> (exact figures are 1.1 million of children and 13.4 million of seniors).

¹³⁹ *Policy Basics: Top Ten Facts about Social Security on the Program's 75th Anniversary*, CTR. ON BUDGET & POLICY PRIORITIES (Aug. 13, 2010), http://www.cbpp.org/files/PolicyBasics_SocSec-TopTen.pdf.

¹⁴⁰ *Id.*

¹⁴¹ Richard Fry et al., *Hispanics and the Social Security Debate*, PEW HISPANIC CTR., (March 16, 2005), <http://pewhispanic.org/files/reports/43.pdf>.

¹⁴² *Id.* at 7.

¹⁴³ *Id.* at 9.

While Social Security taxes are terribly regressive, Social Security benefits are notably progressive. The Social Security system is designed to redistribute meaningful financial resources from high wage earners to lower wage earners. The redistribution occurs through a very complicated and opaque benefits formula. The lack of transparency may be one secret to the Social Security system's long-time success and overwhelming public support. Although Social Security is not means tested, it is a phenomenally successful antipoverty government assistance program that bears none of the oppressive stigma of welfare.

Any and all workers over the age of 62 generally are entitled to Social Security retirement benefits if they have worked in covered employment for at least forty quarters (ten years).¹⁴⁴ A retiree's monthly benefit is based upon her thirty-five year earnings history (up to the maximum annual earnings cap, which is \$106,800 for 2011) adjusted for wage inflation. The highest thirty-five years of wage-inflation adjusted annual earnings are combined and divided by 420 (12 months x 35 years) to derive an inflation adjusted monthly amount.

This monthly amount is then put into a formula to derive the retiree's monthly retirement benefit at full retirement age. Presently, the retirement age is 66, but is increasing to age 67 for those born in 1960 or later.¹⁴⁵ The benefits formula is progressive.¹⁴⁶ For a worker turning 62 in 2011, the monthly benefit equals 90 percent of the first \$749, plus 32 percent of the next \$3,768 (if any) plus 15 percent of any remaining amount. This monthly amount is decreased if a retiree starts her benefits before her full retirement age or increased if a retiree continues to work beyond her full retirement age.¹⁴⁷

In addition to retiree benefits, the Social Security system provides monthly benefits for a retiree's spouse, dependents, and survivors. A retiree's nonworking spouse can retire and receive a benefit derived solely from her spouse's benefit. This benefit is equal to 50 percent of the worker's benefit. If the retiree dies leaving a surviving spouse, she is entitled to a monthly benefit equal to 100 percent of the retiree's benefit for her lifetime and any dependents will also receive monthly benefits through age eighteen.¹⁴⁸

¹⁴⁴ See Prajna Tuladhar, *There's Something About Mexico: Exploring the Controversy, Costs, and Benefits of a Social Security Totalization Agreement with Our Neighbor to the South*, 15 ELDER L.J. 581, 585 (2007).

¹⁴⁵ See Soc. Sec. Admin., *The Full Retirement Age is Increasing*, available at <http://ssa.gov/pubs/ageincrease.htm>.

¹⁴⁶ NAT'L COUNCIL OF LA RAZA, *supra* note 47, at 3.

¹⁴⁷ For a comprehensive review of the Social Security benefits formula, see Francine J. Lipman & James E. Williamson, *Social Security Benefits 101*, ORANGE COUNTY LAWYER May 2011 at 11, available at <http://ssrn.com/abstract=1826404>.

¹⁴⁸ See generally, *Survivor Planner*, SOCIAL SECURITY ONLINE, <http://ssa.gov/survivorplan/onyourown.htm> (last reviewed or modified Jan. 3, 2012).

The Social Security benefit formula ensures that lower-wage workers and their families will receive a critically higher return on their contributions than higher wage workers. The current Social Security system particularly favors married one-worker large families with low lifetime earnings. Immigrants benefit substantially from this formula because, on average, they have lower incomes, a higher incidence of disability, more children per family, and longer life expectancies.¹⁴⁹ One study by Harvard economists found that Hispanics enjoy a Social Security rate of return that is 35–60 percent higher than the rate of return for the general population.¹⁵⁰

A lower-wage worker, earning \$24,000 average annual earnings for the last thirty-five years, retiring at full retirement at age 66 in 2011 would receive tax-free Social Security benefits of \$12,888 per year for the rest of her life. If she were married to a nonworking spouse, upon his retirement at full retirement age they would receive tax-free Social Security benefits of \$19,332 per year or more than 80 percent of their pre-retirement income. This critical antipoverty relief, which is contingent upon thirty-five years of hard-work and steady payment of regressive Social Security taxes, is not available to unauthorized workers and their families.

Unauthorized workers who pay more than \$12 billion dollars of Social Security taxes each year on tens of billions of dollars of wages (more than \$835 billion through 2007) will never qualify for these retirement benefits or Medicare unless they are legally present in the United States and obtain work authorization. For decades, only individuals who were legally present in the United States could qualify for Social Security benefits. Since 2004, it has become even more difficult to qualify for Social Security benefits. After President Bush signed the Social Security Protection Act of 2004 into law, a noncitizen who files for Social Security benefits based on a SSN assigned on or after January 1, 2004, is required to have work authorization at the time the SSN is assigned or at some later time.¹⁵¹ Therefore, in addition to being legally present undocumented immigrants with 2004 or later issued SSNs must receive work authorization to qualify for Social Security benefits.

Only if all of these requirements are satisfied will a former undocumented immigrant qualify for Social Security benefits. If a former undocumented immigrant qualifies for Social Security benefits, they will be based on all Social Security-covered earnings regardless of their work

¹⁴⁹ Fernando Torres-Gil et al., *The Importance of Social Security to the Hispanic Community*, CTR. ON BUDGET & POLICY PRIORITIES, (June 28, 2005), <http://www.cbpp.org/files/6-28-05socsec3.pdf>.

¹⁵⁰ Jason Furman, *Top Ten Facts on Social Security's 70th Anniversary*, CTR. ON BUDGET & POLICY PRIORITIES (Aug. 11, 2005), <http://www.cbpp.org/files/8-11-05socsec.pdf>.

¹⁵¹ Social Security Act of 2004, Pub. L. No. 108-203, § 211, 118 Stat. 493, 518 (2004).

status during the earning period.¹⁵² However, the retiree has the burden of proving her earnings history and only wages that are reported to the SSA, and not paid “under the table,” count toward the required forty quarters of earnings to qualify for Social Security benefits and Medicare.

Because unauthorized workers do not have a SSN the SSA will not have an accurate record of their earnings history. Accordingly, unauthorized workers must provide satisfactory documentation to the SSA evidencing their annual earnings history. Currently, the SSA has a policy of assisting, and not prosecuting these workers because the SSA is charged with maintaining correct earnings records.¹⁵³ However, this policy is subject to change immediately. It is a felony to falsely use a SSN carrying a penalty of up to \$5,000 and five years in prison.¹⁵⁴ Even if unauthorized workers become documented residents with work authorization many are too afraid to risk coming forward even to receive life-changing Social Security credits for decades of work.

Because of complexity and lack of transparency in the Social Security system, most U.S. citizens do not understand how their benefits accrue. Unauthorized workers, who often lack critical English language skills, an education, and any familiarity with the U.S. tax and retirement systems are likely unaware that this substantial benefit is available to them.¹⁵⁵ If they have ten years of covered wages, are lawfully present and obtain work authorization, they have a lifetime of meaningful, antipoverty family benefits awaiting them amounting to hundreds of thousands of dollars. However, some members of Congress are trying to deny any possibility of Social Security benefits with respect to unauthorized work despite the requirement to pay Social Security taxes on these wages.

C. Congress Narrowly Defeats a Provision to Deny Social Security Benefits to Otherwise Eligible Lawfully Present Immigrant Workers

In May 2006, the Senate narrowly defeated (50–49) former Senator John Ensign’s amendment to deny Social Security quarterly credits to legally present immigrant workers for work performed while the workers did not have a SSN authorizing employment, but upon which the worker

¹⁵² Dawn Nuschler & Alison Siskin, *Social Security Benefits for Noncitizens: Current Policy and Legislation* CRS REPORT FOR CONG. (May 11, 2005), <http://fpc.state.gov/documents/organization/46681.pdf>.

¹⁵³ OFFICE OF THE INSPECTOR GENERAL, CONGRESSIONAL RESPONSE REPORT: SOCIAL SECURITY ADMINISTRATION BENEFITS RELATED TO UNAUTHORIZED WORK 4–5 (2003), available at <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-03-03-23053.pdf>.

¹⁵⁴ 42 U.S.C. § 408(a) (2006). *But see* Flores-Figueroa v. United States, 556 U.S. 646 (2009).

¹⁵⁵ See Randy Capps et al., *The Health and Well-Being of Young Children of Immigrants*, URBAN INST. (2004), http://www.urban.org/UploadedPDF/311139_Childrenimmigrants.pdf.

and her employer paid Social Security and Medicare taxes.¹⁵⁶ This is not the first time this economic injustice has been proposed nor will it be the last. In 2003, the Senate Finance Committee considered a similar proposal, but the then SSA Commissioner stated that the proposal was not practicable. The Commissioner stated in writing that the information regarding the immigration status necessary to implement any accurate adjudication of benefits under this proposal did not exist.¹⁵⁷ In February 2008, the now head of the House Ways and Means Subcommittee Social Security proposed a similar bill (H.R. 5515, 110th Congress).¹⁵⁸

Denying Social Security benefits for work upon which taxes were paid would deter tax compliance for the millions of unauthorized workers and their employers. According to the SSA's Chief Actuary three-quarters of unauthorized workers pay payroll taxes.¹⁵⁹ If this proposal were implemented, employers may choose to pay unauthorized workers cash "under the table" and forgo sending tax payments or any information to the IRS or SSA.

This unjust strategy comes at a significant cost to the U.S. government. The National Taxpayer Advocate Nina Olson has warned, "a change in tax compliance of even one percentage point equates to an annual loss of more than \$20 billion of revenue to the federal government."¹⁶⁰ Moreover, "[o]ver the next 75 years, new immigrants will provide a net benefit of approximately \$611 billion in present value to the Social Security system."¹⁶¹ In short, this proposal is not only fundamentally unjust and un-American it is poor fiscal policy that could undermine the continuation of the most successful financial justice program for qualifying retirees and their families.

The denial of life-changing Social Security and Medicare benefits for undocumented immigrant families coupled with the requirement to pay all employment taxes (and in 2009 and 2010 in many cases at a higher tax rate than similarly situated U.S. citizens and legally working residents) results in an oppressive undocumented immigrant wage tax. The Social Security tax rate for undocumented immigrants was higher than for similarly situated U.S. citizens and legally working residents in 2009 and 2010

¹⁵⁶ 152 CONG. REC. S4746-47 (daily ed. May 18, 2006) (statement of Sen. Leahy & vote results).

¹⁵⁷ Jonathan Blazer, *Immigration Reform and Access to Public Benefits: The Return of an Uneasy Coupling*, NAT'L IMMIGRATION CTR. (May 15, 2006), http://www.nilc.org/immlawpolicy/cir/cirandbenefits_2006-5-15.pdf.

¹⁵⁸ 154 CONG. REC. H2168-69 (daily ed. Apr. 10, 2008) (statement of Rep. Johnson).

¹⁵⁹ 152 CONG. REC. S4742 (daily ed. May 18, 2006) (statement of Sen. Cornyn).

¹⁶⁰ U.S. GOV'T ACCOUNTABILITY OFFICE, GA-06-100, OPTIONS EXIST TO ENABLE DATA SHARING BETWEEN IRS AND USCIS BUT EACH PRESENTS CHALLENGES 31 (2005).

¹⁶¹ *Proposal to Strip Workers of Social Security Earnings Based on Prior Employment Status: Bad for the System and an Affront to Our Values*, NAT'L IMMIGRATION LAW CENTER (2007), http://www.nilc.org/immlawpolicy/CIR/ensign_ss_amdmt_2007-02-28.pdf.

because of the Making Work Pay tax credit.

D. Making Work Pay (Social Security Tax Rate Cut) Tax Credit in 2009 and 2010

When Congress passed, and President Obama signed into law, the American Recovery and Reinvestment Act of 2009 (ARRA) they put into effect an exclusion from employee Social Security taxes (6.2 percent tax rate cut) on up to \$6,451 of earned income (\$12,903 of earned income for married filing jointly taxpayers).¹⁶² The exclusion was implemented through the income tax system as the Making Work Pay tax credit, a refundable income tax credit of up to \$400 (\$6,451 x .062) for single taxpayers or \$800 (\$12,903 x .062) for married filing jointly taxpayers.¹⁶³ The Making Work Pay tax credit was the centerpiece of the tax reduction provisions of the ARRA. President Obama strongly pursued its inclusion in the legislation because it would put money back into the pockets of workers.

Nevertheless not all workers in America qualified for the credit. Because the credit was targeted to lower and middle wage earners it phased-out above modified adjusted gross income levels of \$95,000 (\$190,000 for married filing jointly taxpayers). In addition, a SSN is required for the credit. Therefore, undocumented immigrants and their families do not qualify for this credit. However, in an interesting departure from the 2008 economic stimulus tax credit and somewhat consistent with the HEART 2008 amendments, married filing jointly taxpayers only need one SSN to qualify for the full credit.¹⁶⁴ This relaxation of the Social Security requirement is irrespective of the couples' military status (so broader than the HEART 2008 amendment). Moreover, the SSN does not have to belong to the working spouse. As a result, if an undocumented immigrant is married to an individual who qualifies for a SSN the couple can qualify for the tax credit in 2009 and 2010. Nevertheless, Congress' SSN requirement denies the 2009 and 2010 Social Security tax rate cut to millions of unauthorized workers who cannot file with a spouse with a Social Security number and as a result are paying Social Security taxes at a higher tax rate.

¹⁶² See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 § 1001, 123 Stat. 115, 309 (2009).

¹⁶³ *Id.*

¹⁶⁴ See *Most Workers Need to File New Schedule M; Making Work Pay Credit Offers Tax Savings Up to \$800*, INTERNAL REVENUE SERV. (last reviewed or updated Mar. 8, 2011), <http://www.irs.gov/newsroom/article/0,,id=217793,00.html>

E. Social Security Tax Rate Cut for ALL Workers in 2011

In 2011, Congress enacted and President Obama signed into law the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010.¹⁶⁵ The 2010 Act cut the employees' Social Security tax rate from 6.2 percent to 4.2 percent on all wages and self-employment income.¹⁶⁶ This one-year 2 percent tax cut on up to \$106,800 of wages is projected to generate up to \$2,136 tax savings per worker or \$110 billion.¹⁶⁷ Unlike the 2009 and 2010 Making Work Pay tax credits this tax rate cut is not phased out for higher wage earners, but is capped at the maximum amount of wages subject to Social Security taxes. Because of its design more than 40 percent of the \$110 billion in tax savings goes to households with income levels at or above \$100,000. Twenty-five percent of the tax savings goes to households with income under \$50,000. By contrast, more than half of the 2009 and 2010 Making Work Pay tax credit went to households making less than \$50,000 and just one-sixth to those with income over \$100,000.¹⁶⁸

However, because the Social Security tax rate cut is implemented through the payroll tax system and not the income tax system all workers in the payroll tax system receive the tax rate cut including all unauthorized workers. Accordingly, while these workers do not qualify for Social Security benefits or Medicare, at least in 2011 as compared to 2009 and 2010, they are not paying a higher Social Security tax rate than similarly situated U.S. citizens and authorized workers.

Undocumented immigrants are subject to and pay all payroll taxes even though they do not qualify for the benefits provided by the Social Security, Medicare, disability, unemployment, and other worker benefit systems. Undocumented immigrant wage taxes are in addition to the requirement to pay all federal, state, and local sales, use, excise, property, and income taxes.

¹⁶⁵ Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010, Pub. L. No. 111-312, § 601, 124 Stat. 3296, 3297 (2010).

¹⁶⁶ *Id.* (reducing the payroll tax rate by 2.0 percent).

¹⁶⁷ Emily Brandon, *6 Ways to Spend Your Social Security Payroll Tax Cut*, U.S. NEWS & WORLD REPORT'S PLANNING TO RETIRE BLOG (Mar. 10, 2011), <http://money.usnews.com/money/blogs/planning-to-retire/2011/03/10/6-ways-to-spend-your-social-security-payroll-tax-cut>.

¹⁶⁸ Robertson Williams, *The Paradox of Thrift, or What to do With My Payroll Tax Cut?*, TAX POLICY CENTER. URBAN-BROOKINGS TAX POLICY CTR. (Feb. 9, 2011), <http://taxvox.taxpolicycenter.org/2011/02/09/the-paradox-of-thrift-or-what-to-do-with-my-payroll-tax-cut/>.

IV. THE UNDOCUMENTED IMMIGRANT TAX: AN ECONOMIC
REDISTRIBUTION FROM WORKING POOR UNDOCUMENTED IMMIGRANT
FAMILIES TO AMERICANS FROM SEA TO SHINING SEA

As a great American once said nothing is as certain as taxes.¹⁶⁹ I hope that this Article has made certain the truth of the statement that “undocumented immigrants pay taxes.”¹⁷⁰ Indeed, undocumented immigrants have paid, are paying, and will continue to pay billions of dollars in taxes every year to federal, state, and local governments across this great nation. These direct tax payments are equal to hundreds of billions of dollars and indirectly enrich all Americans from sea to shining sea.

The undocumented immigrant tax described in this Article includes both additional income taxes and wage tax burdens. The undocumented immigrant income tax, which includes the denial of the EITC, was increased in 2008 with the even more problematic denial of the 2008 economic stimulus tax credit. In addition, because of challenging filing requirements and lack of literacy and access, millions of undocumented immigrants overpay their federal and state income tax liabilities because they are not able to file for tax refunds. Moreover, millions of undocumented immigrants pay billions of dollars in Social Security (at a higher rate in 2009 and 2010 than U.S. citizens and other authorized workers because of the denial of the Making Work Pay tax credit) and Medicare taxes as well as disability and unemployment taxes every year without any corresponding benefits. More recently, former Republican Senator John Ensign of Nevada has proposed amendments to comprehensive immigration reform acts that have threatened to increase retroactively “the undocumented immigrant tax” even more significantly. Consequently, undocumented immigrants are subject to greater tax burdens than U.S. citizens in the same circumstances even though they do not qualify for the broad safety net of government benefits (other than emergency medical care and primary and secondary education, which they sometimes reject because of fear and vulnerability) or have the right to vote.¹⁷¹

Without the opportunity to vote or even to be heard in any meaningful sense undocumented immigrants have little or no recourse for injustices. As a result, they suffer daily. Their suffering translates into lower prices

¹⁶⁹ The full quote attributed to Benjamin Franklin is “Our Constitution is in actual operation; everything appears to promise that it will last; but nothing in this world is certain but death and taxes.” Jeffery L. Yablon, *As Certain as Death: Quotations About Taxes (2010 Edition)*, TAX ANALYSTS (2009), <http://taxprof.typepad.com/files/yablon.pdf>.

¹⁷⁰ *Undocumented Immigrants as Taxpayers*, IMMIGRATION POLICY CTR. (Nov. 1, 2007), <http://www.immigrationpolicy.org/just-facts/undocumented-immigrants-taxpayers>.

¹⁷¹ See Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and the Current Prospects for Change*, 18 LAW & INEQ. 271, 282–85 (2000).

for countless goods and services and lower taxes in America. As Americans we have an obligation to speak out for those without a voice. You have a voice and a vote; exercise them with this knowledge and the goal of financial justice for all.

How long will hate and prejudice thrive in America? As Dr. King said almost fifty years ago:

The battle is in our hands. And we can answer with creative nonviolence the call to higher ground to which the new directions of our struggle summons us. The road ahead is not altogether a smooth one. There are no broad highways that lead us easily and inevitably to quick solutions. But we must keep going.¹⁷²

¹⁷² King, *supra* note 4.

Coalition, Cross-Cultural Lawyering, and Intersectionality: Immigrant Identity as a Barrier to Effective Legal Counseling for Domestic Violence Victims

JESSICA H. STEIN[†]

I. INTRODUCTION

If it is so hard to work together, if the gulfs in experience are so wide, if the false universals of the modern age are truly bankrupt, what need binds us? What justifies unity in our quest for self-knowledge? My answer is that we cannot, at this point in history, engage fruitfully in jurisprudence without engaging in coalition, without coming out of separate places to meet one another across all the positions of privilege and subordination that we hold in relation to one another.

-Mari J. Matsuda¹

This is a true story. It is the story of how the law punished a man for speaking about his legal rights; of how, after punishing him, it silenced him; of how, when he did speak, he was not heard. This pervasive and awful oppression was subtle and, in a real way, largely unintentional. I know because I was one of his oppressors. I was his lawyer.

-Clark D. Cunningham²

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¹ Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1188 (1991).

² Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1299 (1992).

Domestic violence victims face enormous obstacles in their struggle for safety and security. Immigrant domestic violence victims face even greater challenges because they have additional lethality factors and impediments.³ Many articles have discussed the “external” barriers to legal and social services. These articles note the hesitation that immigrants have in contacting the police due to a fear that the police are the same organization as the Immigration & Customs Enforcement Agency (“ICE”) or at least due to a fear that the police will report them to ICE.⁴ They also fear that police will not understand them because of their poor English language skills,⁵ that, based on past experiences in their native country, police will conspire with their abuser,⁶ or that police will arrest them instead.⁷ Some do not know that domestic violence is against the law in this country.⁸ They are afraid of going to family court if they are undocumented because they believe that discovery of their status will prevent them from receiving services.⁹ They are afraid of leaving their husbands because their husbands are the only people who can vouch for their status to ICE, or their husbands are in possession of their immigration or identification documents.¹⁰ They are also afraid because they may have no marketable skills and no means to support their children or themselves,

³ Lethality factors are those actions by the batterer that increase the level of danger for the victim, also referred to as “high risk factors.” Janet A. Johnson & Victoria L. Lutz, *Death by Intimacy: Risk Factors for Domestic Violence*, 20 PACE L. REV. 263, 282–83 (2000). General lethality factors for all victims include: the victim’s “gut level” feelings of danger, threats, use of or access to weapons, obsessiveness about victim or family, actual or perceived separation, stalking behaviors, depression, strangulation acts, access to partner, children, or family members, increase in degree of dangerous behaviors, upcoming symbolic or memorable days (such as an anniversary), personal risks taken by the abuser such as public exposure, alcohol and drug abuse, repeated calls to law enforcement, hostage-taking, and prior history of criminal misconduct. *Id.* at 282–83, 282 n.89.

⁴ See, e.g., Margot Mendelson, *The Legal Production of Identities: A Narrative Analysis of Conversations with Battered Undocumented Women*, 19 BERKELEY WOMEN’S L. J. 138, 179–180 (2004); Tien-Li Loke, Note, *Trapped in Domestic Violence: The Impact of United States Immigration Laws on Battered Immigrant Women*, 6 B.U. PUB. INT. L. J. 589, 591 (1997).

⁵ See, e.g., Karin Wang, Comment, *Battered Asian American Women: Community Responses from the Battered Women’s Movement and the Asian American Community*, 3 ASIAN L.J. 151, 162–63 (1996).

⁶ Loke, *supra* note 4, at 592.

⁷ See, e.g., Mendelson, *supra* note 4, at 181; Wang, *supra* note 5, at 163.

⁸ See, e.g., Mendelson, *supra* note 4, at 182–83; Loke, *supra* note 4, at 592; Felicia E. Franco, *Unconditional Safety for Conditional Immigrant Women*, 11 BERKELEY WOMEN’S L.J. 99, 99–101 (1996).

⁹ Sometimes this fear is warranted. Many undocumented immigrants are not eligible to receive legal services from organizations that receive funding from the Legal Services Corporation. Sarah M. Wood, Note, *VAWA’s Unfinished Business: The Immigrant Women Who Fall Through the Cracks*, 11 DUKE J. GENDER L. & POL’Y 141, 152 (2004).

¹⁰ See, e.g., *id.* at 142 (“The structure of immigration law, however, is the greatest barrier to reporting crimes of domestic violence. Women who are hoping to obtain legal status through their husbands inevitably fear that reporting abuse will jeopardize their chances for legal immigration, and undocumented women whose husbands or partners are themselves undocumented face the additional threat that their abusers will report them to immigration authorities, and that they will be deported as a result.”).

especially because their lack of documentation may preclude them from receiving government benefits.¹¹

Fewer commentators have noted the “internal” barriers that immigrant domestic violence victims face. These internal barriers apply specifically to the victim’s relationship with her attorney and counselors, or those from whom she seeks help and guidance in her struggle with external barriers.¹² Language in this respect can be as large an internal barrier as it is an external barrier. The attorney-client relationship is defined by a sense of trust and confidentiality.¹³ When an interpreter is required, even one who translates word-for-word, there is a strain on that relationship. When an interpreter seems to be influencing a client—or a yes or no question seems to take ten minutes with back and forth between the client and the interpreter—it is difficult to assess exactly what is going on and how to handle the situation. The second and larger issue, which seems to be intertwined with the first, is one of culture.

Cultural differences between attorney and client are the focus of this Note. These differences can be the most difficult barrier to overcome and the hardest to define when working with immigrant victims of domestic violence. This issue also seems to be the most puzzling and frustrating to attorneys. Many of the answers proposed can be uncomfortable and could offend a progressive, liberal sense of lawyering.¹⁴ For example, one author has suggested the idea of ethnic matching for attorneys and clients as the only means of solving this problem.¹⁵ Others have stressed the need for

¹¹ See Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 5–6 (2006) (“[U]ndocumented immigrants are barred from almost all government benefits, including food stamps, Temporary Assistance for Needy Families, Medicaid, federal housing programs, Supplemental Security Income, Unemployment Insurance, Social Security, Medicare, and the Earned Income Tax Credit (EITC). Generally, the only benefits federally required for undocumented immigrants are emergency medical care, subject to financial and category eligibility, and elementary and secondary public education.”).

¹² In no way do I wish to suggest that there are no male domestic violence victims or to denigrate the experiences of men facing family or relationship-based violence. This paper focuses on female victims of domestic violence because this is the population with whom I have experience working. I also do not mean to suggest that women who have women partners do not experience abuse in their relationships.

¹³ See, e.g., Kenneth P. Troccoli, *“I Want a Black Lawyer to Represent Me”: Addressing a Black Defendant’s Concerns with Being Assigned a White Court-Appointed Lawyer*, 20 LAW & INEQ. 1, 3 (2002) (“Trust is essential to establishing rapport [in the attorney-client relationship] Trust and rapport, in turn, enhance attorney effectiveness which, correspondingly, promotes justice”).

¹⁴ For instance, Naomi Cahn discusses the difficulties in addressing race and culture in the legal representation process. “[I]t is important for advocates to be aware of how race affects the representation process, and for advocates to use race to challenge the legal requirements placed on their clients. The difficult issues concern the relevance of race and deciding how to use it in the advocacy process.” Naomi R. Cahn, *Representing Race Outside of Explicitly Racialized Contexts*, 95 MICH. L. REV. 965, 988–89 (1997).

¹⁵ See Shani M. King, *Race, Identity, and Professional Responsibility: Why Legal Services Organizations Need African American Staff Attorneys*, 18 CORNELL J.L. & PUB. POL’Y 1, 6 (2008) (“Race, especially for African Americans, has a gravity that cannot be understood if taken out of its socio-political-legal and historical context. The experience of African Americans cannot be fully

cultural competency training and education for attorneys to enhance their understanding of their clients, to gain their trust, and to more competently advocate for their interests.¹⁶ Each suggestion is worthy of extensive discussion and thoughtful study, and can be integrated into a unified plan of action that will address the issues that hinder immigrant victims' access to and continued effective use of legal services.

In Part II of this Note, I present a narrative of my experience working with a particular immigrant victim. The story of Ms. H illustrates how culture can erect an internal barrier to effective legal counseling of immigrant victims of domestic violence. In Part III, I discuss the intersectionality of immigrant domestic violence victims more thoroughly, addressing some of the cultural differences that may lead to difficulties in the attorney-client relationship. Finally, in Part IV, I address several possible solutions, an amalgamation of which, if implemented, could break down some of the barriers that immigrant victims face and lead the way to improved access to effective and compassionate legal counseling.

I conclude that the problems faced by immigrant victims in seeking help can only be solved by the recognition of the intersectionalities apparent in immigrant domestic violence cases, by the use and encouragement of cross-cultural lawyering, requiring a sincere effort by attorneys to be culturally competent, and by the forceful coming together of a coalition of advocates ready to tackle and solve this problem. The term coalition traditionally has referred to coalition-building, or the coming together of different groups of people to engender discussion or to solve a problem. When discussing this type of coalition, I will refer to coalition-building. I use the term coalition in this Note as it is defined by Mari Matsuda in her groundbreaking article "*Beside My Sister, Facing the Enemy*."¹⁷

Coalition, as Matsuda sees it, is a deepened and expanded view of traditional coalition-building.¹⁸ Matsuda argues that coalition-building is "merely the beginning of the worth" of coalition.¹⁹ True coalition requires

communicated in books, documentaries, law school, or by cultural competence trainers—it is something that must be lived. Therefore, legal services organizations cannot improve their service delivery to clients by simply hiring cultural competence trainers.”)

¹⁶ See Leslie Espinoza Garvey, *The Race Card: Dealing with Domestic Violence in the Courts*, 11 AM. U.J. GENDER SOC. POL'Y & L. 287, 298 (2003) (“Lawyers need to develop cultural and race competencies. Other professions, such as psychology and medicine, recognize the need to train professionals to develop these skills.”); see also Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 FLA. COASTAL L.J. 219, 229–30 (2002) (“In this new millennium, multicultural competence is an essential component of good legal practice. But acquiring multicultural competence requires facing discomfiting truths about ourselves and our society, especially for those of us who enjoy the privileges of the dominant culture.”).

¹⁷ Matsuda, *supra* note 1, at 1188.

¹⁸ See generally *id.*

¹⁹ *Id.* at 1184.

us to acknowledge the struggle of others while we struggle to end our own subordination and to recognize that our own subordination cannot end while others are still subordinated.²⁰ “Working in coalition forces us to look for both the obvious and non-obvious relationships of domination, helping us to realize that no form of subordination ever stands alone.”²¹ It is in this context that I frame my discussion of coalition as a method of breaking down the barriers that prevent immigrant victims of domestic violence from seeking and obtaining help.

II. MY CLIENT DOESN'T TRUST ME BECAUSE I AM NOT KOREAN

When I arrived for my 1L summer internship in the Matrimonial and Family Law Unit (“FLU”)²² at the New York Legal Assistance Group (“NYLAG”), I thought of myself as the culturally sensitive, accepting, knowledgeable, educated product of a progressive upbringing and liberal arts education. I felt more than adequately prepared to deal with the diverse clients with whom I would be working and to understand their legal issues. I underwent the FLU training to understand the best way to work with domestic violence victims, how race affects domestic violence, how education and job skills can trap women in these situations, and how class identity can shift legal outcomes. I learned about working with immigrant victims by attending trainings on the Violence Against Women Act, self-petitioning, and applying for asylum.²³ Through my training, I acquired practical skills for helping these victims attain legal permanent residency and citizenship. I also was taught more generally about housing issues affecting domestic violence victims and about the laws affecting custody, divorce, visitation, and the termination of parental rights.

Additionally, I underwent cultural competency training as part of the Courtroom Advocates Project (CAP), which was provided by the organization Sanctuary for Families.²⁴ I also learned the proper

²⁰ For instance, when feminist scholars and critical race scholars come together to build a coalition, they must engage in coalition by acknowledging their own contributions to subordination and by acknowledging the intersectionality of sexism and racism. We must recognize that “all forms of subordination are interlocking and mutually reinforcing.” *Id.* at 1189.

²¹ *Id.*

²² I will refer to the Unit as the FLU, which is the acronym used within the department.

²³ The Violence Against Women Act (“VAWA”) was designed to prevent violence against women generally in the United States, but also it attempted to improve conditions for immigrant women victims of domestic violence, providing a path to citizenship through self-petitioning. Prior to VAWA, women had to be sponsored by their spouses in order to apply for citizenship. For a good outline of the legislative history behind VAWA and a historical look at immigration policies affecting victims of domestic violence, see Katerina Shaw, Note, *Barriers to Freedom: Continued Failure of U.S. Immigration Laws to Offer Equal Protection to Immigrant Battered Women*, 15 CARDOZO J.L. & GENDER 663, 666–73 (2009) (describing how even the most recent amendments to VAWA still leave out a significant portion of battered women, and concluding that current immigration law is still inadequate to protect victims).

²⁴ CAP is a program under the auspices of Sanctuary for Families and NYLAG, which provides

procedures with which to successfully advocate for my client in the system—how to request translation services in court, how to have a client report to the police in her native language—and all of the rights that must be provided to accommodate victims in New York. I learned how to interview victims and how to be sensitive to their needs. I learned how to develop trust with clients by listening to their stories and then by reconstructing their narratives. I learned to avoid asking certain questions and to make my goal the same as my client's. It was not my place to judge the client's feelings or decisions as long as those goals and decisions did not make her unsafe, in which case I was taught to ask her whether she would feel safe with the outcome. At that point, the decision was hers. I was not to be another patronizing voice in the victim's life. Ultimately, I was taught that it is the victim's decision and the victim's life. The victim's voice is the only voice to listen to and the victim knows the best way to keep herself and her children safe. With all of that in mind, I was still expected to accurately gather extremely private information from our clients so that I would be able to help represent them zealously and effectively.²⁵

The clients with whom I met at NYLAG that summer were from places as diverse as Ukraine and Guyana. They varied in religion, ethnicity, age, and country of origin. I felt in almost every case that I was able to relate to the client and to bridge the gap in understanding resulting from cultural factors that presented during my assistance in their representation. Most clients with whom I worked over the course of the summer appreciated the way that the FLU did business because the FLU required the unit to act sensitively and compassionately. It was often difficult to unravel the complicated stories of abuse from a client who was frightened, confused, and hurt. Generally, though, where I was charged with doing so by my supervisors, I was able to piece together a narrative of the client's life, documenting the first, most recent, and most violent episodes of domestic violence. I always asked the client what she considered the worst incident of abuse and many times that incident was not the type of incident that I would think of, as an outsider and as a law student not yet fully experienced in working with victims. For instance, one client discussed an incident which had taken place almost twenty years

learning opportunities for summer associates and law students in New York. The students assist domestic violence victims with petitions for Orders of Protection and follow the case by attending adjournment dates and advocating for the victims in Family Court or the Integrated Domestic Violence Courts. *Courtroom Advocates Project*, SANCTUARY FOR FAMILIES, http://www.sanctuaryforfamilies.org/index.php?option=com_content&task=view&id=78&Itemid=162 (last visited Oct. 1, 2011).

²⁵ All work that I completed at NYLAG was performed under the supervision of the FLU Staff Attorneys, as well as the Director and Associate Director of the FLU. I advocated for these clients utilizing a Student Practice Order.

earlier when her husband took her newborn son out of the house for over twelve hours without telling her and threatened that he would never bring the baby back. The child was still breastfeeding at the time and was not able to digest solid foods. In her history of abuse, the client suffered violent attacks at her husband's hands that would make most people cringe, but this incident represented the pinnacle of her loss of control and her fear for her child's life, and it remained with her. Even when I did not fully understand a client's mixed feelings or when it took several meetings over a number of weeks to establish the chain of incidents over a span of time, I was able to unfold my clients' narratives—with one exception.

That exception was a client, Ms. H, with whom my supervisor and I began working about a month and a half into my summer. Ms. H was the client to whom I felt closest, the client about whom I woke up in the night worrying, and the client whom I could least understand. With all of my cultural competence, my liberal education, and all of my experiences, Ms. H was inaccessible to me. Ms. H had moved to the United States only eight months earlier from South Korea. Her husband, a Korean-American, was in the United States Armed Forces and had been stationed in South Korea where the couple met, wed, and had a child. Unlike many immigrant victims of domestic violence, Ms. H was a United States citizen because of a program that allows military spouses a shortcut to citizenship.²⁶

Ms. H's case included the worst physical violence that I had encountered in my short time as an intern in the FLU, even though I had worked on some fairly extreme cases. Ms. H also was unusual in that she had more documentation of both her injuries and of the violent incidents she had experienced than any other client whom I had met. For example, a closed circuit camera in a South Korean indoor parking garage had captured Ms. H's husband running her over with his car at full speed. She had video footage of her husband playing with guns and knives next to the couple's then one year-old child. She had medical records and photographs documenting her broken ribs and arms and all of her fractures. She had a Domestic Incident Report from the police department documenting one of the recent violent incidents as well as her brother, who had partially

²⁶ See 8 U.S.C. § 1430(b) (2006) (“Any person . . . whose spouse is . . . a citizen of the United States . . . in the employment of the Government of the United States [and is] regularly stationed abroad in such employment, and . . . who is in the United States at the time of naturalization, and . . . who declares before the Attorney General in good faith an intention to take up residence within the United States immediately upon the termination of such employment abroad of the citizen spouse, may be naturalized upon compliance with all the requirements of the naturalization laws, except that no prior residence or specified period of physical presence within the United States or within a State or a district of the Service in the United States or proof thereof shall be required.”). Military spouses, however, are considered “within the United States” while still abroad if they marry abroad and their spouses are engaged by “official orders” abroad which keep them from returning to the United States. 8 U.S.C. § 1430(e)(1) (2006 & Supp. III 2009).

witnessed the event documented by the report and who was willing to testify on her behalf.²⁷ The images of Ms. H's abuse will probably haunt me for my entire life.

Despite the volume of evidence present in this case (which led me, perhaps naively, to initially believe it would be an easy victory), it proved to be the most difficult and emotionally taxing case that I worked on during my summer at NYLAG. NYLAG was retained initially only on Ms. H's divorce case. She had already been a complaining witness in the criminal case against Mr. H for which he had accepted a plea deal.²⁸ There was an ongoing neglect case against Mr. H initiated by the Administration for Children's Services ("ACS") in which Ms. H was considered the non-respondent mother²⁹ and was represented by what is called an 18-B, a court appointed attorney.³⁰ Ms. H was also represented by the 18-B in her family offense petition against her husband, as well as her custody and visitation cases. She had temporary orders of protection against him issued in both family and criminal court, which were renewed periodically and always expired on the following adjournment date.³¹

The fact that Ms. H wanted to reconcile with her husband was not what

²⁷ During the incident documented in the police report, Ms. H had been in her in-laws' adjoining apartment when her husband began screaming at her. She ran up the stairs to the bedroom she shared with her husband and locked the door. She immediately picked up the phone and called her brother. While she was on the phone asking her brother for help, her husband kicked the door down and began a storm of kicking, punching, and spitting on her after dragging her by her hair. Her brother was on the phone for the duration of the attack and called the police somehow, alerting them to the incident.

²⁸ During my entire summer, with one exception, I never witnessed a criminal domestic violence case end in anything but a plea bargain from which the batterer received a "Violation" and was ordered to enter "batterer's intervention" in conjunction with a full criminal order of protection. A violation is a lesser charge than a misdemeanor. See N.Y. PENAL LAW § 10.00(3) (McKinney 2008). Even for inflicting serious injuries, which if inflicted on anyone but an intimate partner would have resulted in a jail term for the batterer, abusers never once received jail time, or even pled to anything but a violation.

²⁹ Historically, in New York, neglect petitions were filed against domestic violence victim mothers as well as their abusive husbands. The idea was that the mother was not protecting her children and was neglecting them by staying with her abuser. This practice ended with the landmark court case of *Nicholson v. Scoppetta*, 820 N.E.2d 840 (N.Y. 2004). NYLAG filed an amicus curiae brief on behalf of the respondent mother. For a good article about Sharwline Nicholson's struggle with ACS and her court battle, see Wendy Davis, *Active Parenting: Her boyfriend beat her so badly she had to be hospitalized. Then the city took her kids because of it. Meet the mom who's turning a legal fight into a source of inspiration for other two-time victims.*, CITY LIMITS (May 13, 2002), http://www.citylimits.org/content/articles/viewarticle.cfm?article_id=2773.

³⁰ N.Y. COUNTY LAW § 722 (McKinney Supp. 2011). The attorneys are referred to as 18-B because § 722 falls under Article 18-B: Representation of Persons Accused of Crime or Parties Before the Family Court or Surrogate's Court.

³¹ Unfortunately the 18-B assigned to her neglect and family offense cases, though a very nice man, was not particularly familiar with working with victims of domestic violence. He would leave her alone in the waiting area where her husband would also be waiting. He neglected to prepare her for a meeting where she would be required to discuss painful memories in front of the attorney for the child, the ACS attorney conducting the inquest into her husband's neglect of their child, myself, and some others. She was terrified. I met her at the courthouse early in order to discuss the meeting with her and assuage her fears. The 18-B attorney was mostly absent. The neglect case was coming to a head and as soon as there was a resolution to that case, NYLAG planned to take over Ms. H's representation on all of her various dockets.

was frustrating to me about her case. My supervisor and I saw many clients who openly wanted to reconcile or behaviorally seemed to indicate as much. For instance, in one case, a client accepted several daily phone calls from her abuser even though she had a full “stay away” order of protection from him prohibiting all contact, even via third parties.³² Many clients were comfortable with varying degrees of contact, or if they were not, they were comfortable with their FLU attorney dealing with the violation in a variety of different ways. For instance, technically these women could hang up the phone upon receipt of a phone call from their batterer and call the police, who would be required to arrest the batterer for violating the order. In my summer at NYLAG, I never encountered a client who thought this approach was the best way to handle the violation. Some of these clients would call the NYLAG office and tell us about the contact. NYLAG would file a violation petition with the court and personally serve it on the batterer. Sometimes the client would not even want NYLAG to file the violation petition at all. None of that was surprising to me. I was taught that victims know what they need to do to keep themselves safe and I was taught to respect their decisions on how to handle the situation safely. What was frustrating about Ms. H was not even that she would tell us her stories piecemeal or that she would leave out important facts in order to protect her husband. In all of these respects, Ms. H’s preferences and responses seemed typical.

What was strange and frustrating to me about Ms. H is best represented by the following incident. Until this incident occurred, I felt closer to Ms. H than I did to most other clients with whom I had worked that summer. The incident began when Ms. H neglected to tell my supervisor and me key information relevant to her case, her own personal safety, and the safety of her child. The most significant omission was that she had been bringing her child to see her husband on a regular basis, violating several court orders. Ms. H did feel comfortable, however, telling this information to the Korean interpreter at the courthouse whom she had known for only a few minutes. Ms. H also told this Korean interpreter every single event in graphic detail that she had been unwilling or unable to communicate to my

³² Several different courts may issue Orders of Protection. There are criminal Orders of Protection issued by criminal court and family Orders issued by family courts. A victim may be provided both types of order or just one order depending on whether criminal charges were filed against her batterer. The courts generally issue full or partial Orders. A “stay away” Order excludes the abuser from the home and includes prohibitions from any form of contact. Generally, the Order includes a specific distance that the abuser must keep from the victim. Phone, email, and all other contact is barred by the Order as well as third party contact, for example, having a friend or other person contact the victim on the abuser’s behalf. Courts also issue “refrain from” Orders which do not exclude the abuser from the home and simply instruct the abuser that he may not menace, harass, or stalk the victim. NYLAG attorneys almost always attempt to receive a stay away, unless in a particular situation a stay away Order would make the victim less safe. See KRISTEN KERSCHENSTEINER, CALLAGHAN’S FAMILY COURT LAW & PRACTICE § 3:11 (2011), available at Westlaw NYFCLP.

supervisor and me over the course of two months of our representation.

We were in court because the Civil term judge demanded that we proceed with the divorce case despite the unresolved dockets pending in family court. The judge had denied our request for a continuance. Instead, he allowed us a ten minute recess to confer with our client so that she could consider her options and come to a decision. The clock was ticking and Ms. H had no choice but to provide the court with an answer or she risked being held in contempt. Ms. H was not ready to make a decision regarding her future. She was crying and the flustered interpreter was telling us that she could not tell us what Ms. H had spoken to her about because it was “confidential.” After everything—all the time we had spent with Ms. H, holding her child, watching over her shoulder to be sure her husband was not coming towards her, meeting with her over and over again, being supportive, walking her back and forth to the subway, spending hours on the phone attempting to get her back into the shelter system, waking up in the night worrying about her safety—Ms. H did not trust me or my supervisor because we were not Korean.

After a hurried explanation of the nature of our confidential relationship with Ms. H, the interpreter finally informed us that Ms. H had been secretly meeting with her husband and their child. Two days earlier, they had gone to the zoo together. In fact, a week earlier when we had been in family court, Mr. and Ms. H had arrived within five minutes of one another. They were both late and when we had called Ms. H on her cell phone, she said that a “friend” had driven her. With usual battering cases, this type of behavior, if discovered by a judge, would simply weaken the family offense petition and might serve as a means to revoke an Order of Protection. In Ms. H’s case, it could have been disastrous. If ACS or the judge or any person associated with or knowledgeable about the case had seen the family together, Ms. H would have been subject to a neglect hearing herself and could have risked removal of her son into foster care. The interpreter also told us that Mr. H told Ms. H that he wanted to reconcile with her and that their families wanted them to reconcile. His mother had been calling her—in violation of the Order of Protection’s ban on third-party contact. Ms. H wanted us to tell the judge that they were stopping the divorce proceedings.

We tried to make Ms. H understand that we had no power to stop the divorce proceedings. Mr. H filed the divorce complaint and, therefore, there was nothing that we could do to stop it. In a very emotional discussion, one that left me feeling distressed, my supervisor and I had to tell Ms. H that the only person who could stop her divorce was her husband. We told her that if he really wanted to reconcile, he could advise his attorney at any point to withdraw the complaint, but since he had not done so, it seemed like what he told her must be a lie. We had to tell her that this was a scheme batterers often use in order to manipulate their

victims and to weaken both their court claims and their resolve.³³ Following this troubling conversation, we returned to the courtroom and provided the judge with Ms. H's answer.

The fact that Ms. H is a Korean immigrant influenced almost every aspect of our work with her.³⁴ Although the above incident represents a point in time when the cultural divide made our interactions particularly difficult, even exasperating, this was not the first time that an interpreter had come between us. When Ms. H left the marital home, where she lived adjoining Mr. H's extended family, she went to a shelter run by an Asian American social services agency. She stayed there for 135 days, the maximum allowed for a Crisis 1 center.³⁵ We began representing her while she was still living at the confidential shelter. She was assigned a caseworker from the social services agency. Her caseworker was not Korean; she was Japanese. Ms. H had attended university in Japan and had a degree in Japanese linguistics making communication fairly easy between them.³⁶ Her caseworker, L, would join her in meetings with us in order to facilitate translation.³⁷

While I believe that social workers are extremely important partners for attorneys in working with victims of domestic violence, and can be tremendous advocates for these women, my supervisor and I found it

³³ While writing this Note, I found out that after I left for the summer, Ms. H decided to drop all of her cases against her husband with the exception of the neglect petition which she had no power to drop because she was considered the non-respondent mother. She and her husband reconciled as much as they possibly could while there was still an order of protection associated with the neglect finding against Mr. H. They had a plan to fully reunite after the order of protection expired, which would have been in August 2010 at which point they would be free to associate with one another and with their child unencumbered. Ms. H's husband dropped the divorce complaint. As of the time of publication, I have been unable to find out if the family successfully reunited or how Ms. H has fared.

³⁴ I acknowledge that my own culture also influences every aspect of my work and, in turn, how I approach situations and how I interact with clients and the legal system in general. Leslie Espinoza Garvey notes that:

I indicate the complicated nature of contextual, cultural, and racial understanding. The narrative requires that we hold onto the individual story, with all its unique characteristics, and simultaneously embrace the cultural context and metamessage of the story. As we lawyer in a way that is always about our personal, cultural and social history, so too does the client present a legal situation that is set in a personal context and a cultural reality.

Garvey, *supra* note 16, at 303.

³⁵ Technically, a woman is allowed to stay only for ninety days in a Crisis 1 shelter, but there is a forty-five day extension period. N.Y. COMP. CODES R. & REGS. tit. 18, § 408.6(b)-(d) (2010).

³⁶ It is unclear why Ms. H was not assigned a Korean caseworker. I have speculated that perhaps there were fewer Japanese victims at the shelter at that period. While Ms. H was fluent in Japanese, she still found it more comfortable to communicate in Korean.

³⁷ There are two Korean-speaking attorneys at NYLAG but neither works in the FLU. Agencies like Safe Horizon make use of phone translation services where necessary, but these are expensive and inconvenient. Another problem with phone translation services is that they are not subject-specific so it can be cumbersome to attempt to explain legal terms or domestic violence related services to the interpreter who then has to understand competently enough to translate to the client, a process which can be enormously confusing.

particularly difficult to work with L. The problem we had with L was that since we could not understand when she spoke to Ms. H in Japanese, it became impossible to discern whether L was translating properly. Their exchanges made it seem like L was not only translating, but also advising Ms. H on how she should answer our questions. My supervisor and I would ask L to translate a straightforward yes or no question to Ms. H. After five minutes of back and forth communication, L would say something like “Ms. H agrees.” Garvey discusses a case where a student with whom she had worked had a difficult experience communicating with a Haitian client, which mirrored our interaction with Ms. H and L:

The student explained to the interpreter that he wanted to have a direct translation. He wanted everything that he said directly related to the client and then the client’s exact words back to him. Nevertheless, every time the student would ask a question, such as, “Do you want to stay in the apartment?”, he would hear the interpreter and the client speak back and forth, with great animation, for several minutes. Then the interpreter would turn to him and say, “No.” The student attorney did not know what to do. He felt that he was not understanding the client at all and he was worried that the client was not getting information from him.³⁸

In Garvey’s case, the student performed research which led him to believe that in the Creole pattern of discourse, it was not polite to ask certain questions directly to the client so that the interpreter felt bound to “tell a story” in order to respectfully uncover the needed information.³⁹

In our case, I admit that I did not look for cultural reasons as to why the interpretation was so slow, and why there was so much dialogue that I was not privy to, when in my mind, I had asked very simple questions. I came to believe, however, that L was inserting her own opinion while she was translating. I noticed in court that the Korean interpreters were able to, by all appearances, translate word for word. If the judge asked a question, it took the same amount of time for the court interpreter to ask that question. Likewise, when a Korean-speaking attorney in our office was available to help us during a meeting with Ms. H, the translation was smooth and my supervisor and I felt a genuine back and forth dialogue was taking place between us and our client. My hunch was further confirmed when my supervisor commented that she had not had the same problem

³⁸ Garvey, *supra* note 16, at 300.

³⁹ *Id.*

with Japanese interpreters in her other cases.

Worse than the fact that our dialogue with our client was frustrating and slow when we were forced to rely on L to translate for us, it seemed that the type of responses that we would hear would differ greatly when L was present and when she was not. My supervisor noted to me that she encountered this type of situation in the past when working with social workers from the particular center where L worked, which catered to Asian American women. She found that, while social workers from other organizations could empower clients while remaining respectful of their wishes, social workers from the center where L worked tended to placate and reinforce the cultural influences which led Ms. H to feel as if she was disrespecting her family and heritage. L's approach was passive and appeared disempowering at the very least.⁴⁰

My supervisor contrasted our frustration with Ms. H's case with a previous case on which she had worked with another client, Ms. M. Ms. M had a very positive outcome that my supervisor hoped to replicate with Ms. H. Ms. M was an immigrant from Japan. Unlike Ms. H, she was not a citizen and was on the path to legal permanent residency based on her marriage to a U.S. Citizen. When my supervisor first met Ms. M, Ms. M was skittish, nervous, and afraid. Though she spoke fluent English, she refused to communicate in English and did not want to say anything about herself or her case. The entire system frightened her and she was constantly in fear of being deported by ICE, as she had already experienced a negative encounter with the agency.⁴¹

Ms. M began working with my supervisor and another attorney at NYLAG. The other attorney is an immigrant from Belgium and has a striking and powerful presence both in and out of the courtroom. Ms. M also worked with an immigration lawyer from a Catholic organization who also was a Japanese immigrant, just like Ms. M. While the litigation was ongoing, Ms. M worked with a therapist. She was successfully able to

⁴⁰ Perhaps L is simply not a good social worker. In fact, I am fairly sure this is the case. For instance, L allowed Ms. H to be discharged from the emergency shelter and to move back in with her brother in a location known to her batterer. She neglected to secure any type of transitional housing for Ms. H or to make any attempt to help her obtain shelter housing after we repeatedly insisted that this was necessary for Ms. H's safety. I eventually had to try to find shelter space for her myself. It is my hope to avoid essentialism. I do not mean to hold L out as the archetypal Asian social worker. The evidence that the center was placating rather than empowering is purely anecdotal.

⁴¹ Ms. M's husband told Immigration & Customs Enforcement (then known as the Immigration & Naturalization Service) that she had forged an important document that elucidated her work history and which was integral to her citizenship application. In Japan, it is customary, with permission, to affix another person's "seal" to mark the authentication of a document. Ms. M had permission from her boss in Japan to affix his seal, which signaled that he had "signed" the document. Due to the fact that the INS believed her husband, the issue had to be litigated in court and with the INS. Ms. M did not want to involve her boss because in Japan, she said, it is considered shameful to entwine business with one's messy personal affairs.

self-petition under VAWA for citizenship.⁴² As she went through this process and worked with these strong women—two of whom were also immigrants possessing acumen, drive, and strength—Ms. M began to shift her response to what was happening to her. She became determined and empowered by those around her and the path she was beginning to take. She saw that the system was working to help her. Ultimately, Ms. M testified against her husband in near perfect English and felt empowered by the entire experience. She was able to get her green card, get away from her husband, and move on with her life.

III. INTERSECTIONALITY OF IMMIGRANT DOMESTIC VIOLENCE VICTIMS

Both Ms. H and Ms. M's stories represent the intertwining of different identities. Both are women, Asian Americans, immigrants, and domestic violence victims.⁴³ Intersectionality stresses the need to examine the interactions between these different identities.⁴⁴ For instance, being Asian may mean dealing with Asian-specific cultural distinctions and history, community, stereotypes, and racism. Being a woman may mean dealing with sexism and having a shared common female identity. Being an immigrant may bring with it cultural alienation, isolation, worries about citizenship, language concerns, job concerns, and close-knit immigrant communities. Being a victim of domestic violence may encompass feelings of fear, guilt, shame, worries about safety of self and children, and more. Issues of class and poverty can be pervasive in all of these categories.

Paulette Caldwell discusses the intersection of race and gender as a means to combat the oppression of both sexism and racism, specifically

⁴² See 8 U.S.C. § 1154 (2006).

⁴³ I hope to avoid engaging in essentialism. When I use the words Asian American, it is to denote cultural "commonalities" as Karin Wang describes them. See Wang, *supra* note 5, at 161 ("I do not intend to assert an essential Asian American identity, as there is no singular Asian culture or nation. 'Asian American' as an identity is socially constructed and created out of political and social necessity, in recognition of the need to embrace commonalities among diverse Asian Americans. It is in this vein that I discuss battered Asian American women. To effectively address barriers faced by Asian American women but not by battered white women, a recognition of commonalities among Asian American communities is critical.").

⁴⁴ I borrow Kimberle Crenshaw's apt explanation as a caveat to this section:

I should say at the outset that intersectionality is not being offered here as some new, totalizing theory of identity. Nor do I mean to suggest that violence against women of color can be explained only through the specific frameworks of race and gender considered here. Indeed, factors I address only in part or not at all, such as class or sexuality, are often as critical in shaping the experiences of women of color. My focus on the intersections of race and gender only highlights the need to account for multiple grounds of identity when considering how the social world is constructed.

Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244-45 (1991).

focusing on the treatment of African-American women.⁴⁵ She discusses the attempt to eliminate sexism and racism separately as admirable places to begin the struggle to end both forms of oppression.⁴⁶ Caldwell boldly asserts that theoretical analyses which fail to examine the intersectionality of race and gender, the point where the two meet, are problematic and incomplete.⁴⁷ In the experience of many African-American women, sexism and racism are inextricably linked.⁴⁸ The existence of the interactive relationship between race and gender “flows factually and logically from an examination of the structure of dominance—historically and contemporarily—and the stereotypes, myths, and images about race and gender, and in particular black women, that sustain it.”⁴⁹ Though the separation stems from the formation of disparate political movements, it is ultimately all activists’ failure to recognize intersectionalities that accounts for our own contributions to oppression.⁵⁰ “These stereotypes, and the culture of prejudice that sustains them, exist to define the social position of black women as subordinate on the basis of gender to all men, regardless of color, and on the basis of race to all other women.”⁵¹ Caldwell demands that we recognize that racism and sexism can act in concert to disadvantage African-American women as victims of both forms of oppression, and that advocates themselves will continue to contribute to oppression until this intersectionality is acknowledged.⁵²

This logic is illuminating when applied to immigrant domestic violence victims. Immigrant identity takes into account issues of cultural isolation, nativism, and xenophobia. Racism and stereotyping can also be major factors in the immigrant experience depending on the place from which the immigrant has emigrated. Female domestic violence victims are physically and emotionally battered by their husbands or boyfriends. Domestic violence itself is an implicit and debasing form of sexism

⁴⁵ Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 372–77 (1991).

⁴⁶ *Id.* at 373–74.

⁴⁷ *Id.*; see also Crenshaw, *supra* note 44, at 1242 (“In the context of violence against women, this elision of difference in identity politics is problematic, fundamentally because the violence that many women experience is often shaped by other dimensions of their identities, such as race and class. Moreover, ignoring difference *within* groups contributes to tension *among* groups, another problem of identity politics that bears on efforts to politicize violence against women. Feminist efforts to politicize experiences of women and antiracist efforts to politicize experiences of people of color have frequently proceeded as though the issues and experiences they each detail occur on mutually exclusive terrains.”).

⁴⁸ Caldwell, *supra* note 45, at 374.

⁴⁹ *Id.*

⁵⁰ See Crenshaw, *supra* note 44, at 1258 (“Not only do race-based priorities function to obscure the problem of violence suffered by women of color; feminist concerns often suppress minority experiences as well.”).

⁵¹ Caldwell, *supra* note 45, at 376.

⁵² See generally *id.*

including notions of domination, oppression, abuse, and categorization.⁵³ Immigration social and legal service agencies and those writing about immigration difficulties must directly acknowledge these issues and must pay attention to the ways in which domestic violence can be hidden amongst other immigration issues that may take precedence in the immigrant's presentation.⁵⁴ Domestic violence advocates, on the other hand, must be sensitive to the reality that domestic violence outreach efforts often exclude immigrant victims.

A. *The White Woman Paradigm*

The anti-domestic violence movement has been criticized for catering to a white middle class archetype of the domestic violence victim.⁵⁵ By recognizing domestic violence exclusively as a gendered issue, white privilege allows advocates and others to overlook the plethora of critical issues faced by immigrant victims.

By focusing on gender alone, the anti-domestic violence
movement falls into the same trap as other feminist

⁵³ See Sally F. Goldfarb, *Applying the Discrimination Model to Violence Against Women: Some Reflections on Theory and Practice*, 11 AM. U. J. GENDER SOC. POL'Y & L. 251, 251–52 (2003) (“Domestic violence occurs on a continuum along with other manifestations of sex discrimination, including inequality in the workplace, deprivation of reproductive rights, and inadequate access to welfare, child support, and child care. Every aspect of women’s oppression renders them vulnerable to violence, and in turn, violence makes women more vulnerable to other forms of disadvantage.”); see also Anat First & Michal Agmon-Gonnen, *Is a Man’s Car More Important than a Battered Woman’s Body? Human Rights and Punishment for Violent Crimes Against Female Spouses*, 12 NEW CRIM. L. REV. 135, 138 (2009) (“We prefer to use the term ‘patriarchal violence’ over the accepted term ‘domestic violence’ because the term ‘patriarchal violence’ is an inherent reminder that violence occurring in the home is connected to sexism, to sexist thinking, and to male dominance. The term ‘domestic violence’ had served as a ‘soft’ term, for too long, implying that this violence exists in an intimate context, and therefore is less brutal and threatening.”); see also Crenshaw, *supra* note 44, at 1241 (“Drawing from the strength of shared experience, women have recognized that the political demands of millions speak more powerfully than the pleas of a few isolated voices. This politicization in turn has transformed the way we understand violence against women. For example, battering and rape, once seen as private (family matters) and aberrational (errant sexual aggression), are now largely recognized as part of a broad-scale system of domination that affects women as a class.”).

⁵⁴ See Emira-Habiby Browne, Conference, *Issues in Representing Immigrant Victims*, 29 FORDHAM URB. L.J. 71, 74 (2001) [hereinafter *Issues in Representing Immigrant Victims*] (discussing the difficulties and experiences of the Arab American Family Support Center in recognizing and appreciating the Arab immigrant experience with domestic violence, “[w]e were not prepared to address these problems, which had been successfully covered up by the community. We found several cultural factors, combined with the destabilizing effect of immigration were causing increasing incidents of domestic violence.”).

⁵⁵ See, e.g., Wang, *supra* note 5, at 153 (“Women of color have gained less from the progress of the anti-domestic violence movement, which has been primarily ‘white-centered.’ And within communities of color, including Asian American communities, domestic violence has yet to become a priority issue.”); see also Crenshaw, *supra* note 44, at 1246 (“Where systems of race, gender, and class domination converge, as they do in the experiences of battered women of color, intervention strategies based solely on the experiences of women who do not share the same class or race backgrounds will be of limited help to women who because of race and class face different obstacles.”).

movements: it ends up privileging white women. In American society and laws, gender and race both operate hierarchically. Men are privileged over women, and white is privileged over non-white. In a hypothetical world where gender is the only basis for oppression, the subordination of women to men might be the only battle women need to fight. However, in the very real world where race is also a basis of oppression, where oppressions are not discrete and insular, and where white is the privileged race, white women possess an “unearned advantage” and a “conferred dominance” over non-white women by virtue of being white. White privilege allows white women to examine gendered issues such as domestic violence from a color-blind perspective.⁵⁶

Immigrant victims face additional challenges that American-born women do not face. For instance, American-born victims may take for granted having public service announcements in their own language. Immigrant victims of color face even further difficulty. Women in domestic violence awareness campaigns might not look like them or have similar cultural markers, such as wearing headscarves—that is, if they are lucky enough to understand the message of the advertisement or have access to it in the first place.

More importantly, cultural norms regarding gender and violence can make the victim’s experience a completely unique one from that of a middle class American-born white woman’s. In fact, it is difficult to understand how it could be the same. The anti-domestic violence movement generally bases its outreach on certain underlying assumptions. For instance, it assumes that domestic violence is wrong and is considered wrong by family, neighbors, friends, police, and society in general.⁵⁷ While white American-born women may have concerns about a bystander’s reluctance to intrude into their personal affairs—as in the Kitty Genovese case⁵⁸—they may presume that even those overhearing a violent incident who would be unwilling to be good Samaritans would at least believe that what was happening was morally and legally wrong. These assumptions do not always apply to immigrant victims, or at least, the victims may not believe that they are true.

⁵⁶ Wang, *supra* note 5, at 158.

⁵⁷ *Id.* at 156.

⁵⁸ Kitty Genovese was murdered in her Queens neighborhood in 1964. Many neighbors apparently overheard Ms. Genovese’s screams and knew there was an attack taking place, but none did anything to help her. No one even phoned the police. See Joe Sexton, *Reviving Kitty Genovese Case, and Its Passions*, N.Y. TIMES, July 25, 1995, at B1.

B. *The Struggle of Arab-American Women*

At the Fifth Annual Domestic Violence Conference held at Fordham University School of Law, Emira Habiby Browne, Executive Director of the Arab American Family Support Center (“the Center”)⁵⁹, spoke about the experiences of Arab immigrants who are victims of domestic violence.⁶⁰ The information Browne shared illustrates the vast differences between American and immigrant views of domestic violence and highlights the “cultural factors, combined with the destabilizing effect of immigration [that] were causing increasing incidents of domestic violence.”⁶¹ It also shows that campaigns may need to be tailored to recognize the unique problems of each community’s struggle with domestic violence. Browne noted that the Arab community does not condemn internal domestic violence due to the fact that Arab immigrants come from societies that celebrate large patriarchal families in which men are “kings of their castles.”⁶² She also discussed how it is considered shameful for men to have “lost control” of their families.⁶³

Conversely, according to Browne, Arab-American women are expected to remain in the interior world of the household in the economic and physical care of their husbands and are not encouraged to think or act without permission.⁶⁴ Responsibility for the happiness of both partners falls on the woman. “Success of the marital relationship is her responsibility. Failure is viewed by the community as her fault, with serious social sanctions if she leaves the marital relationship.”⁶⁵ Further complicating matters for Arab-American victims is the fact that it is considered taboo for a woman to divorce or live on her own, so a woman forced to leave her relationship and home due to domestic violence would need to have the support of family in order to do so.⁶⁶ Arab-American women are expected by their community to stay with their husbands at all costs. “Women are expected to accept physical, emotional, and verbal abuse rather than break up the family.”⁶⁷ When family members believe

⁵⁹ The Center is “the first and only Arabic-speaking social services agency in the New York City metropolitan area.” Browne, *supra* note 54, at 72 n.1. Established in 1994, the Center is a non-profit organization that provides social services to Arab American immigrant families and children in the New York City metropolitan area including: “English as a Second Language and literacy classes; citizenship courses; legal services; afterschool, summer and weekend programs for children; violence prevention and intervention programs; and access to free and or low-cost health care.” ARAB AMERICAN FAMILY SUPPORT CENTER, <http://www.aafscny.org/aboutus/our-mission-history> (last visited Oct. 6, 2011).

⁶⁰ Browne, *supra* note 54.

⁶¹ *Id.* at 74.

⁶² *Id.* at 74–75.

⁶³ *Id.* at 75.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Browne, *supra* note 54, at 75.

⁶⁷ *Id.* at 75–76.

that domestic violence is the victim's fault, it seems unlikely that they will support her or allow her to live with them after she leaves her batterer.

Browne also discussed the difficulty the Center has had in placing victims in the shelter system. Many of these women have never lived apart from their family or their husbands. She noted that the Center "[has] never been successful in sending [victims] to shelters."⁶⁸ Almost all of the women that she has worked with at the Center eventually returned to their abusers, where they often faced further abuse in retaliation for their initial departure from the home.⁶⁹ Part of this retaliation is also due to the fact that the Arab community places enormous pressure on families to maintain reputation and standing, which is jeopardized when a woman leaves the home.⁷⁰

Browne explained how "family problems are not to be discussed or publicly displayed."⁷¹ The males in the family are ultimately held responsible for the family's reputation and honor and must maintain it. "Family violence, therefore, cannot be openly acknowledged and must be outwardly denied, eliminating the possibility of addressing it openly and honestly."⁷²

C. *The Latina Experience*

The Latina immigrant experience with domestic violence provides yet another divergent cultural context that differs from the dominant view of domestic violence. Jenny Rivera discusses the idea that the ideal Latina is a wife and mother, subservient to the patriarchal society around her, and bound by the traditional gender roles placed upon her.⁷³

For Latinas, cultural norms and myths of national origin intersect with these patriarchal notions of a woman's role and identity. The result is an internal community-defined role, modified by external male-centered paradigms. This

⁶⁸ *Id.* at 76.

⁶⁹ *Id.*

⁷⁰ *Id.* at 74–76

⁷¹ *Id.* at 77.

⁷² *Id.*

⁷³ Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231, 241 (1994) ("Those within the Latino community expect Latinas to be traditional, and to exist solely within the Latino family structure. A Latina must serve as a daughter, a wife, and a parent, and must prioritize the needs of family members above her own. She is the foundation of the family unit. She is treasured as a self-sacrificing woman who will always look to the needs of others before her own. The influence of Catholicism throughout Latin America solidifies this image within the community, where Latinas are expected to follow dogma and to be religious, conservative, and traditional in their beliefs."); *see also* Wood, *supra* note 9, at 151 ("Exacerbating these difficulties is an unwillingness to violate strong cultural norms of what a wife and mother should be, which represent another barrier to seeking help.").

intersection of gender, national origin, and race denies Latinas a self-definitional, experiential-based, feminist portrait.⁷⁴

Rivera contends that the anti-domestic violence movement and the system have failed when services cannot effectively help Latinas because of cultural and language barriers.⁷⁵

Rivera differentiates Latina immigrants from other immigrants by the fact that Latina immigrants are much less likely to contact others including friends, clergy, or other social service providers before entering the shelter system.⁷⁶ Since they are more likely to marry at a younger age, have large families, be poorer and less educated, and stay in relationships for a longer period of time, correspondingly, Latina victims suffer more extensive periods of abuse than other victims.⁷⁷ Rivera notes that movements within the Latino community have focused on the struggle for equality, ignoring domestic violence issues because these are regarded as “private.”⁷⁸ She also notes that there is a backlash in the community against raising awareness of domestic violence perpetrated by Latino males, because the community feels strongly that Latino males are characterized as “violent” and “macho” by whites and others. Rivera suggests that these stereotypes regarding Latino men are embraced within the community, despite activists’ attempts to dismantle them.⁷⁹ Though the goal of reducing stereotypes associated with the Latino community generally is laudable, Rivera argues that it must not be at the expense of Latina identity and victimization.⁸⁰

D. Asian American Victims

The Asian immigrant context is yet another example where culture serves as a differentiating factor for domestic violence victims. Ms. H’s case represents my own experience working with an Asian immigrant client and my experience, as outlined above, highlights the cultural differences between us which made representation very difficult. In our

⁷⁴ Rivera, *supra* note 73, at 241.

⁷⁵ *Id.* at 242.

⁷⁶ *Id.* at 232, 252. Rivera provides an anecdote that illustrates her explanation of a reason why Latinas may resist help-seeking behavior. *Id.* at 231 (“After about two months he started . . . hitting me again. This time I was going to do something, so I told Yolanda, my best friend. She said, and I’ll never forget it, ‘So what, you think my boyfriend doesn’t hit me? That’s how men are.’ It was like I was wrong or weak because I wanted to do something about it. Last time he got mad he threatened me with a knife. That really scared me.”).

⁷⁷ *Id.* at 252.

⁷⁸ *Id.* at 255.

⁷⁹ *Id.* at 240–41, 251, 255.

⁸⁰ Rivera, *supra* note 73, at 255.

case, Ms. H gave my supervisor and me some context for her experiences. She told us that in Korea, domestic violence is not only commonplace, but is an accepted way of life, albeit a secret one. She described to us how in the early morning hours, there are lines of victims waiting outside the hospitals. The women receive medical treatment and are sent directly home to their abusers. The police do not wish to be involved and would turn away a victim requesting assistance, because even mentioning the occurrence of domestic violence is shameful.

Karin Wang's discussion of Asian American victims of domestic violence correlates with Ms. H's narrative of life in Korea.⁸¹ Wang notes that there are important commonalities across Asian cultures. Asian women may be distinguished from white women due to "the overwhelmingly immigrant character of Asian American communities . . . the existence of similar cultural patterns across most Asian American communities, and . . . the existence of harmful stereotypes about Asian Americans collectively and Asian American women specifically."⁸² Wang explains that the idea of "keeping face" is evident in the sense that protecting the family honor is paramount to individual identity and concerns.⁸³ She provides the following wrenching, yet illustrative narrative from a news article to begin her discussion of Asian family and gender roles:

"I didn't sense the danger because I was so focused on the shame my daughter's actions would bring in the Cambodian community. And I was thinking about my daughter's children and the importance of their having a family." Kim Leang is remembering her daughter Kim Seng, killed by her abusive husband, Sartout Nom. A week before Kim Seng's murder, Kim Leang had organized a family meeting, where both sides of the family urged the young couple to stay together and asked Nom to stop beating Kim Seng. Says Kim Leang, "Sometimes because we value our cultural traditions, we try to get families reunited at whatever cost."⁸⁴

This description of the Leang family's reaction to the battering of their daughter and the Seng family's reaction to their son battering his wife matches the character of Ms. H's situation exactly. Wang argues that this

⁸¹ See Wang, *supra* note 5, at 169–70.

⁸² *Id.* at 162.

⁸³ *Id.* at 169.

⁸⁴ *Id.* at 168 (quoting Geeta Anand, *Mother's Regret Raises Abuse Issue*, BOSTON GLOBE, May 8, 1994, at 29).

behavior is representative of the strong emphasis on sacrificing for one's family as part of a group identity that is characteristic of Asian cultures.⁸⁵ To the extent that individual identity is present at all, male identity is prized over female identity.⁸⁶

Asian women in the traditional family structure are expected to "be dependent, to suffer, and to persevere."⁸⁷ The strong group identity and push to sacrifice for one's family deter women from choosing to leave their husbands or getting a divorce.⁸⁸ If they do attempt to leave home, they face shelters that are generally ill-equipped to handle the language and cultural concerns of Asian American victims.⁸⁹

Win Ha first sought help last year after her husband beat her three times during her first month in the U.S. A Vietnamese friend gave her the number of an advocacy group, and Ha was placed in a mainstream women's shelter. But she stayed only three days. "There was no Vietnamese food in the shelter," says Ha, and no one spoke Vietnamese, so when Ha's children became sick, she didn't know what to do.⁹⁰

These issues together serve to reinforce fears about the outside world that may prevent victims from leaving home. Issues with shelter, language, and food, for instance, cause victims to return to their abusers even if they were able to leave initially.

These are simply several examples of instances where an immigrant's culture intersects with her gender and her identity as a victim of domestic violence. There are many different ethnic and cultural experiences that are not represented above and which may be extremely different from the preceding examples. Lawyers and others who work to help domestic violence victims must take cultural identity into account because each woman's story is unique, and every case bears the imprint of the victim's cultural and personal experiences. Only through our understanding of her culture can the victim's story become accessible and, in turn, our help become meaningful.

⁸⁵ *Id.* at 169.

⁸⁶ *Id.*

⁸⁷ Wang, *supra* note 5, at 169.

⁸⁸ *Id.* at 170.

⁸⁹ *See id.* at 157.

⁹⁰ *Id.* (quoting *Battered Asian Immigrant Women Find Help at Shelter* (NPR Radio Broadcast, July 24, 1994), available at LEXIS, Transcript No. 1081-13).

IV. SOLUTIONS

As we engage in the struggle to end the subordination of immigrant victims of domestic violence, we must recognize and promote awareness of their intersectional identities. Solutions to both “internal” and “external” problems for these victims must take intersectionality into account.⁹¹ Similarly, in recognizing and dealing with this intersectionality, the only way that we can possibly appreciate and successfully approach all aspects of the immigrant victim’s struggle is by coming together in a coalition.⁹² Mari Matsuda’s idea of coalition provides a framework for the type of action that must be taken in order to begin peeling back the layers of subordination, subordination that is based on gender, on national origin, on language ability, and on race.⁹³

A. Coalition

Matsuda presents a revolutionary theory which proposes to end subordination through the formation of a coalition.⁹⁴ Coalition means an acknowledgment of our own biases and cultural influences, but it also encompasses the realization that we can only end our own subordination by ending all subordination. Coalition also means reaching out across all areas of subordination in order to recognize the parallels in our struggles, and to struggle together in an attempt to overcome what we cannot easily overcome alone. “This is the revolutionary theory of law that we are developing in coalition, and I submit that it is both a theory of law we can *only* develop in coalition, and that it is the *only* theory of law we *can* develop in coalition.”⁹⁵

If we fail to recognize intersectionality and if we cannot come together from our own places of subordination, whether it is as feminists, as civil rights advocates, or as immigrant advocates, we will have failed our clients because we will not understand who they are and what they face. As individuals working in the domestic violence context, we must reach out to immigrant advocates to understand the immigration laws as they relate to domestic violence. We must reach out to social workers, activists, and advocates through coalition-building. We must be involved in the struggle

⁹¹ See *id.* at 184 (“It is important to push both the battered women’s movement and the Asian American community towards an intersectional framework because battered Asian American women face certain unique obstacles which are rooted in both their gender and race. These obstacles must be addressed together, not in discrete and insular packages of race as separate from gender. Only within such an intersectional paradigm can the unique needs and concerns of Asian American women be adequately addressed.”).

⁹² There are very subtle, yet key differences between the idea of coalition and the idea of coalition-building. For an outline of the distinctions, see *supra* Part I.

⁹³ Matsuda, *supra* note 1, at 1188.

⁹⁴ *Id.*

⁹⁵ *Id.*

against subordination in all forms, rather than simply completing our small piece of the puzzle and patting ourselves on the back. While our job is to zealously advocate for our clients in the courtroom and beyond, it is also part of our charge to engage in active lawyering and to work towards ending subordination through coalition.

B. Cross-Cultural Lawyering

After we recognize our own role in the struggle, our own subordination of others, and the subordination we each face, we must take practical steps to alleviate that subordination. We must be culturally competent and we must engage in cross-cultural lawyering. Leslie Espinoza Garvey asserts: “I believe that lawyering can be conducted in a way that creates space for understanding outsider perspectives.”⁹⁶ I believe that we *must* create this space.

The stories we hear from our clients indicate two things. First, these stories demonstrate the power of narrative to yield contextual, cultural, and racial understanding. Second, they indicate the complicated nature of contextual, cultural, and racial understanding. The narrative requires that we hold onto the individual story, with all its unique characteristics, and simultaneously embrace the cultural context and metamessage of the story. As we lawyer in a way that is always about our personal, cultural and social history, so too does the client present a legal situation that is set in a personal context and a cultural reality.⁹⁷

We must be trained in how to recognize our own implicit biases and their relationship to the complicated histories and contexts of our clients. We must acquire and use that knowledge to be effective advocates. Cultural competence training requires us to conduct “a deliberate exploration of the deeply rooted cultural assumptions that claim us” and to face “discomforting truths about ourselves and our society.”⁹⁸

Though it might be uncomfortable to do so, by recognizing and appreciating differences in culture between ourselves and our clients, we can begin the process of understanding. Marjorie Silver notes that “[i]n the broad use of the term, all lawyering is cross-cultural, yet few lawyers

⁹⁶ Garvey, *supra* note 16, at 298.

⁹⁷ *Id.* at 303.

⁹⁸ Silver, *supra* note 16, at 230.

perceive it as such.”⁹⁹ What in fact makes a lawyer culturally competent is the recognition that we must act as cross-cultural lawyers, that we already engage in cross-cultural lawyering, whether successfully or not, and the subsequent realization that we require education in the art of doing so.¹⁰⁰ It is also a recognition of our limitations, which calls for further learning, or simply the realization that certain cultural ideas or racial understandings are beyond our ability to grasp. In my situation with Ms. H, I cannot think of anything that I could have done differently that would have made her feel comfortable. That feeling remains troubling to me.

C. *Ethnic Matching*

Shani King proposes a theory of ethnic matching¹⁰¹ in the attorney-client relationship, which I believe is a practical way of bridging the gap between attorney and client. There is a point at which the attorney-client relationship hits a wall due to a lack of identification or understanding, ultimately interfering with the client’s representation. The idea is that, if you have an African-American attorney at your legal services organization, then you should place African-American clients with that attorney. Similarly, if we had a Korean attorney in the FLU, we would have had the Korean attorney represent Ms. H. King describes the African-American experience with the legal system and the increased comfort level that African-American clients have with African-American attorneys, including the sharing of a group identity, increased trust, better communication between attorney and client, and a shared perception and recognition of a racist judicial system.¹⁰² She stresses that cultural competency trainers can only do so much and that despite the training an attorney has received, she will never be able to live the experience of being African-American without being born African-American.¹⁰³

The idea of ethnic matching is intrinsically disturbing, but I believe that King is correct when she stresses the need for us to let go of these feelings of discomfort and to realize the practical benefits of such a system.¹⁰⁴ “[W]e cannot afford for race-consciousness to be seen as an

⁹⁹ *Id.*

¹⁰⁰ See Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 55 (2001) (“Thus, a competent cross-cultural lawyer acknowledges racism, power, privilege and stereotyped thinking as influencing her interactions with clients and case planning, and works to lessen the effect of these pernicious influences.”).

¹⁰¹ King, *supra* note 15, at 4–5 (proposing that matching clients with an attorney of their race would allow legal services organizations to better serve clients by helping to build trust and providing more effective communication between client and attorney).

¹⁰² *Id.* at 1.

¹⁰³ *Id.* at 6.

¹⁰⁴ The suggestion of intentional segregation by race is troubling to me based on its shameful place in United States history. My uneasiness is also due to the reminder that our society, even in 2011, has not progressed to the point where race is no longer a barrier between people.

arbitrary, irrational evil, irrespective of who is taking race into consideration and regardless of the context in which it is being used.”¹⁰⁵

The idea is particularly helpful with immigrants because, even if you discount King’s arguments regarding the cultural differences between African-Americans and whites—which I do not—you could still make the argument that whites and African-Americans share the culture of being born American, which provides at least some basis of understanding. With immigrants, there may be next to nothing shared culturally between attorney and client.

The problems with ethnic matching, like its benefits, are of a practical nature. One problem with instituting ethnic matching is that legal services firms are understaffed and underfunded. In cities like New York, it would be impossible for a small legal services firm like NYLAG to hire an attorney of every ethnicity, if one could even fathom every ethnicity. New York is one of the most culturally diverse cities in the world. Every single client with whom I interacted this summer was ethnically different from every other. Our department had seven attorneys. While NYLAG is incredibly diverse overall, it would be impossible for us to hand off a domestic violence case to an attorney in the Housing department just because she is Korean.¹⁰⁶ Another problem with ethnic matching is one that King herself notes; legal services organizations could run into trouble with Title VII of the Civil Rights Act based on hiring certain races.¹⁰⁷ King’s interpretation of *Grutter v. Bollinger*¹⁰⁸ ultimately leads her to believe that racially motivated hiring under a “diversity rationale” would steer legal services agencies into the clear.¹⁰⁹ I believe that ethnic matching should be encouraged where possible, but cannot solve the problems described above because it is impractical in the world of public interest lawyering.

D. Domestic Violence-Specific Outreach to Immigrant Communities

Solutions must entail breaking down the subordination and barriers that prevent immigrant victims from accessing legal services to begin with, no matter what the race or culture of their attorney is likely to be. This must be done by increasing immigrant victims’ awareness of the services that are available to help them. It is part of our duty, expanding our role as

¹⁰⁵ King, *supra* note 15, at 19.

¹⁰⁶ There was a Korean attorney working in the Housing department during my time working on Ms. H’s case. On two occasions, she was able to translate for us, which was enormously helpful. Having both a native speaker and an attorney as interpreter was immeasurably helpful. I could only notice, however, how much easier and more comfortable it would have been for Ms. H if a Korean attorney could have represented her.

¹⁰⁷ King, *supra* note 15, at 47.

¹⁰⁸ 539 U.S. 306 (2003).

¹⁰⁹ King, *supra* note 15, at 48.

part of a coalition. Marry Ann Dutton, Leslye Orloff, and Giselle Aguilar Hass surveyed Latina victims in Washington D.C. for Ayuda.¹¹⁰ They found that “educational campaigns about domestic violence and the relief available to help battered women escape, avoid, resist, or stop the violence aimed at women in immigrant communities may be the best route to reach battered immigrant women.”¹¹¹ The authors note that the campaigns should also be aimed at those who might be in the support network of a victim in order to expand the reach of the message and to avoid women thinking “well that isn’t happening to me.”¹¹²

These educational and public service campaigns must be ubiquitous and they must be multi-lingual and multicultural. “Additional funding for linguistically-compatible and culturally-sensitive shelters is a wasted expenditure if battered women fail to realize that the resources are available.”¹¹³ Women must see women in the advertisements that look like them and that speak their language. The public service messages must be clearly understandable and must be broadcast on foreign language radio stations and television stations where possible. Some have even suggested that ICE should bear the financial and distribution responsibilities of providing pamphlets to immigrant women when they enter the country.¹¹⁴ This solution, while promising, would not reach undocumented immigrants who make up a large portion of battered immigrant victims.¹¹⁵

E. Positive Outcome Outreach

Dutton and her colleagues’ survey results also indicated that grassroots involvement by victims who have had success with the legal system could enable other victims to engage in help-seeking behavior in order for more

¹¹⁰ Mary Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 *GEO. J. ON POVERTY L. & POL’Y* 245, 256 (2000). Ayuda is a community organization which protects the rights of low-income immigrants in the District of Columbia metropolitan area specifically with immigration and family law issues. “We are the region’s leading provider of multilingual legal and social services for low-income immigrants in the areas of immigration, human trafficking, domestic violence and sexual assault.” AYUDA, <http://www.ayudainc.org/template/index.cfm> (last visited Oct. 3, 2011).

¹¹¹ Dutton et al., *supra* note 110, at 282.

¹¹² *See id.* at 282–83.

¹¹³ Franco, *supra* note 8, at 134.

¹¹⁴ *See id.* (“On the bureaucratic level, [ICE, formerly] INS should be required to distribute pamphlets that provide information about immigrant women’s legal rights. A special emphasis should be placed on reaching battered immigrant women.”); *see also* Loke, *supra* note 4, at 622–23 (“[ICE, formerly] INS should be required to distribute information about domestic violence and its impact on immigrant women. The law presently requires [ICE] to inform conditional residents of the joint petition requirements to adjust to permanent residency. Information about domestic violence could easily be distributed at the same time. Immigrant women should be made aware that laws are different in the United States. They can then make informed choices about their safety and the relative risks of behavior.”).

¹¹⁵ *See* Dutton et al., *supra* note 110, at 263, tbl. 2 (noting that 44.7% of survey respondents reporting abuse were undocumented immigrants).

successful outcomes.¹¹⁶ I think that this type of victim-survivor interaction is enormously helpful and must be encouraged at the grassroots advocacy level, extending to the legal interactions between attorney and client. I call this type of interaction “positive outcome outreach” where a survivor can coach a victim. In Ms. H’s case, both my supervisor and I felt that positive outcome outreach with another client of a similar background, like Ms. M, who became empowered by her interactions with the legal system, would have been extremely helpful for Ms. H in her struggle.

F. Solutions in Concert

Ms. H would have benefitted both directly and indirectly from each of the solutions mentioned above. Ethnic matching, if feasible, would have eliminated a number of the problems that my supervisor and I encountered in attempting to effectively represent her. It would have made her more comfortable and able to share the information necessary to build her case and to keep her safe. Attempting to recognize intersectionalities, to lawyer cross-culturally, and to achieve cultural competence is an ongoing process—one that we must strive to improve upon every day. We must strive to recognize our own contributions to our client’s subordination and also the ways in which we ourselves are subordinated.

V. CONCLUSION

Victims of domestic violence face daunting odds in attempting to seek help. They risk their safety and the safety of their children and may lose their entire way of life. They venture into the world often with no way to support themselves and no one on whom they can rely for help. Immigrant victims not only face these same problems, but they often do not speak the majority language, do not understand the legal system, and have no idea where to go for assistance. In fact, they may believe there is no one who will help them. Many immigrant victims have no documentation at all, but even those who possess some sort of conditional residency or U.S. citizenship may fear deportation, or that their husbands will report them to ICE or will rescind sponsorship of citizenship.

Many immigrants are so isolated that the only voice they hear is that of their abuser. They may not be aware that domestic violence is illegal in the United States or that the police may be willing and able to help them. They may justifiably fear that their husband’s superior English language skills will mean that police will listen to him and not to them. They may fear losing their children due to their undocumented status or might believe that, like in the country from which they emigrated, fathers always retain

¹¹⁶ See *id.* at 284–85.

custodial rights to children. Even if they are able to leave, immigrant victims may have no idea that there are resources available to them, if there are resources that will be able to fully accommodate them. For instance, there may be social service agencies and shelters that speak their language, know their culture, and provide sensitive services with both in mind, but these services are not available for every ethnic background and may be less available in suburban or rural areas.

If immigrant victims are able to access social and legal services, there still may be gaps in culture and understanding that prevent open lines of communication. Immigrant identity thus may act as a barrier to effective legal counseling. Interpreters often are required which can interfere with the development of a trusting relationship between attorney and client. Cultural cues, customs, and social norms can be vastly different between attorney and client. The client may feel more comfortable confiding in her interpreter than in her attorney and may feel a strain when trying to discuss what tend to be emotional, conflicting, painful, and trying issues with an attorney who figuratively and literally does not speak her language.

In order to alter the system in which we currently practice, we must recognize two important ideas. First, we must account for and appreciate the intersectionality of gender, culture, language, and other barriers that affect our clients. With immigrant clients, we must understand their pain as much as possible through the lens of *their* cultural experience, and not our own. We must attempt to facilitate an open exchange that extends beyond language barriers.

If these movements that seem to hold such promise of transforming law into a healing profession are to make a meaningful difference in the *status quo*, we who support them must self-consciously reach out across racial divides. We must both figure out why we have so far not succeeded in doing so, and how to overcome this failing. And we must be open to the possibility that the contributions of lawyers, psychologists, social workers, and clients from a multiplicity of racial groups may transform our understanding of what it means to practice law as a profession of healing. We must be open to the possibility that by embracing diverse perspectives, our very notion of transformation may be altered.¹¹⁷

The only way to accomplish these goals, to transform our profession and our practice, is by engaging in coalition. We must build a coalition of

¹¹⁷ Silver, *supra* note 16, at 237.

social workers, social services agencies, and governmental agencies, where safe to do so. We can deconstruct barriers between us by communicating, having meetings and organizing. We must also engage in coalition by recognizing our own contributions to subordination generally, and being aware of our cultural predispositions and assumptions.

As Mari Matsuda explains, we must create and participate in an active theory of the law, a “revolutionary” theory of law “taking sides.”¹¹⁸ We must step outside our limited legal universe, to forge partnerships, to attempt to understand where we go wrong, and to learn what others can teach us to help us get it right. “When we work in coalition . . . we compare our struggles and challenge one another’s assumptions. We learn of the gaps and absences in our knowledge. We learn a few tentative, starting truths, the building blocks of a theory of subordination.”¹¹⁹ We must find the means to end this subordination. Immigrant identity may be a barrier to effective legal counseling, but an active theory of law can break down this barrier brick by brick.

I propose that as attorneys and law students representing immigrant domestic violence victims, we must strive to be culturally competent, we must be aware of our status as cross-cultural lawyers, and we must embrace that role. We must encourage multi-lingual ethnically conscious education and public service messages that reach every community, in languages that are understandable, and in cultural contexts that provide victims with the means to self-identify. We must encourage positive outcome outreach by pairing victims with survivors to lessen fear, to guide victims through the process in a way that may be unavailable to them through their attorney or social workers, and to show them that the legal process can actually empower them. “Through our sometimes painful work in coalition we are beginning to form a theory of subordination; a theory that describes it, explains it, and gives us the tools to end it.”¹²⁰

¹¹⁸ Matsuda, *supra* note 1, at 1188 (“As lawyers working in coalition, we are developing a theory of law taking sides, rather than law as value-neutral.”).

¹¹⁹ *Id.*

¹²⁰ *Id.*

A Look at *In re Fabian A.*: Examining the Extension of Due Process Protections and Failure to Object as Waiver in the Juvenile Justice System

ELIZABETH BANNON†

I. INTRODUCTION

There is little doubt as to the importance of the protection provided by due process to defendants in the American judicial system. It is of particular importance, however, where it applies to the notion of informed consent, specifically as it pertains to plea canvasses and whether a guilty plea has been entered into “knowingly and voluntarily.”¹

Recently, the Supreme Court of Connecticut established a rule requiring that the due process protection of informed consent be extended to plea canvasses in the juvenile process. This decision is in line with the national movement towards recognizing that, while the adult and juvenile justice systems must be different in order to reflect the inherent differences between adult and juvenile offenders, certain due process protections must apply to *both* systems.²

Shortly after the Connecticut Supreme Court’s decision in *In re Jason C.*,³ another issue arose with regards to informed consent—namely, to what extent must the court inform a juvenile defendant during a plea canvass⁴ of circumstances surrounding his commitment and sentence in order to ensure that the plea is made knowingly and voluntarily? As seen in the case of *In re Fabian A.*,⁵ the failure of the court in *In re Jason C.* to establish a specific standard of the extent of information provided during a plea

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¹ See *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969) (citing *McCarthy v. United States*, 394 U.S. 459, 466 (1969) which establishes, at a federal level, that “if a guilt[y] plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void”); *State v. Godek*, 438 A.2d 114 (Conn. 1980) (establishing the “knowing and voluntary” requirement at a state level).

² See *In re Winship*, 397 U.S. 358 (1970) (applying criminal standard of proof beyond a reasonable doubt to juvenile proceedings); *In re Gault*, 387 U.S. 1, 41, 57 (1967) (applying requirements for adequate notice of hearing and confrontation of witnesses to juvenile adjudicatory proceedings).

³ See *In re Jason C.*, 767 A.2d 710 (Conn. 2001).

⁴ A plea canvass is a pre-trial proceeding during which time a trial court judge informs the defendant of his charges and conditions surrounding the entry of a guilty or nolo contendere plea, at which point the defendant either enters a plea or proceeds to trial. See, e.g., CONN. SUPER. CT. R. 30a-4 (2011).

⁵ See *In re Fabian A.*, 941 A.2d 411 (Conn. App. Ct. 2008).

canvass resulted in the Appellate Court's finding that the plea had not been made knowingly or voluntarily because the court failed to adequately inform Fabian A. of circumstances under which his commitment might be extended.

While the notions of due process and informed consent are relevant, what is most surprising and troublesome about the case of *In re Fabian A.* is the defense counsel's failure to raise the issue of informed consent during the juvenile's initial plea canvass. As seen with due process generally, the adult and juvenile justice systems seem to be growing more and more similar. Does that—*should* that—mean that what would constitute a failure to preserve a claim (by failing to object during the plea canvass) in the adult system also amount to failure to preserve a claim in the juvenile system?

This Note will argue is that while it is important to extend the protection of due process to the juvenile justice system, it is of equal importance to preserve the flexibility and rehabilitative focus that for so long has differentiated the juvenile system from the adult. The general rule, which is to accept a failure to object as waiver of the right to pursue a claim at a later date, may be fair and appropriate in an adult criminal system.⁶ However, extending such rigid restrictions to the juvenile system ultimately undermines its very purpose – to hold juveniles accountable for their unlawful behavior while at the same time protecting their best interest.

II. BACKGROUND: *IN RE JASON C.* AND *IN RE FABIAN A.*

A. *In re Jason C.: Establishing “Knowing and Voluntary” in the Juvenile System*

The development of the “knowing and voluntary” requirement during plea canvasses in the juvenile justice system in Connecticut began with the case of *In re Jason C.*⁷ This case involved the commitment of two separate minors, Jason C. and Greily L., to the Department of Children and Families (“DCF”). Both juveniles pleaded nolo contendere to various charges brought against them and were committed to DCF during separate plea canvasses. To understand the application of the due process requirement of “knowing and voluntary” to the admission of a guilty plea, or in the cases of Jason C. and Greily L., a plea of nolo contendere, it is important to know the facts and history of each case.

⁶ See CONN. GEN. STAT. § 46b-121h (2011).

⁷ See *In re Jason C.*, 767 A.2d at 719.

I. In re Jason C.: *The Facts*

In August or September of 1996, Jason C., a sixteen-year-old male, “allegedly committed an act likely to impair the health and morals of a child under the age of sixteen in violation” of Connecticut law.⁸ On February 10, 1997, the Superior Court adjudicated Jason C. a delinquent, following a plea of *nolo contendere* to the charge, and Jason C. subsequently was committed to DCF “for a period not to exceed eighteen months.”⁹ In March of 1997, prior to his commitment, Jason C. allegedly engaged in sexual conduct with a four-year-old child, once again violating the law of the State of Connecticut.¹⁰ On October 30, 1997, Jason C. once again appeared before the trial court in a plea canvass, this time for the adjudication of the charge of sexual assault in the fourth degree.¹¹ He once again pleaded *nolo contendere*.¹² Pursuant to the two plea agreements, the court committed Jason C. to DCF for eighteen months, effective October 31, 1997. Subsequently, Jason C.’s commitment was extended by agreement between DCF and the court until October 30, 1999 – well beyond the original eighteen-month commitment period as originally agreed upon during the October 30, 1997 plea canvass.¹³ On October 1, 1999, DCF again filed a petition, this time seeking to extend Jason C.’s commitment for an additional twelve months. It is important to note that at no time during either plea canvass, or after DCF filed its second petition for extension of commitment, did the trial court advise Jason C. of the possibility that DCF could petition for an extension of his commitment.¹⁴

The second juvenile defendant in *In re Jason C.* was Greily L., a seventeen-year-old female. On April 6, 1998, the Superior Court adjudicated Greily L. a delinquent following a plea of *nolo contendere* to the charge of violating a court order.¹⁵ The Court committed Greily L. to DCF for a period not to exceed eighteen months. However, as it did during Jason C.’s plea canvasses, the Court failed to inform Greily L. of the possibility that DCF could petition for an extension of her commitment,

⁸ *Id.* at 712.

⁹ *Id.* Under Connecticut law, “commitment of children convicted as delinquent by the Superior Court to the Department of Children and Families shall be for (1) an indeterminate time up to a maximum of eighteen months. . . .” CONN. GEN. STAT. § 46b-141 (2011).

¹⁰ *In re Jason C.*, 767 A.2d at 712.

¹¹ *Id.* at 712–13.

¹² *Id.* at 13.

¹³ *Id.* Pursuant to CONN. GEN. STAT. § 46b-141 (2011), “[t]he Commissioner of Children and Families may file a motion for an extension of the commitment. . . (a) beyond the eighteen-month period on the grounds that such extension is for the best interest of the child or the community. The court shall give notice to the parent or guardian and to the child at least fourteen days prior to the hearing upon such motion.”

¹⁴ *In re Jason C.*, 767 A.2d at 713.

¹⁵ *Id.*

which DCF did on September 23, 1999.¹⁶

On November 22, 1999 and December 3, 1999, both Jason C. and Greily L., respectively, filed motions to dismiss the extension petitions, claiming in relevant part that “granting the petition to extend commitment would violate the plea agreement,” that Conn. Gen. Stat. § 46b-141 was “void for vagueness,” and that “granting the petition for extension of commitment would violate the prohibition against double jeopardy.”¹⁷ The trial court granted each motion to dismiss on the grounds that “[f]ailure to advise the respondents of a possible extension of delinquency commitment prevented them from entering a *knowing and voluntary* plea, thereby rendering the plea invalid.”¹⁸

2. *The Effect of In re Jason C. on the Juvenile Justice Process*

The court in *In re Jason C.*, by granting the defendants’ motions to dismiss, established a precedent in the Connecticut juvenile justice system that “when accepting a plea agreement, due process requires a court to advise a juvenile of possible extensions to the delinquency commitment.”¹⁹ Because neither defendant had been advised of the possibility that DCF could petition for an extension of commitment—an action that would bring their confinement beyond the eighteen month maximum as established by Connecticut law, the maximum time they believed they could be committed—they did not have “all the relevant information required by . . . long-standing and well settled [Connecticut] law.”²⁰ Therefore, the Court concluded that “their pleas were not knowing and voluntary,” and thus were invalid.²¹ As a result of *In re Jason C.*, trial courts are now “required to advise a juvenile of the possibility that his or her delinquency commitment may be extended beyond the period of time stated in the plea agreement.”²²

The new standard for acceptance of a juvenile defendant’s guilty plea during a plea colloquy mirrors the standard that has been well-established in the adult justice system in Connecticut, both in statute and at common law.²³ In essence, what the court in *In re Jason C.* did was extend the due

¹⁶ *Id.* DCF’s petition sought to extend Greily L.’s commitment for an additional eighteen months. *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 713–14 (emphasis added).

¹⁹ *Id.* at 714.

²⁰ *In re Jason C.*, 767 A.2d 710, 716 (Conn. 2001); see CONN. GEN. STAT. § 46b-141 (2011).

²¹ *In re Jason C.*, 767 A.2d at 716.

²² *Id.* at 714. This rule has since been codified into Connecticut law: “To assure that any plea or admission is voluntary and knowingly made, the judicial authority shall address the child or youth in age appropriate language to determine that the child or youth substantially understands . . . [t]he possible penalty, including any extensions or modifications.” CONN. SUPER. CT. R. § 30a-4 (2011).

²³ See, e.g., CONN. SUPER. CT. R. § 39-19 & 39-20 (requiring that the “judicial authority . . . not accept the [guilty] plea without first addressing the defendant personally and determining that he or she

process protection of informed consent required in the adult justice system to the juvenile justice system. In doing so, it acknowledged the Supreme Court's precedent that there are inherent differences between juveniles and adults, which require a difference in the law's treatment of each.²⁴ However, the court also acknowledged that courts must take special caution to balance state objectives in the juvenile justice system against notions of fundamental fairness.²⁵ Thus, "[b]ecause of the seriousness involved in the institutionalization of a juvenile, and the lack of a negative effect on juvenile proceedings," the court concluded that "a juvenile is entitled to be advised of the possibility of commitment extensions when making a plea. The status of being a juvenile does not warrant abandonment of the well established rule that a defendant be advised of the direct consequences of his plea."²⁶

B. "Knowing and Voluntary" Meets Waiver: In re Fabian A.

The court in *In re Jason C.* made great strides towards extending due process protections inherent in the adult criminal justice system to the juvenile system in Connecticut. It laid out that basic rule that trial courts, before accepting a juvenile's guilty plea or plea of nolo contendere, must ensure that the juvenile is aware of the possibility of extension of his or her commitment and that the plea is made knowingly and voluntarily. However, the court failed to specifically enumerate the extent to which the court must advise the defendant so as to ensure that his or her plea is made knowingly and voluntarily. This issue arose in the context of *In re Fabian A.*

1. Background and Facts

On August 25, 2005, Fabian A., a fifteen-year-old male, pleaded guilty to charges of disorderly conduct and violation of probation.²⁷ The trial court adjudicated him delinquent and committed him to the custody of DCF for a period not to exceed eighteen months.²⁸ At the outset of the

fully understands: (1) The nature of the charge to which the plea is offered; (2) The mandatory minimum sentence, if any; . . . [and] (4) The maximum possible sentence on the charge. . . ."); CONN. SUPER. CT. R. § 39-20 (ensuring that the defendant's plea is "voluntary and is not the result of force or threats or of promises apart from a plea agreement"). See also *State v. Hall*, 992 A.2d 343, 345 (Conn. App. 2010), cert. granted in part, 995 A.2d 638 (Conn. 2010) (finding that, by failing "to address [the defendant] personally or to determine that he understood that his immigration status might be adversely affected by his guilty pleas[,] the court failed to substantially comply with Connecticut statute).

²⁴ See *Schall v. Martin*, 467 U.S. 253, 263 (1984) (acknowledging the necessity to maintain "informality and flexibility" in the juvenile setting).

²⁵ *In re Jason C.*, 767 A.2d at 718 (looking at *In re Steven G.*, 556 A.2d 131 (Conn. App. Ct. 1989).

²⁶ *Id.*

²⁷ *In re Fabian A.*, 941 A.2d 411, 413 (Conn. App. Ct. 2008).

²⁸ *Id.*

plea canvass, the presiding Judge Wollenberg, advised Fabian A. that he could ask a question at any time.²⁹ Judge Wollenberg proceeded to ask him various questions, pursuant to the rule set forth by *In re Jason C.*, in order to establish that Fabian A.'s plea was made knowingly and voluntarily.³⁰ After accepting his plea, the court turned to the order of commitment. Upon learning from the probation officer that the requested commitment was for a period of eighteen months, the *prosecutor* asked the court to inform Fabian A. as to the possibility of recommitment.³¹ In response, Judge Wollenberg stated, "Well, if [the eighteen month commitment] doesn't work and something happens, you can be recommitted, do you understand that?"³² Initially, Fabian A. failed to respond verbally and the court instructed him that he must respond with a "yes" or "no," at which point he responded in the affirmative.³³

Fabian A.'s commitment was set to expire on February 28, 2007. However, as a result of his behavior while in custody, DCF filed a motion to extend his commitment on January 29, 2007.³⁴ Fabian A.'s attorney opposed the motion to extend commitment, but on March 22, 2007 the court granted the motion and extended Fabian A.'s commitment to January 19, 2008.³⁵ The presiding Judge Gleeson found that at the time Fabian A. had entered his guilty plea he had been "advised adequately as to the possibility that his commitment could be extended."³⁶

Counsel for Fabian A. filed an appeal on April 9, 2007, asserting that Fabian A.'s plea was not entered knowingly or voluntarily because the court had failed to properly inform the defendant of the circumstances that may lead to an extension of his commitment. Namely, the court had only inquired as to the sentence *after* accepting the guilty plea, the court "failed to make any inquiry of [Fabian A.'s] understanding of the sentence, the maximum penalty or the possibility of an extension," and that it was "only at the suggestion of the prosecutor, *after* the plea had been accepted, that the court informed the defendant of a 'recommitment possibility.'"³⁷ Upon reviewing the transcript from the plea canvass, the court held that Fabian A. "could not have possessed an understanding of the law in relation to the facts because the court, in canvassing him, did not include all the relevant

²⁹ *Id.*

³⁰ *Id.* Specifically, the court asked Fabian A. "his age, what grade he was in at school, if anyone had forced him to plead guilty, if anyone had promised him anything if he pleaded guilty, whether his attorney had informed him of how a trial would work and whether he was satisfied with the representation of his attorney."

³¹ *Id.* at 413–14 (emphasis added).

³² *In re Fabian A.*, 941 A.2d 411, 414 (Conn. App. Ct. 2008) (internal quotation marks omitted).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 416 (emphasis added).

information concerning the commitment. As a result . . . the plea of the respondent was not knowingly or voluntarily made.”³⁸

C. *The Defense’s Silence*

The court in *In re Jason C.* established the rule that a juvenile’s plea must be made knowingly and voluntarily; however, it failed to instruct future courts as to what exactly is required to ensure that a juvenile is indeed making his or her plea knowingly and voluntarily. Thus, it is no surprise that the court found that Fabian A. had not been properly informed of the circumstances that could lead to an extension of his commitment; as a result, his plea was not made knowingly or voluntarily and was thus invalid. It is important to note that, during the plea canvass, neither Fabian A. nor his counsel asked any questions regarding commitment, and counsel “did not make a motion to withdraw [the] guilty plea or in any other way indicate that Fabian [A.] did not understand the judge’s advisement that his commitment could be extended.”³⁹

III. EVOLUTION OF DUE PROCESS IN THE JUVENILE SYSTEM

As this Note previously mentioned, there is a general movement in both federal and state criminal justice systems towards extending many of the protections of due process inherent in the adult system to the juvenile justice system. Included in these protections are the right to counsel, the right to confront and cross-examine witnesses, the right to reasonable search and seizure, and the privilege against self-incrimination.⁴⁰ There seems to be a general consensus that the juvenile justice system requires a balance between a strict application of due process rights in the juvenile setting and judicial flexibility regarding procedural process, so long as “constitutional demands are satisfied.”⁴¹ Although these rights are neither identical to nor as extensive as those rights guaranteed to adult offenders, they may be curtailed for legitimate reasons when doing so “serves the state’s interests in promoting the health and growth of the child.”⁴²

If we are to view the extension of due process protections to the

³⁸ *In re Fabian A.*, 941 A.2d 411, 417 (Conn. App. Ct. 2008).

³⁹ Brief of Appellee at 5, *In re Fabian A.*, 941 A.2d 411 (Conn. App. Ct. 2008) (No. 28704).

⁴⁰ See generally *In re Gault*, 387 U.S. 1 (1967) (finding that the Due Process Clause of the Fourteenth Amendment requires that children charged with criminal acts enjoy several procedural protections). It is worth noting that, while there is a general consensus among most state courts that juveniles should be afforded most of the due process protections afforded to similar adult offenders, some states disagree that such an expansion of due process rights to juvenile offenders is warranted. See, e.g., *Petitioner F v. Brown*, 306 S.W.3d 80, 90 (Ky. 2010) (holding that juvenile offenders are not afforded all constitutional rights that adult offenders receive; instead, they should be afforded only “right to fair treatment”).

⁴¹ 47 AM. JUR. 2D *Juvenile Courts, Etc.* § 83 (2006).

⁴² *Id.*

juvenile justice system as a realization of the necessity to protect the “vulnerable dependents” within our society,⁴³ it would necessarily follow that protections outside of due process may be appropriate in the juvenile system as well. This section will address the development and goals of the juvenile justice system, as well as the concept of waiver generally. It will ultimately argue that the rigidity associated with waiver in the adult criminal justice system is incompatible with the goals of the juvenile justice system – namely, the juvenile justice system was specifically designed to be flexible and individualized, affording judges discretion not only in their procedures, but in their sentences, so as to keep in line with the system’s goals of not only punishment, but rehabilitation.⁴⁴

A. History of the Juvenile Courts and Due Process in the Juvenile Justice System

The first juvenile court was established in Chicago in 1899, the direct result of a progressive movement in the criminal justice system that recognized the fundamental differences between adult and juvenile offenders.⁴⁵ The new court “combined the new conception of children as vulnerable dependents with the rehabilitative orientation” of the progressive movement.⁴⁶ In the new juvenile court system, the state took on a *parens patriae* role and, as such, “assessing criminal responsibility became subordinate to assuring the social welfare of the child.”⁴⁷ Because the courts were viewed to be “benign” and implementing intervention strategies in the children’s best interest, leaders of the progressive movement “rejected the [adult] criminal law’s jurisprudence and procedural safeguards” finding them to be unnecessary.⁴⁸ Unfortunately, juvenile courts frequently sentenced children to commitment in juvenile institutions, often without the due process afforded to adult offenders who faced the same deprivation of liberty.⁴⁹ It is no surprise, then, that the lack of procedural protections in the juvenile court system, combined with the “sweeping custodial powers [afforded to] juvenile court judges,” soon caught the eye of critics and judicial reformers.⁵⁰

The most impressive reform of the juvenile court system occurred in 1964 after the annual meeting of the National Council of Juvenile Court

⁴³ Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 586 (2002).

⁴⁴ See CONN. GEN. STAT. § 46b-121h (2011).

⁴⁵ See Berkheiser, *supra* note 43, at 585–86.

⁴⁶ *Id.* at 586.

⁴⁷ *Id.*

⁴⁸ *Id.* at 587 (citing Barry C. Feld, *The Transformation of the Juvenile Court – Part II: Race and the “Crack Down” on Youth Crime*, 84 MINN. L. REV. 327, 337–38 (1999)).

⁴⁹ See *Id.*

⁵⁰ *Id.*

Judges.⁵¹ It was during this meeting that Chief Justice Earl Warren boldly announced that, while great latitude is given to juvenile courts with regards to procedure, decisions, and sentencing, those courts, like adult criminal courts, “must function within the framework of the law and provide juveniles with due process protection against capricious decisionmaking” to “satisfy the basic requirements of due process and fairness”⁵²

Though the Chief Justice failed to elaborate as to the specific protections of due process which should apply in the juvenile setting, his remarks served to refocus the goals of the juvenile system and opened the door to decisions that very quickly began extending almost all of the due process protections from adult criminal courts to those in the juvenile system. The first of the cases to tackle the issue of due process in the juvenile court system, thus marking a new era of juvenile justice, was *In re Gault*.⁵³ The Supreme Court, upon careful examination, observed that, in the juvenile justice system, “the child receives the worst of both worlds: . . . he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”⁵⁴ Thus, in the fundamental fairness guarantee, the court found the “jurisprudential basis for affording the essential protections of the adult criminal process while preserving the rehabilitative goals, confidentiality, and other benevolent features of the juvenile court process.”⁵⁵ The years following the Supreme Court’s decisions in *Gault* saw a continued expansion of juveniles’ due process rights and a restructuring of the juvenile court system so it more closely resembled the adult system in terms of procedural process protections. At the same time, the new juvenile courts remained distinct by preserving the system’s original goals: flexibility, rehabilitation, confidentiality, and other benevolent features unique to the juvenile system.⁵⁶

B. Goals of the Modern Juvenile Justice System

The United States Supreme Court, beginning with its decision in *In re Gault*, acknowledged the inherent differences between the adult and

⁵¹ *Id.* at 588.

⁵² *Id.* at 588–89 (internal quotation marks omitted).

⁵³ 387 U.S. 1 (1967). Gerald Gault was fifteen when he was adjudicated delinquent. The juvenile court, in exercising the discretion afforded to it by the Arizona Juvenile Code, committed Gault to a State Industrial School “for the period of his minority, unless sooner discharged by due process of law.” *Id.* at 7–8. The Supreme Court of Arizona found that the Code was invalid because it permitted a juvenile to be committed to a state institution in proceedings in which the court had “virtually unlimited discretion.” *Id.* at 10.

⁵⁴ *Id.* at 18 n.23 (citing *Kent v. US*, 383 US 541, 556 (1966)).

⁵⁵ Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 558 (1998).

⁵⁶ *See id.*; Berkheiser, *supra* note 43, at 593.

juvenile justice systems, and emphasized that, where the goals of the adult criminal justice system are deterrence and retribution, the goals of the juvenile justice system should balance the goals of accountability with those of rehabilitation and the best interest of the child.⁵⁷

Connecticut, too, acknowledges the inherent differences between the two systems, and, through its courts and legislature, has tried “to strike a balance—to respect the informality and flexibility that characterize juvenile proceedings . . . and yet to ensure that such proceedings comport with the fundamental fairness demanded by the Due Process Clause.”⁵⁸ The handling of juvenile matters in Connecticut exemplifies the “attempt to balance fundamental fairness with the unique characteristics of the juvenile justice system. . . .”⁵⁹ According to Conn. Gen. Stat. § 46b-121h, the “juvenile justice system [is intended to] provide individualized supervision, care, accountability and treatment in a manner consistent with public safety to those juveniles who violate the law.”⁶⁰ The statute recognizes that, while one goal is to “[h]old juveniles accountable for their unlawful behavior,” punishment must be balanced against efforts to reintegrate the juvenile into society.⁶¹ The statute provides for “programs and services that are community-based and are provided in close proximity to the juvenile’s community,” seeks to “[r]etain and support juveniles in their homes whenever possible and appropriate,” and “[p]romote[s] the development and implementation of community-based programs including, but not limited to, mental health services, designed to prevent unlawful behavior and to effectively minimize the depth and duration of the juvenile’s involvement in the juvenile justice system.”⁶² “Thus, it is clear that [Conn. Gen. Stat.] § 46b-121h includes both rehabilitation and accountability as desired goals of the juvenile justice system.”⁶³

IV. WAIVER

As we have seen, the juvenile justice system emerged as separate and distinct from the adult justice system with an eye towards rehabilitation of minors, as opposed to mere punishment and retribution. The juvenile system recognizes that the characteristics and needs of juvenile offenders

⁵⁷ See *In re Jason C.*, 767 A.2d 710, 717 (Conn. 2001); Michelle Haddad, *Catching Up: The Need for New York State to Amend Its Juvenile Offender Law to Reflect Psychiatric, Constitutional and Normative National Trends Over the Last Three Decades*, 7 CARDOZO PUB. L. POL’Y & ETHICS J. 455, 457 (2009) (distinguishing the goals of the modern juvenile justice system from those of the adult system).

⁵⁸ *Schall v. Martin*, 467 U.S. 253, 263 (1984) (internal citations and quotation marks omitted).

⁵⁹ *In re Jason C.*, 767 A.2d 710, 718 (Conn. 2001).

⁶⁰ CONN. GEN. STAT. § 46b-121h (2011).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *In re Jason C.*, 767 A.2d at 717 n.12.

are different than those of their adult counterparts, and as such juvenile offenders require a separate system for the administration of justice.⁶⁴ While the juvenile system is distinct from the adult system in terms of its goals and enhanced judicial discretion, it has become increasingly similar to the adult system in terms of its processes and procedural protections. As the two systems become more similar, it raises questions as to whether the juvenile justice system should not only adapt the protections afforded to defendants in the adult system, but also other procedures inherent in the adult system.

In considering this expansion of processes, it seems there would be a split in opinion regarding an extension of the adult justice system's interpretation of actions or omissions on the part of the defendant that might constitute a waiver of the right to bring up that issue at a later date. One school of thought would argue that, because the courts have extended due process, almost in its entirety, to the juvenile justice system and applied its protections strictly, the juvenile courts should adopt the adult system's notion of waiver strictly as well. If a juvenile defendant has the right to counsel, just as an adult does, should he not be able to waive his right to counsel just as easily as an adult defendant? The other school of thought regarding juvenile waiver would argue that in order to preserve the fundamental fairness premise on which the juvenile justice system was founded—flexibility—the adult system's notion of waiver should be adopted, but applied with judicial discretion. For example, where an adult defendant's silence regarding improper jury instructions may result in an inability to object to the jury instructions on appeal, that claim may be preserved where a juvenile defendant makes a similar omission.

A. Waiver, Generally

The adult procedure that lies at the heart of this Note's analysis of the juvenile justice system, generally, and of *In re Fabian A.*, specifically, is waiver. In *Johnson v. Zerbst*, the Supreme Court held that the commonly recognized test for waiver of any right is "ordinarily an intentional relinquishment or abandonment of a known right or privilege."⁶⁵ In order to determine whether a defendant has validly waived a right requires that the court determine the person's knowledge or intent with regards to the relinquishment of that right. Namely, "[t]he rights holder first must know of the right and then make an intentional choice to relinquish it. Otherwise, there is no waiver."⁶⁶ However, a look at the decisions of

⁶⁴ See 47 AM. JUR. 2D *Juvenile Courts, Etc.* § 4 (2006).

⁶⁵ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); see *Moore v. Michigan*, 355 U.S. 155, 161 (1957) (extending the "competent and intelligent" standard to state court proceedings).

⁶⁶ Berkheiser, *supra* note 43, at 601.

courts throughout the country, federal and state, adult and juvenile, demonstrates that courts no longer adhere to the strict requirement that the rights-holder explicitly or intentionally choose to waive the right in dispute.

B. Waiver in Connecticut

In Connecticut, waiver is defined by not only the Connecticut Practice Book, but also by the Connecticut judiciary. For example, the Connecticut Practice Book is clear that, if an attorney fails to object or file a motion to dismiss within a reasonable amount of time, he fails to preserve his claim and is deemed to have waived his right to raise the issue at a later time (generally, on appeal).⁶⁷ Further, the “failure of a defendant not in custody, absent good cause shown, to appear after notice, shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.”⁶⁸ Clearly the Connecticut Practice Book deems a failure to positively act in a timely matter, be it filing a motion or appearing in court, to be an implicit waiver of the right that would otherwise be preserved. The Connecticut Supreme Court has held similarly.⁶⁹

However, the Connecticut courts have gone further to define specific omissions on the part of counsel in *adult* proceedings as constituting waiver. Namely, the Connecticut courts are in consensus in finding that a failure to object or raise a claim—during trial or pretrial proceedings (more specifically a plea canvass)—results in an inability to raise the claim at a later point in time. For example, the Connecticut Appellate Court held that an attorney’s failure to object to juror misconduct constitutes waiver.⁷⁰ Furthermore, the Appellate Court also held that failing to object to a court’s ruling constitutes waiver.⁷¹ The Connecticut courts have ruled similarly in matters where a defendant’s fundamental rights are at issue. For example, the Appellate Court held that, where defense counsel fails to object to the State not proving each element of a crime, such omission

⁶⁷ See CONN. SUPER. CT. R. § 10-32 (deeming “[a]ny claim of lack of jurisdiction over the person or improper venue or insufficiency of process or insufficiency of service of process [to be] waived if not raised by a motion to dismiss filed” in a timely manner); see also CONN. SUPER. CT. R. § 42-1 (stating that “a failure to elect a jury trial” at the time the court informs the defendant of his right to a jury trial “may constitute a waiver of that right.”).

⁶⁸ CONN. SUPER. CT. R. § 40-55.

⁶⁹ See *Kim v. Magnotta*, 733 A.2d 809, 813 (Conn. 1999) (holding that lack of personal jurisdiction may be waived, unless challenged by a motion to dismiss filed in a timely manner); *Lostritto v. Cmty. Action Agency of New Haven, Inc.*, 848 A.2d 418, 431 (Conn. 2004) (holding that a challenge to personal jurisdiction is waived if it is not raised in a motion to dismiss within 30 days of the filing of a complaint).

⁷⁰ *State v. Tyson*, 862 A.2d 363, 366 (Conn. App. Ct. 2004).

⁷¹ *State v. Lynch*, 1 A.3d 1254, 1263–64 (Conn. App. Ct. 2010).

constitutes waiver.⁷² It later laid out the blanket rule that a defendant in criminal prosecution may waive one or more of his fundamental rights.⁷³ Most relevant to the case of *In re Fabian A.*, however, is the Connecticut Supreme Court's holding in *State v. Golding* that a failure on the part of a defense attorney to object to jury instructions constitutes waiver.⁷⁴ If we are to read the *Golding* decision strictly, it would seem as though the Connecticut courts do not require that a waiver be explicit, even in situations where an objection may be directed towards the court's procedure.

So far, the courts in Connecticut have refused to extend the strict interpretation of failure to object as constituting waiver from the adult justice system to the juvenile system. However, it is worth noting that implicit waiver is not a completely foreign notion within the Connecticut juvenile justice system. In *In re Adrien C.*, the Connecticut Appellate Court held that a mother waived her right to contest the court's jurisdiction when she failed to comply with the thirty-day requirement for filing a motion to dismiss the State's claim.⁷⁵ The Connecticut Superior Court followed suit, holding that a mother's failure to object to the late scheduling of an initial hearing regarding the termination of her parental rights "constitute[d] a waiver of any right she might have to do so."⁷⁶ Again, the court interpreted an *adult's* failure to object as waiver. However, what is still relevant is the court's *reasoning* for interpreting such omission as waiver. The court in *In re Adrien C.* emphasized, and the court in *In re Samantha B.* reiterated, that the time restriction on filing a motion to dismiss was the result of legislative concerns for delay in the juvenile process and as a way to promote the best interest of the child involved.⁷⁷ Admittedly, there are vast differences between a juvenile delinquency hearing and a termination of parental rights hearing; however, a unifying theme between the two is the court's attention to the best interest of the child (or minor) involved.

⁷² *State v. Cooper*, 664 A.2d 773, 777 (Conn. App. Ct. 1995).

⁷³ *State v. Hudson*, 998 A.2d 1272, 1278 (Conn. App. 2010), *cert. denied*, 4 A.3d 1229 (Conn. 2010).

⁷⁴ *State v. Golding*, 567 A.2d 823 (Conn. 1989). It is important to note that the Court's decision in *Golding* has narrow application. The Court stated that a failure to object will only constitute waiver if four criteria are met: "(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." *Id.* at 827.

⁷⁵ *In re Adrien C.*, 519 A.2d 1241, 1245–46 (Conn. App. Ct. 1987).

⁷⁶ *In re Samantha B.*, 722 A.2d 300, 300 (Conn. Super. Ct. 1997).

⁷⁷ *In re Adrien C.*, 519 A.2d at 1245.

C. Waiver in Other Jurisdictions

There is a great weight of federal authority supporting the notion that, by failing to object, defense counsel waives the right to pursue a claim on appeal. For example, the Supreme Court in *U.S. v. Gagnon* held that, in the absence of an objection, the defendant had waived his right to be present at all stages of his criminal trial.⁷⁸ In *Levine v. U.S.*, the Court held that counsel's failure to object to the closing of a courtroom was a waiver of the right to a public trial.⁷⁹ Finally, in *U.S. v. Bascaro*, the Eleventh Circuit Court held that, because defendant raised the defense of double jeopardy for the first time on appeal after failing to raise an objection to the charges at trial, he had waived his right to assert such a defense.⁸⁰ The federal courts are clear regarding waiver in adult proceedings: unless defense counsel makes an objection during trial (or during a pretrial hearing), he is deemed to have waived the right to argue the specific claim—no matter how fundamental a right the claim is asserting to protect—at a later date.

State courts throughout the country generally follow the same rule and accept that an adult defendant may implicitly waive various rights. The Tennessee Supreme Court held in *State v. Walker* that a conspiracy defendant's failure to object at trial to the admission of his co-conspirator's statements made to the defendant's sister constituted a waiver of his right to raise the issue in his motion for a new trial.⁸¹ In *State v. Gove*, the Wisconsin Supreme Court found that the defendant had waived his right to challenge on appeal that the trial court, in a witness unavailability ruling, violated his right to confront his accuser when he failed to object to the court's ruling during trial.⁸² Finally, the Maryland Court of Appeals held in *Berry v. State* that defense counsel's failure to object to the admission of handgun evidence constituted a waiver of defendant's right to raise the evidence's admission on appeal.⁸³ State courts, like their federal counterparts, rigidly interpret an attorney's failure to object as constituting waiver. But how rigidly should state juvenile courts apply the waiver standard to a juvenile defense counsel's failure to object?

Cases regarding waiver, implicit and explicit alike, in juvenile settings are much more limited. However, the cases identified by this author seem to point to a tendency among courts to strictly interpret juvenile defense counsel's initial failure to object as a waiver of the right to pursue the claim at a later time. For example, the Utah Supreme Court held in *State*

⁷⁸ *U.S. v. Gagnon*, 470 U.S. 522, 528 (1985).

⁷⁹ *Levine v. U.S.*, 362 U.S. 610, 619 (1960).

⁸⁰ *U.S. v. Bascaro*, 742 F.2d 1335, 1365 (11th Cir. 1984).

⁸¹ *State v. Walker*, 910 S.W.2d 381, 388 (Tenn. 1995).

⁸² *State v. Gove*, 437 N.W.2d 218, 220 (Wis. 1989).

⁸³ *Berry v. State*, 843 A.2d 93, 109 (Md. Ct. Spec. App. 2004).

ex rel. Christensen v. Christensen that a defendant waived his right to object, on appeal, to the admission of testimony “as to matters which were not embraced within the allegations of the petition for rehearing of the case” because defense counsel “failed to object to the admission of such testimony at the hearing.”⁸⁴ In North Dakota, its Supreme Court held in *In the Interest of R.D.B.* that a juvenile who was with his parents at the time of a juvenile court proceeding effectively waived his right to counsel, and that he “knowingly, intelligently, and voluntarily waived [his] right to counsel at the adjudicatory hearing.”⁸⁵ The court went on to reject the claim that a waiver of the right to counsel should be valid only when the representation given by the parents is of the same caliber as the child would have received from an attorney.⁸⁶ Thus, the court emphasized that the juvenile defendant’s waiver need not be explicit to prevent him from objecting to inefficient or lack of counsel on appeal; rather, the mere representation by his parents sufficiently constituted waiver.

D. Waiver of Counsel in the Juvenile Setting as a Model

Unfortunately, there seems to be no case law or statutory guidance for determining whether defense counsel’s failure to object to an insufficient plea canvass may constitute waiver in a juvenile court setting. However, there has been extensive research conducted regarding implicit waiver with regards to defendants’ *right to counsel* in juvenile delinquency hearings. While the right to counsel derives more directly from due process protections found in the Constitution, both the right to counsel and informed consent affect whether a juvenile defendant receives a fair trial, which is also a constitutionally-based right.

In her article *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, Mary Berkheiser refers to a myriad of “social-psychological studies showing that most children are developmentally incapable of exercising a valid waiver.”⁸⁷ The studies reveal that “juveniles as a class have limited decisionmaking abilities, lack an adequate understanding of their legal rights, and as a result are incapable of exercising an effective waiver.”⁸⁸ If this inability on the part of juveniles

⁸⁴ State *ex rel. Christensen v. Christensen*, 227 P.2d 760, 762–63 (Utah 1951). It is important to note that this case was decided before the Supreme Court’s decision in *In re Gault*, which extended procedural protections to the juvenile justice system. However, this decision is still good law in Utah and is therefore a good example of how some states apply not only rigid adult procedural protections to juvenile matters, but a rigid interpretation of failure to object as constituting waiver.

⁸⁵ *In re R.D.B.*, 575 N.W.2d 420, 423 (N.D. 1998).

⁸⁶ *Id.*

⁸⁷ Berkheiser, *supra* note 43, at 581.

⁸⁸ *Id.* See generally Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 CRIM. JUST. 26 (2000); Wallace J. Mlyniec, *A Judge’s Ethical Dilemma: Assessing a Child’s Capacity to Choose*, 64 FORDHAM L. REV. 1873 (1996).

to even *explicitly* waive their right to counsel is true, one can easily argue that under no circumstances can a juvenile defendant *implicitly* waive his right to counsel merely by failing to object to lack of counsel's presence at any stage of the judicial proceedings.

Further, the Connecticut Supreme Court often warned that judges "should indulge 'every reasonable presumption' against waiver" where defendants' constitutional rights are at stake.⁸⁹ "Yet juvenile court practices as revealed in the reported cases [of waiver of right to counsel] demonstrate a total disregard for that presumption."⁹⁰ As a result, there have been many cases where juvenile court judges have found "waiver by inaction."⁹¹ For example, in *In re Christopher T.*, when a juvenile defendant showed up for his adjudication hearing without counsel, the court inferred that he had waived his right to counsel and, as a result, proceeded directly to adjudication.⁹² This trend of finding "waiver by inaction" occurs even in states with detailed statutes that identify and limit circumstances under which a judge may accept that a juvenile defendant has waived his right to counsel.⁹³

There are many cases that indicate juvenile court judges have a tendency to infer juvenile defendants' waiver of their right to counsel "by inaction." However, there has been a trend among appellate courts to reverse trial decisions based on an abuse of discretion by the trial court judge in finding that the juvenile defendant had implicitly waived his right to counsel.⁹⁴ This trend is hopeful and it serves to reinforce the fundamental principle of *Gault* that none of the due process protections it mandated should undermine the beneficial qualities of juvenile court proceedings.⁹⁵ Taking this statement at face value, one may infer that the *Gault* Court sought to strike a balance between strict application of due process protections in *all* juvenile settings against the preservation of judicial discretion to be used in situations that may not warrant such a rigid

⁸⁹ Berkheiser, *supra* note 43, at 611.

⁹⁰ *Id.*

⁹¹ *In re Christopher T.*, 740 A.2d 69, 71 (Md. Ct. Spec. App. 1999).

⁹² *Id.*

⁹³ Berkheiser, *supra* note 42, at 617. Berkheiser specifically focuses her analysis on Florida, which has one of the most specific waiver rules of any state: "Rule 8.165 of the Florida Rules of Juvenile Procedure requires the court to advise the child of his or her right to counsel and to appoint counsel 'unless waived by the child at each stage of the proceedings.'" *Id.* at 618. However, Florida has one of the highest rates of appellate decisions overturning juvenile waiver of right to counsel based on noncompliance with state statute. *Id.* at 618, 661-60.

⁹⁴ See *McBride v. Jacobs*, 247 F.2d 595, 596 (D.C. Cir. 1957) (holding that, where the court had informed the juvenile defendant's mother of his right to counsel but failed to notify the defendant himself, any waiver, by parent or child, must be "an intelligent, knowing act"); *Shioutakon v. District of Columbia*, 236 F.2d 666, 670, 670 n.26 (D.C. Cir. 1956) (holding that "where the [right to counsel] exists, the court must be assured that any waiver of it is intelligent and competent," as determined by the child's "age, education, and information, and all other pertinent facts").

⁹⁵ *In re Gault*, 387 U.S. 1, 25-27 (1967).

application of the due process doctrine.

V. IMPLICATIONS OF EXTENDING STRICT WAIVER RULES TO THE JUVENILE SYSTEM

As the previous section illustrated, courts throughout the country, including those in Connecticut, are relatively unanimous in their decisions interpreting an attorney's failure to object as a waiver of the right to raise the claim in later proceedings. This interpretation of attorney silence as waiver holds true not just in adult adjudicatory settings, but in the juvenile justice system, as well. So I pose the question: *Should it?*

A. Recommendations for Connecticut

It is clear that the divide in opinion regarding a strict application of waiver to the juvenile justice system may have an impact on the system's procedural flexibility and general attainment of its goals. For example, as applied to *In re Fabian A.*, if we are to strictly adhere to the adult justice system's notions of waiver, Fabian A.'s attorney would be deemed to have waived his client's right to an appeal based on the fact that he failed to object to the judge's insufficient canvass. As a result his client's plea was not made knowingly or voluntarily. However, if we are to adopt a more lenient interpretation of waiver in the juvenile justice system (as would be in line with the system's generally flexible character), one might argue that in order for a minor to waive his right to an appeal, the waiver must be explicit, rather than a mere failure to object. In this case, Fabian A.'s right to an appeal would be preserved, regardless of the fact that his attorney failed to object to the deficient canvass.

So what is Connecticut to do? Unfortunately, "neither the presumption against waiver nor the enactment of detailed statutory waiver procedures have been effective constraints against juvenile court judges' continued exercise of their 'discretion' to deny juveniles their right to counsel."⁹⁶ This statement illustrates the catch-22 that lies at the heart of the juvenile justice system: on one hand, judicial discretion preserves the flexibility and individualized attention upon which the juvenile justice system was founded; on the other hand, judicial discretion allows a judge to ignore statutory due process requirements, such as right to counsel, under the guise of addressing the child's best interest. The latter instance is quite distressing. For that reason, I would recommend that Connecticut not only pass a statute that implements a strict no-waiver policy, unless the waiver is explicit and made in writing, but also go a step further and include in it the threat of sanctions against any judge that violates the no-waiver policy.

⁹⁶ Berkheiser, *supra* note 42, at 611.

Though such a rigid, and arguably severe, rule goes against juvenile justice notions of flexibility and discretion, such a statute may counteract the possible abuse of discretion by juvenile court when deciding whether to preserve a defendant's claim by placing judges who abuse their discretion at risk of sanctions.

B. Implications for In re Fabian A.

The United States Supreme Court and legal scholars alike have long recognized that “the right to counsel is fundamental to the exercise of other procedural rights by those accused of criminal acts. As early as 1932, the Court stated that without the ‘guiding hand of counsel,’ an accused’s ‘right to be heard would be, in many cases, of little avail.’”⁹⁷ Unfortunately, as seen in the case of Fabian A., counsel is not always adequate or effective in advocating and protecting a juvenile defendant’s best interest and fundamental rights. As I recommended in the previous section, Connecticut juvenile courts should move away from the national state court trend of rigidly interpreting counsel’s failure to object as a waiver, and instead allow for judicial discretion in instances where counsel’s failure to object carries with it the potential for the juvenile defendant’s deprivation of liberty after entering a plea that is neither knowing nor voluntary.⁹⁸ If Connecticut courts were to afford juvenile judges greater discretion, there is a chance that a court hearing Fabian A.’s case on appeal may allow the juvenile defendant to pursue the claim that his guilty plea was made neither knowingly nor voluntarily. However, if the court disallows Fabian A. to pursue his claim (even in a judicial system that requires explicit waiver rather than a mere failure to object), he may be able to pursue an alternative course of action and bring a claim against his attorney for ineffective counsel. Allowing such a claim would not only encourage juvenile defense attorneys to be more attentive during plea canvasses (especially in the case of Fabian A., where defense counsel even failed to object to the canvass after the *prosecuting* attorney raised the issue of insufficiency), but may also allow juvenile defendants who would otherwise not be able to appeal an extension of commitment to do so.

VI. CONCLUSION

The history of the juvenile justice system is defined by dueling opinions as to how juvenile defendants should be treated. At its inception, the “juvenile court replicated the historical *parens patriae* practice of the courts of chancery in England and the United States to exercise jurisdiction

⁹⁷ *Id.* at 580 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

⁹⁸ A possible repercussion for judges who abuse this discretion could be sanctions.

for the protection of the unfortunate child[,]” focusing on benevolence and intervention as opposed to punishment and retribution.⁹⁹ Because their focus was on a child’s best interest, rather than merely locking him or her up and throwing away the key, early juvenile courts saw the due process procedural protections inherent to adult courts as unnecessary in their newly-established judicial sphere.¹⁰⁰ Judicial reformers challenged the view that, because the juvenile court was a benevolent parent, focused on serving the juvenile defendant’s best interest. They pointed out that, in reality, the juvenile court system afforded children “fewer rights under the law, based on the children’s presumed lack of capacity to exercise good judgment.”¹⁰¹ As such, the juvenile court system began a procedural movement increasingly similar to its adult counterpart, specifically by adapting due process protections inherent in the adult system.

The divide between the adult and juvenile court systems has been gradually narrowing as juvenile courts continue to adapt procedural protections and procedural rigidity. An examination of courts across the country shows a clear trend among juvenile judges to rigidly apply adult procedure regarding failure to object and implicit waiver. This trend is incongruous with the fundamental premises upon which the juvenile system is based—flexibility and fundamental fairness. As a result, juvenile defendants—whom the courts have identified as not only unique from their adult counterparts but who may also lack the capacity and maturity to fully understand their legal situation or consequences—are often deprived of many rights and opportunities a less rigid and more discretionary system might—and should—afford them.

By analyzing the history of the juvenile justice system and tracking court trends regarding due process and waiver, this Note attempted to address the issues raised by the Connecticut Superior Court in the case of *In re Fabian A.* While it is, as of now, unclear which way the court will rule on the basis of waiver, the decision either way will be a watershed decision regarding Connecticut courts’ stance on the rigid interpretation of absence of objection as constituting waiver.

⁹⁹ *Id.* at 586 (internal quotation marks omitted).

¹⁰⁰ *Id.* at 587.

¹⁰¹ *Id.* at 623.

