

# NOTES

## SECURE COMMUNITIES: BURDENING LOCAL LAW ENFORCEMENT AND UNDERMINING THE U VISA

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## INTRODUCTION

The Department of Homeland Security (DHS) claims it is making the community safer by targeting and removing dangerous criminal immigrants.<sup>1</sup> But Isaura Garcia, an immigrant living in Los Angeles, was neither dangerous nor a criminal. In fact, all she did was call 911 in February 2011 out of desperation to report domestic abuse by her boyfriend.<sup>2</sup> As is typically the case in domestic disputes, the police arrested both parties and fingerprinted Isaura according to procedure.<sup>3</sup> Because of the Secure Communities program, immigration officials obtained these fingerprints and flagged Isaura, who was undocumented, for removal.<sup>4</sup> Now the question for Isaura's friends and neighbors—many of whom are likely in a similar situation—is whether it is better to endure violent abuse or call for help and face deportation.

Illegal immigration is one of the most prominent issues plaguing the political and legal spheres. DHS estimates that as of January 2011, approximately 11.5 million undocumented immigrants resided in the United States.<sup>5</sup> Just under 60 percent arrived before January 1, 2000, and 29 percent arrived between 2000 and 2004.<sup>6</sup> Although government officials nationwide are quick to make their opinions known, and to create and institute programs intended to deal with illegal immigration, the wisdom of these programs is unclear.

Secure Communities is one such program. In 2008, DHS created Secure Communities as a tool to focus the limited resources of U.S. Immigration and Customs Enforcement (ICE) on identifying and removing the most dangerous undocumented immigrants.<sup>7</sup>

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1. See *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/) (last visited Mar. 31, 2013).

2. Editorial, *Secure Communities Program: A Flawed Deportation Tool*, L.A. TIMES (May 23, 2011), <http://articles.latimes.com/2011/may/23/opinion/la-ed-secure-20110523>.

3. *Id.*

4. *Id.*

5. MICHAEL HOEFER ET AL., DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2011, at 1, 3 (2012), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2011.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf).

6. *Id.* at 3.

7. See *Secure Communities*, *supra* note 1, at "The Basics."

Although the program appears to be a legitimate use of limited resources, its actual implementation has expanded far beyond the program's purported purpose. More importantly, the program has had the indirect effect of undermining the U Nonimmigrant Visa (U Visa) by discouraging immigrant interactions with law enforcement. One of the primary purposes of the U Visa statute is to assist local law enforcement in investigating crimes by encouraging the cooperation of victims. Secure Communities has blurred the line between local law enforcement—whose purpose is to protect the community—and ICE. The ultimate consequence of this blurred distinction is that many undocumented immigrant victims, who had been encouraged by the passage of the U Visa to report crimes and cooperate with investigations, have a renewed fear of interacting with the police. Although Secure Communities has made ICE's job easier, it has made the jobs of local law enforcement agencies, particularly in areas with large immigrant communities, significantly more difficult.

Secure Communities cannot continue in its current form. DHS created the program in a manner that extends its reach well beyond its alleged purpose and severely disadvantages local law enforcement. As implemented, this program undermines the U Visa statute and requires modification. If the goal of Secure Communities is truly to identify and remove serious criminals, then DHS should reform the program to accomplish that specific goal. As it appears DHS has no intention of doing so, this Note takes the position that Congress should act, if for no other reason than to prevent ICE from undermining Congress's own legislation.

Part I will detail the Secure Communities program and discuss the divergence between the program's actual implementation and its purported purpose. Part II will describe the U Visa statute and the reasons why Congress created it. Of particular importance will be the relationship that the U Visa encourages between local law enforcement and immigrant populations. Part III will analyze the problematic interaction between Secure Communities and the U Visa. Finally, this Note will conclude by insisting that the best solution is to modify Secure Communities to require a conviction before releasing an immigrant's fingerprints.

## I. SECURE COMMUNITIES

Drawing its authority from a 2002 congressional mandate instructing the Federal Bureau of Investigation (FBI) to share information with ICE,<sup>8</sup> and from several immigration laws regarding the deportability of criminal aliens,<sup>9</sup> DHS initiated in 2008 an information sharing program between the FBI and ICE.<sup>10</sup> The program, called Secure Communities, facilitates the identification and removal of illegal aliens.<sup>11</sup> Starting with only 14 jurisdictions, the program has expanded to over 3000 jurisdictions.<sup>12</sup> The eventual goal was to expand the program nationwide.<sup>13</sup>

*A. Purported Purpose*

ICE receives annual appropriations from Congress that fall drastically short of the amount necessary to apprehend and remove the entire population of undocumented immigrants.<sup>14</sup> For the 2012 fiscal year, the U.S. Senate Committee on Appropriations approved legislation that would grant ICE approximately \$5.8 billion.<sup>15</sup> Although this is \$34 million more than the appropriation for 2011,<sup>16</sup> it is nowhere near the amount necessary for mass deportation. The estimated cost of apprehending, legally processing, and removing the entire undocumented population would be approximately \$200 billion over five years.<sup>17</sup> Admittedly, the government does not ap-

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8. See 8 U.S.C. § 1722(a)(2) (2006).

9. See *id.* § 1226(c)-(d) (discussing the identification and detention of criminal aliens); *id.* § 1227(a)(2) (designating criminal aliens as deportable); *id.* § 1228(a)(3) (instructing the expedited removal of aliens convicted of committing aggravated felonies).

10. See *Secure Communities*, *supra* note 1.

11. See *id.*

12. *Id.* at “The Basics.”

13. *Id.*

14. See *id.*

15. Press Release, U.S. Senate Comm. on Appropriations, Summary: Fiscal Year 2012 Homeland Security Appropriations 5 (Sept. 6, 2011), available at <http://appropriations.senate.gov/news.cfm?method=news.view&id=657ba3e6-b6da-46e3-80f3-4865726d8889>.

16. *Id.*

17. MARSHALL FITZ ET AL., CTR. FOR AM. PROGRESS, THE COSTS OF MASS DEPORTATION: IMPRACTICAL, EXPENSIVE, AND INEFFECTIVE, at i (2010), available at [http://www.americanprogress.org/wp-content/uploads/issues/2010/03/pdf/cost\\_of\\_deportation.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2010/03/pdf/cost_of_deportation.pdf).

portion all of these duties to ICE, but even the cost of apprehension and detention—the tasks of ICE—would be approximately \$187 billion.<sup>18</sup>

Because of its limited resources, ICE purports to prioritize the removal of criminals and those that pose a threat to public safety.<sup>19</sup> ICE created Secure Communities in order to carry out this prioritization.<sup>20</sup> Its three main objectives are to

- (1) identify aliens in federal, state, and local custody charged with or convicted of serious criminal offenses who are subject to removal and at large aliens convicted of a serious criminal offense who are subject to removal;
- (2) prioritize enforcement actions to ensure apprehension and removal of aliens convicted of serious criminal offenses; and
- (3) transform criminal alien enforcement processes and systems to achieve lasting results.<sup>21</sup>

### *B. The Procedure*

Secure Communities makes use of an already-existing framework of information sharing between local law enforcement and the federal government. After fingerprinting individuals booked into county and city jails, local jurisdictions have traditionally released the fingerprints to the FBI to check the individuals' criminal records.<sup>22</sup> Under Secure Communities, the FBI automatically sends the fingerprints to ICE.<sup>23</sup> ICE checks the fingerprints against its immigration databases to see if the individuals are unlawfully in the United States or if they are otherwise removable based on a criminal conviction.<sup>24</sup>

In order to prioritize the removal of serious criminals, Secure Communities identifies criminal charges as fitting into one of three

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18. *Id.*

19. *See Secure Communities, supra* note 1.

20. *Id.*

21. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, SECURE COMMUNITIES STANDARD OPERATING PROCEDURES 3 [hereinafter STANDARD OPERATING PROCEDURES], *available at* [http://www.epic.org/privacy/secure\\_communities/securecommunitiesops93009.pdf](http://www.epic.org/privacy/secure_communities/securecommunitiesops93009.pdf).

22. *See Secure Communities, supra* note 1.

23. *Id.*

24. *Id.* Even aliens who are lawfully in the United States are deportable if they are convicted of certain types of crimes. *See* 8 U.S.C. § 1227(a)(2)(A)(i)-(iii) (2006).

levels, based on the severity of the crime.<sup>25</sup> Level 1 offenses are the most serious. Secure Communities purports to prioritize only the removal of aliens with Level 1 charges or convictions.<sup>26</sup> This category includes national security violations, homicide, sexual assault and other sex offenses, hit-and-run offenses involving injury or death, robbery, aggravated assault, resisting an officer, cruelty toward child or spouse, and drug offenses carrying a sentence of over a year.<sup>27</sup>

Although the program does not prioritize lesser offenses, it nonetheless classifies them for identification purposes into either Level 2 or Level 3. Level 2 offenses are largely property crimes and include arson, burglary, larceny, fraud, smuggling, embezzlement, and traffic offenses.<sup>28</sup> All other offenses, primarily misdemeanors, are Level 3, including gambling, extortion, property damage, bribery, violations of election laws, public order crimes, and obstructing the police.<sup>29</sup> Secure Communities classifies immigration offenses as Level 3.<sup>30</sup>

Because the FBI automatically releases information to ICE, local jurisdictions play no part in the process until ICE targets an immigrant for removal. ICE will issue an Immigration Detainer to the local law enforcement office that booked the immigrant.<sup>31</sup> If the jurisdiction has already released the alien before ICE issues the detainer, law enforcement should provide ICE with information relating to the individual's identification and location.<sup>32</sup>

Local law enforcement cooperation is essential to Secure Communities. After receiving a detainer order, the local law enforcement office must hold the immigrant for up to forty-eight hours, excluding weekends and holidays, to allow ICE to retrieve the alien.<sup>33</sup> After forty-eight hours, the detainer automatically expires, and if ICE does not take custody of the immigrant, the law requires

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25. See STANDARD OPERATING PROCEDURES, *supra* note 21, at 9.

26. See *id.* at 5 ("When ICE determines an alien has been charged or convicted of a Level 1 offense that could result in removal ... ICE will file an Immigration Detainer.").

27. *Id.* at 5, 9.

28. See *id.*

29. *Id.*

30. See *id.* at 9.

31. *Id.* at 5.

32. *Id.*

33. 8 C.F.R. § 287.7(d) (2012).

that law enforcement release the alien.<sup>34</sup> Failure to do so subjects the agency to a potential civil rights suit for violation of the immigrant's due process rights.<sup>35</sup> DHS also instructs law enforcement agencies to allow ICE agents access to detainees to conduct interviews and serve documents, as well as to assist ICE in acquiring information about the immigrant.<sup>36</sup> Even beyond procedural involvement, DHS encourages law enforcement offices to promote Secure Communities by including it in community policing and by disseminating information about the program.<sup>37</sup>

### *C. Reality and Controversy*

On paper, Secure Communities appears to limit detention efforts to the most serious offenders. Likewise, ICE claims to prioritize the removal of "individuals who present the most significant threats to public safety" based on criminal history and the severity of their crime.<sup>38</sup>

The data, however, tells a different story. Since the creation of the program in October 2008, ICE has removed approximately 220,322 aliens from the United States based on the fingerprint submissions it has received through the Secure Communities program.<sup>39</sup> Only 61,348 of those were charged with or convicted of Level 1 crimes.<sup>40</sup> Of the remaining 158,974 aliens removed, 54,258 were noncriminals

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34. *See id.*

35. *See Rivas v. Martin*, 781 F. Supp. 2d 775, 780 (N.D. Ind. 2011) (finding that the plaintiff "ha[d] pleaded sufficient allegations of prolonged detention in violation of her right to due process"); *see also Immigrants Challenge Use of Detainers*, LITIG. CLEARINGHOUSE NEWSL. (Am. Immigrant Law Found. Legal Action Ctr., Washington, D.C.), Oct. 2, 2009, at 1, 2, available at [http://www.legalactioncenter.org/sites/default/files/docs/litclr\\_newsletter\\_100209.pdf](http://www.legalactioncenter.org/sites/default/files/docs/litclr_newsletter_100209.pdf) (discussing a case in which a deported immigrant reached a settlement with the City of New York for unlawfully detaining him past forty-eight hours on two separate occasions).

36. *See* STANDARD OPERATING PROCEDURES, *supra* note 21, at 6.

37. *Id.*

38. *See Secure Communities*, *supra* note 1.

39. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, SECURE COMMUNITIES IDENT/IAFIS INTEROPERABILITY STATISTICS: MONTHLY STATISTICS THROUGH AUGUST 31, 2012, at 2 (2012) [hereinafter ICE STATISTICS], available at [http://www.ice.gov/doclib/foia/sc-stats/nationwide\\_interop\\_stats-fy2012-to-date.pdf](http://www.ice.gov/doclib/foia/sc-stats/nationwide_interop_stats-fy2012-to-date.pdf).

40. *Id.*

—they were not charged with or convicted of either Level 1, Level 2, or Level 3 crimes.<sup>41</sup>

These results are even more disturbing when observed on a county-by-county basis. The percent of noncriminals removed through Secure Communities is strikingly high in certain counties. For example, since DHS implemented the program in Jefferson Parish, Louisiana, in November 2009,<sup>42</sup> 67 percent of aliens removed have been noncriminals.<sup>43</sup> In Prince George's County, Maryland, just outside the District of Columbia, the percentage of noncriminal removals is as high as 60 percent.<sup>44</sup> With a larger number of total immigrant deportations than either of the former, Miami-Dade, Florida registers 47 percent noncriminal removals.<sup>45</sup> Of the 11,774 immigrants deported from Los Angeles County between August 2009 and January 2011, nearly half were either noncriminals or had committed only misdemeanors.<sup>46</sup> The American Immigration Lawyers Association (AILA) recently released a report documenting 127 cases from twenty-four states in which police detained immigrants for minor offenses and those immigrants ended up in removal proceedings.<sup>47</sup> In forty-one of those cases, local law enforcement never pursued any charges against the immigrants.<sup>48</sup>

With data like this, it is little wonder that, since its implementation, Secure Communities has been the subject of significant controversy. Law enforcement, members of Congress, crime victim advocates, and community leaders have criticized the program for greatly exceeding its stated goal of targeting dangerous criminals.<sup>49</sup>

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41. *Id.*

42. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ACTIVATED JURISDICTIONS 9 (2012) [hereinafter ICE JURISDICTIONS], available at <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated2.pdf>.

43. ICE STATISTICS, *supra* note 39, at 22.

44. *Id.* at 23.

45. *Id.* at 12. Other notable examples include Webb County, Texas (48 percent), Palm Beach (53 percent), Orange County (49 percent), and Broward County, Florida (50 percent). *Id.* at 11, 12, 47.

46. Editorial, *supra* note 2.

47. AM. IMMIGRATION LAWYERS ASS'N, IMMIGRATION ENFORCEMENT OFF TARGET: MINOR OFFENSES WITH MAJOR CONSEQUENCES 3 (2011), available at <http://www.aila.org/content/fileviewer.aspx?docid=36646&linkid=236762>.

48. *See id.* at 5-7.

49. *See* AM.'S VOICE EDUC. FUND, PUBLIC SAFETY ON ICE: HOW DO YOU POLICE A COMMUNITY THAT WON'T TALK TO YOU? 1 (2011), [http://amvoice.3cdn.net/73093e2eeae748d60d\\_bdm6iy3u2.pdf](http://amvoice.3cdn.net/73093e2eeae748d60d_bdm6iy3u2.pdf).

Police in cities with large immigrant populations are concerned by stories of ICE targeting victims and other noncriminals for removal, and they fear that the program will deter immigrants from reporting crimes or providing useful information.<sup>50</sup> Chief of Police Brian Kyes of Chelsea, Massachusetts, for example, believes that Secure Communities has created “mistrust of local police, discouraged people from reporting crime, and made everyone more vulnerable to crime by breaking down hard earned relationships.”<sup>51</sup>

Despite the controversy, Secure Communities has continued to expand. DHS launched the program in 2008 with only fourteen active jurisdictions.<sup>52</sup> Since then, the number of active Secure Communities jurisdictions has expanded exponentially. Generally, Secure Communities jurisdictions are congruent with local police jurisdictions and normally represent a specific county within a state. As of January 22, 2013, DHS reached nationwide activation of all U.S. jurisdictions under the Secure Communities program,<sup>53</sup> meaning that all 3181 U.S. jurisdictions are currently active.<sup>54</sup>

Once thought to be voluntary, Secure Communities appears now to be a mandatory program. ICE recently declared that, despite some confusion based on its prior statements, state and local jurisdictions cannot now, nor could they ever, opt out of the program.<sup>55</sup> Local jurisdictions can choose not to receive the identifications that result from the processing of the fingerprints through ICE’s system, but this has no effect on whether the local ICE office will take enforcement action based on those results.<sup>56</sup> Secure Communities can, and will, continue to function regardless of any disapproval by the states or the public.

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50. Editorial, *supra* note 2.

51. Press Release, ACLU of Mass., Gov. Patrick Rejects Federal Deportation Program in Massachusetts (June 6, 2011), *available at* [http://aclum.org/news\\_6.6.11](http://aclum.org/news_6.6.11).

52. *Secure Communities*, *supra* note 1, at “The Basics.”

53. ICE JURISDICTIONS, *supra* note 42.

54. *Id.*

55. *Secure Communities: Get the Facts*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, [http://www.ice.gov/secure\\_communities/get-the-facts.htm](http://www.ice.gov/secure_communities/get-the-facts.htm) (last visited Mar. 31, 2013); *see also infra* Part III.C.

56. *Secure Communities*, *supra* note 1.

## II. THE U VISA

Like Secure Communities, the U Visa is an immigration program aimed at promoting public safety, but it uses a very different approach. The U Visa<sup>57</sup> is a form of temporary legal status granted to qualifying immigrant victims of crime.<sup>58</sup> Congress created this visa through the passage of the Battered Immigrant Women Protection Act (BIWPA) as part of the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA).<sup>59</sup> Six years earlier, Congress had passed the Violence Against Women Act of 1994 (VAWA),<sup>60</sup> which granted abused spouses of U.S. citizens or permanent residents an avenue to obtain immigration benefits without having to rely on their abusive spouse.<sup>61</sup> In 2000, however, Congress recognized the

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57. Its name comes from the corresponding section of the United States Code. *See* 8 U.S.C. § 1101(a)(15)(U) (2006).

58. *See* Tahja L. Jensen, *U Visa "Certification": Overcoming the Local Hurdle in Response to a Federal Statute*, 45 IDAHO L. REV. 691, 691-92 & n.2 (2009); *see also* 8 U.S.C. § 1101(a)(15)(U) (enumerating the qualifications immigrant crime victims must meet to gain temporary legal status). This temporary status is not exclusively available to undocumented immigrants. *See id.* (noting that an "alien" who meets the qualifications can file a petition for status); *see also id.* § 1101(a)(3) (defining "alien" as anyone who is not a citizen or national, regardless of her immigration status). The temporary nature of the legal status provided by the U Visa, however, makes it of no benefit to immigrants who already have permanent residency. *See id.* § 1101(a)(20). Because U Visas have the possibility of leading to legal permanent residency, Victims of Trafficking and Violence Protection Act, Pub. L. No. 106-386, § 1513(a)(2)(C), 114 Stat. 1464, 1534 (2000), it is conceivable that an alien with some other form of temporary legal status may seek out a U Visa in an effort to extend his or her stay. The most likely beneficiary of the U Visa, however, remains an individual who does not currently have legal status.

59. §§ 1501-1513, 114 Stat. at 1518-37 (codified in scattered sections of 8 U.S.C., 18 U.S.C., 20 U.S.C., 22 U.S.C., 27 U.S.C., 28 U.S.C., 42 U.S.C., and 44 U.S.C.). Though Congress passed this Act in 2000, United States Citizenship and Immigration Services (USCIS) did not issue regulations for the U Visa until 2007. *New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status*, 72 Fed. Reg. 53,014 (Sept. 17, 2007) (codified at 8 C.F.R. pts. 103, 212, 214, 248, 274a, and 299). It was not until October 17, 2007 that USCIS began adjudicating U Visa petitions. *See USCIS Update: U Nonimmigrant Interim Relief Recipients Reminded to Apply for U Visa*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Dec. 14, 2009), <http://www.uscis.gov/news> (navigate to "December 2009"; then follow "USCIS Update: U Nonimmigrant Interim Relief Recipients Reminded to Apply for U Visa" hyperlink) (last updated Dec. 14, 2009).

60. Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., and 42 U.S.C.).

61. *Fact Sheet: USCIS Issues Guidance for Approved Violence Against Women Act (VAWA) Self-Petitioners*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Apr. 11, 2008), <http://www.uscis.gov/>

limitations of VAWA and sought to pass legislation that would have a broader effect.<sup>62</sup> Recognizing that immigrants were particularly vulnerable to violent-crime victimization,<sup>63</sup> Congress asserted that all victims should be able to report crimes and participate fully in the investigation and prosecution of those crimes without fear of deportation.<sup>64</sup> In an effort both to protect victims and to encourage reporting of crimes, BIWPA created a new nonimmigrant visa classification that gave immigrant victims of crime the possibility of acquiring legal status if they cooperate with the criminal investigation.<sup>65</sup>

Although federal law incorporates a long list of qualifying crimes that create U Visa eligibility for victims,<sup>66</sup> Congress sought specifically to address concerns about domestic violence.<sup>67</sup> A closer look at the list of qualifying crimes reveals that the majority are crimes often associated with domestic violence, including rape and sexual assault.<sup>68</sup> Although not exclusively used for domestic violence victims, the U Visa is one of the most valuable assets immigrant domestic violence victims have.<sup>69</sup>

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news (navigate to “April 2008”; then follow “Fact Sheet: USCIS Issues Guidance For Approved Violence Against Women Act (VAWA) Self-Petitioners” hyperlink) (last updated Nov. 14, 2011).

62. Victims of Trafficking and Violence Protection Act § 1502(a)(3) (“[T]here are several groups of battered immigrant women and children who do not have access to the immigration protections of the Violence Against Women Act of 1994 which means that their abusers are virtually immune from prosecution because their victims can be deported as a result of action by their abusers.”).

63. *Id.* § 1513(a)(1)(A).

64. *Id.* §§ 1502(a)(2), 1513(a)(1)(B).

65. *Id.* § 1513(a)(2)(A)-(B).

66. *See* 8 U.S.C. § 1101(a)(15)(U)(iii) (2006).

67. *See* Victims of Trafficking and Violence Protection Act § 1502(b)(2) (stating that one of the purposes of the Act was “to offer protection against domestic violence occurring in family and intimate relationships”).

68. *See* 8 U.S.C. § 1101(a)(15)(U)(iii).

69. Although U Visas can be obtained for victims of other qualifying crimes, advocates most often pursue them for victims of domestic violence. *Compare, e.g.,* Lauren Smiley, *U-Visa: Illegal Immigrants Become Legal Residents via Crime Victimization*, SFWEEKLY (Mar. 16, 2011), <http://www.sfweekly.com/2011-03-16/news/u-1-visa-illegal-immigrant-crime-victim-lauren-smiley/> (telling the story of an immigrant receiving a U Visa after he was robbed at gunpoint), *with* BATTERED WOMEN’S JUSTICE PROJECT, ASSISTING IMMIGRANT VICTIMS OF DOMESTIC VIOLENCE: ADVOCATE’S GUIDE 6-7, available at <http://www.vaw.umn.edu/documents/assistingimmigrantdv/assistingimmigrantdv.pdf> (discussing U Visas as an option for domestic violence victims).

*A. Dual Purpose*

When Congress passed BIWPA, it made its intent perfectly clear:

The purpose of this section is to create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes ... committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interest of the United States.<sup>70</sup>

Congress believed that “[t]his visa [would] encourage law enforcement officials to better serve immigrant [communities] and to prosecute crimes committed against aliens.”<sup>71</sup>

Congress recognized the unique circumstances of immigrant victims of crime and the important concerns they face when attempting to report violence.<sup>72</sup> Undocumented immigrants live most of their lives in constant fear of deportation and are thus placed in the unique situation of feeling unable to use society’s resources—particularly law enforcement—to protect themselves from acts of violence.<sup>73</sup> With many immigrant victims of violence unable to obtain the immigration protections of VAWA,<sup>74</sup> Congress created this new broadly applicable nonimmigrant visa. Its goal was the protection of “certain crime victims including victims of crimes against women,”<sup>75</sup> regardless of their immigration status or that of the perpetrator.

Beyond merely protecting victims, Congress wanted to strengthen the ability of law enforcement to investigate and prosecute crimes.<sup>76</sup> Immigrant victims are often silenced by their fear of deportation, their distrust of law enforcement, and their misunderstanding of the

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70. Victims of Trafficking and Violence Protection Act § 1513(a)(2)(A).

71. *Id.*

72. *See id.* § 1502(a)(2).

73. *See* Jamie R. Abrams, *The Dual Purposes of the U Visa Thwarted in a Legislative Duel*, 29 ST. LOUIS U. PUB. L. REV. 373, 379 (2010).

74. Victims of Trafficking and Violence Protection Act § 1502(a)(3).

75. *Id.* § 1513.

76. *Id.* § 1513(a)(2)(A).

criminal justice system.<sup>77</sup> Congress hoped that “[c]reating a new nonimmigrant visa classification [would] facilitate the reporting of crimes to law enforcement officials by ... victimized ... aliens who are not in lawful immigration status.”<sup>78</sup>

### *B. Elements the Victim Must Show*

In order to obtain a U Visa, an immigrant needs to prove (1) that she was a victim of a qualifying crime that occurred in the United States or its territories; (2) that she possesses information about the crime; (3) that she has been or will be helpful in the investigation; and (4) that she suffered substantially as a result of the crime.<sup>79</sup> Only victims of certain crimes, however, qualify for legal status. Qualifying crimes include, but are not limited to “rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; [or] sexual exploitation.”<sup>80</sup> In addition to these specifically mentioned crimes, the statute also includes attempts and conspiracies to commit a qualifying crime and allows for jurisdictional differences in criminal definitions.<sup>81</sup>

As mentioned, one of the dual purposes of the U Visa is to promote public safety by encouraging cooperation with law enforcement.<sup>82</sup> Setting aside the humanitarian interest the government has in protecting victims of crime, extending the possibility of legal

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77. See Abrams, *supra* note 73, at 379. Distrust of the justice system may have little to do with immigrants’ experiences in the United States and may stem from encounters with police in their home country. *Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws: J. Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec. & Int’l Law and the Subcomm. on the Constitution, Civil Rights & Civil Liberties of the Comm. on the Judiciary H.R.*, 111th Cong. 77 (2009) [hereinafter *Immigration Hearing*] (statement of Professor David A. Harris, University of Pittsburgh School of Law), available at [http://judiciary.house.gov/hearings/printers/111th/111-19\\_48439.pdf](http://judiciary.house.gov/hearings/printers/111th/111-19_48439.pdf).

78. Victims of Trafficking and Violence Protection Act § 1513(a)(2)(B).

79. 8 U.S.C. § 1101(a)(15)(U)(i) (2006); Alien Victims of Certain Qualifying Criminal Activity, 8 C.F.R. § 214.14(b) (2012).

80. 8 U.S.C. § 1101(a)(15)(U)(iii). Additional qualifying crimes include “female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; [or] perjury.” *Id.*

81. *Id.*

82. See *supra* Part II.A.

status to victims has the practical effect of eliminating one possible deterrent to cooperating with police and ultimately leads to a greater likelihood that the police will apprehend the perpetrator. In order to be of assistance to the police, the victim must have beneficial information about the crime. Thus, the second requirement for a U Visa is that the immigrant must “possess[] credible and reliable information establishing that he or she has knowledge of the details concerning the qualifying criminal activity upon which his or her petition is based.”<sup>83</sup> These specific facts about the crime must be sufficient to cause law enforcement to determine that the immigrant has or will provide assistance in the investigation.<sup>84</sup>

In conjunction with possessing information, the immigrant must be willing to use that information in order to assist with the investigation or prosecution of the crime. The alien is required to prove that she “has been helpful, is being helpful, or is likely to be helpful.”<sup>85</sup> Although an immigrant can attempt to show helpfulness through her required personal statement,<sup>86</sup> the most important piece of evidence is a signed law enforcement certification. As part of her U Visa petition, every applicant must submit a Form I-918, Supplement B, “U Nonimmigrant Status Certification.” This form is often referred to as the “law enforcement certification” and must be signed by a certifying official from a certifying agency stating that the immigrant was a victim of a qualifying crime and that she was helpful.<sup>87</sup>

### *C. The Problem of Law Enforcement Certifications*

Since the enactment of the U Visa statute, one of the largest hurdles for immigrants to overcome has been obtaining the law enforcement certification.<sup>88</sup> Although submitting this certification is a requirement for consideration for the U Visa, “an agency’s

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83. 8 C.F.R. § 214.14(b)(2).

84. *Id.*

85. 8 U.S.C. § 1101(a)(15)(U)(i)(III); *see also* 8 C.F.R. § 214.14(b)(3).

86. 8 C.F.R. § 214.14(c)(2)(iii).

87. *Id.* § 214.14(c)(2)(i).

88. *See Jensen, supra* note 58, at 700-04 (describing the U Visa certification hurdle and reasons for it).

decision to provide a certification is entirely discretionary.”<sup>89</sup> In addition to the logistical difficulties encountered by immigrants and legal advocates,<sup>90</sup> even more prevalent is the ignorance and reluctance of law enforcement officials to sign U Visa certifications.<sup>91</sup> One common misunderstanding among potential certifiers is that signing a U Visa certification is essentially granting an immigrant legal status.<sup>92</sup> This is not the case. The law enforcement certification is simply a fact-based determination that the immigrant was a victim of a qualifying crime and that she has been helpful in the investigation.<sup>93</sup> The certifying official does not make the final decision as to whether an immigrant will receive a U Visa.

Another potential barrier is the reluctance to certify immigrants who are currently in removal proceedings,<sup>94</sup> under the belief that those individuals would be ineligible to receive a U Visa. Ultimately, because the law enforcement certification is only a fact-based determination of helpfulness, an immigrant’s removal status should be of no concern to the certifying official, as he or she does not make the ultimate eligibility decision. Although illegal entry into the United States and illegal presence are both grounds for inadmissibility under the Immigration and Nationality Act, and both would thus prevent an immigrant from obtaining a visa,<sup>95</sup> a U Visa applicant can apply for a waiver to set aside her inadmissibility

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89. U.S. CITIZENSHIP & IMMIGRATION SERVS., INSTRUCTIONS FOR I-918, SUPPLEMENT B, U NONIMMIGRANT STATUS CERTIFICATION 1 [hereinafter INSTRUCTIONS FOR I-918], *available at* <http://www.uscis.gov/files/form/i-918supbinstr.pdf>.

90. *See* Leslye E. Orloff et al., *Mandatory U-Visa Certification Unnecessarily Undermines the Purpose of the Violence Against Women Act’s Immigration Protections and Its “Any Credible Evidence” Rules—A Call for Consistency*, 11 GEO. J. GENDER & L. 619, 637 (2010) (noting that many enforcement agencies and prosecutors’ offices have failed to designate an official from the agency to sign U Visa certifications).

91. *See* Jensen, *supra* note 58, at 701, 704-07.

92. *See* Sejal Zota, *Law Enforcement’s Role in U Visa Certification*, UNC SCH. OF GOV’T IMMIGR. L. BULL., June 2009, at 1, 5, *available at* <http://sogpubs.unc.edu/electronicversions/pdfs/ilb02.pdf> (responding to this concern).

93. *See* INSTRUCTIONS FOR I-918, *supra* note 89, at 1.

94. SAMEERA HAFIZ ET AL., NAT’L IMMIGRANT VICTIMS’ ACCESS TO JUSTICE P’SHIP, TOOL KIT FOR LAW ENFORCEMENT USE OF THE U-VISA 43 (2010), *available at* <http://www.acasa.us/pdfs/U-Visa-Toolkit%20%20FINAL.pdf> (responding to this concern and clarifying continued eligibility).

95. *See* 8 U.S.C. § 1182(a)(7)(A)(i)(I)-(II) (2006).

grounds.<sup>96</sup> In fact, many immigrants with final orders of removal have applied for and obtained U Visas.<sup>97</sup>

Because of the difficulties faced with U Visa certifications, legal advocates have expended substantial effort to educate law enforcement and garner support for this avenue to legal status for immigrants.<sup>98</sup> Whatever strides they may have made through their efforts, however, have been undercut by Secure Communities, which makes law enforcement officers the adversaries of undocumented immigrants.

### III. SECURE COMMUNITIES UNDERMINES THE U VISA

Congress created the U Visa with two important goals in mind: to protect victims of crime and to strengthen law enforcement efforts.<sup>99</sup> Because of U.S. Citizenship and Immigration Services' (USCIS) delay in implementing the U Visa,<sup>100</sup> proponents of the U Visa had only about a year to convince the immigrant population that cooperating with the police was safe and beneficial before Secure Communities undermined their efforts. Although the purported intent of Secure Communities is not in opposition to the U Visa, its implementation is. Not only do its large-scale deportation schemes perpetuate fear throughout immigrant communities, but its use of local law enforcement as a deportation tool makes futile any attempt to convince immigrants that cooperation is safe.

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96. *Id.* § 1182(d)(14) ("The Secretary of Homeland Security shall determine whether a ground of inadmissibility exists with respect to a nonimmigrant [U Visa applicant]. The Secretary of Homeland Security, in the Attorney General's discretion, may waive [inadmissibility grounds] if the Secretary of Homeland Security considers it to be in the public or national interest to do so.").

97. See Anna Gorman, *A Race Between Protection and Deportation*, L.A. TIMES (July 13, 2009), <http://articles.latimes.com/2009/jul/13/local/me-u-visa13>.

98. See, e.g., HAFIZ ET AL., *supra* note 94; Stacey Ivie & Natalie Nanasi, *The U Visa: An Effective Resource for Law Enforcement*, FBI L. ENFORCEMENT BULL., Oct. 2009, at 1, 10, available at <http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2009-pdfs/october2009.pdf>.

99. See *supra* Part II.A.

100. See *supra* note 59.

*A. Secure Communities Creates a Chilling Effect*

The goal of law enforcement is to protect the community. To do so, it relies heavily on the cooperation of the public. Imagine a community with rampant crime but no victims or witnesses willing to report those crimes or cooperate with law enforcement. In this scenario, criminals would be free to commit crimes with little fear of repercussion. The most disturbing part of that scenario is that it is not far from reality in many immigrant communities where “[t]he fear of deportation has created a class of silent victims and undermined officers’ attempts at community-oriented policing among immigrant populations.”<sup>101</sup> Community policing emphasizes collaboration between law enforcement and the community to develop solutions to problems and increase trust in police.<sup>102</sup> Trust and collaboration cannot occur if members of the community believe that any interaction with police will lead to their deportation. If victims do not report crimes, then law enforcement officials cannot do their jobs effectively.

One of the purposes of the U Visa was to strengthen the ability of law enforcement to apprehend perpetrators by encouraging immigrant victims to cooperate in investigations.<sup>103</sup> Secure Communities has thwarted that purpose by blurring the distinction between local law enforcement and ICE officials. ICE may require local police who arrest an immigrant but decide not to charge him or her to detain the individual anyway for as long as five days.<sup>104</sup> Not only would the police be detaining the individual for immigration reasons but ICE officials would also question the individual regarding the immigration matter at the police station.<sup>105</sup> From the perspective of the immigrants, their interactions with the local police would ultimately result in their placement in removal proceedings. This is especially

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101. Ivie & Nanasi, *supra* note 98, at 10.

102. OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP’T OF JUSTICE, COMMUNITY POLICING DEFINED 5 (2012), *available at* <http://www.cops.usdoj.gov/Publications/e030917193-CP-Defined.pdf>.

103. *See supra* notes 76-78 and accompanying text.

104. By issuing an Immigration Detainer, ICE can require law enforcement to detain an immigrant for up to forty-eight hours. *See* 8 C.F.R. § 287.7 (2012). However, if it were a holiday weekend, the immigrant would be detained for five days.

105. Secure Communities requires local law enforcement to open up their facility to ICE for interviewing immigrants. *See* STANDARD OPERATING PROCEDURES, *supra* note 21, at 6.

true if the immigrant is transitioned directly from police custody to ICE custody, but it is also the case even when ICE detention occurs after the police have released the immigrant.

News of deportation spreads quickly through immigrant communities, and “when one victim or witness is deported ... fear proliferates.”<sup>106</sup> It is easy to see the harm this causes law enforcement. When immigrants associate the police with deportation, they begin to fear any interaction with them. As one expert testified before Congress in 2009, “They will fear that any encounter with the police—reporting a crime, telling a police officer about dangerous persons or events in the community, or even telling an officer that they themselves have become crime victims—will result in investigation of *them*, and will focus on their immigration status.”<sup>107</sup>

This will have an effect not only on undocumented immigrants but also on citizens and immigrants that have legal status. According to the Pew Hispanic Center, approximately 3.2 million American citizens live in households in which some people have legal status and others do not.<sup>108</sup> If they believe that interactions with the police will bring immigration consequences on a household member, even individuals with legal status may refuse to cooperate with the police.<sup>109</sup> This chilling effect created by Secure Communities makes opponents worry that it may be causing more harm than good. Ultimately, “[t]he heart of concern is that the program, conceived of as a method of targeting those who pose the greatest threat to our communities, is in fact having the opposite effect and compromising public safety by deterring witnesses to crime and others from working with law enforcement.”<sup>110</sup> When immigrants lose trust in the police because of their involvement with ICE, crime actually increases because residents stop cooperating and criminals remain at large.<sup>111</sup> Law enforcement is unable to promote public

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106. AM.’S VOICE EDUC. FUND, *supra* note 49, at 4.

107. *Immigration Hearing*, *supra* note 77, at 77.

108. *Id.*

109. *Id.*

110. Letter from Mylan L. Denerstein, Counsel to Andrew M. Cuomo, Governor of N.Y., to John Sandweg, Counselor to the Sec’y, U.S. Dep’t of Homeland Sec. (June 1, 2011) [hereinafter N.Y. Letter], available at <http://www.governor.ny.gov/assets/Secure%20Communities.pdf>.

111. See ROBERT KOULISH, IMMIGRATION AND AMERICAN DEMOCRACY: SUBVERTING THE RULE OF LAW 137 (2010).

safety effectively if an entire subset of the community is unwilling to cooperate: “How do we police a community that won’t talk to us?”<sup>112</sup>

### *B. Secure Communities Harms Victims*

One of the key motivations behind the U Visa legislation was a desire to protect victims of crime, particularly victims of domestic violence.<sup>113</sup> The only way to do so is to arrest and prosecute the perpetrators. This is particularly difficult with domestic violence because victims already report only about half of all domestic violence crimes that occur in the United States.<sup>114</sup> The rates are even lower when the victim is an immigrant. Lawful permanent residents report domestic violence only 43.1 percent of the time, and the rate drops to 20.8 percent for those with temporary legal status and 18.8 percent for those who are undocumented.<sup>115</sup> Congress created the U Visa to try to improve those statistics.<sup>116</sup>

The proponents of Secure Communities would argue that the program has no effect on the goal of the U Visa because it applies to only those individuals who law enforcement officials have arrested, not to victims.<sup>117</sup> The problem with this reasoning is that it ignores the reality of domestic violence cases: police often arrest either both parties or the wrong party.<sup>118</sup> If all that is necessary for ICE to run a person through the Secure Communities database is an arrest, then it makes no difference that the individual was in fact the victim rather than the abuser: “[O]fficers arrest victims of domestic

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112. Leah Rae, *Police Foundation Looks at Immigration Role for Local Cops: ‘Why and Why Not?’*, BEYOND BORDERS, LOHUD (Aug. 19, 2008, 3:34 PM), <http://immigration.lohudblogs.com/2008/08/19/police-foundation-looks-at-immigration-role-for-local-cops-why-and-why-not/> (quoting Ron Miller, chief of police for Topeka, Kansas).

113. See *supra* note 75 and accompanying text.

114. See AM.’S VOICE EDUC. FUND, *supra* note 49, at 6.

115. Nawal H. Ammar et al., *Calls to Police and Police Response: A Case Study of Latina Immigrant Women in the USA*, 7 INT’L J. POLICE SCI. & MGMT. 230, 236 (2005).

116. See *supra* notes 62-75 and accompanying text.

117. See *supra* Part I.B.

118. See Editorial, *supra* note 2; Shankar Vedantam, *No Opt-Out for Immigration Enforcement*, WASH. POST (Oct. 1, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/30/AR2010093007268.html>; Jordan Helton, *New Immigration Law in Washington Has Anti-Violence Groups Worried*, MEDILL ON THE HILL (Mar. 8, 2010), <http://news.medill.northwestern.edu/390/news.aspx?id=160341>.

violence along with their abusers only to later release them without charge .... Secure Communities will therefore result in undocumented victims of domestic violence being deported.”<sup>119</sup> Not only does Secure Communities deter victims from reporting crimes,<sup>120</sup> leaving them with few options but to attempt to escape the abuse on their own, it also punishes the few victims who do report their abusers by placing them in removal proceedings as well.

Admittedly, DHS did not intend Secure Communities to affect the willingness of victims and witnesses to cooperate with the police. Recognizing that victims and witnesses were inadvertently ending up within the system, ICE’s director issued a memo reminding field officers to “exercise all appropriate discretion on a case-by-case basis when making detention and enforcement decisions in the case of victims of crime, witnesses to crime, and individuals pursuing legitimate civil rights complaints.”<sup>121</sup> Although the memo encourages prosecutorial discretion, it provides no remedy if individual agents do not adhere or make a mistake regarding the immigrants status as a victim or witness<sup>122</sup>: “These guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.”<sup>123</sup> Simply encouraging prosecutorial discretion does not provide a sufficient safeguard.

The only possible way Secure Communities could exist alongside the U Visa and not undermine it completely would be to prevent the removal of victims without serious convictions. However, as the law stands now, ICE’s power is unchecked even by the judicial system:

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119. Helton, *supra* note 118.

120. *See supra* Part III.A.

121. Memorandum on Prosecutorial Discretion from John Morton, Dir., U.S. Immigration & Customs Enforcement 2 (June 17, 2011) [hereinafter Memo on Prosecutorial Discretion], available at <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>.

122. In fact, the overall effectiveness of this memo is doubtful. *See, e.g.*, AM. IMMIGRATION LAWYERS ASS’N, HOLDING DHS ACCOUNTABLE ON PROSECUTORIAL DISCRETION 4 (2011), available at <http://www.aila.org/content/default.aspx?docid=37615> (reporting that most ICE offices have not changed their practices, even after directed to exercise prosecutorial discretion).

123. Memo on Prosecutorial Discretion, *supra* note 121, at 3. Whereas the memo advocates the idea that prosecutorial discretion cannot be subject to review, some have rejected this notion in other contexts. *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 840-55 (1985) (Marshall, J., concurring) (rejecting the “presumption of unreviewability” of agency decisions).

“No court may set aside any action or decision ... regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.”<sup>124</sup> ICE retains discretion over who is placed in removal proceedings, and as the evidence shows,<sup>125</sup> it has not adhered to the ultimate purpose of Secure Communities—identifying and removing the most serious criminals. Nothing holds ICE to its claim that it will not target victims and witnesses.

### C. Opt-Out Controversy

One of the biggest controversies behind the Secure Communities program has been the question of opting out. Many initially believed that the program was optional and that jurisdictions could opt out of participation.<sup>126</sup> Throughout the early stages of the program, ICE entered into memoranda of agreement with the participating states.<sup>127</sup> These memoranda detailed Secure Communities’ procedure and laid out the responsibilities of each agency.<sup>128</sup> The memoranda also included a clause about termination, stating that either party could choose to terminate the agreements at any time.<sup>129</sup> Additional ICE reports also gave jurisdictions detailed instructions for opting out of the program or delaying their activation date.<sup>130</sup> For example,

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124. 8 U.S.C. § 1226(e) (2006).

125. See *supra* Part I.C; note 122.

126. See Elise Foley, *Opting Out of Immigration Enforcement*, WASH. INDEP. (Sept. 1, 2010, 4:12 PM), <http://washingtonindependent.com/96472/opting-out-of-immigration-enforcement> [hereinafter Foley, *Opting Out*] (noting opt-out procedure); Elise Foley, *Rep. Zoe Lofgren to DHS: Secure Communities Investigation Should Start Now*, HUFFINGTON POST (July 18, 2011, 6:12 AM), [http://www.huffingtonpost.com/2011/05/18/zoe-lofgren-secure-communities-investigation\\_n\\_863915.html](http://www.huffingtonpost.com/2011/05/18/zoe-lofgren-secure-communities-investigation_n_863915.html); David Rice, “*Secure Communities*” Program No Longer Voluntary, SAN DIEGO READER (Aug. 9, 2011), <http://www.sandiegoreader.com/weblogs/news-ticker/2011/aug/09/secure-communities-program-no-longer-voluntary/>; see also David Sherfinski, *Secure Communities Program Confusing to FBI*, WASH. TIMES (Nov. 10, 2011), <http://www.washingtontimes.com/news/2011/nov/10/secure-communities-program-confusing-to-fbi/?page=all> (discussing the confusion due to mixed messages regarding opt out).

127. See Memorandum of Agreement Between U.S. Dep’t of Homeland Sec. Immigration & Customs Enforcement and [State Identification Bureau], available at [http://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiesmoatemplate.pdf](http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesmoatemplate.pdf).

128. *Id.* at 1-4.

129. *Id.* at 4-5.

130. See Foley, *Opting Out*, *supra* note 126; see also Memorandum to Sarah Regarding “Opt Out,” ICE FOIA 10-2674.0003146, <http://uncoverthetruth.org/featured/opt-out-documents-reproduced> (follow “ICE Documents” hyperlink and download documents).

If a jurisdiction does not wish to activate on its scheduled date in the Secure Communities deployment plan, it must formally notify its state identification bureau and ICE in writing (email, letter or facsimile). Upon receipt of that information, ICE will request a meeting with federal partners, the jurisdiction, and the state to discuss any issues and come to a resolution, which may include adjusting the jurisdiction's activation date in or removing the jurisdiction from the deployment plan.<sup>131</sup>

When several states and jurisdictions attempted to terminate the agreements and opt out of the program, ICE changed its original position and told these jurisdictions that despite earlier reports and correspondence, the program was mandatory.<sup>132</sup> ICE explained that because the program relies on information sharing between the FBI and ICE, the only way to opt out was to stop sending fingerprints to the FBI.<sup>133</sup> Homeland Security Secretary Janet Napolitano now insists that “[t]his whole opt-in, opt-out thing was a misunderstanding from the get-go.”<sup>134</sup>

Controversy over ICE's mixed messages and the current status of the opt-out option ultimately led several immigrant advocacy groups to file a Freedom of Information Act request with ICE regarding Secure Communities.<sup>135</sup> After ICE withheld certain records regarding opt out, claiming a FOIA exemption, the groups sought to compel their release, asserting that ICE had “intentionally concealed its plans for the implementation of Secure Communities, leaving the public in the dark.”<sup>136</sup> The court-ordered released documents do in fact show a distinct change in stance within ICE on whether the program was mandatory.<sup>137</sup> Some internal DHS e-mails even give

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131. Foley, *Opting Out*, *supra* note 126.

132. Vedantam, *supra* note 118.

133. *Id.*

134. Carla Marinucci, *Janet Napolitano Clarifies Immigration Program*, S.F. CHRON. (Apr. 26, 2011), <http://www.sfgate.com/politics/article/Janet-Napolitano-clarifies-immigration-program-2374118.php>.

135. Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency, 811 F. Supp. 2d 713, 729 (S.D.N.Y. 2011).

136. *Id.* at 731.

137. *Compare, e.g.*, E-mail Chain Within Enforcement Law Div., ICE, Re: SC question, ICE FOIA 10-2674.0002022 (July 29-30, 2010), *available at* <http://uncoverthetruth.org/featured/opt-out-documents-re-produced> (follow “ICE Documents” hyperlink and download documents) (stating that Secure Communities is a voluntary program), *with* Mandatory Interoperability Definition Talking Points, ICE FOIA 10-2674.0002417, *available at* <http://uncoverthetruth.org>.

the impression that the program was voluntary until some jurisdictions refused to participate, at which point it became mandatory.<sup>138</sup>

Despite reports that the program is now mandatory, several states and jurisdictions have nonetheless attempted to opt out.<sup>139</sup>

For example, in a letter from the New York Governor's Office to DHS, Governor Andrew M. Cuomo's counsel declared,

[U]ntil the numerous questions and controversies regarding [Secure Communities] can be resolved, we have determined that New York is best served by relying on existing tools ... especially given our overriding concern that the current mechanism is actually undermining [sic] law enforcement. As a result, we are suspending New York's participation in this program.<sup>140</sup>

Illinois Governor Pat Quinn also sent a similar letter terminating the state's Memorandum of Agreement with ICE based on information that less than 20 percent of the immigrants deported from Illinois under Secure Communities had serious criminal convictions.<sup>141</sup> Massachusetts, Washington State, Pennsylvania, and the District of Columbia, have also refused further participation in the program.<sup>142</sup> Remaining undeterred by the controversy, ICE informed the governors of the thirty-nine states that had signed memoranda of agreement that it did not need the states' approval to continue operating Secure Communities in their states and said it was voiding the earlier signed agreements.<sup>143</sup>

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org/featured/opt-out-documents-re-produced (follow "ICE Documents" hyperlink and download documents) (noting that the program "does not require the consent of [local law enforcement agents]").

138. See Mallie Jane Kim, *Controversial Immigration Program Spurs Federal-State Spat*, U.S. NEWS (June 27, 2011), <http://www.usnews.com/news/articles/2011/06/27/controversial-immigration-program-spurs-federal-state-spat> ("The [Secure Communities] initiative will remain voluntary at both the State and Local level.... Until such time as localities begin to push back on participation, we will continue with this current line of thinking." (quoting internal DHS e-mail produced in response to FOIA request)).

139. See *id.* (discussing how California may join several other states in opting out).

140. N.Y. Letter, *supra* note 110.

141. Letter from Pat Quinn, Governor of Ill., to Marc Rapp, Acting Assistant Dir. of Secure Communities, U.S. Immigration & Customs Enforcement (May 4, 2011), *available at* <http://ccrjustice.org/files/2011-05ilterminate.pdf>.

142. Kim, *supra* note 138.

143. Brian Bennett, *States Can't Opt Out of Secure Communities Program*, L.A. TIMES (Aug. 6, 2011), <http://articles.latimes.com/2011/aug/06/nation/la-na-secure-communities->

## IV. SECURE COMMUNITIES MUST BE REFORMED

Secure Communities undercuts federal law and cannot continue in its current form. Although purporting to make communities safer, it has actually perpetuated fear and undermined the work of local law enforcement.<sup>144</sup> Rather than using the program to help prioritize its limited resources, ICE has used Secure Communities to initiate a mass deportation scheme at the expense of community security and law enforcement nationwide.<sup>145</sup> Although ICE does not have the resources to fully finance a scheme of this magnitude,<sup>146</sup> through Secure Communities it is able to use local jurisdictions to do much of the legwork in locating and initially detaining aliens. By saving money in one area, it can remove more aliens using fewer resources.<sup>147</sup> The problem is that Secure Communities has placed significant burdens on local jurisdictions in the name of protecting against the most serious criminals but has in reality removed immigrants indiscriminately.<sup>148</sup> ICE has essentially chosen quantity over quality and sacrificed other interests to its goal of mass deportation.

Admittedly, many law enforcement officials do not consider the program harmful.<sup>149</sup> Some appear apathetic, noting that submitting the fingerprints does not require any extra work on their part.<sup>150</sup> This view, however, ignores the extra difficulty that officers face because of uncooperative victims and witnesses.<sup>151</sup> Other officers insist that the program creates no community division because the officers are not seeking out immigrants, and the only individuals

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144. *See supra* Part III.A.

145. *See supra* Parts I.C., III.A.

146. *See supra* Part I.A.

147. *See* OFFICE OF IMMIGRATION STATISTICS, 2010 YEARBOOK OF IMMIGRATION STATISTICS 94 (2011) (showing a significant increase in the number of removals occurring in 2010 as compared to 2007, before the implementation of Secure Communities). Admittedly, these statistics do not account for increases in funding.

148. *See supra* Part I.C.

149. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, WHAT OTHERS ARE SAYING ... ABOUT SECURE COMMUNITIES 1 (June 2011), <http://www.ice.gov/doclib/secure-communities/pdf/what-others-say.pdf> [hereinafter WHAT OTHERS ARE SAYING] (explaining that several law enforcement organizations have issued statements in support of Secure Communities).

150. *Id.* at 2 (quoting Sgt. J.D. Nelson of Alameda County, California).

151. *See supra* Part III.A.

fingerprinted are “criminals processed into our jail.”<sup>152</sup> Regardless of the perception of some law enforcement officials, the facts show that many of the immigrants removed because of Secure Communities have no criminal record.<sup>153</sup> Some officials even argue that Secure Communities “deters some illegal immigrants from committing crimes.”<sup>154</sup> The proponents of this argument, however, have no ability to test the validity of their claim. The fact that police may arrest fewer undocumented immigrants than before the initiation of Secure Communities could mean that rather than there being fewer immigrants committing crimes, there are simply fewer immigrants reporting crimes.<sup>155</sup>

Despite the rising controversy around the program and several jurisdictions announcing that they want nothing to do with it,<sup>156</sup> ICE has made it clear that it is expanding rather than reducing the reach of the program.<sup>157</sup> It also appears to have no sympathy for the states and jurisdictions that have concerns about Secure Communities.<sup>158</sup> Although using local law enforcement to collect data may be very useful to ICE, it is very harmful to community policing. The majority of law enforcement relies heavily on the cooperation of the public in order to combat crime effectively. When that cooperation ceases, so does the effectiveness of policing.

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152. WHAT OTHERS ARE SAYING, *supra* note 149, at 2 (quoting Lt. Basilio “Sonny” Cachuela, Jr. of Fairfax County, Virginia). Note that in reality, 26 percent of immigrants deported from Fairfax County, Virginia—where the quoted speaker is from—were noncriminals. ICE STATISTICS, *supra* note 39, at 47.

153. *See supra* Part I.C.

154. WHAT OTHERS ARE SAYING, *supra* note 149, at 2 (quoting Sheriff Lee Baca of Los Angeles, California).

155. *See supra* Part III.A. Additionally, any reduction in the number of immigrants arrested and convicted of crimes could be the result of a reduction in the overall immigrant population, related in large part to the recent economic downturn in the United States. *See* DEMETRIOS G. PAPADEMETRIOU & AARON TERRAZAS, MIGRATION POLICY INST., IMMIGRANTS AND THE CURRENT ECONOMIC CRISIS 2-3, 9-10 (2009) (finding a leveling off of the immigrant population in the United States since the recession and a correlation between economic conditions and the population of undocumented immigrants).

156. *See supra* notes 139-43 and accompanying text.

157. *See supra* note 13 and accompanying text.

158. Before signing a Memorandum of Agreement with ICE, officials from Colorado spent months negotiating the terms of the agreement in order to ensure protection for victims of domestic violence; when ICE unilaterally terminated all agreements, it voided those protections. Bennett, *supra* note 143.

*A. Effective Coexistence Requires That Congress Modify Secure Communities*

In their current states, Secure Communities and the U Visa cannot effectively coexist. The success of the U Visa legislation depends on willing cooperation between local law enforcement and immigrant communities. Immigrant victims stand to benefit from the temporary legal status program only if they assist law enforcement, and the U Visa only enhances law enforcement efforts if officers can maintain the trust of the community. Secure Communities, on the other hand, relies on law enforcement arrests to locate undocumented immigrants. Although on paper Secure Communities appears to have little impact on the effectiveness of the U Visa, ICE has implemented the program in a way that undercuts the U Visa's efforts to promote cooperation between immigrants and local law enforcement.

The difficulty in finding a solution to these contradicting programs is that both programs serve different but equally important interests: The U Visa promotes a humanitarian interest in protecting victims, particularly those of domestic violence, and a community safety interest in assisting local law enforcement. Secure Communities' contribution to community safety is in identifying and removing dangerous criminal aliens. Because the programs cannot coexist in their present state, one or both must be modified or eliminated. The complete elimination of either one, however, would be a drastic step that the government should take only if necessary. Therefore, the best options are to modify the U Visa, modify Secure Communities, or modify both. This Note advocates the slight modification of Secure Communities in a way that alleviates the tension between it and the U Visa so that both programs can promote the specific government interests they purport to advance.

Secure Communities can serve a legitimate purpose, but its current implementation reflects a goal of removing as many undocumented immigrants as possible, notwithstanding that the majority of the immigrants it places in removal proceedings pose no security threat to the community.<sup>159</sup> Worse yet, many of the aliens with Level 1 convictions are not removed. Since its implementation, Secure Communities has identified approximately 239,592 aliens with

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159. See *supra* notes 39-48 and accompanying text.

Level 1 charges or convictions, but ultimately only 26 percent of them were removed from the United States.<sup>160</sup> To ensure that Secure Communities serves its purported purpose of removing serious criminals, ICE should be forced to wait until local police and prosecutors have convicted someone of a Level 1 crime before receiving that individual's fingerprints and checking his or her immigration status.

By focusing on convictions rather than arrests or charges, this modification would ensure that those immigrants removed because of Secure Communities are actually serious criminals. As a result, ICE will be forced to use Secure Communities for the purpose for which it was created, rather than as a mechanism to remove any alien who comes into contact with the police. Even with this modification, ICE would still receive the benefit of assistance in locating and detaining undocumented immigrants, as well as assistance in prioritizing its limited resources. Additionally, the public and local law enforcement would still receive the benefit that ICE's apprehension and removal of serious criminals provides for overall community safety, but would not suffer the consequences that the current version of Secure Communities has produced.

Reforming Secure Communities leaves unchanged ICE's overall authority to detain and remove undocumented immigrants. This Note's proposed modification is limited to the context of an immigrant's interaction with local law enforcement. ICE retains the ability to place any undocumented alien in removal proceedings, regardless of criminal history. The modified version of Secure Communities would protect an immigrant from placement in removal proceedings as a result of relatively minor interactions with the police. It does not issue a blanket protection to all noncriminal undocumented immigrants who come into contact with ICE by other means, including through employment or application for immigration benefits.

Most importantly, reforming Secure Communities would alleviate the tension between it and the U Visa. This modification would ensure that victims of crime—particularly those of domestic violence who police often arrest as a matter of local procedure<sup>161</sup> or by

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160. See ICE STATISTICS, *supra* note 39, at 2.

161. As discussed above, arresting both parties in a domestic violence situation is routine practice in some jurisdictions. See *supra* notes 118-19 and accompanying text.

mistake—could report crimes and cooperate with the police without fear that their involvement would place them in removal proceedings. By eliminating that fear, this modification would also ensure that local law enforcement officials have the opportunity to garner trust among immigrant communities and effectively police them. Ultimately, modifying Secure Communities would allow it to exist concurrently with the U Visa without undermining its purpose.

Procedurally, modifying Secure Communities would leave unchanged the practice of releasing the fingerprints of arrestees to the FBI to check for a criminal record. If an arrestee is found to have a prior Level 1 conviction, ICE would receive his or her fingerprints the same way it would for someone with a recent conviction. However, if the arrestee does not have a past Level 1 conviction, the FBI should release those fingerprints only in the event of a future Level 1 conviction. By narrowly tailoring this modification, any unnecessary burdens this change could inadvertently create would be minimized.<sup>162</sup>

Ideally, ICE would acquiesce to public concern about its implementation and use Secure Communities only for its purported purpose, making modification unnecessary. Unfortunately, ICE has made no indication it is willing to do so.<sup>163</sup> As such, it is imperative that Congress modify the program to prevent ICE's abuse of it. Although the current version of Secure Communities provides benefits for ICE by assisting in the discovery and apprehension of undocumented immigrants, it does so at the expense of local law enforcement.<sup>164</sup> By limiting the reach of Secure Communities to convicted criminal aliens, Congress would prevent the interests of ICE from taking precedence over the interests of local jurisdictions.

### *B. Counterarguments*

Supporters of Secure Communities may argue that its benefits outweigh the interests promoted by the U Visa and that Congress should modify or eliminate the U Visa and leave Secure Communities unaffected. Many supporters of Secure Communities believe

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162. The question of whether this modification would significantly increase the burden placed on the FBI is beyond the scope of this Note, but conceivably, the government could create some form of alert system that would make any increase in burden negligible.

163. See *supra* notes 52-56 and accompanying text.

164. See *supra* Part III.A-B.

that undocumented immigrants increase crime rates and thus it is beneficial to public safety to deport them.<sup>165</sup> Studies on the relationship between immigration and crime, however, often find no substantial connection to support this claim.<sup>166</sup> With no evidence to support the assertion that increasing removal efforts across the board promotes public safety, one cannot reasonably determine that the interests supported by Secure Communities outweigh those supported by the U Visa. Arguing that Congress should eliminate the U Visa altogether in favor of Secure Communities ignores the legitimate government interest in protecting victims, particularly those of domestic violence, and promoting cooperation with local law enforcement. Though the humanitarian interest in protecting victims may prove unconvincing to some who place a higher value on security, the community safety interest should be important to all factions. A program that encourages all people within a community to cooperate with the police makes it easier for law enforcement to investigate crime and apprehend criminals: the fewer criminals that remain at large, the safer the community.

Even those who recognize the importance of the U Visa may still support modifying it rather than making the proposed change to Secure Communities. There is, however, no feasible way of changing the U Visa while still supporting the government's dual interests. One of the major reasons the U Visa is not able to function effectively is the chilling effect created by Secure Communities.<sup>167</sup> The only way to avoid that chilling effect is to eliminate the law enforcement certificate requirement that verifies an immigrant's helpfulness in a criminal investigation.<sup>168</sup> This elimination, however, would defeat Congress's intent in creating the U Visa to not only protect victims but also to promote cooperation with local law enforcement.<sup>169</sup> This Note's goal is to formulate a solution that will allow

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165. See, e.g., Max Fisher, *Does Illegal Immigration Really Cause Crime?*, ATLANTIC WIRE (May 27, 2010), <http://www.theatlanticwire.com/politics/2010/05/does-illegal-immigration-really-cause-crime/24291/>.

166. See, e.g., RUBEN G. RUMBAUT & WALTER A. EWING, IMMIGR. POL'Y CENTER, THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION: INCARCERATION RATES AMONG NATIVE AND FOREIGN-BORN MEN 1 (2007); Kristin F. Butcher & Anne Morrison Piehl, *Crime, Corrections, and California*, PUB. POL'Y INST. OF CAL., Feb. 2008, at 1-2.

167. See *supra* Part III.A.

168. See *supra* Parts II.C., III.A. for a discussion on the requirement of a law enforcement certification and the problems that occur when immigrants do not trust the police.

169. See *supra* Part II.A.

both programs to function effectively, and modifying the U Visa in this manner would fail to achieve that purpose.

Opponents of Secure Communities may argue that the program is unsalvageable and Congress should eliminate it: ICE should have to use its own resources to identify and remove undocumented immigrants. An argument based on this premise is also lacking because it ignores the community and government's interest in removing serious criminal aliens from the United States.<sup>170</sup> While ICE could prioritize the removal of criminal aliens even in the absence of Secure Communities, a system that automatically releases the fingerprints of convicted criminals streamlines its efforts and increases the likelihood of removing serious offenders. Additionally, retaining the reformed version of Secure Communities should appeal to even the most fervent of immigration advocates because it ensures that most of ICE's resources are focused on the removal of criminal offenders. Absent Secure Communities, ICE would likely continue to remove any undocumented immigrant whose information is provided by law enforcement, regardless of criminal history.

Ultimately, the only option that supports all of the government's interests and alleviates the tension between Secure Communities and the U Visa is to modify Secure Communities. This is not to say that this solution would satisfy all involved. Some may insist that any solution that delays or reduces the removal of undocumented immigrants is unacceptable, because enforcement of immigration laws should be a top law enforcement priority. Even ICE, however, admits that "[t]he highest priority of any law enforcement agency is to protect the communities it serves."<sup>171</sup> Safety is, and should be, the government's priority, and in order to promote that priority, concessions must be made.

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170. It is important to note, however, that studies have shown that undocumented immigrants are no more likely to reoffend than other aliens. See Laura J. Hickman & Marika J. Suttorp, *Are Deportable Aliens a Unique Threat to Public Safety? Comparing the Recidivism of Deportable and Nondeportable Aliens*, 7 *CRIMINOLOGY & PUB. POL'Y* 59, 77 (2008). Nonetheless, the goal of reducing recidivism in general could warrant the removal of criminal aliens because it would at least reduce the number of individuals able to reoffend in the United States.

171. *Secure Communities*, *supra* note 1.

## CONCLUSION

Isaura Garcia was one of the many casualties of Secure Communities. She was not a criminal, and yet she was the victim of a program that purports to target only the most serious offenders. Because of what happened to Isaura, the other immigrants in her community may now think twice before calling the police. Other victims of domestic violence may decide it is better to suffer abuse than to face deportation. Whereas Isaura and other victims could have benefited from the U Visa, they never will if they are too afraid to report crimes. The police could arrest and convict violent criminal abusers, but they never will if the victims and witnesses of the crime refuse to speak out for fear of deportation.

Under the reformed version of Secure Communities, Isaura would not have ended up in removal proceedings as a result of calling the police.<sup>172</sup> She could have cooperated with law enforcement and, if convicted, ICE would have received her abuser's fingerprints and placed him in removal proceedings. Isaura could then have returned to her community and told them about how helpful the local police had been. Her positive experience may have encouraged other victims of crime to call the police, possibly allowing the police to arrest and convict more serious criminals who ICE could subsequently remove from the United States. Under this reformed version of Secure Communities, victims will no longer need to fear interactions with local law enforcement, and increased cooperation sparked by the U Visa will create a much safer society for all.

*Lindsey J. Gill\**

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172. After an outpouring of support by immigration and civil rights advocates on behalf of Isaura Garcia, ICE finally terminated removal proceedings against her. See Matt Coker, *Isaura Garcia, Battered Woman Facing Deportation, Embodies Problems with ICE Program*, OCWEEKLY (May 13, 2011, 5:26 PM), [http://blogs.ocweekly.com/navelgazing/2011/05/isaura\\_garcia\\_battered\\_secure.php](http://blogs.ocweekly.com/navelgazing/2011/05/isaura_garcia_battered_secure.php). Unfortunately, there are many like her for whom this has not been the case.

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