Secure Communities: Burdening Local Law Enforcement and Undermining the U Visa

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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. 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. As is typically the case in domestic disputes, the police arrested both parties and fingerprinted Isaura according to procedure. Because of the Secure Communities program, immigration officials obtained these fingerprints and flagged Isaura, who was undocumented, for removal. 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. Just under 60 percent arrived before January 1, 2000, and 29 percent arrived between 2000 and 2004. 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.  

3. Id.
4. Id.
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,8 and from several immigration laws regarding the deportability of criminal aliens,9 DHS initiated in 2008 an information sharing program between the FBI and ICE.10 The program, called Secure Communities, facilitates the identification and removal of illegal aliens.11 Starting with only 14 jurisdictions, the program has expanded to over 3000 jurisdictions.12 The eventual goal was to expand the program nationwide.13

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.14 For the 2012 fiscal year, the U.S. Senate Committee on Appropriations approved legislation that would grant ICE approximately $5.8 billion.15 Although this is $34 million more than the appropriation for 2011,16 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.17 Admittedly, the government does not ap-

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.
16. Id.
portion all of these duties to ICE, but even the cost of apprehension and detention—the tasks of ICE—would be approximately $187 billion.\footnote{18}{Id.}

Because of its limited resources, ICE purports to prioritize the removal of criminals and those that pose a threat to public safety.\footnote{19}{See Secure Communities, supra note 1.} ICE created Secure Communities in order to carry out this prioritization.\footnote{20}{Id.} 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.\footnote{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.}

\subsection*{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.\footnote{22}{See Secure Communities, supra note 1.} Under Secure Communities, the FBI automatically sends the fingerprints to ICE.\footnote{23}{Id.} 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.\footnote{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).}

In order to prioritize the removal of serious criminals, Secure Communities identifies criminal charges as fitting into one of three
levels, based on the severity of the crime.\textsuperscript{25} Level 1 offenses are the most serious. Secure Communities purports to prioritize only the removal of aliens with Level 1 charges or convictions.\textsuperscript{26} 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.\textsuperscript{27}

Although the program does not prioritize lesser offenses, it nevertheless 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.\textsuperscript{28} 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.\textsuperscript{29} Secure Communities classifies immigration offenses as Level 3.\textsuperscript{30}

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.\textsuperscript{31} 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.\textsuperscript{32}

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.\textsuperscript{33} After forty-eight hours, the detainer automatically expires, and if ICE does not take custody of the immigrant, the law requires

\textsuperscript{25} See Standard Operating Procedures, supra note 21, at 9.
\textsuperscript{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.”).
\textsuperscript{27} Id. at 5, 9.
\textsuperscript{28} See id.
\textsuperscript{29} Id.
\textsuperscript{30} See id. at 9.
\textsuperscript{31} Id. at 5.
\textsuperscript{32} Id.
\textsuperscript{33} 8 C.F.R. § 287.7(d) (2012).
that law enforcement release the alien. Failure to do so subjects the agency to a potential civil rights suit for violation of the immigrant’s due process rights. 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. 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.

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.

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. Only 61,348 of those were charged with or convicted of Level 1 crimes. Of the remaining 158,974 aliens removed, 54,258 were noncriminals

34. See id.
36. See STANDARD OPERATING PROCEDURES, supra note 21, at 6.
37. Id.
38. See Secure Communities, supra note 1.
40. Id.
they were not charged with or convicted of either Level 1, Level 2, or Level 3 crimes.41

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 2009,42 67 percent of aliens removed have been noncriminals.43 In Prince George’s County, Maryland, just outside the District of Columbia, the percentage of noncriminal removals is as high as 60 percent.44 With a larger number of total immigrant deportations than either of the former, Miami-Dade, Florida registers 47 percent noncriminal removals.45 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.46 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.47 In forty-one of those cases, local law enforcement never pursued any charges against the immigrants.48

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.49

41. Id.
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).
46. Editorial, supra note 2.
48. See id. at 5-7.
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. 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.”

Despite the controversy, Secure Communities has continued to expand. DHS launched the program in 2008 with only fourteen active jurisdictions. 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, meaning that all 3181 U.S. jurisdictions are currently active.

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. 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. Secure Communities can, and will, continue to function regardless of any disapproval by the states or the public.

50. Editorial, supra note 2.
52. Secure Communities, supra note 1, at “The Basics.”
53. ICE JURISDICTIONS, supra note 42.
54. Id.
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 is a form of temporary legal status granted to qualifying immigrant victims of crime. 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). Six years earlier, Congress had passed the Violence Against Women Act of 1994 (VAWA), 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. In 2000, however, Congress recognized the

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)(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.
limitations of VAWA and sought to pass legislation that would have a broader effect. 62 Recognizing that immigrants were particularly vulnerable to violent-crime victimization,63 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. 64 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.65

Although federal law incorporates a long list of qualifying crimes that create U Visa eligibility for victims,66 Congress sought specifically to address concerns about domestic violence.67 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.68 Although not exclusively used for domestic violence victims, the U Visa is one of the most valuable assets immigrant domestic violence victims have.69
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.\(^{70}\)

Congress believed that “[t]his visa [would] encourage law enforcement officials to better serve immigrant [communities] and to prosecute crimes committed against aliens.”\(^{71}\)

Congress recognized the unique circumstances of immigrant victims of crime and the important concerns they face when attempting to report violence.\(^{72}\) 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.\(^{73}\) With many immigrant victims of violence unable to obtain the immigration protections of VAWA,\(^{74}\) Congress created this new broadly applicable nonimmigrant visa. Its goal was the protection of “certain crime victims including victims of crimes against women,”\(^{75}\) 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.\(^{76}\) 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).
74. Victims of Trafficking and Violence Protection Act § 1502(a)(3).
75. Id. § 1513.
76. Id. § 1513(a)(2)(A).
criminal justice system. 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.”

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. 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.” 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.

As mentioned, one of the dual purposes of the U Visa is to promote public safety by encouraging cooperation with law enforcement. Setting aside the humanitarian interest the government has in protecting victims of crime, extending the possibility of legal
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 ben-
ficial 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.”\textsuperscript{83} 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.\textsuperscript{84}

In conjunction with possessing information, the immigrant must
be willing to use that information in order to assist with the in-
vestigation 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.”\textsuperscript{85} Although an immigrant can attempt to show helpfulness
through her required personal statement,\textsuperscript{86} 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.\textsuperscript{87}

\textbf{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.\textsuperscript{88} Although submitting this certification
is a requirement for consideration for the U Visa, “an agency’s

\begin{itemize}
\item \textsuperscript{83} 8 C.F.R. § 214.14(b)(2).
\item \textsuperscript{84} \textit{Id}.
\item \textsuperscript{85} 8 U.S.C. § 1101(a)(15)(U)(i)(III); \textit{see also} 8 C.F.R. § 214.14(b)(3).
\item \textsuperscript{86} 8 C.F.R. § 214.14(c)(2)(iii).
\item \textsuperscript{87} \textit{Id}., § 214.14(c)(2)(i).
\item \textsuperscript{88} \textit{See} Jensen, \textit{supra} note 58, at 700-04 (describing the U Visa certification hurdle and
reasons for it).
\end{itemize}
decision to provide a certification is entirely discretionary." In addition to the logistical difficulties encountered by immigrants and legal advocates, even more prevalent is the ignorance and reluctance of law enforcement officials to sign U Visa certifications. One common misunderstanding among potential certifiers is that signing a U Visa certification is essentially granting an immigrant legal status. 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. 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, 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, a U Visa applicant can apply for a waiver to set aside her inadmissibility.

91. See Jensen, supra note 58, at 701, 704-07.
93. See INSTRUCTIONS FOR I-918, supra note 89, at 1.
grounds. In fact, many immigrants with final orders of removal have applied for and obtained U Visas.

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. 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. Because of U.S. Citizenship and Immigration Services’ (USCIS) delay in implementing the U Visa, 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.

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.”).
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 relys 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.”101 Community policing emphasizes collaboration between law enforcement and the community to develop solutions to problems and increase trust in police.102 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.103 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.104 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.105 From the perspective of the immigrants, their interactions with the local police would ultimately result in their placement in removal proceedings. This is especially

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."106 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."107

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.108 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.109 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."110 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.111 Law enforcement is unable to promote public

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.
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?”

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. 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. 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. Congress created the U Visa to try to improve those statistics.

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. 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. 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

113. See supra note 75 and accompanying text.
116. See supra notes 62-75 and accompanying text.
117. See supra Part I.B.
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.”¹¹⁹ Not only does Secure Communities deter victims from reporting crimes,¹²⁰ 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.”¹²¹ 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 witness¹²²: “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.”¹²³ 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:

¹¹⁹. Helton, supra note 118.
¹²⁰. See supra Part III.A.
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.”

ICE retains discretion over who is placed in removal proceedings, and as the evidence shows, 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. Throughout the early stages of the program, ICE entered into memoranda of agreement with the participating states. These memoranda detailed Secure Communities’ procedure and laid out the responsibilities of each agency. The memorandum also included a clause about termination, stating that either party could choose to terminate the agreements at any time. Additional ICE reports also gave jurisdictions detailed instructions for opting out of the program or delaying their activation date. For example,

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125. See supra Part I.C; note 122.
128. Id. at 1-4.
129. Id. at 4-5.
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.\footnote{131}

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.\footnote{132} 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.\footnote{133} Homeland Security Secretary Janet Napolitano now insists that “[t]his whole opt-in, opt-out thing was a misunderstanding from the get-go.”\footnote{134}

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.\footnote{135} 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.”\footnote{136} The court-ordered released documents do in fact show a distinct change in stance within ICE on whether the program was mandatory.\footnote{137} Some internal DHS e-mails even give

\footnote{131. Foley, \textit{Opting Out}, supra note 126.}
\footnote{132. Vedantam, \textit{supra} note 118.}
\footnote{133. \textit{Id.}}
\footnote{136. \textit{Id.} at 731.}
\footnote{137. \textit{Compare, e.g.\textemdash}, E-mail Chain Within Enforcement Law Div., ICE, Re: SC question, ICE FOIA 10-2674.0002022 (July 29-30, 2010), \textit{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), \textit{with} Mandatory Interoperability Definition Talking Points, ICE FOIA 10-2674.0002417, \textit{available at} http://uncoverthetruth.
the impression that the program was voluntary until some jurisdictions refused to participate, at which point it became mandatory.  

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

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.  

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.  

Massachusetts, Washington State, Pennsylvania, and the District of Columbia, have also refused further participation in the program.  

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.
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.144 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.145 Although ICE does not have the resources to fully finance a scheme of this magnitude,146 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.147 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.148 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.149 Some appear apathetic, noting that submitting the fingerprints does not require any extra work on their part.150 This view, however, ignores the extra difficulty that officers face because of uncooperative victims and witnesses.151 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.
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.” 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. Some officials even argue that Secure Communities “deters some illegal immigrants from committing crimes.” 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.

Despite the rising controversy around the program and several jurisdictions announcing that they want nothing to do with it, ICE has made it clear that it is expanding rather than reducing the reach of the program. It also appears to have no sympathy for the states and jurisdictions that have concerns about Secure Communities. 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.

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.159 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

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. 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 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.162

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.163 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.164 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

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.\textsuperscript{165} Studies on the relationship between immigration and crime, however, often find no substantial connection to support this claim.\textsuperscript{166} 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.\textsuperscript{167} 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.\textsuperscript{168} 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.\textsuperscript{169} This Note’s goal is to formulate a solution that will allow


\textsuperscript{167} See supra Part III.A.

\textsuperscript{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.

\textsuperscript{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.\textsuperscript{170} 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.”\textsuperscript{171} Safety is, and should be, the government’s priority, and in order to promote that priority, concessions must be made.

\begin{itemize}
\item \textsuperscript{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. POLY 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.
\item \textsuperscript{171} Secure Communities, supra note 1.
\end{itemize}
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.\(^1\) 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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\(^1\) 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. Unfortunately, there are many like her for whom this has not been the case.

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