STATUS IN A STATE OF EMERGENCY: U VISAS AND THE FLINT WATER CRISIS.

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Table of Contents

I. Introduction .......................................... 122
II. The U Visa ............................................. 126
A. The U Visa’s Dual Intent ............................. 127
B. U Visa Eligibility .................................... 128
C. Implementation of the U Visa ......................... 132
III. Vulnerabilities of Undocumented Immigrants in Crisis Situations ............................................. 133
A. Undocumented Immigrants Face Significant Barriers to Obtaining Information and Assistance During a Crisis ............................................. 135
   1. Barriers to Obtaining Information ................. 135
   2. Lack of Access to Assistance ..................... 136
   3. Fear of Deportation ................................ 139
B. Lawful Status in the Aftermath of a Crisis: Lessons from 9/11 ................................................ 142
IV. The Flint Water Crisis ................................ 145
A. Timeline of Events ................................... 146
B. Undocumented Immigrants and the Flint Water Crisis ................................................ 155
V. Immigration Relief for Victims of the Flint Water Crisis: The U Visa ..................................... 159
A. Undocumented Residents of Flint Are Potentially Eligible for U Visas ................................. 160
   1. The Criminal Activity That Occurred During the Flint Water Crisis is Covered Under the U Visa ................................. 161
   2. Undocumented Flint Residents Are Indirect Victims Who Suffered Substantial Harm ................................. 162
   3. Undocumented Residents of Flint Have Information About the Criminal Activity and Could Be Helpful

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I. INTRODUCTION

“This situation requires our government not just to act in the immediate crisis, but also to develop a plan to protect public health and victims over the long term. The government should not deport children and families it has poisoned.”

Susan Reed, Michigan Immigrant Rights Center Supervising Attorney

Undocumented immigrants are particularly vulnerable to harm in times of crisis for reasons that include language and cultural isolation, and fear of deportation. For those without lawful status, obtaining assistance in the aftermath of a crisis may be impossible. Not only is lawful status required for most forms of public assistance, it allows victims to come forward to access emergency services without fear. The importance that lawful status plays in allowing immigrants to access medical care and social services in the aftermath of a crisis cannot be underestimated. Yet, there is no form of immigration status available to victims of a crisis, solely based on their victimhood. If, however, the crisis is man-made, and criminal activity played a

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2 The terms “disaster,” “state of emergency,” “catastrophe,” and “crisis,” while similar, have specific meanings for federal aid based on the magnitude of the event and whether the event was man-made or caused by natural forces. For the purposes of this article, I will generally use the most inclusive term “crisis.” For a discussion of the differences between the terms, see K. Joanne McGlown, ANTICIPATE, RESPOND, RECOVER: HEALTHCARE LEADERSHIP AND CATASTROPHIC EVENTS, Ch. 1 (Mar. 1, 2011), https://www.ache.org/pubs/McGlown%20Sample.pdf, archived at https://perma.cc/53QK-CKRZ.

3 See infra Part III.A.

4 See infra Part III.A.2.


6 See infra Part III.A.3.

role in creating the crisis, undocumented immigrant victims may be eligible for a form of immigration relief known as the U visa.\(^8\)

Congress created the U visa for immigrant victims of certain crimes who cooperate with the investigation or prosecution of those crimes.\(^9\) In creating the U visa, Congress manifested a dual intent: to promote the cooperation of immigrants with law enforcement and to provide protection to immigrant victims of crime.\(^10\) For undocumented immigrant victims of a man-made crisis involving criminal activity, U visas can be a valuable tool for prosecutors, and a welcome form of relief for the victims. The water crisis that unfolded in Flint, Michigan beginning in April 2014 offers a case study of a crisis where the U visa could be an important tool in obtaining immigration relief for undocumented victims.

In April 2014, the city of Flint, Michigan switched from using treated water from the Detroit Water and Sewage Department (DWSD) to water sourced from the Flint River.\(^11\) During the conversion, Flint failed to treat the water or use corrosion control, despite the fact that the water was far more toxic and corrosive than the treated water that had come from Detroit.\(^12\) As a result, Flint residents, including thousands of children, were exposed to contaminated drinking water and lead poisoning.\(^13\)

Among those Flint residents poisoned by contaminated Flint River water were 700 to 1000 undocumented immigrants.\(^14\) Many of the undocumented immigrants in Flint were unaware of the water contamination. Early notice warnings about the Flint water crisis were printed only in English,\(^15\) and even when volunteers knocked on doors to distribute information, many undocumented Flint residents did not open their doors for fear that immigra-

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\(^10\) See infra Part II.A.


\(^12\) See CTRS FOR DISEASE CONTROL AND PREVENTION, BLOOD LEVELS AMONG CHILDREN AGED >6 YEARS – FLINT, MICHIGAN, 2013-2016 (July 1, 2016) [hereinafter CDC REPORT], available at http://www.cdc.gov/mmwr/volumes/65/wr/mm6525e1.htm?s_cid=mm6525e1_w, archived at https://perma.cc/8F5B-NC7A; Mona Hanna-Attisha et al., Elevated Blood Lead Levels in Children With the Flint Drinking Water Crisis: A Spatial Analysis of Risk and Public Health Response, 106 AM. J. FOR PUB. HEALTH, 283 (2016).


\(^15\) Advocacy Coalition to Feds, supra note 1 at n.2.
tion authorities might be on the other side. 16 In addition, when Flint began distributing bottled water, workers initially required identification before handing out the water. 17 This proved to be a significant deterrent to immigrants who either did not have identification, or feared that presenting identification would lead to deportation. 18 As a result of these problems, many immigrants continued to drink tap water for months after Michigan Governor Rick Snyder finally declared a state of emergency in Flint in January 2016. 19

The Flint water crisis is distinctive in that criminal activity by state officials played a significant role in creating the crisis, as demonstrated by ongoing criminal investigations and prosecutions of state officials. 20 As a result, undocumented Flint residents, unlike many other undocumented victims in a crisis, have a potential path to lawful status through the U visa. If undocumented Flint residents are willing to cooperate with the ongoing investigations or prosecutions in Flint, they should be able to meet the statutory requirements of the U visa. 21 Flint’s undocumented residents faced the same or, in many cases, higher levels of exposure to contaminated water as did other Flint residents, and as a result, face life-long potential health problems. 22 Undocumented residents of Flint could be particularly helpful in a sentencing trial since many undocumented residents drank contaminated water longer than other residents and likely face more severe health consequences as a result.

In order to obtain a U visa, each undocumented victim in Flint must first obtain a law enforcement certificate (LEC) attesting to their “helpful-


18 See Casey Tolen, Undocumented Immigrants in Flint Say They’ve Been Denied Free Water and are Scared to Get Help, Fusion (Jan. 25, 2016), http://fusion.net/story/258628/undocumented-immigrants-flint-water/, archived at https://perma.cc/P3XC-A7PN.

19 Singh, supra note 17.


21 To qualify for a U visa, an immigrant crime victim must demonstrate that: (1) he was a victim of qualifying criminal activity that violated U.S. law or occurred in the U.S.; (2) he possessed information concerning that criminal activity; (3) he suffered substantial mental or physical abuse as a result of having been a victim of the criminal activity; and (4) he has been helpful, is being helpful, or is likely to be helpful to a Federal, State or local authority investigating or prosecuting the criminal activity. 8 C.F.R. § 214.14(b) (2016).

22 For example, lead poisoning can lead to a lifetime of serious health problems, particularly in children. FWATF REPORT, supra note 11 at 23.
ness” in an investigation or prosecution of state officials.21 However, prosecutors may be unwilling to issue LECs to such a large group of individuals for both procedural and discretionary reasons. Issuing such a large number of LECs would require significant resources, and prosecutors could decide they do not need the assistance of all, or any, of the undocumented residents of Flint. However, refusing to issue LECs for procedural or discretionary reasons to undocumented Flint residents who come forward to help would thwart the dual intent of the U visa. Offering LECs to undocumented residents only if law enforcement decides that their assistance is necessary or expedient would actually discourage undocumented immigrants from coming forward to cooperate with law enforcement. As a result of increased immigration enforcement activity under President Donald Trump’s administration, undocumented immigrants are more reluctant than ever to cooperate with authorities for fear of deportation.22

Predicating the issuance of LECs on the basis of law enforcement need, rather than the undocumented immigrant’s helpfulness, also contravenes the original humanitarian intent of the U visa to provide protection to immigrant crime victims. Instead, making LECs available to victims of a crisis in which criminal activity played a role not only comports with Congress’ dual intent in creating the U visa, it is good public policy. By receiving LECs, victims have a chance to obtain lawful status and thereby greater access to services. With lawful status, undocumented victims of a crisis also gain the ability to actively participate in community rebuilding.

There is much scholarship on the U visa25 as well as on the vulnerabilities of immigrants in a crisis26; however, there has been very little written


about the U visa as a possible form of immigration relief for victims of a crisis. Part II of this article will introduce the U visa as a form of immigration relief for immigrant victims of crime and will explore the dual purpose of the U visa. Part III of this article will discuss the vulnerabilities of undocumented immigrants in times of crisis, and why a lack of lawful status can have a devastating effect on the ability of undocumented immigrants to obtain information and assistance. Part IV will provide a primer on the Flint water crisis and its impact on undocumented residents in Flint. In Part V, this article will explore the possibility of U visas for the undocumented victims in Flint. I will argue that issuing LECs to undocumented Flint residents who provide assistance in the ongoing investigation and prosecution of state officials, no matter how large a group that might be, comports with the original dual intent of the U visa and promotes community rebuilding.

II. THE U VISA

In 2000, during the reauthorization of the Violence Against Women Act (VAWA),\(^2\) Congress created a new visa, the U visa, as part of the Victims of Trafficking and Violence Protection Act.\(^2\) The U visa provides temporary lawful status to immigrant victims of a variety of enumerated crimes who are helpful to law enforcement in the investigation or prosecution of those crimes.\(^2\) The creation of the U visa reflected a dual intent on the part of Congress: to promote cooperation with law enforcement and to provide humanitarian protection to immigrant victims of crime.\(^\text{30}\) Since its inception, scholars and immigration advocates have sought to ensure the effective and consistent implementation of the U visa.\(^\text{31}\)


The U visa was the result of intensive advocacy by sponsors and negotiations between Congressional Republicans and Democrats for more than a year.Originally conceived as a form of immigration relief for undocumented victims of domestic violence not covered by other forms of immigration relief, Congress ultimately incorporated a larger list of crimes covered by the U visa. This expansion of enumerated crimes supported one of the primary purposes of the U visa: encouraging the cooperation of immigrant crime victims with law enforcement in the investigation and prosecution of criminal activity. The U visa legislation states that “[t]he 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.” Congress recognized that “it is virtually impossible for state and federal law enforcement . . . to punish and hold perpetrators of crimes against non-citizens accountable if abusers and other criminals can avoid prosecution by having their victims deported.”

Efforts to use the U visa to promote law enforcement cooperation have increasingly taken precedence over the other purpose of the U visa, namely providing protection to undocumented immigrant crime victims. Nevertheless, providing protection to immigrant crime victims reflects the original
humanitarian intent of the U visa’s sponsors. The statutory language of the U visa legislation expressly states that “providing temporary legal status to aliens who have been severely victimized by criminal activity... comports with the humanitarian interests of the United States.” Congress’ humanitarian intent is also evident in the details of the U visa legislation. For example, under the Act, the U visa has extremely generous waiver provisions of inadmissibility grounds that would otherwise prevent U visa applicants from lawfully entering or remaining in the United States. The U nonimmigrant status allows a recipient to live and work in the United States for up to four years. U visa regulations also provide derivative status for certain family members of U visa recipients, thus promoting family unity by allowing those family members to stay in the United States as well. Finally, after three years, a recipient of a U visa may be eligible to adjust her status to lawful permanent residence if her “continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.”

B. U Visa Eligibility

In order to establish eligibility for a U visa, an applicant must demonstrate that he meets several required elements: (1) she was a victim of qualifying criminal activity that occurred in the United States or violated U.S. law; (2) she possessed information concerning that criminal activity; (3) she suffered substantial mental or physical abuse as a result of having been a victim of the criminal activity; and (4) she has been helpful, is being helpful,

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39 See Pendleton, supra note 32 at 2.
41 Immigration and Nationality Act § 212(d)(3), (14), 8 U.S.C. § 1182(d)(3), (14) (2012). (Section 212(a) of the INA lists the various categories of immigrants that are excluded from lawful entry or presence in the United States. If an immigrant falls into one of these categories, she is “inadmissible.”); see also Rachel Gonzalez Settlage, ET AL., IMMIGRATION RELIEF: LEGAL ASSISTANCE FOR NONCITIZEN CRIME VICTIMS, 40 (2014) (“In general, most grounds of inadmissibility may be waived for a petitioner granted U nonimmigrant status except for those who were participants in Nazi persecutions or who committed acts of genocide, extrajudicial killings, or torture.”); see also Leticia M. Saucedo, Immigration Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Immigrant Workplace, 38 FORDHAM URB. L. J. 308, 314 (“The broad waiver provisions for U nonimmigrant crime victims indicates the extent to which Congress sought to protect U visa crime victim recipients.”).
42 Extensions are available if the recipient’s assistance is still needed in the investigation or prosecution of the criminal activity. 8 C.F.R. § 214.14(c)(7), (g) (2016).
43 Family members eligible for derivative status include the U visa recipient’s spouse and unmarried children under 21 years of age, and, if the U visa recipient is under 21 years of age, her parents and unmarried siblings under 18 years of age. The perpetrator of the crime, even if a family member, is not eligible for derivative status. 8 C.F.R. § 214.14(a)(10), (f)(1) (2016); see also McCormick, supra note 38 at 602.
44 Immigration and Nationality Act § 245(m)(1)(b), 8 U.S.C. § 1255(m)(1)(B) (2012) (emphasis added). In addition, the U visa recipient must not have unreasonably refused to provide continued assistance to law enforcement during her period of lawful presence. Immigration and Nationality Act § 245(m)(1), 8 U.S.C. § 1255(m)(1) (2012).
Spring 2017  U Visas and the Flint Water Crisis  129

or is likely to be helpful to a Federal, State or local authority investigating or prosecuting the criminal activity.45

First, the applicant must demonstrate that she was a victim, direct or indirect, of a qualifying criminal activity that occurred in the United States or violates U.S. law.46 The enumerated qualifying criminal activities, as covered under the initial U visa legislation, are: abduction, abusive sexual contact, being held hostage, blackmail, domestic violence, extortion, false imprisonment, felonious assault, female genital mutilation, incest, involuntary servitude, kidnapping, manslaughter, murder, obstruction of justice, peonage, perjury, prostitution, rape, sexual assault, sexual exploitation, slave trade, torture, trafficking, unlawful criminal restraint, witness tampering, attempt, conspiracy, or solicitation to commit any of these crimes.47 In 2013, during the reauthorization of VAWA, Congress added two new qualifying crimes: stalking and fraud in foreign labor contracting.48

The regulations also provide that in addition to the enumerated crimes, qualifying criminal activity may include “any similar activity in violation of Federal, State, or local criminal law.”49 The regulations define “similar activity” as “criminal offenses in which the nature and elements of the offenses are substantially similar to the statutorily enumerated list of criminal activities.”50 By design, the U visa does not cover every crime, but even during the commission of a non-qualifying crime, criminal activity may occur that is covered by the U visa, such as obstruction of justice.51

In most cases, the immigrant victim must be the direct victim of the qualifying crime; in other words, the victim must have been directly and proximately harmed by the criminal activity.52 In certain situations, an indirect victim may also be eligible for a U visa. First, if the direct victim is deceased or incapacitated as a result of the crime, an indirect victim may apply for a U visa.53 Second, if the direct victim is a minor or otherwise incompetent, a family member may qualify as an indirect victim.54 If the qualifying criminal activity is technically not against a person, as is the case with obstruction of justice, witness tampering, or perjury, then an indirect victim may also qualify for a U visa.55 In cases where the criminal activity

45 8 C.F.R. § 214.14(b) (2016); see also Settlage, supra note 25.
46 8 C.F.R. § 214.14(b) (2016).
49 Id.
54 Id. (Indirect family member victims are limited to a spouse and unmarried children under 21 years of age and, if the direct victim is a child under 21 years of age, parents and unmarried siblings under 18 years of age.).
was not against a person, an indirect victim must have been directly and proximately harmed by the perpetrator of the criminal activity.\textsuperscript{56} In addition, the perpetrator must have committed the crime for one of two reasons: to avoid or frustrate efforts to investigate, arrest, prosecute, or otherwise bring to justice the perpetrator for other criminal activity or to further the perpetrator’s abuse, exploitation or control over the victim through the legal system.\textsuperscript{57}

Second, an applicant for a U visa must demonstrate that she suffered substantial mental or physical abuse as a result of having been a victim of qualifying criminal activity.\textsuperscript{58} In defining “substantial abuse,” the regulations state:

Whether abuse is substantial is based on a number of factors, including but not limited to: The nature of the injury inflicted or suffered; the severity of the perpetrator’s conduct; the severity of the harm suffered; the duration of the infliction of the harm; and the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim, including aggravation of pre-existing conditions.\textsuperscript{59}

Third, an immigrant victim must also possess information concerning that criminal activity.\textsuperscript{60} This information can include not just knowledge about the details of the commission of the crime, but also knowledge about the resulting harm as well, if that knowledge helps in the investigation or prosecution of the crime.\textsuperscript{61} For example, a rape victim may not have seen the face of her rapist if he wore a mask, but the result of a rape examination may help to identify the assailant even if that is the only piece of evidence she can provide.

Finally, the immigrant victim must demonstrate that he was helpful, is being helpful, or is likely to be helpful to a Federal, State, or local authority investigating or prosecuting the criminal activity.\textsuperscript{62} Helpfulness means assisting in the investigation or prosecution of a crime, and this helpfulness requirement is defined broadly to encompass assistance provided in the past, present or future.\textsuperscript{63} Helpfulness can come at many stages of an investigation

\textsuperscript{57} Id.
\textsuperscript{58} Id. § 214.14(a)(8) (2016).
\textsuperscript{59} Id. § 214.14(b)(1) (2016).
\textsuperscript{60} Id. § 214.14(b)(2) (2016).
\textsuperscript{61} DEPT O F H OMELAND S EC., U VISA L AW E NFORCEMENT CERTIFICATION R ESOURCE G UIDE, supra note 51 at 5. (“To be eligible for a U visa, the victim of the crime must possess credible and reliable information establishing that the victim has knowledge of the details of the criminal activity or events leading up to the criminal activity, including specific facts about the crime/victimization leading law enforcement to determine that the victim has assisted, is assisting, or is likely to provide assistance in the investigation or prosecution of the crime.) (emphasis added).
\textsuperscript{63} Id. § 214.14(b) (2016).
Spring 2017 U Visas and the Flint Water Crisis

or prosecution, including the sentencing stage. Importantly, there is no requirement that the crime be ultimately prosecuted; simply reporting the crime or providing a witness statement may be enough to demonstrate helpfulness. The Department of Homeland Security (DHS) has specifically advised that a “current investigation, the filing of charges, a prosecution or conviction are not required to sign the law enforcement certification. Many instances may occur where the victim has reported a crime, but an arrest or prosecution cannot take place due to evidentiary or other circumstances.”

In order to demonstrate helpfulness, a U visa applicant must obtain a law enforcement certification (LEC) from a certifying official in a certifying agency, which attests to the applicant’s helpfulness. A certifying official is defined as a Federal, State, or local judge or “the head of the certifying agency, or any person(s) in a supervisory role who has been specifically designated by the head of the certifying agency to issue U nonimmigrant status certifications on behalf of that agency.”

A certifying official has complete discretion regarding whether or not to sign an LEC, and that decision is not subject to review. However, the decision regarding whether or not the applicant meets the requirements of the U visa is made by U.S. Citizenship and Immigration Services (USCIS), not the certifying official who issues an LEC. Once a U visa is granted, in order to keep lawful U status or eventually adjust to lawful permanent residency, the applicant must continue to cooperate with reasonable requests from law enforcement.

64 Following the terrorist attacks on September 11, 2011, advocates for undocumented victims of the attacks and their family members were able to obtain U visas for some victims based on their cooperation with the sentencing trial of Zacarias Moussaoui, one of the terrorists. See infra Part III.B.
65 See SETTLAGE ET AL., supra note 401 at 39.
66 DEP’T OF HOMELAND SEC., U VISAN CENSO L ENFORCEMENT CERTIFICATION RESOURCE GUIDE, supra note 51 at 5.
69 The instructions for the I-918B law enforcement certification form specifically state that “[a]n agency’s decision to provide a certification is entirely discretionary; the agency is under no legal obligation to complete a Form I-918, Supplement B, for any particular alien. However, without a completed Form I-918, Supplement B, the alien will be ineligible for U nonimmigrant status.” U.S. CITIZENSHIP & IMMIGR. SERVS., DEP’T OF HOMELAND SEC., INSTRUCTIONS FOR I-918 SUPPLEMENT B, U NONIMMIGRANT STATUS CERTIFICATION 1–2 [hereinafter U.S. CITIZENSHIP & IMMIGR. SERVS., INSTRUCTIONS FOR I-918 SUPPLEMENT B], https://www.uscis.gov/sites/default/files/files/form/i-918supbinstr.pdf, archived at https://perma.cc/66PX-2KUF (2013); see also Pendleton, supra note 32 at 2.
70 8 C.F.R. § 214.14(b) (2016).
71 Immigration and Nationality Act § 245(m)(1), 8 U.S.C. § 1255(m)(1)(B) (2012); see DEP’T OF HOMELAND SEC., U VISAN CENSO L ENFORCEMENT CERTIFICATION RESOURCE GUIDE, supra note 51 at 3-4.
C. Implementation of the U Visa

Since its creation, scholars and advocates have sought to clarify the U visa requirements and to ensure that all undocumented victims who are statutorily eligible for a U visa are able to obtain one despite procedural obstacles.\(^ {72}\) Many of these efforts have focused on the LEC. In some localities, law enforcement officers are unwilling to issue LECs or will only issue LECs in very limited circumstances, in violation of the regulations and USCIS guidelines.\(^ {73}\) However, because the decisions of certifying agents are not subject to appeal, there is a little a victim can do if denied an LEC.\(^ {74}\) Thus, advocates and scholars have sought to make information on the LEC more widely available and understood by possible certifying agencies.\(^ {75}\)

While U visa applications are filed overwhelmingly by battered immigrants,\(^ {76}\) U visas have been granted to victims to many other types of crimes as well.\(^ {77}\) U visa have also been granted to individuals in a group where there are multiple victims of a single criminal scheme. For example, advocates have seen some success in obtaining U visas for groups of exploited undocumented workers. In one case, a group of 10 undocumented workers in New Orleans engaged in Hurricane Katrina clean-up brought a complaint against their employer,\(^ {78}\) who promptly reported the workers to Immigration and Customs Enforcement (ICE).\(^ {79}\) The workers requested that the trial court act as a certifying official for LECs so that they could apply for U

\(^{72}\) See, e.g., Joey Hipolito, supra note 25; Orloff et al, Mandatory U Visa Certification, supra note 25; Abreu et al., supra note 25; How Law Enforcement is Using the U-Visa, supra note 31; Promoting U Visas with Local Officials, supra note 31.

\(^{73}\) See Abreu et al., supra note 31 at 3-4 (The authors of this report argue that asking law enforcement for an LEC is tantamount to playing “geographical roulette.”); see also Natalia Lee et al., Nat’l Immigrant Women’s Advocacy Project, Department of Homeland Security Policy Answers to Law Enforcement Reasons for Not Certifying, 2–10 (2013), http://library.niwap.org/wp-content/uploads/2015/IMM-Qref-DHSAnswerforLawEnforcementNotCertifying-09.27.13.pdf., archived at https://perma.cc/5QQZ-36Q5; see generally Settage, supra note 25.

\(^{74}\) See U.S. Citizenship & Immigr. Servs., Instructions for Form I-918 Supplement B, supra note 69.

\(^{75}\) See, e.g., Abreu et al., supra note 31; How Law Enforcement is Using the U-Visa, supra note 31; Promoting U Visas with Local Officials, supra note 31; Lee et al., supra note 73.


\(^{77}\) Leslye Orloff et al. U-Visa Victims and Lawful Permanent Residency, supra note 76 at 8-9.


\(^{79}\) Coleman, supra note 78 at 3.
visas.80 The trial court provided LECs for the named plaintiffs, and they eventually obtained U visas.81 In another case, after 8 workers filed a complaint against their employer in Tennessee, federal prosecutors pursued criminal charges against the workers for identity theft and fraud.82 However, the Equal Employment Opportunity Commission investigated their workplace claims and granted the workers LECs, which later led to U visas for the workers.83 Both of these cases also demonstrate that certifying officials are not just limited to police officers or prosecutors.

In the above cases, although groups were involved, the groups were relatively small.85 An uncharted area for the U visa is when there is a very large group of victims, as there potentially would be in a man-made crisis caused by criminal activity, such as the water crisis in Flint, Michigan. Even if all the victims of such a crisis meet the requirements for issuing an LEC and are otherwise statutorily eligible for a U visa, obtaining LECs for large groups may prove difficult because of the number of individuals involved. Yet, given the vulnerabilities and needs of undocumented immigrants in times of crisis, a U visa is an important tool for advocates when criminal activity is involved.

III. Vulnerabilities of Undocumented Immigrants in Crisis Situations

Being an undocumented immigrant in the United States is difficult. Undocumented immigrants face hostility and discrimination from others in U.S. society.86 Undocumented immigrants tend to be poorer and less well-educated than U.S. citizens or lawful permanent residents.87 They are less likely to be covered by health insurance or have access to medical care.88
They also live in constant fear of being deported, which in many cases means separation from their family and community.\(^89\)

Being an undocumented immigrant when disaster strikes can be fatal. Undocumented immigrants are particularly vulnerable to harm during disasters or crisis situations.\(^90\) Language barriers and cultural isolation, as well as a fear of law enforcement and of deportation, prevent many undocumented immigrants from learning about a crisis as it happens.\(^91\) These same issues, as well as laws limiting access to benefits for undocumented immigrants,\(^92\) prevent many undocumented immigrants from getting assistance in the aftermath of a crisis. Thus, a lack of status is one of the defining characteristics that make undocumented immigrants vulnerable during and after a crisis situation.

Despite the importance of lawful status in a crisis, there is no form of immigration status available to undocumented immigrants solely based on being a victim of a crisis.\(^93\) The Department of Homeland Security (DHS), exercising prosecutorial discretion, may decide not to engage in enforcement activity temporarily.\(^94\) However, this does not lead to a lawful status.\(^95\) If, however, criminal activity is involved in creating the crisis, such as in the 9/11 terrorist attacks or the Flint water crisis, then victims may be eligible for immigration relief in the form of a U visa. While U visas are only available to victims of criminal activity, understanding the vulnerabilities of undocumented immigrants generally in disaster and crisis situations informs the importance of obtaining such legal status.

\(^{89}\) Leticia M. Saucedo, A New “U”; Organizing Victims and Protecting Immigrant Workers, 42 Univ. Of Richmond L. Rev. 891, 909 (2008).

\(^{90}\) See generally Am. Pub. Health Ass’n, Addressing the Needs of Immigrants in Response to Natural and Human-Made Disasters in the United States, supra note 5.

\(^{91}\) Id.

\(^{92}\) 8 U.S.C. § 1612.

\(^{93}\) There are very few paths to lawful status in the United States. See Settlage, supra note 25 at 3 (“There are essentially four broad categories of lawful immigration: (1) family-based immigration, (2) employment-based immigration, (3) diversity immigration (as recipients of the diversity visa), and (4) humanitarian admissions (primarily refugees and asylees).”); see also Immigration and Nationality Act § 101(a)(15), 8 U.S.C. § 1101(a)(15) (2012); Dep’t of Homeland Sec., 2012 Yearbook of Immigration Statistics, Table 6, Persons Obtaining Legal Permanent Resident Status by Type and Major Class of Admission: Fiscal Years 2003 to 2012, http://www.dhs.gov/yearbook-immigration-statistics-2012-legal-permanent-residents, archived at https://perma.cc/KSV8-MR7N.

\(^{94}\) Prosecutorial discretion may be exercised at any stage of an immigration proceeding, including during an initial decision to arrest or detain an immigrant. DHS agencies with authority to exercise prosecutorial discretion include USCIS, ICE, and U.S. Customs and Border Patrol. See Am. Immigr. Council, Fact Sheet: Understanding Prosecutorial Discretion in Immigration Law, (May 26, 2011), https://www.americanimmigrationcouncil.org/research/understanding-prosecutorial-discretion-immigration-law, archived at https://perma.cc/W9F6-ZRBQ.

\(^{95}\) Id.
A. Undocumented Immigrants Face Significant Barriers to Obtaining Information and Assistance During a Crisis

1. Barriers to Obtaining Information

Language barriers significantly increase the likelihood that immigrants will not receive needed information about impending or ongoing crisis situations.\(^96\) Government agencies and state and local social services do not always provide warnings or information in languages other than English.\(^97\) Individuals with limited English proficiency may not learn about an impending crisis, or may not understand what information they do receive.\(^98\) Language barriers may be compounded by cultural and social isolation.\(^99\) Racial bias and cultural insensitivity on the part of officials and relief workers may also impede the dissemination of disaster information to immigrants.\(^100\)

The challenges faced by undocumented immigrants in a crisis, particularly those with limited English proficiency, is well illustrated by the events surrounding Hurricane Katrina in 2005.\(^101\) As Hurricane Katrina approached...
the Gulf Coast, the State of Louisiana issued warnings about the coming hurricane in English only.\footnote{102} Other sources of information that could be understood by those with limited English proficiency were extremely limited, if available at all.\footnote{103} In New Orleans, there was only one Spanish language station, and the hurricane interrupted that station’s broadcasts.\footnote{104} Some service personnel reported that the devices they used to facilitate translation during the hurricane were not useful because there was no electricity.\footnote{105}

There were similar problems when a series of severe tornados struck Oklahoma in May 2013.\footnote{106} The National Weather Service in Norman, Oklahoma issued storm and tornado warnings in English only.\footnote{107} The only Spanish language station in Oklahoma City went off-air as personnel sought shelter during one massive tornado on May 31, 2013.\footnote{108} Of the people killed during the tornados, nine were part of the growing Guatemalan immigrant community and were unfamiliar with such storms.\footnote{109} Surviving friends and family members believe that if they had understood the warnings, they might have survived.\footnote{110}

2. Lack of Access to Assistance

Undocumented immigrants in a time of crisis face a number of barriers to obtaining assistance during or following a crisis. For one, undocumented


\textsuperscript{103} See DISASTER PREPAREDNESS IN URBAN IMMIGRANT COMMUNITIES, supra note 96 at 11; see also Brenda Muniz, In the Eye of the Storm: How the Government and Private Response to Hurricane Katrina Failed Latinos, NAT’L COUNCIL OF LA RAZA, 2 (2006).


\textsuperscript{105} See DISASTER PREPAREDNESS IN URBAN IMMIGRANT COMMUNITIES, supra note 96 at 11.


\textsuperscript{107} See Juliana Keeping & Hannah Covington, Oklahoma Storms: Many Spanish-Speaking Families Struggle to Understand Storm Precautions, Officials Say, THE OKLAHOMAN (July 14, 2013, 12:00 AM), http://newsonok.com/article/3862301, archived at https://perma.cc/2FSX-V2PG.

\textsuperscript{108} See Keeping & Covington, supra note 107.

\textsuperscript{109} Id.

\textsuperscript{110} Id.
immigrants are not entitled to the vast majority of public benefits, including welfare, health, housing, and food benefits. The Affordable Care Act does not cover undocumented immigrants, nor does Medicaid. Most long-term aid following a disaster or state of emergency is also not available to undocumented immigrants.

Undocumented immigrants are entitled to emergency medical assistance and short-term in-kind emergency and disaster relief. The Stafford Disaster Relief and Emergency Assistance Act requires that FEMA provide immediate temporary housing, emergency food supplies, and crisis counseling to all victims of a disaster or emergency, regardless of status. The Stafford Act also requires that this short-term assistance be provided without discrimination. In addition, undocumented immigrants may be eligible for some forms of state or private assistance. U.S. citizen children are entitled to the full range of government benefits, regardless of the status of their parents.

111 Even lawful permanent residents generally must reside in the United States for at least five years before being eligible for the full range of government benefits. 8 U.S.C. § 1612.


113 See When Disaster Strikes, supra note 102 at 21.


115 Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 USC § 5121 et seq. (2013) (as amended by the Post-Katrina Emergency Management and Reform Act of 2006); see also Wasem, supra note 114 at 7.

116 Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 USC § 5121 et seq. (2013) (as amended by the Post-Katrina Emergency Management and Reform Act of 2006), §5151, 308(a) ("...relief and assistance activities shall be accomplished in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, disability, English proficiency, or economic status."); see also U.S. DEPT. OF JUST., HOMELAND SEC., HOUSING & URB. DEV., HEALTH & HUM. SERVS., & TRANSP., GUIDANCE TO STATE AND LOCAL GOVERNMENTS AND OTHER FEDERALLY ASSISTED RECIPIENTS ENGAGED IN EMERGENCY PREPAREDNESS, RESPONSE, MITIGATION, AND RECOVERY ACTIVITIES ON COMPLIANCE WITH TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 (Aug. 2016), https://www.justice.gov/crt/file/885401/download, archived at https://perma.cc/JM3H-34DM.


For the immigrant victim who does not speak English, however, understanding what forms of relief are available during a crisis may be an insurmountable challenge.\textsuperscript{119} Even without language barriers, undocumented immigrants may be unaware that they are eligible for certain forms of disaster or emergency relief.\textsuperscript{120} In addition, relief workers are often unaware of eligibility guidelines and may turn away undocumented immigrants attempting to access benefits to which they are entitled.\textsuperscript{121} In mixed status families,\textsuperscript{122} undocumented parents may be unaware that their U.S. citizen children are entitled to federal benefits.\textsuperscript{123} Even if the parents are aware of their children’s eligibility, the process to obtain those benefits is exceedingly complex with multiple steps, and government workers have erroneously denied undocumented parents benefits for their children.\textsuperscript{124}

Following Hurricane Katrina in 2005, FEMA failed to make assurances regarding access to emergency aid for undocumented victims of the Hurricane.\textsuperscript{125} FEMA did not provide emergency housing to some Latinos, assuming they were undocumented, even though those undocumented immigrants were eligible for emergency housing.\textsuperscript{126} Red Cross volunteers at one site asked some victims for identification and turned away those who could not prove their citizenship.\textsuperscript{127} In mixed status families, FEMA erroneously denied benefits to U.S. citizen children because of their parents’ lack of status.\textsuperscript{128}

In 2010, the British Petroleum (BP) Deepwater Horizon oil spill on the Gulf of Mexico\textsuperscript{129} hit the Vietnamese immigrant community particularly

\textsuperscript{119} Id.; see Singh, supra note17; Peguero, supra note 99 at 6–9.
\textsuperscript{121} WHEN DISASTER STRIKES, supra note 102 at 21; Muniz, supra note 103 at 4.
\textsuperscript{122} “Mixed status” refers to families in which some members have lawful status or citizenship while others have no lawful status. See Jeffrey S. Passel & Paul Taylor, Unauthorized Immigrants and Their U.S.-Born Children, Section iii. Household Structure; Mixed Families (Aug. 11, 2010), http://www.pewhispanic.org/2010/08/11/iii-household-structure-mixed-families/, archived at https://perma.cc/ND77-4VSL.
\textsuperscript{123} WHEN DISASTER STRIKES, supra note 102 at 21; Muniz, supra note 103 at 4. UNMET NEEDS, supra note 120 at 19; Muniz, supra note 103 at 4.
\textsuperscript{125} Muniz, supra note 103 at 4–5.
\textsuperscript{126} WHEN DISASTER STRIKES, supra note 102 at 21.
\textsuperscript{127} Muniz, supra note 103 at 4.
\textsuperscript{128} On April 20, 2010, the Deepwater Horizon oil rig exploded and sank, killing 11 people and leaking more than 3 million barrels of oil into the water off the coast of Louisiana. The spill was devastating to local ecosystem and wildlife, and has resulted in long-term physical and mental health issues for some coastal residents. SMITHSONIAN MUSEUM OF NAT. HIST. OCEAN PORTAL, GULF OIL SPILL, http://ocean.si.edu/gulf-oil-spill, archived at https://perma.cc/53K5-J4V (last visited Apr. 13, 2017); see also Mark Schleifstein, BP Deepwater Horizon Spill: Scientists Say Seafood Safe, but Health Effects Being Measured, THE TIMES-PICA-
hard. Much of the Vietnamese community in the Gulf of Mexico relied exclusively on fishing for their livelihood. Yet, language barriers prevented many from accessing information about claims against BP and about other financial and social services available to those affected by the spill.

In contrast, as Hurricane Sandy approached the east coast in October 2012, New York Mayor Michael Bloomberg released an online guide in Spanish and other languages, which made clear that even those without lawful status were eligible for hurricane assistance and provided a list of services by state, city, and federal government. Nevertheless, some relief sites and food pantries required that those seeking aid produce identification, negatively affecting the ability of undocumented residents to obtain aid. Furthermore, a survey of residents on Long Island and Staten Island in December 2012 found that 78 percent of immigrants surveyed had not applied for disaster-related public or private relief, with most saying that they did not know how to apply or if they were eligible. Of those immigrants who did apply for relief, only one in four actually received help.

3. Fear of Deportation

A fear of deportation also prevents many undocumented immigrants from seeking assistance in the aftermath of a crisis. As one scholar has noted, undocumented migrants “live with the constant fear that deportation will rip them away from the lives that they have built, including their spouses and children.” This is true even when there are U.S. citizen chil-

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131 Grossman & Mark, supra note 130.
132 Id. at 9 (For those immigrants with limited English proficiency, 84 percent had not applied for disaster-related assistance.).
133 See Tumlin & Blazer, supra note 126; see also DISASTER PREPAREDNESS IN URBAN IMMIGRANT COMMUNITIES, supra note 96 at 27-28 (noting that, according to those interviewed, during the 2007 San Diego fires, police called immigration authorities on undocumented victims).
dren in a family who are eligible for public benefits. When the parents of U.S. citizen children are undocumented, those parents are often reluctant to take their get medical assistance for their children, fearing they will be asked about their immigration status.

In recent years, the undocumented immigrant community’s fear of deportation has grown for many reasons, including an increased number of localities in which police actively cooperate with the federal government in immigration enforcement activities, as well as dramatic increases in the number of individuals removed from the United States in the late 1990’s and 2000’s. At the beginning of 2017, President Trump issued an executive order focused on increased immigration enforcement, which lead to immigration raids across the country. As a result, fear in immigrant communities has increased even further. Social service agencies report that they are seeing a drop in the number of immigrants applying for benefits for which they or their children are eligible, due to a fear of deportation.

Exercising prosecutorial discretion, DHS has declined to engage in immigration enforcement activity in the aftermath of some crisis situa-

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140 See Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193); 42 U.S.C. §1320b-7(b) & (d); Singh, supra note 17.
145 See Kulish, et al, supra note 24; Schrank, supra note 24.
147 See AM. IMMIGR. COUNCIL, FACT SHEET: UNDERSTANDING PROSECUTORIAL DISCRETION IN IMMIGRATION LAW, supra note 94.
In other words, DHS has declined to detain or deport undocumented victims in crisis situations. For example, in the aftermath of Hurricane Charley in 2004, DHS made clear that it would not detain or seek to deport undocumented immigrants seeking assistance. A suspension of immigration enforcement activity permits undocumented immigrants to seek assistance without fear of deportation. However, while DHS may decide to exercise prosecutorial discretion, this does not lead to lawful immigration status.

In some crisis situations, DHS has refused to exercise prosecutorial discretion. Following Hurricane Katrina in 2005, DHS repeatedly refused to say that it would not use information obtained from people seeking disaster relief for immigration enforcement purposes. On the contrary, DHS stated that undocumented immigrants would have no immunity from removal when seeking disaster assistance. This refusal by DHS to suspend immigration enforcement activities in the aftermath of Hurricane Katrina was particularly problematic since FEMA reportedly used ICE officers as security in some of their post-disaster relief offices, further discouraging undocumented victims from seeking help. Some undocumented immigrants also reported that relief workers interrogated them about their immigration status when they did seek aid.

DHS did not simply decline to offer assurances following Hurricane Katrina that undocumented immigrants could seek relief aid without fear of deportation. Rather, DHS initiated immigration proceedings against some undocumented immigrant victims, rounding them up at shelters or taking
them off buses or planes during the evacuations.156 Likewise, in 2010 in the aftermath of the Deepwater Horizon oil spill, DHS conducted immigration enforcement actions at clean-up sites, searching for undocumented workers.157 Such instances have a chilling effect on communities with undocumented immigrants and make it even less likely that undocumented immigrants will seek needed help.

B. Lawful Status in the Aftermath of a Crisis: Lessons from 9/11

It is impossible to underestimate the importance that lawful status plays in allowing immigrants to access services in the aftermath of a crisis.158 Lawful status is required for most government benefits.159 More importantly, lawful status allows victims to come forward to access services without fear of deportation.160 Lawful status is also important to ensure family unity following a crisis, particularly in mixed status families with U.S. citizen children and undocumented parents.161 Undocumented parents live in fear of being separated from their U.S. citizen children, and often perceive that they must choose between obtaining care for their children and staying safe from deportation.162 However, there is no form of lawful immigration status available to undocumented immigrants solely because they are the victims of a disaster or a crisis.

The experiences of undocumented immigrants who lost family members during the September 11, 2001 terrorist attacks provide important lessons about the ways that immigration laws and policies can be used to help undocumented victims in a time of crisis, rather than contributing to their vulnerability. During the 9/11 terrorist attacks, at least 25 undocumented immigrants lost family members in the attacks.163 Initially, many undocumented immigrants who lost family members in the attacks did not make

158 See Saucedo, A New “U,” supra note 89 at 906-907 (arguing that for many undocumented migrants, legalization represents freedom from fear and from the exploitation that results from undocumented status).
159 See Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193) § 402(b); 42 U.S.C. §1320b-7(b) & (d); 8 U.S.C. § 1612 (Even lawful permanent residents generally must reside in the United States for at least five years before being eligible for the full range of government benefits.); see also AM. PUB. HEALTH ASS'N, ADDRESSING THE NEEDS OF IMMIGRANTS IN RESPONSE TO NATURAL AND HUMAN-MADE DISASTERS IN THE UNITED STATES, supra note 5.
160 See Tumlin & Blazer, supra note 126.
161 See Passel & Cohn, supra note 87 at 8.
162 See Ramji-Nogales, supra note 139 at 1050.
Spring 2017  U Visas and the Flint Water Crisis

claims with the September 11 Victim Compensation Fund{164} for fear that their information would be shared with ICE.{165} In August 2002, DHS clarified that it would not use information provided to the Victim Compensation Fund to initiate immigration enforcement activities.{166} This clarification by DHS meant that 14 individuals identified as undocumented immigrants ultimately received compensation through the Fund.{167} However, the Victim Compensation Fund did not offer any kind of lawful status, and the undocumented immigrant family members of victims of the September 11 attacks continued to live in fear of deportation.

In 2005, Representative Carolyn Maloney introduced a bill, the September 11th Family Humanitarian Relief and Patriotism Act, which would have granted lawful permanent residency to family members of individuals who had died in the attacks.{168} In introductory remarks to a companion bill in the Senate, Senator Reid, a cosponsor, stated that “[m]any of our immigrant residents lost loved ones that day, and no person who has faced such personal heartache and hardship at the hands of terrorists should be forced to face deportation.”{170} However, both bills died in Committee. Representative


{168} H.R.3575, September 11th Family Humanitarian Relief and Patriotism Act, 109th Congress (2005-2006); see also Introduction of September 11th Humanitarian Relief and Patriotism Act (July 28, 2005), https://www.congress.gov/congressional-record/2005/07/29/extensions-of-remarks-section/article/E1676-2, archived at https://perma.cc/CSTA-PSS2 (statement of Representative Maloney) (“While the Administration continues to act with care by not moving forward with deportation procedures for these individuals, their legal status remains in limbo unless they are given legal status in the United States. They should not continue to be victimized by the 9/11 terrorists by living in fear that they will have to leave their homes, jobs, and communities.”); see also Illegal Immigrants Seek Residency in 9/11 Bill, supra note 163.


Maloney and Senator Lautenberg reintroduced the bills in 2007, and again in 2009, with amendments, but without success.\textsuperscript{171}

The introduction of the House and Senate Bills was important nevertheless because it ultimately led, in August 2008, to DHS granting humanitarian parole\textsuperscript{172} to 16 undocumented immigrants who lost family members in the 9/11 attacks.\textsuperscript{173} DHS granted humanitarian parole on the condition that it could transmit information about the 16 individuals to Congress to aid in their consideration of the \textit{September 11th Family Humanitarian Relief and Patriotism Act}.\textsuperscript{174} The grants of humanitarian parole permitted the undocumented family members to remain in the United States while awaiting Congress’ deliberation on the \textit{September 11th Family Humanitarian Relief and Patriotism Act}. This also meant the family members could remain in the United States while they sought an alternative form of immigration relief through the U visa.\textsuperscript{175}

Fourteen undocumented immigrants who either lost family members or had been injured themselves in the 9/11 attacks gave statements to a prosecutor in the sentencing trial of Zacarias Moussaoui, one of the terrorists.\textsuperscript{176} Should be permitted to remain here to visit the memorials that are presently being built in New York and other locations to honor the victims who perished in the terrorist attacks. In many cases, these memorials will be all that husbands, wives, and children, have left to remember their loved ones.


\textsuperscript{174}Baker Letter, supra note 173.


All fourteen described the effect of the attacks on their lives and the physical or mental harm they suffered as a result. However, the prosecutor ultimately issued LECs to only three of the fourteen whose stories he found most compelling. He explained that he refused to grant LECs to the other nine because they had not met all of the U visa requirements, despite the fact that only USCIS has the authority to make such determinations.

Nevertheless, a few years later, prosecutors trying the cases of several of the alleged terrorists in the Southern District of New York granted LECs to the remaining family members after extensive interviews and investigations. All of those who were interviewed, investigated, and gave witness statements in the SDNY trials eventually obtained U visas as well. The granting of LECs to the family members of victims of the September 11 terrorist attacks demonstrates that the U visa can be an important tool for undocumented immigrants when there is criminal activity involved in a crisis.

IV. The Flint Water Crisis

In April 2014, the city of Flint, Michigan began sourcing its water from the Flint River. However, Flint failed to treat the water or use corrosion control, despite the fact that the water was both toxic and corrosive, which resulted in lead from older pipes leaching into the water supply. As a result, Flint residents, including hundreds of undocumented immigrants, were exposed to contaminated drinking water. Undocumented immigrants in Flint faced significant obstacles to obtaining information about the crisis as it unfolded and as a result, many drank contaminated water for longer than other residents. Undocumented Flint residents continue to face obstacles obtaining medical and social services because of their lack of lawful status.

The water crisis garnered national attention. As state and federal agencies and the media began investigating the crisis, it became apparent
that criminal malfeasance on the part of state officials played a significant role in causing the crisis. As a result, the Attorney General of the State of Michigan has filed criminal charges against several state officials. Thus, not only did state officials help create the water crisis, but also, because undocumented residents in Flint now face life-long health concerns, state officials created the immigrants’ need for access to medical and social services. Yet, because of a lack of status, most undocumented residents in Flint are unable to access many of the services they need.

A. Timeline of Events

“[T]o anyone who grew up in Flint as I did, the notion that I would be getting my drinking water from the Flint River is downright scary.”

Email from Michael Gadola, Former Legal Counsel to Governor Snyder, to the Executive Director of the Michigan Agency for Energy (Oct. 14, 2014)

Flint, Michigan is one of the poorest and most economically troubled cities in the country. The city as a whole has suffered dramatic population loss. Joblessness is endemic and more than 40 percent of the residents in Flint live below the poverty line. In 2011, after declaring Flint a financial emergency, Michigan Governor Rick Snyder appointed an emergency manager to Flint. Emergency managers, who are unelected, make all decisions


Vasquez, supra note 186.


FWATF REPORT, supra note 11 at 15 (noting that the poverty rate in Flint is almost 3 times greater than the national average); see also Hammer, supra note 192 at 5–6.

See Local Financial Stability and Choice Act § 9(1), Mich. COMP. LAWS § 141.1549 (2012) (“The governor may appoint an emergency manager to address a financial emergency within that local government as provided for in this act.”); see also FWATF REPORT, supra note 11 at 39–42; Kristin Longley, Dayne Walling Re-Elected Mayor as State Declares Finan-
related to city planning and answer only to the Michigan Department of Treasury. In matters related to city governance, the Flint City Council can only offer advisory opinions to the emergency manager. There were four emergency managers in Flint between 2011 and April 2015, each of whom had full control of the city’s administration. Scholars, advocates, and others have criticized the emergency manager law as an undemocratic form of governance, not subject to the checks and balances inherent in elections, and prone to abuses of power.

Since 1967, Flint had received treated water from the Detroit Water and Sewage Department (DWSD), which sources water from Lake Huron. In April 2013, after a symbolic vote by the Flint City Council, Emergency Manager Ed Kurtz signed an agreement to join the Karegnondi Water Authority (KWA) pipeline, arguing that doing so would save money. The KWA, which would also source water from Lake Huron, was still under

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195 See Local Financial Stability and Choice Act, MICH. COMP. LAWS §§ 141.1541–75 (2012). A popular referendum in Michigan initially repealed the Emergency Manager Law as introduced by Snyder and passed by the legislature; however, Snyder then reintroduced an amended Emergency Manager Law that passed in a lame duck session and was not subject to a referendum. See Hammer, supra note 192 at 3–4.

196 See FWATF Report, supra note 11 at 39–42.


200 Not only did the City Council not have any actual power to make a decision on the matter and they did not have all the information they needed to make an informed decision. See Hammer, supra note 192 at 19–20 (citing Spectacle Tv, Flint City Council March 25th 2013, YOUTUBE (Mar. 28, 2013), https://www.youtube.com/watch?v=U3gbZShzZKI, archived at https://perma.cc/9SCQ-SEUV).

development at the time. Shortly thereafter, the DWSD issued a notice to Flint that it would terminate its contract in one year, prior to the completion of the KWA, as required by its contract. During negotiations with Emergency Manager Kurtz, DWSD offered various options to continue providing water to Flint; however, Kurtz rejected all offers.

In June 2013, Kurtz signed off on a contract to begin using Flint River water, despite having previously rejected such a switch in 2012 after consulting with the Michigan Department of Environmental Quality (MDEQ). Kurtz made this decision even though Genesee County Commissioner Jeff Wright had refused to switch Genesee County, where Flint is located, to Flint River water due to the extremely high cost that would be necessary to treat the water. According to a July 2011 study, it would cost more than $61 million to upgrade Flint’s water treatment plant.

Nevertheless, in April 2014, under the tenure of a new emergency manager, Darnell Earley, Flint’s water source changed from DWSD-treated water to water from the Flint River. No one consulted the Flint City Council and the Council did not vote on this decision. The plan was to use Flint River water for two years until construction on the KWA pipeline finished. However, Flint invested only a small fraction of the money needed to make the recommended upgrades to Flint’s water treatment plant. As a result, during the conversion, Flint failed to treat the water or use corrosion control, despite the fact that the water was far more toxic and corrosive than the treated water that had come from Detroit. Almost immediately after the water switch, Flint residents started noticing disturbing changes in their water. Reports flowed in of dirty, brown

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202 Id. at 17; FWATF REPORT, supra note 11 at 16.
204 DSWD even made a final offer that would have saved Flint and Genesee County a significant amount of money over joining the KWA, but the emergency manager also rejected this offer. See Hammer, supra note 192 at 21.
205 FWATF REPORT, supra note 11 at 17.
206 Ruble, supra note 201.
207 Id. Genesee County remained a non-contract customer of the DWSD throughout the duration of the Flint water crisis. See FWATF REPORT, supra note 11 at 17.
209 FWATF REPORT, supra note 11 at 15–25; Hammer, supra note 192 at 22.
210 Ruble, supra note 201 (County commissioner Bryant Nolan stated that “[i]t was a situation that extremely trying and troubling because they took away our democratic form of government. We just had to go along with it.”).
211 Ruble, supra note 201.
213 MDEQ decided, incorrectly, that corrosion control was not initially required under the EPA’s Lead and Copper Rule. See FWATF REPORT, supra note 11 at 16; see also CDC REPORT, supra note 12; see also Control of Lead and Copper, 40 C.F.R. § 141(1) (2017).
water that tasted bad and smelled terrible.\textsuperscript{214} Residents also reported becoming ill, developing rashes, and losing hair after drinking or bathing in the water.\textsuperscript{215} In August 2014, and again in September 2014, the city found the bacterium \textit{E coli} in Flint water and issued notices to boil all tap water.\textsuperscript{216} In October 2014, state officials noted a spike in the number of cases of Legionnaire’s disease, or Legionellosis, in Genesee County.\textsuperscript{217} However, state officials did not report the outbreak until 2016 when a Flint hospital tied the outbreak to Flint water after finding the Legionella bacteria, which causes Legionellosis, in its water supply.\textsuperscript{218} Legionellosis can be life-threatening to the elderly or those with compromised immune systems; one in ten individuals with Legionellosis die.\textsuperscript{219} In Genesee County, doctors confirmed 88 cases of Legionellosis, including 12 deaths, in the months after Flint began using water from the Flint River.\textsuperscript{220}

In October 2014, General Motors (GM) complained that the Flint River water was corroding its car parts on the assembly line in its Flint factory.\textsuperscript{221} GM switched back to Lake Huron water, but the state did not inform the residents of Flint about the corrosion problems or the switch for GM.\textsuperscript{222} Despite concerns voiced by members of Snyder’s staff,\textsuperscript{223} both Emergency 

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\textsuperscript{215} See, e.g., Ruble, supra note 201; see also Julia Lurie, \textit{A Toxic Timeline of Flint’s Water Fiasco: This is How a Nightmare Unfolds}, MOTHER J ONES (Jan. 26, 2016), http://www.motherjones.com/environment/2016/01/flint-lead-water-crisis-timeline, archived at https://perma.cc/D8CY-QTHC.

\textsuperscript{216} Id.


\textsuperscript{218} FWATF REPORT, supra note 11 at 24.

\textsuperscript{219} Previously, less than a dozen cases of Legionnaire’s disease were reported each year in Genesee County. See Elisha Anderson & John Wisely, \textit{Records: Falsified Report Led to Charges in Flint Water Crisis}, DETROIT FREE PRESS (Apr. 22, 2016, 11:10 PM), http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/04/22/warrant-request-charges-flint-water-crisis/83406590/, archived at https://perma.cc/4FLE-X596; see also Anderson supra note 218; see also Bouffard, supra note 13.


Manager Earley and officials from MDEQ insisted that the Flint River Water was safe for drinking.224

In January 2015, Flint issued an advisory that Flint water contained high levels of total trihalomethanes (TTHMs), a contaminant.225 TTHMs are formed when organic materials interact with chlorine disinfectant during the treatment of water, and in Flint, were caused by problems at the Flint water treatment plant.226 TTHMs can cause liver, kidney, and central nervous system damage.227 Yet the advisory noted that only sick or elderly people may be at risk of illness from TTHMs.228 Nevertheless, Flint began providing bottled water to preschool children, and a state building in Flint installed water coolers.229 That same month, Emergency Manager Earley rejected yet another offer from the DWSD to reconnect Flint to its water system.230

In February 2015, researchers from the University of Michigan-Flint found high levels of lead in the water,231 a finding later corroborated by Professor Marc Edwards of Virginia Tech University,232 and the U.S. Environmental Protection Agency (EPA).233 The corrosiveness of the Flint River


224 See Hammer, supra note 192 at 40.


227 See CDC REPORT, supra note 12.

228 See Lurie, supra note 215; Ruble, supra note 201.

229 Ruble, supra note 201.

230 See Lurie, supra note 215.


232 In August 2015, Professor Marc Edwards from Virginia Tech, after testing 48 samples of water in Flint, found that 30 percent had lead levels greater than 15 parts per billion. An MDEQ official attempted to discredit these findings. In September 2015, Professor Edwards released further findings after testing 252 samples of Flint water, demonstrating that Flint had a serious lead problem. FWATF REPORT, supra note 11 at 20–21; see generally FLINTWATERSTUDY.ORG GUIDE (June 30, 2016), available at http://flintwaterstudy.org/guide-to-flintwaterstudy-org/, archived at https://perma.cc/RJ3F-UTT3.

had caused lead from older pipes to leach into the water supply. As a result, Flint residents, including all of the children in Flint, were exposed to lead contaminated drinking water.

From January until late September 2015, state officials continued to deny that there was a problem. State officials, relying on findings from MDEQ, repeatedly insisted that the water was safe. MDEQ conducted its own test of city water, but pre-flushed pipes before testing them. MDEQ blamed the internal plumbing of specific homes for test results that came back with high levels of lead, including test results from one home that showed lead levels at 27 times the EPA threshold requiring action.

In March 2015, after numerous complaints about Flint’s dirty and rancid tap water, Flint City Council members voted to return to DWSD water. However, the new emergency manager, Jerry Ambrose, who took over in January 2015, rejected the decision, calling the vote “incomprehensible” and citing cost concerns. In a memo to the Deputy State Treasurer, he stated, “I am satisfied that the water provided to Flint users today is within all MDEQ and EPA guidelines, as evidenced by the most recent water quality tests conducted by MDEQ.”

In September 2015, Dr. Mona Hanna-Attisha, a pediatrician at Flint’s Hurley Medical Center, documented a spike in the blood-lead levels of Flint children. An MDEQ spokesman pushed back against Dr. Hanna-Attisha’s findings of increased lead levels in Flint children, calling her findings “unfortunate” in a time of ‘near-hysteria’ among residents.

Finally, on September 29, 2015, Genesee County issued a health advisory regarding Flint water quality, and Governor Snyder acknowledged the

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234 See CDC REPORT, supra note 12.
235 Id.
237 See Lurie, supra note 215.
238 Id.
239 See Ruble, supra note 201.
242 Hanna-Attisha et al., supra note 12.
152 Harvard Latinx Law Review Vol. 20

lead problem. The city instructed residents to use filtered water and
structed pregnant women and children under age 6 to use bottled water. On October 16, 2015, Flint switched its water source back to the DWSD. On October 21, 2015, Snyder created the Flint Water Advisory Task Force, an independent task force, to investigate the crisis. On January 5, 2016, Governor Snyder declared a state of emergency for Genesee County. Snyder also requested $96 million in federal emergency aid from President Obama and requested that the Flint crisis be declared a national disaster. On January 16, 2016, Obama declared a state of emergency in Flint but could not declare Flint a disaster since that is a term reserved by FEMA for natural events.

When media coverage of the crisis broke, many began questioning whether state and local officials knew about the tainted water, when they knew about the tainted water, and if there had been a cover-up. In January


245 FWATF REPORT, supra note 11 at 21.


247 See CDC REPORT, supra note 12.


250 Ashley Southhall, State of Emergency Declared Over Man-Made Water Disaster in Michigan City, N.Y. TIMES, Jan. 17, 2016. Because Flint could only be classified as an “emergency,” not as a “disaster,” the maximum amount of federal aid that could be given is $5 million. See Berg, supra note 249; The Disaster Declaration Process, FEMA, (Aug. 23, 2016), https://www.fema.gov/disaster-declaration-process, archived at https://perma.cc/Z4FM-XV88 (stating that “[t]he President can declare an emergency for any occasion or instance when the President determines federal assistance is needed.”).

251 The Disaster Declaration Process, supra note 250 (“The President can declare a major disaster for any natural event, including any hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought, or, regardless of cause, fire, flood, or explosion, that the President determines has caused damage of such severity that it is beyond the combined capabilities of state and local governments to respond.”).

2016, Michigan Attorney General Bill Schuette announced that he was opening an investigation into the crisis. Shortly after that, Genesee County Prosecutor David Leyton also opened an investigation into the crisis. In February 2016, the U.S. Attorney’s Office, working with the FBI and the EPA, also opened an investigation.

In March 2016, the Flint Water Advisory Task Force released its report, spreading the blame for the crisis among several government individuals and agencies.

“The Flint water crisis is a story of government failure, intransigence, unpreparedness, delay, inaction, and environmental injustice. The Michigan Department of Environmental Quality (MDEQ) failed in its fundamental responsibility to effectively enforce drinking water regulations. The Michigan Department of Health and Human Services (MDHHS) failed to adequately and promptly act to protect public health.”

The report also blamed the EPA for “prolonging the calamity,” and blamed Governor Snyder and his office for not taking steps to “reverse poor decisions by MDEQ and state-appointed emergency managers until October 2015, in spite of mounting problems and suggestions to do so by senior staff members in the Governor’s office[.]”

On April 20, 2016, Attorney General Schuette, working with Genesee County Prosecutor Leyton, filed criminal charges against three state employees: Mike Glasgow, the utilities administrator in Flint, as well as two MDEQ officials, Stephen Busch and Michael Prysby. Specifically, Schuette
charged Busch with three felonies, including misconduct in office and tampering with evidence, and two counts of violating the Safe Water Drinking Act, a misdemeanor. Prysby faces four felony charges, including misconduct in office and tampering with evidence, and two counts of violating the Safe Water Drinking Act. Glasgow negotiated a plea deal, pleading no contest to the misdemeanor of willful neglect of duty in exchange for having the felony charge of tampering with evidence against him dropped.

On July 29, 2016, Schuette brought charges against three MDEQ employees for their alleged role in the Flint water crisis. Liane Shekter-Smith, the former chief of the Office of Drinking Water and Municipal Assistance at MDEQ, faces charges of misconduct in office, which is a felony, and willful neglect of duty, a misdemeanor. Schuette also brought charges against MDEQ water quality analyst Adam Rosenthal and MDEQ community drinking water unit specialist Patrick Cook, charging both with misconduct in office and various misdemeanors. Adam Rosenthal is also facing felony charges of tampering with evidence for allegedly manipulating a July 28, 2015 report to show lower lead levels.

At the same time, Schuette brought charges against three Michigan Department of Health and Human Services employees for allegedly altering or concealing information about lead levels: Nancy Peeler, director of the Michigan Early Childhood Home Visiting Program; Robert Scott, a data manager for the Healthy Homes and Lead Prevention Program, and Corinne Miller, an epidemiologist. The charges against the three include misconduct in office and conspiracy, both of which are felonies, and willful neglect of duty, a misdemeanor.

522704_7.pdf, archived at https://perma.cc/SMG7-YKRJ; see also Schuette Charges Three with Multiple Felonies in First Stage of Flint Water Crisis Investigation, STATE OF MICHIGAN ATTORNEY GENERAL BILL SCHUETTE (Apr. 20, 2016), http://www.michigan.gov/ag/0,4534,7-164-46849_47203-382827—00.html. The charges allege that Busch and Prysby told Glasgow to exclude two lead testing sites in order to reduce the overall level of lead found in the water. Anderson & Wisely, supra note 220.


261 Id., at 2.

262 Id., at 2.

263 Chad Livengood & Jennifer Chambers, Schuette: Workers Hid Discovery of Lead in Blood, DETROIT NEWS (July 30, 2016), http://www.detroitnews.com/story/news/michigan/flint-water-crisis/2016/07/29/flint-water-charges/87699876/, archived at https://perma.cc/6J2F-PSU7. ("Each of these individuals attempted to bury, or cover up, to downplay or hide information that contradicted their own narrative. Their story was there was nothing wrong with Flint water and it was perfectly safe to use.").

264 See Ganim & Sanchez, supra note 188. Prosecutors accused Shekter-Smith of misleading the public and concealing evidence. Id.; see also 6 State Employees Criminally Charged in Connection with Flint Water Crisis, RT (July 29, 2016), https://www.rt.com/usa/353930-flint-water-charges-flint-employees/, archived at https://perma.cc/SWL9-V6SP.

265 Ganim & Sanchez, supra note 188.

266 See 6 State Employees Criminally Charged in Connection with Flint Water Crisis, supra note 264; Ganim & Sanchez, supra note 188.
Spring 2017 U Visas and the Flint Water Crisis 155

On December 20, 2016, Schuette charged four more officials with criminal conduct, including emergency managers Darnell Early and Gerald Ambrose, and two former water plant officials, Howard Croft and Daugherty Johnson.269 The charges against all four include felonies of false pretenses and conspiracy to commit false pretenses.270 Early and Ambrose also face a felony charges of misconduct in office and misdemeanor charges of willful neglect of duty in office.271

B. Undocumented Immigrants and the Flint Water Crisis

“I went to ask for water from the fire station, and they asked for my social security number, so I left. I feel bad that I can’t get the help. I don’t want to expose my kids to lead.”

Mother and undocumented immigrant resident of Flint.272

“No parent should be forced to choose between risking deportation and restoring the health of their poisoned children.”

Miriam Aukerman, Michigan American Civil Liberties Union Staff Attorney273

There are approximately 99,000 residents in Flint, MI, all of whom were exposed to toxic water from the Flint River.274 Among those Flint residents poisoned by contaminated Flint River water are a number of undocumented immigrants. The think tank, Center for Michigan Studies, estimates that approximately 700 undocumented immigrants live in Flint, although news sources have estimated the undocumented population to be closer to

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269 Howard Croft was the former Director of Public Works in Flint and Daugherty Johnson was the former Flint Utilities Director. See Brush, supra note 20.

270 Specifically, Schuette accused Early and Ambrose of misleading the Michigan Department of Treasury to get bonds worth millions of dollars, which they then misappropriated to finance the KWA pipeline, while the water plant officials allegedly aided and abetted the emergency managers. Id.

271 Id.


273 Advocacy Coalition to Feds, supra note 1.

As previously discussed, undocumented immigrants are particularly vulnerable to harm during natural or man-made crisis situations and face numerous obstacles to obtaining information and assistance. Undocumented immigrants in Flint have faced many of the same obstacles to obtaining information about the water crisis and to receiving assistance, even after the State and the Federal Government declared a state of emergency in Flint.

Many of the immigrant residents of Flint who did not speak English were unaware of the water contamination. Early notices warning about the Flint water crisis were printed only in English. Because of limited translated materials, even immigrants who heard about the water crisis did not know how to drink water safely; for example, some boiled water as a preventative measure, not understanding that doing so increases the concentrations of lead. Even when advocates began translating information about Flint water, it was not always understandable due to the technical issues involved or the Spanish competency of the translators. As a result, many continued to drink tap water for months after the governor declared a state of emergency in Flint.

Some immigrants in Flint were not fully aware of the dangers of Flint water until workers and volunteers knocked on their doors. Yet even then, the word did not get to everyone. Many of the workers going door to door included members of the National Guard and the State Police, who appeared in uniform. As a result, undocumented residents in particular were afraid to open their doors for fear that immigration authorities were on the other side waiting to deport them. As the Flint Water Advisory Task Force reported, “The sight of uniformed state troopers and National Guardsman...”

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275 CTR FOR MIGRATION STUDIES, ESTIMATES OF THE UNAUTHORIZED POPULATION, supra note14; see also Wheeler, supra note 14; DEMOGRAPHIC AND LABOR MARKET PROFILE: CITY OF FLINT, supra note 274 at 8.
276 See supra Part III.A.
277 See Wheeler, supra note 14 (noting that some immigrants in Flint only learned of the crisis after speaking to relatives in Mexico who learned of the crisis from news programs broadcast in Mexico).
278 Advocacy Coalition to Feds, supra note 1.
279 Natalie Zarowny, What It’s Like to Live Through Flint’s Water Crisis When You Don’t Speak English, Vice (May 12, 2016), http://www.vice.com/read/what-its-like-to-live-through-flints-water-crisis-when-you-dont-speak-english, archived at https://perma.cc/6FZV-SKZM (noting that eventually there were a series of billboards in Spanish showing an X over a pot of boiling water); see also Singh, supra note 17.
280 Zarowny, supra note 279 (quoting Juana Olivares, president of the Genesee County Hispanic Latino Collaborative, “One of the challenges is getting the right information accurately translated. Sometimes the information is too technical, or it seems like whoever is doing the translation is using Google Translate, so it doesn’t make much sense.”).
281 Singh, supra note 17.
283 See Wheeler, supra note 14. Workers from the Environmental Protection Agency and the Red Cross, as well as some community volunteers, also distributed water and information. See Aguirre, supra note 282.
284 See Wheeler, supra note 14.
entering neighborhoods in convoys with flashing lights frightened many who do not open their doors to accept filter or water distributions.”

When undocumented residents did learn of the tainted water, many were still unable to obtain clean water. Fire stations and other locations began distributing bottled water to residents, but workers at many of these locations required identification before distributing water. According to state officials, water distribution centers implemented this policy to track and gather information on where the water was going to assist with long-term recovery efforts. However, this proved to be a significant deterrent to undocumented immigrants who did not have identification. Others feared that going to distribution centers where workers checked identification would lead to deportation. In January 2016, in response to community criticism, the State changed its policy of requiring identification. Nevertheless, Flint immigrants remained reluctant to go to distribution centers, particularly where uniformed officers distributed the water.

The fear of deportation, widespread in the Flint immigrant community, is not unfounded. ICE had stepped up its immigration enforcement activities in the early days of the crisis. As Susan Reed, managing attorney at the Michigan Immigrant Rights Center has noted “[t]he timing of the water distribution in Flint was unfortunate because it came at the same time as the Obama administration was stepping up raids for folks with recent removal orders. We in the advocacy community were aggressively telling people – undocumented or not – not to open their doors to people without search warrants.”

As a result of a lack of both information and access to safe drinking water, many undocumented immigrant residents of Flint faced greater expo-
sure to contaminated water and face life-long potential health problems as a result. Lead poisoning can lead to a lifetime of serious health problems, particularly in children who absorb lead at rates much higher than adults.295 Even at low levels, lead poisoning can lead to irreversible damage, and lead cannot be removed once it has reached the nervous system.296 Children poisoned by lead may experience health problems including neurobehavioral problems, abdominal issues and weight loss, learning disabilities, lower IQ levels, stunted growth, and impaired hearing.297 Children exposed to lead will need medical monitoring for many years and may need life-long medical treatment.298 Adults exposed to lead may experience cardiovascular disease, hypertension, and kidney, brain, and nervous system damage.299 Pregnant women exposed to lead can miscarry or deliver children with neurological issues.300 However, without lawful status, obtaining testing, care, and long-term follow up services, even for children, may be impossible for undocumented residents in Flint.301

The state and federal government response in the aftermath of the Flint water crisis regarding access to aid for undocumented residents has been insufficient. The State of Michigan determined that health care coverage for those affected by Flint water will be provided under expanded Medicaid.302 However, Medicaid does not extend to many lawful immigrants, and does not extend at all to undocumented immigrants.303 Neither the state, nor Genesee county, have made any plans to provide medical care for undocumented Flint residents, even undocumented children.304 As a result, undocumented Flint residents needing medical care must rely on private clinics where available. However, even many of the private clinics will not treat anyone unless they can provide identification.305

Just as a fear of deportation prevented many undocumented immigrants in Flint from obtaining bottled water, those same fears prevent many from

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296 See FWATF REPORT, supra note 11 at 23; see also Ruble, supra note 201.

297 DeFer, supra note 296.

298 Id.

299 Id.

300 See Vasquez, supra note 186.


302 Medicaid and other federal means-tested benefits are generally only available to immigrants after they have maintained lawful permanent resident status in the United States for at least five years. Social Security Act, 42 U.S.C. §§ 1320b-7(d)–(e), 1396a(b)(46)(B), 1396b(x) (2012); see also Josh Bernstein, supra note 104 at 6.

303 FWATF REPORT, supra note 11 at 56.

304 See Vasquez, supra note 186.
seeking needed medical care and social services. In March 2016, the Michigan American Civil Liberties Union (ACLU), in conjunction with more than 60 children’s rights, public health, and immigrant advocacy organizations, sent a letter to DHS asking that DHS suspend all immigration-enforcement activity in Flint until the crisis had been comprehensively addressed. In addition, the coalition asked that DHS grant immigration relief to those whose families were poisoned by Flint water. In response, DHS agreed not to send undercover officers to water distribution centers; however, no promises were made regarding immigration enforcement activity outside of Flint. Not only is one of the free clinics that serves undocumented residents just outside of Flint, but U.S. Customs and Border Patrol has a large presence around Flint because of the nearby Port Huron International Bridge to Canada. DHS also did not respond to the request that undocumented Flint residents be given lawful immigration status. Thus, a lack of status continues to prevent undocumented residents from accessing services they desperately need.

Undocumented immigrants in Flint are in a perilous position. Criminal malfeasance of the part of state officials led to the poisoning of residents of Flint, including undocumented immigrants, and to significant health problems as a result. Thus, state officials created the need for medical and social services for Flint residents but, because of a lack of lawful status, undocumented residents in Flint are unable to obtain the services they now need. The U visa, because of the criminal activity involved, presents a potential solution for obtaining lawful status, which, in turn, would ameliorate many of the problems faced by undocumented residents in Flint.

V. IMMIGRATION RELIEF FOR VICTIMS OF THE FLINT WATER CRISIS: THE U VISAN

The Flint water crisis is distinctive in that criminal activity by state officials played a significant role in creating the crisis. Because of the criminal activity involved in the Flint water crisis, undocumented Flint residents, unlike many other undocumented crisis victims, have a potential

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306 Id.; see supra Part IV.B.;
308 ACLU LETTER, supra note 307; see also Advocacy Coalition to Feds, supra note 1.
310 See Vasquez, supra note 186.
311 U.S. Dep’t of Homeland Sec., supra note 309.
312 See supra Part IV.A.
path to lawful status through the U visa.313 Indeed, some advocacy groups in Michigan called for U visas for undocumented Flint residents.314 Undocumented residents of Flint, in many cases, drank contaminated water longer than other residents, and thus may face more serious health consequences. These residents could be potentially useful witnesses, particularly in a sentencing trial.315

Many undocumented Flint residents will be able to meet the statutory requirements of the U visa if they come forward to assist the state or federal agencies investigating and prosecuting the state officials involved. However, obtaining U visas for undocumented residents in Flint may be challenging because of the need to convince a certifying agency to sign law enforcement certifications LECs for such a large group. The challenges to obtaining LECs are both procedural and discretionary in nature. Yet, refusing to sign LECs because of the size of a group frustrates both the humanitarian intent of the U visa and its intent to encourage and promote the cooperation of undocumented crime victims with law enforcement. Without a guarantee of an LEC and a chance at a U visa, the fear of deportation will likely keep undocumented residents from coming forward to share their experiences or work with prosecutors. This fear has increased under the Trump administration as a result of immigration enforcement activity in immigrant communities in Michigan.316

Issuing LECs to the undocumented residents of Flint not only comports with the dual intent of the U visa, but also is good public policy. It would allow prosecutors to obtain comprehensive evidence on the magnitude and the severity of the harm experienced by Flint residents. It would also give undocumented Flint residents a chance to obtain lawful status and with that, the ability to participate in the revitalization of their community.

A. Undocumented Residents of Flint Are Potentially Eligible for U Visas

Criminal activity was partly to blame for the Flint water crisis, and as a result, many undocumented Flint residents may be able to meet the U visa requirements if they agree to help in the ongoing investigations and prosecutions in the Flint water crisis. Undocumented residents in Flint who drank contaminated water are indirect victims of qualifying crimes, including ob-


314 See supra Part IV.A.

struction of justice, and they suffered substantial physical and mental harm as a result. However, even if undocumented residents in Flint agree to help with the prosecution of state officials, they may be unable to obtain LECs. The U visa LEC requirement is an individualized requirement. Congress likely did not contemplate that the U visa would be needed to cover large groups of undocumented immigrants in a time of crisis, and thus, there is no class action mechanism for issuing LECs. In order to obtain a U visa, each undocumented victim, of whom there are potentially 1000 in Flint, must first obtain an LEC showing that they were helpful in the investigation or prosecution of those crimes. Each individual victim must come forward to cooperate with an investigation into the crimes and each must receive an individual LEC. This may prove to be an insurmountable barrier for undocumented immigrants in Flint.

1. The Criminal Activity That Occurred During the Flint Water Crisis is Covered Under the U Visa

The enumerated criminal activities covered under the U visa include two crimes that are specifically applicable to the Flint crisis: obstruction of justice, and conspiracy to obstruct justice. Prosecutors charged state officials who were part of the Flint water crisis with the crime of “tampering with evidence.” The crime of tampering with evidence is not explicitly listed in the INA; however, it is still a qualifying criminal activity due to its similarity to the crime “obstruction of justice,” which is an enumerated crime.

Under Federal Law, “obstruction of justice,” refers to specific crimes within Title 18 of the United States Code, including Section 1519 entitled “Destruction, alteration, or falsification of records in Federal investigations.” The Michigan law of “tampering with evidence” is substantially similar to Section 1519. The crime of “tampering with evidence under Michigan law makes it illegal to “knowingly and intentionally remove, alter, conceal, destroy, or otherwise tamper with evidence to be offered in a pre-

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317 CTR FOR MIGRATION STUDIES, ESTIMATES OF THE UNAUTHORIZED POPULATION, supra note 14; see also Wheeler, supra note 14.
321 See, e.g., Complaint, People v. Busch, et al., supra note 259; see also supra Part IV.A.
324 Id. § 1519. (“Whoever knowingly alters destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States [. . .] shall be fined under this title, imprisoned for no more than 20 years, or both.”).
325 MICH. COMP. LAWS § 750.483a(5)(a) (2016).
sent or future official proceeding.” Despite the different names, “obstruction of justice” under federal law and “tampering with evidence” under Michigan law address the same criminal activity, namely the alteration, destruction or concealment of records, documents, or evidence in an investigation or proceeding.

Further, the Board of Immigration Appeals has held that the critical elements of a crime relating to obstruction of justice as referenced in the INA are “an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice.” The Michigan crime of “tampering with evidence” includes the elements of intentional action to interfere with justice. Thus, the term “obstruction of justice” should be read broadly to include the Michigan crime of “tampering with evidence,” making the latter qualifying criminal activity covered by the U visa.

Prosecutors also charged several state officials with “conspiracy to tamper with evidence,” which should be considered a qualifying crime under the U visa as well. Under Federal Law, conspiracy occurs when “two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose[,]” This is substantially similar to Michigan law, which states that when “[a]ny person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy[,]” Thus, “conspiracy to tamper with evidence” under Michigan law is covered by the U visa because of its substantial similarity to the enumerated crime of “conspiracy to obstruct justice.”

2. Undocumented Flint Residents Are Indirect Victims Who Suffered Substantial Harm

The undocumented residents of Flint qualify as indirect victims of crimes associated with the Flint water crisis. They cannot qualify as direct victims of obstruction of justice or conspiracy to obstruct justice because neither is a crime against a person. However, undocumented Flint residents are indirect victims of these crimes. In order to qualify as indirect victims,

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326 Id.
327 The Board of Immigration Appeals (BIA) is the highest administrative appellate body in the Executive Office for Immigration Review in the Department of Justice. Board of Immigration Appeals, U.S. Dep't of Jus't., http://www.justice.gov/eoir/biainfo.htm, archived at https://perma.cc/28XT-Q4MH (last updated Mar. 24, 2016).
329 See, e.g., Complaint, People v. Busch, et al., supra note 259; see also supra Part IV.A.
331 MICH. COMP. LAWS § 750.157a (2016).
the state officials who tampered with evidence must have done so to avoid or frustrate efforts to investigate or prosecute their other crimes. The Michigan Attorney General charged state officials not only with tampering with evidence and conspiracy to tamper with evidence, but also with willful neglect of duty, misconduct while in office, false pretenses, and other crimes. Thus, there are reasonable grounds to conclude that state officials tampered with evidence in an attempt to avoid or frustrate the investigations into the water crisis in Flint.

In order to qualify as indirect victims of obstruction of justice, undocumented Flint residents must also submit evidence showing that they have been directly and proximately harmed by the perpetrators who tampered with evidence. When state officials tampered with evidence they prevented the discovery of lead-tainted water, which resulted in residents' continued use of tainted water. As a result, Flint residents face both short-term and long-term health problems. Flint’s adolescent population likely suffered greater harm than the adult population due to the more serious effects of lead on children; however, both children and adults face long-term health concerns as a result of their exposure.

Undocumented Flint residents should be able to easily demonstrate that they suffered harm as a result of drinking contaminated water. Blood tests showing elevated lead levels would be strong evidence that undocumented Flint residents were harmed, particularly for children since there are no safe blood lead levels for children. Some residents of Flint contracted Legionnaire’s disease. In most households in Flint, residents suffered from a variety of other physical health issues, including illnesses, rashes, fatigue, nausea, and hair loss. Medical reports demonstrating illnesses or physical symptoms stemming from the tainted water would also be strong evidence of the harm suffered by undocumented Flint residents.

Even in the absence of physical ailments, many undocumented Flint residents suffered substantial mental harm as a result of the crisis. When

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334 See supra Part IV.A.
335 Id.
337 See supra Part IV.B.
338 See CDC REPORT, supra note 12.
residents of Flint finally did learn about the water, many experienced extreme anxiety and depression.\textsuperscript{342} Health officials found that two-thirds of Flint households reported having residents who continued to suffer from anxiety or depression, as well as stress and trouble concentrating.\textsuperscript{343} For undocumented Flint residents, many of whom learned about the water months after other residents, their anxiety was exacerbated by concerns about where and how to obtain safe water. Many undocumented residents faced the agonizing choice between seeking help for their children and themselves and not risking deportation.\textsuperscript{344}

3. Undocumented Residents of Flint Have Information About the Criminal Activity and Could Be Helpful in the Investigation and Prosecution of the State Officials Responsible

Undocumented Flint residents have information about the harm they suffered as a result of drinking contaminated water. The same medical or psychological documents that would be used to demonstrate that an undocumented resident suffered harm could be also be used as evidence in the investigation or prosecution of the state officials involved. One area in which such records could be particularly useful is in the sentencing stage, if or when state officials are convicted. Many undocumented residents in Flint, for reasons previously discussed, drank contaminated water longer than other residents, and as a result, potentially face more serious health consequences. Evidence of this harm would be useful, particularly in the aggregate, for prosecutors attempting to demonstrate the pervasiveness and severity of harm in Flint that resulted from the water crisis. However, in order to demonstrate helpfulness, whether it be in the past, present or future, undocumented Flint residents must obtain LECs from a certifying official. Given the individualized nature of LECs, the large number of undocumented resident victims in Flint may be a substantial obstacle to obtaining LECs.

B. Issuing LECs to Undocumented Flint Residents Who Are “Helpful” Comports with the Dual Intent of the U Visa and Is Good Public Policy

There are up to 1000 undocumented residents in Flint who were exposed to tainted water.\textsuperscript{345} The Michigan State Attorney General and the Genesee Country Prosecutor are both investigating the crisis and the role that criminal activity played in the crisis; the Attorney General has already

\textsuperscript{342} See Goodnough & Atkinson, supra note 341.
\textsuperscript{343} Carmody, supra note 340.
\textsuperscript{344} Advocacy Coalition to Feds, supra note 1; Vasquez, supra note 186.
\textsuperscript{345} CTR FOR MIGRATION STUDIES, ESTIMATES OF THE UNAUTHORIZED POPULATION, supra note 14; see also Wheeler, supra note 14.
filed criminal charges against some state officials. Either the Attorney General’s Office or the Genesee County Prosecutor’s Office could act as certifying agencies, as could the prosecuting agencies for ongoing Federal criminal investigations. However, there are several reasons why the LEC requirement may prove to be an insurmountable barrier for undocumented immigrants in Flint.

First, the LEC requirement is an individualized requirement: there is no class action mechanism to provide LECs to large groups. Each individual victim must come forward to cooperate with an investigation into the crimes and each must receive an individual LEC. This could be a tremendous undertaking given that there are up to 1000 potential individuals in Flint who might request an LEC. At a minimum, the issuance of LECs would have to be predicated on certain requirements, including providing evidence that the individual was a Flint resident and providing some evidence of the harm they suffered, such as an affidavit, or medical or psychological reports. Even so, providing LECs for hundreds of individual would take a great deal of time and energy: to vet the individuals, gather their evidence, and sign LECs. Some scholars have explored the possibility that the U visa be amended to provide a class mechanism, whereby named individuals represent a class of individuals as a whole, each of whom is presumed to be willing to cooperate if asked to provide assistance. Yet, no such mechanism currently exists. Certifying agencies may, for justifiable reasons, decide their energy and resources are better spent elsewhere.

Second, even if a procedure could be developed to process LECs for each undocumented resident in Flint, prosecutors may well decide, as the prosecutor in the Moussaoui sentencing trial did, that they do not need the testimony or cooperation of every victim to prosecute their case. Thus, prosecutors may decide not to issue LECs to all or any of the undocumented victims. There are thousands of other potential witnesses in Flint who are

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346 See supra Part IV.A.
348 See supra note 89, at 938–39. (“Of course, the U visa, as currently configured and used, is geared toward individuals rather than a group of workers. Each individual victim must apply for U visa nonimmigrant status, and must separately cooperate with law enforcement agencies to fulfill the requirements of the LEC.”)
349 8 C.F.R. § 214.14(c)(2)(i); see also U.S. Citizenship & Immigr. Serv., Form I-918 Supplement B, U Nonimmigrant Status Certification, supra note 23.
350 See supra note 186.
351 See Coleman, supra note 78, at 12.
352 See e.g. Saucedo, A New “U”, supra note 89 at 939 (“If a group of workers comes forward, for example, they can act in a representative capacity, just as named plaintiffs do in a class action lawsuit. The unnamed plaintiffs can remain in the background and still be eligible for U visas if they are willing to step forward at the request of a law enforcement official. In this way, both purposes of the statute—cooperation and protection—are met even though not all victims are made available to testify.”); Coleman, supra note 78.
353 See supra Part III.B.
354 See supra note 89 at 944 (“In many cases, law enforcement will need only a few of the victims to testify about a scheme or crime. The rest of the victims may not be certified if there is no reason for law enforcement to use their stories. Thus, from a
not in need of immigration status. It is true that undocumented residents could be extremely helpful in a sentencing trial given the more serious harms they likely have suffered, but a certifying agency could decide that their assistance is not really needed. However, the U visa regulations focus not on the “need” that a certifying agency may have for cooperation from an undocumented victim, but on whether that victim was “helpful.”

The U visa regulations specifically state that providing assistance in the “detection” of a qualifying crime is sufficient for meeting the “helpfulness” requirement.355 In the legislation creating the U visa, Congress stated the U visa was needed to “facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status.”356 Thus, as USCIS has confirmed, simply reporting a crime is enough “helpfulness” to make an undocumented crime victim eligible for an LEC.357 A focus on “helpfulness” and not on the “need” for helpfulness is therefore necessitated by one of the two stated purposes of the U visa, namely promoting law enforcement cooperation.

Providing an LEC to an undocumented victim only if law enforcement decides that his assistance is necessary would actually discourage undocumented immigrants from cooperating with law enforcement. Because certifying agencies have complete discretion regarding whether or not to issue an LEC,358 coming forward to cooperate with an ongoing criminal investigation carries a risk of deportation. If the certifying agency chooses not to issue an LEC and the undocumented immigrant victim is arrested or otherwise brought to the attention of ICE, he may face deportation.359 If an immigrant victim knows that his assistance might not be “needed” and thus, he would not get an LEC in return, there is a strong disincentive to come forward to

355 8 C.F.R. § 214.14(a)(5) (2016) (“Investigation or prosecution refers to the detection or investigation of a qualifying crime or criminal activity, as well as to the prosecution, conviction, or sentencing of the perpetrator of the qualifying crime or criminal activity.”); see also New Classification for Victims of Criminal Activity; Eligibility for ‘‘U’’ Nonimmigrant Status; Interim Rule; 72 Fed. Reg. 53014, 53020 (Sept. 12, 2007) (stating that investigation or prosecution includes “the detection of qualifying criminal activity because the detection of criminal activity is within the scope of a law enforcement officer’s investigative duties.”); DEP’T OF HOMELAND SEC., U VISa LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL, AND TERRITORIAL LAW ENFORCEMENT, supra note 51 at 3.


357 DEP’T OF HOMELAND SEC., U VISa LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL, AND TERRITORIAL LAW ENFORCEMENT, supra note 51, at 4. (“A current investigation, the filing of charges, a prosecution or conviction are not required to sign the law enforcement certification. Many instances may occur where the victim has reported a crime, but an arrest or prosecution cannot take place due to evidentiary or other circumstances. Examples of this include, but are not limited to, when the perpetrator has fled or is otherwise no longer in the jurisdiction, the perpetrator cannot be identified, or the perpetrator has been deported by federal law enforcement officials.”)

358 See U.S. CITIZENSHIP & IMMIGR. SERVS., INSTRUCTIONS FOR FORM I-918 SUPPLEMENT B, supra note 69.

359 See Hidalgo, supra note143, at 573; see also Settlage, supra note 25.
report a crime, or offer evidence or testimony about a crime. Refusing to provide LECs to undocumented residents who come forward to help with the ongoing investigations and prosecutions because of a perceived lack of “need” would frustrate the U visa’s goal of promoting cooperation with law enforcement.

Predicating the issuance of LECs on the basis of law enforcement “need,” also contravenes the original humanitarian intent of the U visa to provide protection to immigrant crime victims, which, despite being overshadowed by the law enforcement cooperation purpose, remains an important purpose of the U visa. In the Flint water crisis, state officials played a role in causing the crisis, and thus created the need for medical and social services for residents in Flint exposed to contaminated water. Undocumented residents not only potentially suffered more harm from drinking contaminated water, but they are not able to access most of the medical and social services available to residents without some form of lawful status.

Issuing LECs to undocumented Flint residents who come forward to cooperate with the ongoing prosecutions in Flint is good public policy with the potential to benefit all parties. First, witness statements and documentary evidence provided by undocumented Flint residents would be valuable evidence of the severity and breadth of the harm suffered in Flint. Obtaining that information and issuing LECs need not be overly burdensome. Immigration advocates and legal service organizations could participate in vetting undocumented Flint residents, collecting proof of residency and witness statements, and organizing evidence. Some Michigan advocacy groups have already begun to collect testimonies from undocumented residents of Flint detailing their experiences during the crisis.

Second, and more importantly, obtaining an LEC gives undocumented immigrants a chance for lawful status, which in turn, would benefit the Flint community as a whole. With lawful status, Flint residents would have greater access to medical and social services for themselves and their children. It is true that U visa status does not make an immigrant eligible for Medicaid or the Affordable Care Act; however, lawful status makes it easier to access medical care for children, including U.S. citizen children, and at private clinics. For children, access to health care means greater physical and mental well-being, and as a result, children are less likely to miss

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360 McCormick, supra note 38, at 603.
361 See Vasquez, supra note 186.
364 See Vasquez, supra note186.
Lead poisoning in children has been shown to affect performance in school, and without access to testing, treatment, and specialized services in school, lead poisoning will have an even greater detrimental effect on children. In addition, with lawful status comes the ability to obtain lawful employment, volunteer, and be an active part of the community, without fear of being subject to immigration enforcement activity. In Flint, one of the poorest cities in the nation, this means that there would be an entire group of individuals better able to contribute to the recovery and revitalization of Flint.

VI. CONCLUDING REMARKS

The water crisis in Flint was shocking and drew national attention and concern. The media also gave much attention to the difficulties of undocumented residents in Flint. As a result, many communities in Michigan came together to help Flint residents, including undocumented residents. As news of the harm suffered by undocumented immigrant residents in Flint spread, advocates began calling for U visas for these residents. However, obtaining U visas for a group as numerous as the undocumented residents of Flint faces several challenges. First, in the wake of ICE raids and increased immigration activity in communities around Michigan, many undocumented residents in Michigan have a heightened fear of deportation. In this environment, it will be difficult to convince undocumented Flint residents to come forward and cooperate with the ongoing investigations in Flint unless they are guaranteed an LEC. However, convincing a certifying agency to sign LECs for such a large group may be an insurmountable challenge. Nevertheless, issuing LECs to eligible Flint residents, regardless of their number, comports with the dual intent of the U visa and is good public policy.

366 See DeFer, supra note 296.
367 See Steve Toobman, Migration Policy Institute, Revitalizing Detroit: Is There a Role for Immigration 2, 10 (2014), available at http://www.migrationpolicy.org/sites/default/files/publications/TCM_CitiesDetroit.pdf, archived at https://perma.cc/J6W4-76GM (noting that several other cities, including Baltimore, Dayton, Pittsburgh, and St. Louis have looked to immigration as a potential spur to revitalization, and that studies estimate that Michigan’s immigrants created businesses at three times the rate of the general population between 1996-2007).
368 See e.g., Southhall, supra 250; Delaney & Lewis, supra note 187; Stockton, supra note 187.
369 See e.g., Wheeler, supra note 14; Tolen, supra note 18; Singh, supra note 17; Zarowny, supra note 279; Aquirre, supra note 282.
370 See Vasquez, supra note 186; Scherman, supra note 314.
371 See Warikoo, supra note 316.
Spring 2017  U Visas and the Flint Water Crisis  169

Flint serves as a potentially important precedent for other man-made crisis situations. While there will still be tremendous unmet need for undocumented victims in natural disasters, the U visa is an important tool for advocates when criminal activity plays a role in creating a crisis. Indeed, the Flint water crisis is not unique; there have been other crisis situations caused by criminal activity, be it by terrorists or state officials, and there will undoubtedly be more in the future. For example, recent studies show that water quality tests have been altered around the country and another water crisis is imminent in a number of other cities.372 There will be undocumented residents who are victims in those future crisis situations, although they may not benefit from the same amount of national media attention as did Flint residents. In these future situations, a U visa has the potential be an invaluable tool, not just to obtain lawful status for vulnerable undocumented victims, but for the recovery of the affected communities as well.
