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Status in a State of Emergency: U Visas and the Flint Water Crisis

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

Rachel Gonzalez Settlage[†]

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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 Attorney¹

Undocumented immigrants are particularly vulnerable to harm in times of crisis² for reasons that include language and cultural isolation, and fear of deportation.³ For those without lawful status, obtaining assistance in the aftermath of a crisis may be impossible.⁴ Not only is lawful status required for most forms of public assistance,⁵ it allows victims to come forward to access emergency services without fear.⁶ 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.⁷ If, however, the crisis is man-made, and criminal activity played a

¹ *Advocacy Coalition to Feds: Do Not Deport Immigrant Victims of Flint Water Crisis*, GRAND RAPIDS LEGAL NEWS (Mar. 9, 2016), [hereinafter *Advocacy Coalition to Feds*] <http://www.legalnews.com/grandrapids/1421674/>, archived at <https://perma.cc/2R8Q-VH4M>.

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.

⁵ See *infra* Part III.A.2.; Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193); 42 U.S.C. §1320b-7(b) & (d); see also AM. PUB. HEALTH ASS’N, *ADDRESSING THE NEEDS OF IMMIGRANTS IN RESPONSE TO NATURAL AND HUMAN-MADE DISASTERS IN THE UNITED STATES* (2014), <http://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/23/17/36/addressing-the-needs-of-immigrants-in-response-to-natural-and-humanmade-disasters-in-the-us>, archived at <https://perma.cc/B6XC-QYHN>.

⁶ See *infra* Part III.A.3.

⁷ See Immigration and Nationality Act § 101(a)(15), 8 U.S.C. § 1101(a)(15) (2012).

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-

⁸ Immigration and Nationality Act § 101(a)(15)(U)(iii), 8 U.S.C. § 1101(a)(15)(U)(iii) (2012); 8 C.F.R. § 214.14(a)(9) (2016).

⁹ *Id.*; Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1502, 114 Stat. 1533 (2000).

¹⁰ See *infra* Part II.A.

¹¹ FLINT WATER ADVISORY TASK FORCE, FINAL REPORT, 15-25 (Mar. 2016), https://www.michigan.gov/documents/snyder/FWATF_FINAL_REPORT_21March2016_517805_7.pdf, archived at <https://perma.cc/8Z7D-CL9H> [hereinafter “FWATF REPORT”].

¹² See CTFRS 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).

¹³ See CDC REPORT, *supra* note 12; Karen Bouffard, *Hospital Ties Legionellosis to Flint Water*, DETROIT NEWS (Jan. 23, 2016, 12:27 AM), <http://www.detroitnews.com/story/news/politics/2016/01/22/legionnaires-bacteria-found-tests-mclaren-medical-centers-water/79183428>, archived at <https://perma.cc/2H4U-WZGZ>.

¹⁴ CTR FOR MIGRATION STUDIES, ESTIMATES OF THE UNAUTHORIZED POPULATION, <http://data.cmsny.org/puma.html>, archived at <https://perma.cc/NR5Z-XMBT> (search for Flint, MI Metro Area) (last visited Apr. 9, 2017); Jacob Wheeler, *What Government Owes Flint's Poisoned Immigrant Community*, BRIDGE MAGAZINE (May 24, 2016), http://www.mlive.com/news/index.ssf/2016/05/what_government_owes_flints_po.html, archived at <https://perma.cc/CJ7Y-AG3L>.

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-

¹⁶ THINKPROGRESS, *The Forgotten Victims of the Flint Water Crisis*, (Jan. 28 2016), <https://thinkprogress.org/the-forgotten-victims-of-the-flint-water-crisis-c57395f2983e#4fps3t2h5>, archived at <https://perma.cc/FE5L-ZFC5>; see also Wheeler, *supra* note 14; FWATF REPORT, *supra* note 11 at 56.

¹⁷ Seema Singh, *Immigrants Particularly Hurt by Flint Water Crisis*, MICH. LEAGUE FOR PUB. POL'Y (Apr. 15, 2016), <http://www.mlpp.org/immigrants-particularly-hurt-by-flint-water-crisis>, archived at <https://perma.cc/M92P-32VV>.

¹⁸ See Casey Tolén, *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.

²⁰ See *infra* Part IV.A. State Attorney General Bill Schuette has criminally charged 13 state and local officials their role in the Flint water crisis. Mark Brush, *Four More Criminally Charged for Their Role in the Flint Water Crisis*, MICH. RADIO NEWS (Dec. 20, 2016), <http://michiganradio.org/post/four-more-criminally-charged-their-role-flint-water-crisis>, archived at <https://perma.cc/X92X-DZ83> (citing Press Release, St. of Mich. Att'y Gen., Four More Officials Charged in Third Round of Flint Water Crisis Criminal Investigation, http://www.michigan.gov/ag/0,4534,7-164-78314_78319-400211--,00.html, archived at <https://perma.cc/4DW C-KJYT> (last visited Apr. 9, 2017)).

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.²³ 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.²⁴

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

²³ Immigration and Nationality Act § 101(a)(15)(U)(i)(I), 8 U.S.C. § 1101(a)(15)(U)(i)(I) (2012); 8 C.F.R. § 214.14(b)(3), (c)(2)(i) (2016); *see also* U.S. Citizenship & Immigr. Servs., Dep’t of homeland Sec., Form I-918 Supplement B, U Nonimmigrant Status Certification, (2013), <http://www.uscis.gov/sites/default/files/files/form/i-918supb.pdf>, *archived at* <https://perma.cc/BZH3-9CLA>.

²⁴ *See* Delphine Schrank, *Trump’s Season of Fear: Inside the Devastation Left by Immigration Raids*, THE GUARDIAN (Mar. 13, 2017), <https://www.theguardian.com/us-news/2017/mar/13/undocumented-immigration-raids-ice-impact>, *archived at* <https://perma.cc/88P5-JL3H>; Jane C. Timm, *Experts: Trump’s Immigration Orders Could Drive Crime Up*, NBC NEWS (Feb. 20, 2017), <http://www.nbcnews.com/politics/donald-trump/experts-trump-s-immigration-orders-could-drive-crime-n723301>, *archived at* <https://perma.cc/KGW9-8SSS>; Nicholas Kulish, et al, *Reports of Raids Have Immigrants Bracing for Enforcement Surge*, N.Y. TIMES, (Feb. 10, 2017), <https://www.nytimes.com/2017/02/10/us/immigration-raids-enforcement.html>, *archived at* <https://perma.cc/BS53-CHE7>.

²⁵ *See, e.g.*, Joey Hipolito, *Illegal Aliens or Deserving Victims?: The Ambivalent Implementation of the U Visa Program*, 17 ASIAN AM. L. J. 153 (2010); Leslye E. Orloff, et al, *Mandatory U-Visa Certification Unnecessarily Undermines the Purpose of the Violence Against Women Act’s Immigration Protections and Its “Any Credible Evidence” Rules: A Call for Consistency*, 11 GEO. J. GENDER & L. 619 (2010); Jamie R. Abrams, *The Dual Purposes of the U Visa Thwarted in a Legislative Duel*, 29 ST. LOUIS U. PUB. L. REV. 373, 379 (2010); Michael Kagan, *Immigrant Victims, Immigrant Accusers*, 48 U. MICH. J. L. REFORM 915, 941–942 (2015); Rachel Gonzalez Settlege, *Uniquely Unhelpful: The U Visa’s Disparate Treatment of Immigrant Victims of Domestic Violence*, 68 RUTGERS UNIV. L. REV. 1 (2016) (forthcoming).

²⁶ *See, e.g.*, Kevin R. Johnson, *Hurricane Katrina: Lessons About Immigrants in the Modern Administrative State*, U.C. DAVIS LEGAL STUDIES RESS PAPER SERIES, Research Paper No.

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),²⁷ Congress created a new visa, the U visa, as part of the Victims of Trafficking and Violence Protection Act.²⁸ 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.²⁹ 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.³⁰ Since its inception, scholars and immigration advocates have sought to ensure the effective and consistent implementation of the U visa.³¹

115, (July 2007); 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; Ted Wang & Luna Yasui, *Integrating Immigrant Families in Emergency Response, Relief, and Rebuilding Efforts*, THE ANNIE E. CASEY FOUND. & GRANTMAKERS CONCERNED WITH IMMIGRANTS AND REFUGEES (2008), <http://www.gcir.org/publications/gcirpubs/emergency>, archived at <https://perma.cc/8SWP-QA5N>

²⁷ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

²⁸ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1502, 114 Stat. 1518 (2000); New Classification for Victims of Criminal Activity; Eligibility for 'U' Nonimmigrant Status, 72 Fed. Reg. 53,014 (Sept. 17, 2007).

²⁹ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1502, 114 Stat. 1533 (2000). Immigration and Nationality Act § 101(a)(15)(U)(iii), 8 U.S.C. § 1101(a)(15)(U)(iii) (2012); 8 C.F.R. § 214.14(a)(9) (2016).

³⁰ Violence Against Women Act 2000, Pub. L. No. 106-386, § 1502, 114 Stat. 1502 (2000); *see also* Abrams, *supra* note 25 at 379 (2010); *see also* Settlege, *supra* note 25.

³¹ *See, e.g.*, Joey Hipolito, *supra* note 25; Orloff et al, *Mandatory U Visa Certification*, *supra* note 25; JEAN ABREU ET AL., THE POLITICAL GEOGRAPHY OF THE U VISA: ELIGIBILITY AS A MATTER OF LOCALE (2014), <http://www.law.unc.edu/documents/clinicalprograms/uvisa/fullreport.pdf>, archived at <https://perma.cc/F74H-GJQS>.

; *How Law Enforcement is Using the U-Visa*, PRACTICE BRIEF, 2 (Vera Inst. of Just., New York, N.Y., Oct. 2011), <http://www.vera.org/sites/default/files/resources/downloads/U-visa-practice-brief.pdf>, archived at <https://perma.cc/Z4D2-2DJX>; NAT'L IMMIGRANT FAM. VIOLENCE INST., PROMOTING U VISAS WITH LOCAL OFFICIALS, [hereinafter PROMOTING U VISAS

A. *The U Visa's Dual Intent*

The U visa was the result of intensive advocacy by sponsors and negotiations between Congressional Republicans and Democrats for more than a year.³² Originally conceived as a form of immigration relief for undocumented victims of domestic violence not covered by other forms of immigration relief,³³ Congress ultimately incorporated a larger list of crimes covered by the U visa.³⁴ 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.³⁵ 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.”³⁶ 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.”³⁷

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.³⁸ Nevertheless, providing protection to immigrant crime victims reflects the original

WITH LOCAL OFFICIALS], <http://www.nifvi.org/Promoting%20U%20Visas%20with%20Local%20Officials.pdf>, archived at <https://perma.cc/N7RL-DXGB>.

³² See Ann Moline, *Bipartisan Women Made Anti-Violence Act Happen*, WOMEN ENEWS (Dec. 18, 2000), <http://womensenews.org/2000/12/bipartisan-women-made-anti-violence-act-happen/>, archived at <https://perma.cc/9LKC-LG2K>; see also Gail Pendleton, *Winning U Visas After the Regulations*, EXPERT COMMENTARIES (LexisNexis), pg. 2-3 (Jan. 2008), http://www.asistahelp.org/documents/resources/ExpCommPendleton0108_CE878261804DB.pdf, archived at <https://perma.cc/H2GY-6CA2>.

³³ See Pendleton, *supra* note 32 at 2; 146 CONG. REC. H9029, H9041–42 (daily ed. Oct. 6, 2000) (statement of Rep. Gejdenson) (noting that the Act strengthened and refined “the protections for battered immigrant women, including a new visa for battered immigrant women”) (emphasis added).

³⁴ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1502, 114 Stat. 1533 (2000). Immigration and Nationality Act § 101(a)(15)(U)(iii), 8 U.S.C. § 1101(a)(15)(U)(ii) (2012).

³⁵ See Pendleton, *supra* note 32 at 2.

³⁶ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1502, 114 Stat. 1502 (2000) (“This will encourage law enforcement to better serve immigrant crime victims and to prosecute crimes committed against aliens.”); see also *New Classification for Victims of Criminal Activity; Eligibility for ‘U’ Nonimmigrant Status*, 72 Fed. Reg. 53,014 (Sept. 17, 2007).

³⁷ *New Classification for Victims of Criminal Activity; Eligibility for ‘U’ Nonimmigrant Status*, 72 Fed. Reg. 53,014 (Sept. 17, 2007).

³⁸ Elizabeth McCormick, *Rethinking Indirect Victim Eligibility for U Non-Immigrant Visas to Better Protect Immigrant Families and Communities*, 22 STAN. L. & POL’Y REV. 587, 603 (2011) (“[I]n the decade since the U visa was created, the humanitarian goals of the visa have been increasingly subordinated to the law enforcement goals, often leaving immigrant crime victims without protection if law enforcement agencies choose not to pursue a criminal investigation or prosecution, or decide that the victim’s assistance is no longer necessary.”).

humanitarian intent of the U visa's sponsors.³⁹ 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."⁴⁰ 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.⁴¹ The U nonimmigrant status allows a recipient to live and work in the United States for up to four years.⁴² 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.⁴³ 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."⁴⁴

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,

³⁹ See Pendleton, *supra* note 32 at 2.

⁴⁰ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1502, 114 Stat. 1534 (2000).

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 SETTLAG, 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).

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).

⁴⁷ *Id.* § 214.14(a)(9) (2016).

⁴⁸ Immigration and Nationality Act § 101(a)(15)(U)(iii), 8 U.S.C. § 1101(a)(15)(U)(iii) (2012).

⁴⁹ *Id.*

⁵⁰ 8 C.F.R. § 214.14(a)(9) (2016).

⁵¹ DEPT OF HOMELAND SEC., U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL, AND TERRITORIAL LAW ENFORCEMENT, 13, http://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf, archived at <https://perma.cc/L5ET-S5DV>; *see also* SETTLAGET ET AL., *supra* note 41 at 37.

⁵² 8 C.F.R. § 214.14(a)(14) (2016).

⁵³ *Id.* § 214.14(a)(14)(i) (2016).

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.)

⁵⁵ 8 C.F.R. § 214.14(a)(14)(ii) (2016); *see also* SETTLAGET ET AL., *supra* note 41 at 35-36.

was not against a person, an indirect victim must have been directly and proximately harmed by the perpetrator of the criminal activity.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.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.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.⁵⁹

Third, an immigrant victim must also possess information concerning that criminal activity.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.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.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.⁶³ Helpfulness can come at many stages of an investigation

⁵⁶ 8 C.F.R. § 214.14(a)(14)(ii)(A) (2016).

⁵⁷ *Id.*

⁵⁸ *Id.* § 214.14(a)(8) (2016).

⁵⁹ *Id.* § 214.14(b)(1) (2016).

⁶⁰ *Id.* § 214.14(b)(2) (2016).

⁶¹ DEPT OF HOMELAND SEC., U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE, *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).

⁶² 8 C.F.R. § 214.14(a)(7), (b)(3) (2016).

⁶³ *Id.* § 214.14(b) (2016).

or prosecution, including the sentencing stage.⁶⁴ 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.⁶⁵ 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.”⁶⁶

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.⁶⁷ 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.”⁶⁸ A certifying official has complete discretion regarding whether or not to sign an LEC, and that decision is not subject to review.⁶⁹ 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.⁷⁰ 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.⁷¹

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 40 at 39.

⁶⁶ DEP’T OF HOMELAND SEC., U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE, *supra* note 51, at 5.

⁶⁷ 8 C.F.R. § 214.14(c)(2)(i) (2016); see also U.S. Citizenship & Immigr. Serv., Form I-918 Supplement B, U Nonimmigrant Status Certification, *supra* note 23.

⁶⁸ 8 C.F.R. § 214.14(a)(3) (2016); see also U.S. Citizenship & Immigr. Serv., Form I-918 Supplement B, U Nonimmigrant Status Certification, *supra* note 23.

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 VISA LAW 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 insure 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 31; *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 Settlage, *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.

⁷⁶ See ASISTA, U CAP UPDATE FROM USCIS & ADDITIONAL UPDATES 3 (2013), http://www.asistahelp.org/documents/news/U_cap_advisory_and_notes_from_stakh_60F50EB294846.pdf, archived at <https://perma.cc/PA8F-LE2A>; see also Leslye Orloff et al, *U-Visa Victims and Lawful Permanent Residency*, NAT’L IMMIGRANT WOMEN’S ADVOCACY PROJECT, 8-9 (Sept. 6, 1012), http://www.ncdsv.org/images/NIWAP_U-VisaVictimsAndLawfulPermanentResidency_9-6-12.pdf, archived at <https://perma.cc/6TKK-R58K>

⁷⁷ Leslye Orloff et al, *U-Visa Victims and Lawful Permanent Residency*, *supra* note 76 at 8-9.

⁷⁸ *Garcia v. Audubon Cmty Mgmt*, 2008 WL 1774584 (E.D. La. Apr.15, 2008) (The complaint alleged violations of the Fair Labor Standards Act and the Trafficking Victims Protection Act.); see generally Lezlie Green Coleman, *Procedural Hurdles and Thwarted Efficiency: Immigration Relief in Wage and Hour Collective Actions*, 16 HARV. LATINO L. REV. 1 (2013).

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,⁸² federal prosecutors pursued criminal charges against the workers for identity theft and fraud.⁸³ However, the Equal Employment Opportunity Commission investigated their workplace claims and granted the workers LECs, which later led to U visas for the workers.⁸⁴ 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

⁸⁰ *Garcia*, 2008 WL 1774584; Coleman, *supra* note 78 at 4.

⁸¹ *Garcia*, 2008 WL 1774584; ; Coleman, *supra* note 78 at 4.

⁸² The complaint alleged violations of the Fair Labor Standards Act, Title VII and various state law claims. *Montano-Perez v. Durrett Cheese Sales, Inc.*, 666 F. Supp. 2d 894, 899 (M.D. Tenn. 2009).

⁸³ See Saucedo, *Immigration Enforcement versus Employment Law Enforcement*, *supra* note 41 at 309 (citing *United States v. Moreno-Lopez*, No. 4:09-CR-21, 2010 U.S. Dist. Lexis 2597 (E.D. Tenn. Jan. 13, 2010)).

⁸⁴ *Id.*; see also Dennis Norwood, *8 Sentenced In Federal Court On Immigration Charges*, THE CHATTANOOGAN (June 9, 2010), <http://www.chattanooga.com/2010/6/9/177523/8-Sentenced-In-Federal-Court-On.aspx>, archived at <https://perma.cc/Z8RX-SGPK>.

⁸⁵ See *infra* Part III.B. (discussing the small group of family members of victims of the September 11, 2001 terrorist attacks, who were granted U visas).

⁸⁶ See Xia Wang, *Undocumented Immigrants As Perceived Criminal Threat: A Test of the Minority Threat Perspective*, 50 CRIMINOLOGY 3, 743, 765–66 (2012); Rachel F. Moran, *What If Latinos Really Mattered in the Public Policy Debate?*, 85 CAL. L. REV. 1315, 1327 (1997) (“As the treatment of Latinos illustrates, official policies about race afford little protection when widespread, informal discrimination persists.”).

⁸⁷ Jeffrey S. Passel & D’Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, PEW HISP. CTR. (Apr. 14, 2009) at 22; Moran, *supra* note 86 at 1327.

⁸⁸ Passel & Cohn, *supra* note 87 at 18.

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

⁹⁶ See 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; see also TOMAS RIVERA POL'Y INST. & ASIANPACIFIC AM. LEGAL CTR. OF S. CAL., Disaster Preparedness in Urban Immigrant Communities: Lessons Learned from Recent Catastrophic Events and Their Relevance to Latino and Asian Communities in Southern California, 17 (June 2008), http://trpi.org/wp-content/uploads/archives/DISASTER_REPORT_Final.pdf, archived at <https://perma.cc/Z5CL-9DJJ> [hereinafter DISASTER PREPAREDNESS IN URBAN IMMIGRANT COMMUNITIES].

⁹⁷ See 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; see also Susan L. Cutter, *GI Science, Disasters, and Emergency Management*, 7 TRANSACTIONS IN GIS 439, 443 (2003) (noting that government agencies need a better understanding of undocumented communities to assist in disaster preparedness.).

⁹⁸ Wang & Yasui, *supra* note 26 at 1; see also Olivia Carter-Pokras, et al. *Emergency Preparedness: Knowledge and Perceptions of Latin American Immigrants*, J. HEALTH CARE FOR POOR & UNDERSERVED 18, 465, 466, 475–77 (2007).

⁹⁹ See Anthony A. Peguero, *Latino Disaster Vulnerability: The Dissemination of Hurricane Mitigation Information Among Florida's Homeowners*, 28 HISPANIC J. BEHAVIORAL SCI. 5, Feb. 2006, at 6–9. (“Language, preference for certain channels of disaster information, socioeconomics, and skepticism of the government are just some of the racial and ethnic differences linked to the dissemination of disaster information.”).

¹⁰⁰ See 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; DISASTER PREPAREDNESS IN URBAN IMMIGRANT COMMUNITIES, *supra* note 96 at 27; see Johnson, *supra* note 26 at 45–46 (“[T]he immigrants injured by the disaster of Hurricane Katrina in August 2005 thus were rendered invisible by at least two distinctive disadvantageous characteristics. First, as noncitizens, they were treated as less than full members of US society. They, especially the undocumented, tend to be invisible in U.S. social life, but, when visible, often are attacked and vilified. Second, because many were Latina/o or Asian, they, their plight tended to be submerged by the fact that claims of racial discrimination are considered by many to be primarily the province of African Americans – especially in the South.”).

¹⁰¹ Hurricane Katrina struck the Gulf Coast on August 29, 2005, causing significant damage. In the aftermath of the storm, levees designed by the Army Corp of Engineers to keep back lakes and rivers in the area broke, leading to catastrophic flooding of neighborhoods below sea level. The hurricane and its aftermath led to the death of nearly 2000 people and the displacement of hundreds of thousands of others from their homes. THE HISTORY CHANNEL,

the Gulf Coast, the State of Louisiana issued warnings about the coming hurricane in English only.¹⁰² Other sources of information that could be understood by those with limited English proficiency were extremely limited, if available at all.¹⁰³ In New Orleans, there was only one Spanish language station, and the hurricane interrupted that station's broadcasts.¹⁰⁴ Some service personnel reported that the devices they used to facilitate translation during the hurricane were not useful because there was no electricity.¹⁰⁵

There were similar problems when a series of severe tornados struck Oklahoma in May 2013.¹⁰⁶ The National Weather Service in Norman, Oklahoma issued storm and tornado warnings in English only.¹⁰⁷ The only Spanish language station in Oklahoma City went off-air as personnel sought shelter during one massive tornado on May 31, 2013.¹⁰⁸ Of the people killed during the tornados, nine were part of the growing Guatemalan immigrant community and were unfamiliar with such storms.¹⁰⁹ Surviving friends and family members believe that if they had understood the warnings, they might have survived.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

HURRICANE KATRINA, <http://www.history.com/topics/hurricane-katrina>, archived at <https://perma.cc/26NW-EFP2> (last visited Apr. 13, 2017).

¹⁰² See BOALT HALL SCH. OF L. INT'L HUM. RTS. L. CLINIC, *When Disaster Strikes: A Human Rights Analysis of the 2005 Gulf Coast Hurricanes in Response to the United States' Periodic Report Under the International Covenant on Civil and Political Rights*, (June 2006) [hereinafter *WHEN DISASTER STRIKES*], https://www.law.berkeley.edu/files/IHRLC/Shadow_Report_-_When_Disaster_Strikes.pdf, archived at <https://perma.cc/H7XG-L3FK>.

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).

¹⁰⁴ See Josh Bernstein, *Features that Should be Included in Federal Hurricane Relief Legislation*, NAT'L IMMIGR. L. CTR., 5 (Oct. 21, 2005), https://web.archive.org/web/20060107034918/http://www.nilc.org/disaster_assistance/IRU6-05.pdf, archived at <https://perma.cc/C2B6-HLJG>.

¹⁰⁵ See *DISASTER PREPAREDNESS IN URBAN IMMIGRANT COMMUNITIES*, *supra* note 96 at 11.

¹⁰⁶ In May 2013, over the course of two weeks, severe storms and massive tornados struck Oklahoma, killing dozens of people and injuring hundreds more. Dallas Franklin, *Remembering the Moore Tornado Victims Two Years After May 20, 2013*, NEWS CHANNEL 4, (May 20, 2015), <http://kfor.com/2015/05/20/remembering-the-moore-tornado-victims-two-years-after-may-20-2013/>, archived at <https://perma.cc/4LSM-LNRA>; see also NAT'L WEATHER SERV. WEATHER FORECAST OFF., 2013 OKLAHOMA TORNADOES, NORMAN, OKLAHOMA, <http://www.srh.noaa.gov/oun/?n=tornadodata-ok-2013>, archived at <https://perma.cc/6KSK-XLWL> (last visited Apr. 13, 2017).

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://newsok.com/article/3862301>, archived at <https://perma.cc/2F5X-V2PG>.

¹⁰⁸ See Keeping & Covington, *supra* note 107.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

immigrants are not entitled to the vast majority of public benefits, including welfare, health, housing, and food benefits.¹¹¹ The Affordable Care Act does not cover undocumented immigrants, nor does Medicaid.¹¹² Most long-term aid following a disaster or state of emergency is also not available to undocumented immigrants.¹¹³

Undocumented immigrants are entitled to emergency medical assistance and short-term in-kind emergency and disaster relief.¹¹⁴ 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.¹¹⁵ The Stafford Act also requires that this short-term assistance be provided without discrimination.¹¹⁶ In addition, undocumented immigrants may be eligible for some forms of state or private assistance.¹¹⁷ U.S. citizen children are entitled to the full range of government benefits, regardless of the status of their parents.¹¹⁸

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.

¹¹² See Patient Protection & Affordable Care Act, PL 111-148, sec. 1312 § (f)(3), 1401 § (e)(2), 124 Stat 119 (2010), 42 U.S.C. § 18081(b)(2); §18081(c)(2); Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193), 42 U.S.C. §1320b-7(d); 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.

¹¹³ See WHEN DISASTER STRIKES, *supra* note 102 at 21.

¹¹⁴ Undocumented immigrants are entitled to non-cash emergency assistance, but not to cash benefits or other non-emergency benefits. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193); 42 U.S.C. §1320b-7(d); see also Ruth Ellen Wasem, *Hurricane Katrina-Related Immigration Issues and Legislation*, CONG. RES. SERV. (Sept. 19, 2005), <http://fpc.state.gov/documents/organization/53687.pdf>, archived at <https://perma.cc/S2FS-7D27>; AM. PUB. HEALTH ASS'N, ADDRESSING THE NEEDS OF IMMIGRANTS IN RESPONSE TO NATURAL AND HUMAN-DISASTERS IN THE UNITED STATES, *supra* note 5.

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'S 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>.

¹¹⁷ See, e.g., Tanya Broder, Avidah Moussavian, & Jonathan Blazer, *Overview of Immigrant Eligibility for Federal Programs*, NAT'L IMMIGR. L. CTR., <https://www.nilc.org/issues/economic-support/overview-immeligfedprograms/>, archived at <https://perma.cc/H32X-FDRX> (Last visited Sep. 19, 2016) (providing information about which states allow for undocumented immigrants to receive SNAP or CHIP food benefits, Medicaid, and other services); see also Ashley L. Munger, et al., *More than Just Not Enough: Experiences of Food Insecurity for Latino Immigrants*, 17 J. IMMIGRANT MINORITY HEALTH 1548, 1553–54 (2015).

¹¹⁸ Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193); 42 U.S.C. §1320b-7(d).

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.¹¹⁹ Even without language barriers, undocumented immigrants may be unaware that they are eligible for certain forms of disaster or emergency relief.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.¹²¹ In mixed status families,¹²² undocumented parents may be unaware that their U.S. citizen children are entitled to federal benefits.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.¹²⁴

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

In 2010, the British Petroleum (BP) Deepwater Horizon oil spill on the Gulf of Mexico¹²⁹ hit the Vietnamese immigrant community particularly

¹¹⁹ *Id.*; see Singh, *supra* note 17; Peguero, *supra* note 99 at 6–9.

¹²⁰ MAKE THE ROAD NEW YORK, UNMET NEEDS: SUPERSTORM SANDY AND IMMIGRANT COMMUNITIES IN THE METRO NEW YORK AREA (Dec. 19, 2012) [hereinafter UNMET NEEDS], <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1019&context=institutes>, archived at <https://perma.cc/62WS-VCCY>.

¹²¹ WHEN DISASTER STRIKES, *supra* note 102 at 21; Muniz, *supra* note 103 at 4.

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>.

¹²³ WHEN DISASTER STRIKES, *supra* note 102 at 21; Muniz, *supra* note 103 at 4.

¹²⁴ UNMET NEEDS, *supra* note 120 at 19; Muniz, *supra* note 103 at 4.

¹²⁵ Karen Tumlin & Jonathan Blazer, *Administration's Failure to Reassure Leads to Fear, Isolation, and Hardship in Immigrant Communities Affected by Hurricanes*, NAT'L IMMIGR. L. CTR., 4-5, (Oct. 21, 2005), https://web.archive.org/web/20060107034918/http://www.nilc.org/disaster_assistance/IRU6-05.pdf, archived at <https://perma.cc/RB5U-DAJH>.

¹²⁶ Muniz, *supra* note 103 at 4-5.

¹²⁷ WHEN DISASTER STRIKES, *supra* note 102 at 21.

¹²⁸ Muniz, *supra* note 103 at 4.

¹²⁹ 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/E9KW-4YMV> (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.¹³⁰ Much of the Vietnamese community in the Gulf of Mexico relied exclusively on fishing for their livelihood.¹³¹ 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.¹³²

In contrast, as Hurricane Sandy approached the east coast in October 2012,¹³³ 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.¹³⁴ Nevertheless, some relief sites and food pantries required that those seeking aid produce identification, negatively affecting the ability of undocumented residents to obtain aid.¹³⁵ 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.¹³⁶ Of those immigrants who did apply for relief, only one in four actually received help.¹³⁷

3. Fear of Deportation

A fear of deportation also prevents many undocumented immigrants from seeking assistance in the aftermath of a crisis.¹³⁸ 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.”¹³⁹ This is true even when there are U.S. citizen chil-

YUNE (Jan. 22, 2013, 6:15 PM), http://www.nola.com/news/gulf-oil-spill/index.ssf/2013/01/bp_deepwater_horizon_spill_sci.html, archived at <https://perma.cc/M5ES-BPXF>.

¹³⁰ Elizabeth Grossman & Jason Mark, *Disaster in Another Language: The Oil Spill May Hit the Gulf's Vietnamese Community the Hardest*, EARTH ISLAND J., Autumn 2010, http://www.earthisland.org/journal/index.php/eij/article/disaster_in_another_language/, archived at <https://perma.cc/W57S-N6XE>.

¹³¹ Grossman & Mark, *supra* note 130.

¹³² *Id.*

¹³³ Hurricane Sandy hit the East Coast of the United States in October 2012, causing massive flooding, destroying thousands of homes, and leading to the death of at least 158 people in the United States. Eric S. Blake et al, *Tropical Cyclone Report Hurricane Sandy*, NAT'L HURRICANE CTR. (Feb. 12, 2013), http://www.nhc.noaa.gov/data/tcr/AL182012_Sandy.pdf archived at <https://perma.cc/D33H-L9MA>

¹³⁴ See Wheeler, *supra* note 4.

¹³⁵ See UNMET NEEDS, *supra* note 120 at 18.

¹³⁶ *Id.* at 9 (For those immigrants with limited English proficiency, 84 percent had not applied for disaster-related assistance.).

¹³⁷ *Id.* (The report cites “eligibility and institutional barriers” as the reason for the low success rate for obtaining assistance.).

¹³⁸ 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).

¹³⁹ Jaya Ramji-Nogales, *The Right to Have Rights: Undocumented Migrants and State Protection*, 63 U. KAN. L. REV. 1045, 1050 (2015).

dren in a family who are eligible for public benefits.¹⁴⁰ 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.¹⁴¹

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,¹⁴² as well as dramatic increases in the number of individuals removed from the United States in the late 1990's and 2000's.¹⁴³ At the beginning of 2107, President Trump issued an executive order focused on increased immigration enforcement, which lead to immigration raids across the country.¹⁴⁴ As a result, fear in immigrant communities has increased even further.¹⁴⁵ 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.¹⁴⁶

Exercising prosecutorial discretion,¹⁴⁷ DHS has declined to engage in immigration enforcement activity in the aftermath of some crisis situa-

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.

¹⁴¹ See generally U.S. DEP'T OF HEALTH AND HUM. SERVS., BARRIERS TO IMMIGRANTS ACCESS TO HEALTH AND HUMAN SERVICES PROGRAMS, (May 2012), <https://aspe.hhs.gov/basic-report/barriers-immigrants-access-health-and-human-services-programs>, archived at <https://perma.cc/KL47-6F8B>.

¹⁴² For example, under the "Secure Communities" program, in place from 2008 to 2014, DHS called upon local law enforcement agencies to identify immigrants in jails and detention centers who might be deportable. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, SECURE COMMUNITIES, <https://www.ice.gov/secure-communities#tab1>, archived at <https://perma.cc/FS2A-AFBF> (last visited Apr. 13, 2017); see also *Priority Enforcement Program*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/pep>, archived at <https://perma.cc/V5SW-P89B> (last visited Apr. 13, 2017).

¹⁴³ BIPARTISAN POL'Y CTR, ISSUE BRIEF: INTERIOR IMMIGRATION ENFORCEMENT BY THE NUMBERS, 2 (2014), <http://bipartisanpolicy.org/wp-content/uploads/sites/default/files/files/Interior%20Immigration%20Enforcement.pdf>, archived at <https://perma.cc/48NX-26SM>. Although removals of undocumented immigrants has decreased in recent years, there is still widespread fear. See U.S. IMMIGR. & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., FY 2015 ICE Immigration Removals, <https://www.ice.gov/removal-statistics>, archived at <https://perma.cc/HP7F-8NHC>; see also Rosie Hidalgo, *Advancing a Human Rights Framework to Reimagine the Movement to End Gender Violence*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 559, 574 (2015).

¹⁴⁴ See Kulish, et al, *supra* note 24; Donald J. Trump, *Executive Order: Enhancing Public Safety in the Interior of the United States*, WHITE HOUSE (Jan.25, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united> archived at <https://perma.cc/RTB4-3BTN>.

¹⁴⁵ See Kulish, et al, *supra* note 24; Schrank, *supra* note 24.

¹⁴⁶ See Catilin Dewey, *Immigrants are Going Hungry So Trump Won't Deport Them*, WASH. POST, (Mar. 16, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/03/16/immigrants-are-now-canceling-their-food-stamps-for-fear-that-trump-will-deport-them/?utm_term=.f58c6b61102b, archived at <https://perma.cc/85KY-EH9G>; Kate Wells, *Immigrants Worry Public Assistance Could Get Them Deported*, MICH. RADIO NEWS (FEB 22, 2017), <http://michiganradio.org/post/immigrants-worry-public-assistance-could-get-them-deported>, archived at <https://perma.cc/D4TL-R6NU>.

¹⁴⁷ See AM. IMMIGR. COUNCIL, FACT SHEET: UNDERSTANDING PROSECUTORIAL DISCRETION IN IMMIGRATION LAW, *supra* note 94.

tions.¹⁴⁸ In other words, DHS has declined to detain or deport undocumented victims in crisis situations. For example, in the aftermath of Hurricane Charley in 2004,¹⁴⁹ DHS made clear that it would not detain or seek to deport undocumented immigrants seeking assistance.¹⁵⁰ 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.¹⁵¹

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.¹⁵² On the contrary, DHS stated that undocumented immigrants would have no immunity from removal when seeking disaster assistance.¹⁵³ 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.¹⁵⁴ Some undocumented immigrants also reported that relief workers interrogated them about their immigration status when they did seek aid.¹⁵⁵

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

¹⁴⁸ See, e.g., Tumlin & Blazer, *supra* note 126 at 4.

¹⁴⁹ Hurricane Charley struck Florida in August 2004, resulting in 15 direct and 25 indirect deaths, as well as millions of dollars in damages. Richard J. Pasch, Daniel P. Brown, & Eric S. Blake, *Tropical Cyclone Report Hurricane Charley* (Oct. 18, 2004/Rev'd Sept. 15, 2011), http://www.nhc.noaa.gov/data/tcr/AL032004_Charley.pdf, archived at <https://perma.cc/DQ6P-FDR7>.

¹⁵⁰ See, e.g., Tumlin & Blazer, *supra* note 126 at 4.

¹⁵¹ Immigration and Nationality Act § 212(b)(5)(A), 8 U.S.C. § 1182(b)(5)(A) (2012). Prosecutorial discretion is temporary, and DHS can decide to re-engage in immigration enforcement activities at any time. See, e.g., U.S. CITIZENSHIP & IMMIGR. SERVS., DEP'T OF HOMELAND SEC., CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS, <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca>, archived at <https://perma.cc/FR7X-CRLK> (last visited Apr. 13, 2017).

¹⁵² See Tumlin & Blazer, *supra* note 126 at 5; see also Kari Lydersen, *Some Immigrants Suffer Doubly After Hurricane Katrina*, THE NEW STANDARD (Sept. 28, 2005), <http://new-standardnews.net/content/index.cfm/items/2014>, archived at <https://perma.cc/VZ75-NJK8>.

¹⁵³ Darryl Fears, *For Illegal Immigrants, Some Aid is Too Risky*, WASH. POST (Sept. 20, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/19/AR2005091901398.html>, archived at <https://perma.cc/YNX8-2U5Q> (“‘The administration’s priority is to provide needed assistance: water, food, medical care, shelter,’ said Joanna Gonzalez, a DHS spokeswoman. ‘However, as we move forward with the response, we can’t turn a blind eye to the law.’”).

¹⁵⁴ See Tumlin & Blazer, *supra* note 126.

¹⁵⁵ See Johnson, *supra* note 26 (citing Statement of Jeanne M. Woods & Hope Lewis Prepared for the Hearings of the United Nations Special Rapporteur on Extreme Poverty in the Aftermath of Hurricane Katrina, 8 (Oct. 27, 2005), <https://repository.library.northeastern.edu/files/neu:332419>, archived at <https://perma.cc/KYB8-WGGB>).

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

¹⁵⁶ See Muniz, *supra* note 103 at 13; Chad Terhune & Evan Perez, *Roundup of Immigrants in Shelter Reveals Rising Tensions*, WALL STREET J. (Oct. 3, 2005), <http://www.wsj.com/articles/SB112830055169458141>, archived at <https://perma.cc/HL5K-TBUA>; Suzanne Gamboa, *Handful of Katrina Victims in Deportation*, ASSOCIATED PRESS, (Sept. 20, 2005).

¹⁵⁷ FEET IN 2 WORLDS, SPECIAL REPORT: AMID OIL SPILL CRISIS, U.S. AUTHORITIES SEARCH FOR UNDOCUMENTED IMMIGRANT CLEANUP WORKERS (June 4, 2010), <http://www.beta.fi2w.org/2010/06/04/special-report-u-s-immigration-authorities-crack-down-on-gulf-oil-spill-cleanup-workers/>, archived at <https://perma.cc/CBV4-LAYH>

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.

¹⁶³ See *Illegal Immigrants Seek Residency in 9/11 Bill: Group Pursues Residency for Many Who Lost Family in Sept. 11 Attacks*, NBC NEWS (Nov. 18., 2006), <http://www.nbcnews>

claims with the September 11 Victim Compensation Fund¹⁶⁴ 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,¹⁶⁹ 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

.com/id/13119228/ns/us_news-life/t/illegal-immigrants-seek-residency-bill/#.V7vDq_krLIU, archived at <https://perma.cc/JXJ9-FAH7>.

¹⁶⁴ See SEPTEMBER 11TH VICTIM COMPENSATION FUND WEBSITE, <https://www.vcf.gov/index.html> (“The September 11th Victim Compensation Fund (“VCF”) was created to provide compensation for any individual (or a personal representative of a deceased individual) who suffered physical harm or was killed as a result of the terrorist-related aircraft crashes of September 11, 2001[.]”), archived at <https://perma.cc/JYW6-GAX4>. See generally, Joan Bernott Maginnis, *The 9/11 Compensation Fund: Overview and Comment*, THE FEDERALIST SOC. FOR L. & PUB. POL’Y STUD. (Mar. 26, 2007), <http://www.fed-soc.org/publications/detail/the-911-victim-compensation-fund-overview-and-comment>, archived at <https://perma.cc/3CDJ-V8ZY>; see also September 11th Victim Compensation Fund of 2001, (P.L.107-42).

¹⁶⁵ Santiago Bonilla, *Information About Undocumented Immigrants Affected by 9/11 Is Confidential*, GOTHAM GAZETTE (Aug. 22, 2002), <http://www.gothamgazette.com/citizen/sep02/spanish-911.shtml>, archived at <https://perma.cc/99VK-D8FF>.

¹⁶⁶ See Mary M. Wood, *9/11 Fund’s Special Master Recounts Experiences*, UNIV. VA. SCH. L. NEWS (Sep. 22, 2004), http://www.law.virginia.edu/html/news/2004_fall/feinberg.htm, archived at <https://perma.cc/CJN8-63TR>; Bonilla, *supra* note 165; Tumlin & Blazer, *supra* note 126 at 4.

¹⁶⁷ Cara Buckley, *Bill Would Aid Families of Illegal Immigrants Killed on 9/11*, N.Y. TIMES (Nov. 22, 2009), http://www.nytimes.com/2009/11/23/nyregion/23families.html?_r=0, archived at <https://perma.cc/B9Y7-XX4P>; *Illegal Immigrants Seek Residency in 9/11 Bill*, *supra* note 163.

¹⁶⁸ H.R.3575, *September 11 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/C5TA-PSSZ> (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.

¹⁶⁹ S.1620, *September 11 Family Humanitarian Relief and Patriotism Act*, 109th Congress (2005-2006).

¹⁷⁰ *Statements on Introduced Bills and Joint Resolutions*, Senate (Sept. 7, 2005), <https://www.congress.gov/congressional-record/2005/9/7/senate-section/article/S9729-1>, archived at <https://perma.cc/9Y7Q-TVLW> (statement of Senator Reid) (“Moreover, these family members

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

The introduction of the House and Senate Bills was important nevertheless because it ultimately led, in August 2008, to DHS granting humanitarian parole¹⁷² to 16 undocumented immigrants who lost family members in the 9/11 attacks.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 *September 11th Family Humanitarian Relief and Patriotism Act*.¹⁷⁴ The grants of humanitarian parole permitted the undocumented family members to remain in the United States while awaiting Congress' deliberation on the *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.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.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.”).

¹⁷¹ H.R.1071, *September 11 Family Humanitarian Relief and Patriotism Act*, 110th Congress (2007-2008); S.615, *September 11 Family Humanitarian Relief and Patriotism Act*, 110th Congress (2007-2008); H.R.3290, *September 11 Family Humanitarian Relief and Patriotism Act of 2009*, 111th Congress (2009-2010); S.1736, *September 11 Family Humanitarian Relief and Patriotism Act of 2009*, 111th Congress (2009-2010).

¹⁷² Humanitarian parole allows individuals to stay in the United States for a temporary period of time. Immigration and Nationality Act § 212(d)(5), 8 U.S.C. § 1182(d)(5) (2012); see also U.S. CITIZENSHIP & IMMIGRATION SERVS., DEPT. OF HOMELAND SEC. WEBSITE, HUMANITARIAN PAROLE, <https://www.uscis.gov/humanitarian/humanitarian-parole>, archived at <https://perma.cc/U9GJ-UWB2> (last visited Apr. 13, 2017) (“Humanitarian parole is used sparingly to bring someone who is otherwise inadmissible into the United States for a temporary period of time due to a compelling emergency.”).

¹⁷³ Originally DHS granted humanitarian parole to only 15 family members, but then granted parole to a sixteenth member of the group at a later date after he paid taxes. See Buckley, *supra* note 167; see also Letter from Stewart Baker, Assistant Secretary for Policy, Department of Homeland Security, to Debra Steinberg, Esq., (Aug. 15, 2008), [hereinafter Baker Letter] (cited in Brief for Former Homeland Security, Justice, and State Department Officials as Amici Curiae Supporting Respondents in *U.S. v. Texas*, Appendix B, available at https://www.texasattorneygeneral.gov/files/immigration/15-674_bsac_former_homeland_security_officials.pdf, archived at <https://perma.cc/2D65-WBBJ>); see also U.S. House of Representatives Committee on the Judiciary Report on September 11 Family Humanitarian Relief and Patriotism Act of 2009, H. Rep. 111-667, 111th Cong., 2d Sess., available at <https://www.gpo.gov/fdsys/pkg/CRPT-111hrpt667/html/CRPT-111hrpt667>, archived at <https://perma.cc/Q5R2-J77H>.

¹⁷⁴ Baker Letter, *supra* note 173.

¹⁷⁵ Br. for FM Homeland Security, Just., and State Department Officials as Amici Curiae Supporting Respondents in *U.S. v. Texas*, *supra* note 173 at 4; see also U.S. House of Representatives Committee on the Judiciary Report on September 11, H. Rep. 111-667, 111th Cong., 2d Sess., *supra* note 173.

¹⁷⁶ Nina Bernstein, *A Visa Case With a Twist: 9/11*, N.Y. TIMES (Sept. 16, 2004), http://www.nytimes.com/2004/09/16/nyregion/a-visa-case-with-a-twist-911.html?_r=0, archived at <https://perma.cc/ZKK9-FGEQ>.

All fourteen described the effect of the attacks on their lives and the physical or mental harm they suffered as a result.¹⁷⁷ However, the prosecutor ultimately issued LECs to only three of the fourteen whose stories he found most compelling.¹⁷⁸ 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.¹⁷⁹

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.¹⁸⁰ All of those who were interviewed, investigated, and gave witness statements in the SDNY trials eventually obtained U visas as well.¹⁸¹ 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.¹⁸² However, Flint failed to treat the water or use corrosion control, despite the fact that the water was both toxic and corrosive,¹⁸³ which resulted in lead from older pipes leaching into the water supply.¹⁸⁴ 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.¹⁸⁵ Undocumented Flint residents continue to face obstacles obtaining medical and social services because of their lack of lawful status.¹⁸⁶

The water crisis garnered national attention.¹⁸⁷ As state and federal agencies and the media began investigating the crisis, it became apparent

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*; 8 C.F.R. § 214.14(b) (2016).

¹⁸⁰ Conversation with Debra Brown Steinberg, Esq, co-counsel for the family members, on September 15, 2016 (notes on file with author).

¹⁸¹ *Id.*

¹⁸² FWATF REPORT, *supra* note 11, at 15-25; CDC REPORT, *supra* note 12.

¹⁸³ See CDC REPORT, *supra* note 12.; see also Hanna-Attisha, *supra* note 12, at 283.

¹⁸⁴ See CDC REPORT, *supra* note 12.

¹⁸⁵ See Singh, *supra* note 17.

¹⁸⁶ Tina Vasquez, *Flint's Undocumented Residents Go Without Care in Wake of Water Crisis*, REWIRE (Sep 8, 2016), <https://rewire.news/article/2016/09/08/flints-undocumented-residents-go-care-water-crisis/>, archived at <https://perma.cc/5CA6-SQ5Q>.

¹⁸⁷ See, e.g., Arthur Delaney & Philip Lewis, *Flint's Water Crisis Just Became A Double Emergency*, HUFFINGTON POST (Dec 16, 2015), http://www.huffingtonpost.com/entry/flint-water-crisis_us_5670829de4b0e292150fb022, archived at <https://perma.cc/KH9R-NHCV>; Nick Stockton, *Here's How Hard It Will Be to Unpoison Flint's Water*, WIRED (Jan. 29, 2016),

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.¹⁸⁸ 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.¹⁸⁹

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)¹⁹⁰

Flint, Michigan is one of the poorest and most economically troubled cities in the country.¹⁹¹ The city as a whole has suffered dramatic population loss.¹⁹² Joblessness is endemic and more than 40 percent of the residents in Flint live below the poverty line.¹⁹³ In 2011, after declaring Flint a financial emergency, Michigan Governor Rick Snyder appointed an emergency manager to Flint.¹⁹⁴ Emergency managers, who are unelected, make all decisions

<https://www.wired.com/2016/01/heres-how-hard-it-will-be-to-unpoison-flints-water/>, archived at <https://perma.cc/PSZ8-75JK>.

¹⁸⁸ See Sara Ganim & Ray Sanchez, *Flint Water Crisis: New Criminal Charges are Brought*, CNN (Aug. 3, 2016), <http://www.cnn.com/2016/07/29/us/flint-water-crisis-charges/>, archived at <https://perma.cc/3Z39-VYA5>.

¹⁸⁹ Vasquez, *supra* note 186.

¹⁹⁰ Email from Michael Gadola, Fmr. Legal Counsel to Gov'r, to Valerie Brader, Exec. Dir., Mich. Ag'y for Energy (Oct. 14, 2014), available at Snyder Admin. Flint Water Emails Database, 163–64 http://senatedems.com/snyder_emails/20141001_october2014.pdf, archived at <https://perma.cc/S254-423J> (last visited Apr. 9, 2017).

¹⁹¹ See U.S. CENSUS DEPT., QUICK FACTS: FLINT, <https://www.census.gov/quickfacts/table/PST045215/2629000,00>, archived at <https://perma.cc/2YH8-6TVK> (last visited Apr. 9, 2017); see also FWATF REPORT, *supra* note 11 at 15; Jiquanda Johnson, *Flint, Detroit Among Nation's Poorest Cities, New Census Data Show*, MLIVE (Sept. 17, 2015, 6:31 PM), http://www.mlive.com/news/flint/index.ssf/2015/09/flint_detroit_among_nations_po.html, archived at <https://perma.cc/DAJ4-TDQ2>.

¹⁹² FWATF REPORT, *supra* note 11 at 15; see also Peter J. Hammer, *The Flint Water Crisis, KWA and Strategic-Structural Racism* 5 (WAYNE STATE UNIV. L. SCH., RESEARCH PAPER No. 2016-17, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2812171, archived at <https://perma.cc/6FA9-XUA3>.

¹⁹³ 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.

¹⁹⁴ 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.¹⁹⁵ In matters related to city governance, the Flint City Council can only offer advisory opinions to the emergency manager.¹⁹⁶ There were four emergency managers in Flint between 2011 and April 2015, each of whom had full control of the city's administration.¹⁹⁷ 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.¹⁹⁸

Since 1967, Flint had received treated water from the Detroit Water and Sewage Department (DWSD), which sources water from Lake Huron.¹⁹⁹ In April 2013, after a symbolic vote by the Flint City Council,²⁰⁰ Emergency Manager Ed Kurtz signed an agreement to join the Karegnondi Water Authority (KWA) pipeline, arguing that doing so would save money.²⁰¹ The KWA, which would also source water from Lake Huron, was still under

cial Emergency in Flint, MLIVE (Nov. 9, 2011, 1:59 AM), http://www.mlive.com/news/flint/index.ssf/2011/11/dayne_walling_re-elected_as_st.html, archived at <https://perma.cc/D8BB-WTXH>.

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.

¹⁹⁷ FWATF REPORT, *supra* note 11 at 39; see also Steve Carmody, *Flint's Financial Emergency Declared Over, Transition to Local Control Begins*, MICH. RADIO NEWS (Apr. 29, 2015), <http://michiganradio.org/post/flints-financial-emergency-declared-over-transition-local-control-begins-0>, archived at <https://perma.cc/UQ6U-AJFK>.

¹⁹⁸ See generally Hammer, *supra* note 192; Ryan Scorsone & Nicolette Bateson, *Long-Term Crisis and Systemic Failure: Taking the Fiscal Stress of American Cities Seriously: Case Study: City of Flint*, MICHIGAN STATE UNIVERSITY EXTENSION (Sept. 2011), https://www.city-offlint.com/wp-content/uploads/Reports/MSUE_FlintStudy2011.pdf, archived at <https://perma.cc/CMH5-GR97>; Stephen C. Fehr & Mary Murphy, *Flint Water Crisis Could Spur Changes to Michigan's Emergency Manager Law*, THE PEW CHARITABLE TRUSTS (Mar. 23, 2016), <http://www.pewtrusts.org/en/research-and-analysis/analysis/2016/03/23/flint-water-crisis-could-spur-changes-to-michigans-emergency-manager-law>, archived at <https://perma.cc/MVP9-22Y5>; Michelle Wilde Anderson, *Democratic Dissolution: Radical Experimentation in State Takeovers of Local Governments*, 39 FORDHAM URB. L. J. 577, 605 (2012); Richard C. Schragger, *Democracy and Debt*, 121 YALE L.J. 860, 876–77 (2012).

¹⁹⁹ FWATF REPORT, *supra* note 11 at 15; Ron Fonger, *Former Genesee County Drain Commissioner: We Can't Afford a New Water Pipeline* (Apr. 1, 2010, 4:22 PM), MLIVE, http://www.mlive.com/news/flint/index.ssf/2010/04/former_genesee_county_drain_co.html, archived at <https://perma.cc/8GBC-P3XF>.

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=U3gbZ8hZ_KI, archived at <https://perma.cc/9SCQ-SEUV>).

²⁰¹ FWATF REPORT, *supra* note 11 at 16–17; see also Hammer, *supra* note 192 at 27; Kayla Ruble, *'Smothering the Outcry': The Inside Story of How the State of Michigan Poisoned Flint*, VICE NEWS (Feb. 9, 2016, 10:55 AM), <https://news.vice.com/article/smothering-the-outcry-the-inside-story-of-how-the-state-of-michigan-poisoned-flint-water-crisis>, archived at <https://perma.cc/NP87-G86M>. See generally Hammer, *supra* note 192.

development at the time.²⁰² 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.²⁰³ During negotiations with Emergency Manager Kurtz, DWSD offered various options to continue providing water to Flint; however, Kurtz rejected all offers.²⁰⁴

In June 2013, Kurtz signed off on a contract to begin using Flint River water,²⁰⁵ despite having previously rejected such a switch in 2012 after consulting with the Michigan Department of Environmental Quality (MDEQ).²⁰⁶ 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.²⁰⁷ According to a July 2011 study, it would cost more than \$61 million to upgrade Flint's water treatment plant.²⁰⁸

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.²⁰⁹ No one consulted the Flint City Council and the Council did not vote on this decision.²¹⁰ The plan was to use Flint River water for two years until construction on the KWA pipeline finished.²¹¹ However, Flint invested only a small fraction of the money needed to make the recommended upgrades to Flint's water treatment plant.²¹² 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.²¹³

Almost immediately after the water switch, Flint residents started noticing disturbing changes in their water. Reports flowed in of dirty, brown

²⁰² *Id.* at 17; FWATF REPORT, *supra* note 11 at 16.

²⁰³ Hammer, *supra* note 192 at 30–31.

²⁰⁴ DWSD 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.

²⁰⁸ ROWE ENGINEERING, ANALYSIS OF THE FLINT RIVER AS A PERMANENT WATER SUPPLY FOR THE CITY OF FLINT (July 2011), <https://www.scribd.com/doc/64381765/Analysis-of-the-Flint-River-as-a-Permanent-Water-Supply-for-the-City-of-Flint-July-2011>, archived at <https://perma.cc/S2QN-PYNC>.

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.

²¹² Nancy Kaffer, *Why Didn't Flint Treat Its Water? An Answer, at Last*, DETROIT FREE PRESS (Mar. 31, 2016, 11:46 PM), <http://www.freep.com/story/opinion/2016/03/30/flint-water-crisis/82421546/>, archived at <https://perma.cc/8DMA-TYGC>.

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(I) (2017).

water that tasted bad and smelled terrible.²¹⁴ Residents also reported becoming ill, developing rashes, and losing hair after drinking or bathing in the water.²¹⁵ In August 2014, and again in September 2014, the city found the bacterium *E. coli* in Flint water and issued notices to boil all tap water.²¹⁶ In October 2014, state officials noted a spike in the number of cases of Legionnaire's disease, or Legionellosis, in Genesee County.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.²¹⁸ Legionellosis can be life-threatening to the elderly or those with compromised immune systems; one in ten individuals with Legionellosis die.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.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.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.²²² Despite concerns voiced by members of Snyder's staff,²²³ both Emergency

²¹⁴ FWATF REPORT, *supra* note 11 at 16; Jim Lynch & Chad Livengood, *Flint Resident: Water Looks Like Urine, Smells Like Sewer*, THE DETROIT NEWS (Oct. 1, 2015, 11:34 PM), <http://www.detroitnews.com/story/news/local/michigan/2015/09/30/flint-water-woes-seep-city-state-politics/73129478/>, archived at <https://perma.cc/manage/create>.

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

²¹⁶ FWATF REPORT, *supra* note 11 at 17.

²¹⁷ *Id.*

²¹⁸ Bouffard, *supra* note 13 (quoting Janet Stout, a professor and expert on Legionnaire's disease: "The water quality issues, from a microbiological point of view, certainly were a factor in the increase of Legionnaire's disease in Genesee County."); Elisha Anderson, *Why were Officials Silent on Legionnaires' in Flint*, DETROIT FREE PRESS (Apr. 10, 2016, 11:16 PM), <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/04/09/flint-water-crisis-legionnaires/82397428/>, archived at <https://perma.cc/F9CM-9A6F>.

²¹⁹ FWATF REPORT, *supra* note 11 at 24.

²²⁰ Previously, less than a dozen cases of Legionnaire's disease were reported each year in Genesee County. See Elisha Anderson & John Wisely, *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.

²²¹ Ron Fonger, *General Motors Shutting Off Flint River Water at Engine Plant Over Corrosion Worries*, FLINT J. MLIVE (Oct. 13, 2014, 6:00 PM), http://www.mlive.com/news/flint/index.ssf/2014/10/general_motors_wont_use_flint.html, archived at <https://perma.cc/X4A2-LLV3>.

²²² See Email from Jason Lorenz, Fmr. Pub. Info Off'r, City of Flint, "Water Issues for General Motors are Not Issues for Flint Residents," (Oct. 10, 2014), available at Snyder Admin. Flint Water Emails Database, 176–78 http://senatedems.com/snyder_emails/20141001_october2014.pdf, archived at <https://perma.cc/S254-423J> (last visited Apr. 9, 2017); see also Lurie, *supra* note 215.

²²³ Email from Valerie Brader, Exec. Dir. Mich. Ag'y for Energy, to Dennis Muchmore et al., (Oct. 14, 2014), available at Snyder Admin. Flint Water Emails Database 161, http://senatedems.com/snyder_emails/20141001_october2014.pdf, archived at <https://perma.cc/>

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

S254-423J (last visited Apr. 9, 2017) (noting that there have been problems with Flint water quality and that there is an urgent need for Flint to go back to the DWSD); email from Michael Gadola, Fmr. Legal Counsel to Gov'r, to Valerie Brader, Exec. Dir., Mich. Ag'y for Energy (Oct. 14, 2014), available at Snyder Admin. Flint Water Emails Database, 163–64 http://senatedems.com/snyder_emails/20141001_october2014.pdf, archived at <https://perma.cc/S254-423J> (last visited Apr. 9, 2017).

²²⁴ See Hammer, *supra* note 192 at 40.

²²⁵ CITY OF FLINT DEPT. PUB. WKS., WATER SYSTEM QUESTIONS & ANSWERS (Jan. 13, 2015), available at <https://www.cityofflint.com/wp-content/uploads/CoF-Water-System-FAQ-1-16-2015.pdf>, archived at <https://perma.cc/JMU6-AWTB>; see also CDC REPORT, *supra* note 12.

²²⁶ See Joan B. Rose, *TTHM in Drinking Water: The Flint, Michigan Story, A Lesson for Us All*, WATER QUALITY AND HEALTH (Mar. 13, 2015), <http://www.waterandhealth.org/tthm-drinking-water-flint-michigan-story-lesson/>, archived at <https://perma.cc/8QMS-PPPT>.

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.

²³¹ BRIGHTON ANALYTICAL L.L.C., UNIV. MICH. FLINT LABORATORY TESTING DATA: JAN.–FEB. 2015 30, 34, 41–44, 47–57, available at https://www.umflint.edu/sites/default/files/groups/Campus_Water_Information/january_-_february_2015.pdf, archived at <https://perma.cc/J678-4USN>. The threshold level of lead at which the EPA must initiate an enforcement action is 15 parts per billion, although there is no safe level of lead. Control of Lead and Copper, 40 C.F.R. § 141(I) (2017); see also U.S. ENVTL. PROT. AGENCY, DRINKING WATER REQUIREMENTS FOR STATES AND PUBLIC WATER SYSTEMS: LEAD AND COPPER RULE, <https://www.epa.gov/dwreginfo/lead-and-copper-rule>, archived at <https://perma.cc/75Y6-RKYK> (last updated Mar. 15, 2017).

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 FLINT WATER STUDY.ORG GUIDE (June 30, 2016), available at <http://flintwaterstudy.org/guide-to-flintwater-study-org/>, archived at <https://perma.cc/RJ3F-UTT3>.

²³³ See U.S. ENVTL. PROT. AGENCY, FLINT WATER SAMPLING OBJECTIVES, <https://www.epa.gov/flint/flint-water-sampling-objectives>, archived at <https://perma.cc/6A2Q-L5RV> (last updated Jan. 10, 2017).

had caused lead from older pipes to leach into the water supply.²³⁴ As a result, Flint residents, including all of the children in Flint, were exposed to lead contaminated drinking water.²³⁵

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.²³⁶ MDEQ conducted its own test of city water, but pre-flushed pipes before testing them.²³⁷ 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.²³⁸

In March 2015, after numerous complaints about Flint's dirty and rancid tap water, Flint City Council members voted to return to DWSD water.²³⁹ However, the new emergency manager, Jerry Ambrose, who took over in January 2015, rejected the decision, calling the vote "incomprehensible" and citing cost concerns.²⁴⁰ 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."²⁴¹

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.²⁴² 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."²⁴³

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

²³⁴ See CDC REPORT, *supra* note 12.

²³⁵ *Id.*

²³⁶ See Lurie, *supra* note 215; BRIDGE MAGAZINE, FLINT CRISIS TIMELINE: PART 3, (Mar. 1, 2016), <http://bridgemi.com/2016/03/flint-crisis-timeline-part-3/>, archived at <https://perma.cc/99AH-WL5B>; Lindsey Smith, *Leaked Internal Memo Shows Federal Regulator's Concerns About Lead in Flint's Water*, MICH. RADIO NEWS (July 13, 2015), <http://michiganradio.org/post/leaked-internal-memo-shows-federal-regulator-s-concerns-about-lead-flint-s-water>, archived at <https://perma.cc/R8E6-5UAC> (quoting MDEQ spokesman Brad Wurfel "Let me start here – anyone who is concerned about lead in the drinking water in Flint can relax[.]").

²³⁷ See Lurie, *supra* note 215.

²³⁸ *Id.*

²³⁹ See Ruble, *supra* note 201.

²⁴⁰ Ron Fonger, *Emergency Manager Calls City Council's Flint River Vote 'Incomprehensible'*, FLINT J. MLIVE (Mar. 24, 2015, 1:35 PM), http://www.mlive.com/news/flint/index.ssf/2015/03/flint_emergency_manager_calls.html, archived at <https://perma.cc/96RB-99JU>.

²⁴¹ BRIDGE MAGAZINE, FLINT CRISIS TIMELINE: PART 2 (Mar. 1, 2016), <http://bridgemi.com/2016/03/flint-crisis-timeline-part-2/>, archived at <https://perma.cc/BA9M-V8KK> (Memo dated Mar. 3, 2015 from then-Emergency Manager Jerry Ambrose to Deputy State Treasury Wayne Workman).

²⁴² Hanna-Attisha et al., *supra* note 12.

²⁴³ See MICH. SENATE, DR. MONA HANNA-ATTISHA RESPONSES TO FLINT WATER CRISIS JOINT COMMITTEE QUESTIONS, available at <http://www.senate.michigan.gov/committees/files/2016-SCT-FLINT-03-29-1-10.pdf>, archived at <https://perma.cc/L28T-XGZ4> (last visited Apr. 24, 2017).

lead problem.²⁴⁴ The city instructed residents to use filtered water and instructed pregnant women and children under age 6 to use bottled water.²⁴⁵ On October 16, 2015, Flint switched its water source back to the DWSD.²⁴⁶ On October 21, 2015, Snyder created the Flint Water Advisory Task Force, an independent task force, to investigate the crisis.²⁴⁷ On January 5, 2016, Governor Snyder declared a state of emergency for Genesee County.²⁴⁸ Snyder also requested \$96 million in federal emergency aid from President Obama and requested that the Flint crisis be declared a national disaster.²⁴⁹ On January 16, 2016, Obama declared a state of emergency in Flint²⁵⁰ but could not declare Flint a disaster since that is a term reserved by FEMA for natural events.²⁵¹

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.²⁵² In January

²⁴⁴ See GENESSEE CTY. BD. OF COMMRS, PUBLIC HEALTH ADVISORY FOR PEOPLE USING THE FLINT WATER SUPPLY WITH THE FLINT RIVER AS THE SOURCE (Sept. 29, 2015), available at <http://flintwaterstudy.org/wp-content/uploads/2015/09/water.pdf>, archived at <https://perma.cc/6GCS-7UPD>; Snyder Acknowledges Mistakes in City's Water Troubles, WNEM (Sept. 30, 2015, 2:03 PM), <http://www.wnem.com/story/30153710/snyder-acknowledges-some-mistakes-in-tapping-flint-river>, archived at <https://perma.cc/7MUE-ZBUD>.

²⁴⁵ See CDC REPORT, *supra* note 12.

²⁴⁶ FWATF REPORT, *supra* note 11 at 21.

²⁴⁷ See Press Release, Mich. Off. Governor, Gov. Rick Snyder Announces Flint Water Task Force to Review State, Federal and Municipal Actions, Offer Recommendations (Oct. 21, 2015), available at http://www.michigan.gov/snyder/0,4668,7-277-57577_57657-367761--,00.html, archived at <https://perma.cc/X29P-VGPB>.

²⁴⁸ Paul Egan, Snyder Declares Emergency as Feds Probe Flint Water, DETROIT FREE PRESS (Jan. 15, 2016, 10:17 PM) <http://www.freep.com/story/news/local/michigan/2016/01/05/us-attorneys-office-investigating-lead-flint-water/78303960/>, archived at <https://perma.cc/GGE3-GTNA>.

²⁴⁹ Ed White, Governor Rick Snyder Asks President Obama for Federal Aid in Flint Water Crisis, ASSOCIATED PRESS (Jan. 15, 2016, 4:18 PM), <http://www.wxyz.com/news/governor-rick-snyder-asks-president-obama-for-federal-aid-in-flint-water-crisis>, archived at <https://perma.cc/6Z65-VGCL>; see also Helen Marie Berg, *When a Disaster is Not a Disaster and Why That Matters for Flint*, MICH. J. ENVTL. & ADMIN. L.: THE MJEAL BLOG (MAR. 25, 2016), <http://www.mjeal-online.org/when-a-disaster-is-not-a-disaster-and-why-that-title-matters-for-flint/>, archived at <https://perma.cc/3E63-H7SN> (noting that a “disaster” declaration results in a multitude of federal benefits and aid not available for “emergencies”).

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.”).

²⁵² See Mark Brush, *Expert Says Michigan Officials Changed a Flint Lead Report to Avoid Federal Action*, MICH. RADIO NEWS (Nov. 5, 2015), <http://michiganradio.org/post/expert-says-michigan-officials-changed-flint-lead-report-avoid-federal-action#stream/0>, archived at <https://>

2016, Michigan Attorney General Bill Schuette announced that he was opening an investigation into the crisis.²⁵³ Shortly after that, Genesee County Prosecutor David Leyton also opened an investigation into the crisis.²⁵⁴ In February 2016, the U.S. Attorney's Office, working with the FBI and the EPA, also opened an investigation.²⁵⁵

In March 2016, the Flint Water Advisory Task Force released its report, spreading the blame for the crisis among several government individuals and agencies.²⁵⁶

“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.”²⁵⁷

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[.]”²⁵⁸

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.²⁵⁹ Specifically, Schuette

/perma.cc/YL9J-S6GM; Z. Byron Wolf, *Democrats Outraged at Michigan Governor Over Flint Water Crisis*, CNN (Jan. 18, 2016, 12:08 AM), <http://www.cnn.com/2016/01/18/politics/flint-water-democratic-debate-clinton-sanders-snyder/>, archived at <https://perma.cc/Z2ZU-EV4S>; Ben Mathis-Lilley, *Michigan Knew Last Year That Flint’s Water Might Be Poisoned But Decided Not to Tell Anyone*, SLATE (Jan. 11, 2016), http://www.slate.com/blogs/the_slate_test/2016/01/11/state_of_michigan_flint_broke_law_and_covered_up_lead_levels_in_water_expert.html, archived at <https://perma.cc/32E8-58L7>.

²⁵³ *Michigan Attorney General Bill Schuette Appoints Todd Flood for Flint Lead-Tainted Water Probe*, LAWYER HERALD (Jan. 26, 2016), <http://www.lawyerherald.com/articles/29727/20160126/michigan-attorney-general-bill-schuette-todd-flood-flint-lead-tainted-water.htm>, archived at <https://perma.cc/7UM5-TV5W>.

²⁵⁴ Gary Ridley, *County Prosecutor Gets Green Light to Investigate Flint Water Crisis*, MLIVE (Jan. 27, 2016, 12:56 PM), http://www.mlive.com/news/flint/index.ssf/2016/01/commissioners_clear_way_for_pr.html, archived at <https://perma.cc/9FKP-483N>.

²⁵⁵ See Letter from Assistant U.S. Attorney John K. Neal to Assistant Mich. Attorney Gen. Richard Kuhl (May 19, 2016) (embedded at <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/05/26/snyder-calls-halt-internal-flint-investigation/84971460/>), archived at <https://perma.cc/Q6US-XQ9U>.

²⁵⁶ *Flint Water Advisory Task Force Finds State “Fundamentally Accountable” for Flint’s Water Emergency*, ABC12 News (Mar. 23, 2016, 6:30 AM), <http://www.abc12.com/home/headlines/Gov-Snyders-Flint-water-task-force-report-could-be-released-as-soon-as-Wednesday-373187741.html>, archived at <https://perma.cc/TK33-D4SK>.

²⁵⁷ FWATF REPORT, *supra* note 11, at 1.

²⁵⁸ *Id.*

²⁵⁹ Complaint at 1, *People v. Busch, et al.*, No. 16-0001 (Mich. 67th D. Ct. Apr. 20, 2016), available at http://www.michigan.gov/documents/ag/Complaint-Flint_Water_First_Charges_

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.²⁶⁰ Prysby faces four felony charges, including misconduct in office and tampering with evidence, and two counts of violating the Safe Water Drinking Act.²⁶¹ 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.²⁶²

On July 29, 2016, Schuette brought charges against three MDEQ employees for their alleged role in the Flint water crisis,²⁶³ 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.²⁶⁴ 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.²⁶⁵ Adam Rosenthal is also facing felony charges of tampering with evidence for allegedly manipulating a July 28, 2015 report to show lower lead levels.²⁶⁶

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.²⁶⁷ The charges against the three include misconduct in office and conspiracy, both of which are felonies, and willful neglect of duty, a misdemeanor.²⁶⁸

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.

²⁶⁰ Complaint, *People v. Busch*, et al., *supra* note 259, at 1–2.

²⁶¹ *Id.*

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-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.

²⁶⁷ See Ganim & Sanchez, *supra* note 188.

²⁶⁸ *Id.*; see also *6 State Employees Criminally Charged in Connection with Flint Water Crisis*, *supra* note 264.

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

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.*

²⁷² Tolen, *supra* note 18. Miller pleaded no contest to a misdemeanor charge of willful neglect of duty as part of a plea deal in which prosecutors dismissed the felony charges. Elisha Anderson, *State Official Pleads to Misdemeanor Charge in Flint Water Probe*, DETROIT FREE PRESS (Sept. 14, 2016, 12:25 PM), <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/09/14/corinne-miller-state-official-pleads-misdemeanor-charge-flint-water-probe/90355420/>, archived at <https://perma.cc/AZH6-XAWB>.

²⁷³ *Advocacy Coalition to Feds*, *supra* note 1.

²⁷⁴ See CDC REPORT, *supra* note 12; S. OF MICH. DEP’T OF TECH., MGMT., & BUDGET, DEMOGRAPHIC AND LABOR MARKET PROFILE: CITY OF FLINT, 4 (Apr. 2016), http://milmi.org/Portals/137/publications/Flint_City_Demographic_and_Labor_Mkt_Profile.pdf, archived at <https://perma.cc/2LBX-REK4> [hereinafter DEMOGRAPHIC AND LABOR MARKET PROFILE: CITY OF FLINT].

1000.²⁷⁵ 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.²⁷⁶ 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.²⁷⁷ Early notices warning about the Flint water crisis were printed only in English.²⁷⁸ 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.²⁷⁹ 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.²⁸⁰ As a result, many continued to drink tap water for months after the governor declared a state of emergency in Flint.²⁸¹

Some immigrants in Flint were not fully aware of the dangers of Flint water until workers and volunteers knocked on their doors.²⁸² 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.²⁸³ 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.²⁸⁴ As the Flint Water Advisory Task Force reported, “[t]he sight of uniformed state troopers and National Guardsman

²⁷⁵ CTR FOR MIGRATION STUDIES, ESTIMATES OF THE UNAUTHORIZED POPULATION, *supra* note 14; *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-flint-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.

²⁸² *See* Kristen Aguirre, *Flint Water Crisis, Living Undocumented* (May 10, 2016), NBC25 NEWS, <http://nbc25news.com/news/local/flint-water-crisis-living-undocumented>, *archived at* <https://perma.cc/CD9G-NXCX>; *see also* Wheeler, *supra* note 14.

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.”²⁸⁵

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.²⁸⁶ 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.²⁸⁷ However, this proved to be a significant deterrent to undocumented immigrants who did not have identification.²⁸⁸ Others feared that going to distribution centers where workers checked identification would lead to deportation.²⁸⁹ In January 2016, in response to community criticism, the State changed its policy of requiring identification.²⁹⁰ Nevertheless, Flint immigrants remained reluctant to go to distribution centers, particularly where uniformed officers distributed the water.²⁹¹

The fear of deportation, widespread in the Flint immigrant community,²⁹² is not unfounded. ICE had stepped up its immigration enforcement activities in the early days of the crisis.²⁹³ 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.”²⁹⁴

As a result of a lack of both information and access to safe drinking water, many undocumented immigrant residents of Flint faced greater expo-

²⁸⁵ FWATF REPORT, *supra* note 11 at 56.

²⁸⁶ Singh, *supra* note 17.

²⁸⁷ *No ID Required for Flint Residents to Receive Free Water Resources*, MICHIGAN.GOV: FLINT WATER (Jan. 22, 2016), http://www.michigan.gov/flintwater/0,6092,7-345-75251_75303-374566—,00.html, archived at <https://perma.cc/A9HG-SHUY>.

²⁸⁸ Undocumented immigrants in Michigan cannot legally obtain state identification. MICH. SEC. OF STATE, APPLYING FOR A LICENSE OR ID? YOU’LL NEED THE FOLLOWING DOCUMENTS, http://www.michigan.gov/documents/DE40_032001_20459_7.pdf, archived at <https://perma.cc/3TAM-VMZA> (last visited Apr. 25, 2017); see also Tolen, *supra* note 18.

²⁸⁹ Niraj Warikoo, *Flint Immigrants Struggle to Get Help, Info on Water*, DETROIT FREE PRESS (Feb. 4, 2016, 12:02 AM), <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/02/04/flint-immigrants-struggle-get-help-info-water/79530754/>, archived at <https://perma.cc/UWS3-PYMG>.

²⁹⁰ See *No ID Required for Flint Residents to Receive Free Water Resources*, *supra* note 287; see also Singh, *supra* note 17.

²⁹¹ Singh, *supra* note 17.

²⁹² See Vasquez, *supra* note 186; Tracy Samilton, *Fear Prevents Some Undocumented Immigrants from Getting Water in Flint*, NPR MICH. RADIO (Jan. 27, 2016), <http://michiganradio.org/post/fear-prevents-some-undocumented-immigrants-getting-water-flint>, archived at <https://perma.cc/2CDL-78KF>.

²⁹³ Rebekah Sager, *ICE Raids May Have Worsened Woes for Undocumented Community in Flint*, FOX NEWS-LATINO (Jan. 28, 2016), <http://latino.foxnews.com/latino/news/2016/01/28/ice-raids-may-have-worsened-woes-for-undocumented-community-in-flint/>, archived at <https://perma.cc/QD6S-Y5CW>.

²⁹⁴ Wheeler, *supra* note 14.

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 woman 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

²⁹⁵ FWATF REPORT, *supra* note 11 at 23; *see also* Marie DeFer, *Flint Water Crisis: Policy Measures to Address the Health Consequences of Lead Poisoning*, THE NETWORK FOR PUB. HEALTH L. (May 4, 2016), https://www.networkforphl.org/the_network_blog/2016/05/04/771/flint_water_crisis_policy_measures_to_address_the_health_consequences_of_lead_poisoning, *archived at* <https://perma.cc/A4HG-GZUW>.

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 *Id.*

³⁰¹ *See* Vasquez, *supra* note 186.

³⁰² *See* Press Release, U.S. Dep't of Health and Hum. Servs., HHS Approves Major Medicaid Expansion for Flint (Mar. 23, 2016), <http://www.hhs.gov/about/news/2016/03/02/hhs-approves-major-medicare-expansion-flint.html>, *archived at* <https://perma.cc/YUJ7-8CAD> (last visited Nov. 12, 2016).

³⁰³ 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.

³⁰⁴ FWATF REPORT, *supra* note 11 at 56.

³⁰⁵ *See* Vasquez, *supra* note 186.

seeking needed medical care and social services.³⁰⁶ 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.³⁰⁷ In addition, the coalition asked that DHS grant immigration relief to those whose families were poisoned by Flint water.³⁰⁸ 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.³⁰⁹ 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.³¹⁰ DHS also did not respond to the request that undocumented Flint residents be given lawful immigration status.³¹¹ 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 VISA

The Flint water crisis is distinctive in that criminal activity by state officials played a significant role in creating the crisis.³¹² Because of the criminal activity involved in the Flint water crisis, undocumented Flint residents, unlike many other undocumented crisis victims, have a potential

³⁰⁶ *Id.*; see *supra* Part IV.B.;

³⁰⁷ Joint Letter Sponsored by the A.C.L.U. of Mich. to Jeh Johnson, Sec'y of Homeland Sec., and Sylvia Burwell, Sec'y of Health and Hum. Servs., Request for Directive to Protect Immigrant Victims of Flint Water Crisis (Feb. 29, 2016), <http://www.aclumich.org/sites/default/files/FlintImmigrationLetter022916.pdf>, archived at <https://perma.cc/ZX8G-3BDR> [hereinafter *ACLU LETTER*]; see also *Advocacy Coalition to Feds*, *supra* note 1.

³⁰⁸ *ACLU LETTER*, *supra* note 307; see also *Advocacy Coalition to Feds*, *supra* note 1.

³⁰⁹ Public Notice, U.S. Dep't of Homeland Sec., Public Notice on the Current Water Emergency in Flint, Mich. (Feb. 24, 2016), <https://www.dhs.gov/news/2016/02/24/public-notice-current-water-emergency-flint-mich>, archived at <https://perma.cc/C6CH-F3F9>.

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-

³¹³ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1502, 114 Stat. 1464 (2000); Immigration and Nationality Act § 101(a)(15)(U)(iii), 8 U.S.C. § 1101(a)(15)(U)(iii) (2012); 8 C.F.R. § 214.14(a)(9) (2016).

³¹⁴ See Vasquez, *supra* note 186; Stacie Scherman, *Hispanic/Latino Group Aims to Help Undocumented Flint Residents Cope with Water Crisis*, EAST VILLAGE MAGAZINE (June 6, 2016), <http://www.eastvillagemagazine.org/2016/06/06/hispaniclatino-group-aims-to-help-undocumented-flint-residents-cope-with-water-crisis/>, archived at <https://perma.cc/8C6C-WQ39>.

³¹⁵ See *supra* Part IV.A.

³¹⁶ See Niraj Warikoo, *ICE Raids in Ypsilanti, Detroit Cause Anxiety Among Some Immigrants* DETROIT FREE PRESS (Feb. 24, 2017, 11:15 PM), <http://www.freep.com/story/news/local/michigan/2017/02/24/ice-raids-ypsilanti-detroit-immigrants/98353064/>, archived at <https://perma.cc/3FTB-2M43>.

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,³¹⁷ must first obtain an LEC showing that they were helpful in the investigation or prosecution of those crimes.³¹⁸ Each individual victim must come forward to cooperate with an investigation into the crimes and each must receive an individual LEC.³¹⁹ 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.³²⁰ Prosecutors charged state officials who were part of the Flint water crisis with the crime of “tampering with evidence.”³²¹ 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.³²²

Under Federal Law, “obstruction of justice,” refers to specific crimes within Title 18 of the United States Code,³²³ including Section 1519 entitled “Destruction, alteration, or falsification of records in Federal investigations.”³²⁴ The Michigan law of “tampering with evidence,”³²⁵ 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-

³¹⁷ CTR FOR MIGRATION STUDIES, ESTIMATES OF THE UNAUTHORIZED POPULATION, *supra* note 14; *see also* Wheeler, *supra* note 14.

³¹⁸ 8 C.F.R. § 214.14(c)(2)(i) (2016); *see also* U.S. Citizenship & Immigr. Serv., Form I-918 Supplement B, U Nonimmigrant Status Certification, *supra* note 23.

³¹⁹ 8 C.F.R. § 214.14(c)(2)(i) (2016); *see also* U.S. Citizenship & Immigr. Serv., Form I-918 Supplement B, U Nonimmigrant Status Certification, *supra* note 23.

³²⁰ Immigration and Nationality Act § 101(a)(15)(U)(iii), 8 U.S.C. § 1101(a)(15)(U)(iii) (2012); 8 C.F.R. § 214.14(a)(9) (2016).

³²¹ *See, e.g.*, Complaint, *People v. Busch, et al.*, *supra* note 259; *see also supra* Part IV.A.

³²² 8 U.S.C. § 1101(a)(15)(U)(iii); 8 C.F.R. § 214.14(a)(9).

³²³ 18 U.S.C. §§ 1501–1521 (2012).

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.”³²⁶ 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 Appeals³²⁷ 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.”³²⁸ 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,”³²⁹ 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[.]”³³⁰ 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[.]”³³¹ 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.”³³²

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,

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 JUST., <http://www.justice.gov/eoir/biainfo.htm>, archived at <https://perma.cc/28XT-Q4MH> (last updated Mar. 24, 2016).

³²⁸ Rafael Espinoza-Gonzalez, 22 I. & N. Dec. 889, 894 (1999) (interim decision 3402); *see also* Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(S) (2012).

³²⁹ *See, e.g.*, Complaint, *People v. Busch, et al.*, *supra* note 259; *see also supra* Part IV.A.

³³⁰ 18 U.S.C. § 371 (2012); *see also* Immigration and Nationality Act § 101(a)(43)(U), 8 U.S.C. § 1101(a)(43)(U) (2012) (listing as an aggravated felony “an attempt or conspiracy to commit an offense described in this paragraph,” which includes obstruction of justice under 8 U.S.C. § 1101(a)(43)(3)).

³³¹ MICH. COMP. LAWS § 750.157a (2016).

³³² 8 U.S.C. § 1101(a)(15)(U)(iii); 8 C.F.R. § 214.14(a)(9) (2016).

the state officials who tampered with evidence must have done so to avoid or frustrate efforts to investigate or prosecute their other crimes.³³³ 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.³³⁴ 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.³³⁵

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.³³⁶ 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.³³⁷

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.³³⁸ Some residents of Flint contracted Legionnaire's disease.³³⁹ In most households in Flint, residents suffered from a variety of other physical health issues, including illnesses, rashes, fatigue, nausea, and hair loss.³⁴⁰ 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.³⁴¹ When

³³³ 8 C.F.R. § 214.14(a)(14)(ii).

³³⁴ See *supra* Part IV.A.

³³⁵ *Id.*

³³⁶ 8 C.F.R. § 214.14(a)(14)(ii)(A).

³³⁷ See *supra* Part IV.B.

³³⁸ See CDC REPORT, *supra* note 12.

³³⁹ See Bouffard, *supra* note 13; see also Ron Fonger, *CDC Finds First Genetic Link Between Legionnaires Outbreak*, *Flint Water*, MLIVE (Feb. 16, 2017, 7:00 AM), http://www.mlive.com/news/flint/index.ssf/2017/02/cdc_finds_first_genetic_link_b.html, archived at <https://perma.cc/3TUB-7SAW>.

³⁴⁰ See Ruble, *supra* note 201; Lurie, *supra* note 215; Steve Carmody, *Survey: Majority of Flint Households Report Health Issues* (Nov. 3, 2016), <http://michiganradio.org/post/survey-majority-flint-households-report-health-issues>, archived at <https://perma.cc/M4YY-TNG3>.

³⁴¹ Abby Goodnough & Scott Atkinson, *A Potent Side Effect to the Flint Water Crisis: Mental Health Problems*, *N.Y. TIMES* (Apr. 30, 2016), <http://www.nytimes.com/2016/05/01/us/flint-michigan-water-crisis-mental-health.html>, archived at <https://perma.cc/75LM-QCKE>; Elisha Anderson, *Flint's Growing Mental Health Crisis*, *DETROIT FREE PRESS* (Aug. 7, 2016), <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/08/06/flint-water-crisis-donations-lead/88064570/>, archived at <https://perma.cc/RHE9-DNV5>.

residents of Flint finally did learn about the water, many experienced extreme anxiety and depression.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.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.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.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

³⁴² See Goodnough & Atkinson, *supra* note 341.

³⁴³ Carmody, *supra* note 340.

³⁴⁴ *Advocacy Coalition to Feds*, *supra* note 1; Vasquez, *supra* note 186.

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.³⁴⁶ 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.³⁴⁷ 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.³⁴⁸ Each individual victim must come forward to cooperate with an investigation into the crimes and each must receive an individual LEC.³⁴⁹ 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.³⁵⁰ 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.³⁵¹ 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.³⁵² 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.³⁵³ Thus, prosecutors may decide not to issue LECs to all or any of the undocumented victims.³⁵⁴ There are thousands of other potential witnesses in Flint who are

³⁴⁶ See *supra* Part IV.A.

³⁴⁷ 8 C.F.R. § 214.14(a)(3) (2016).

³⁴⁸ See Saucedo, *A New "U"*, *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 Vasquez, *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 Saucedo, *A New "U"*, *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

scheme that has entrapped hundreds of victims, only a handful may receive law enforcement certification, depending on how broadly law enforcement officials exercise their discretion.”)

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.

³⁵⁶ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513, 114 Stat. 1464 (2000).

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* note 143, at 573; *see also* Settlege, *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.³⁶⁰ 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.³⁶¹

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.³⁶² It is true that U visa status does not make an immigrant eligible for Medicaid or the Affordable Care Act;³⁶³ however, lawful status makes it easier to access medical care for children, including U.S. citizen children, and at private clinics.³⁶⁴ For children, access to health care means greater physical and mental well-being, and as a result, children are less likely to miss

³⁶⁰ McCormick, *supra* note 38, at 603.

³⁶¹ See Vasquez, *supra* note 186.

³⁶² Michael K. Gusmano, *Undocumented Immigrants & Access to Health Care*, THE HASTINGS CTR., (Mar. 27, 2012), <http://www.undocumentedpatients.org/issuebrief/health-care-use/>, archived at <https://perma.cc/F4NZ-SCMA> (“Use of health care services is lower among undocumented adults and their children – regardless of the immigration status of those children – than it is among adult U.S. citizens and their children.”).

³⁶³ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1312(f)(3), 1401(e)(2), 124 Stat 119 (2010), 42 U.S.C. §§ 18081(b)(2), 18081(c)(2); Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 108(g)(8), 42 U.S.C. § 1320b-7(d).

³⁶⁴ See Vasquez, *supra* note 186.

school.³⁶⁵ Lead poisoning in children has been shown to affect performance in school,³⁶⁶ 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.³⁶⁷

VI. CONCLUDING REMARKS

The water crisis in Flint was shocking and drew national attention and concern.³⁶⁸ The media also gave much attention to the difficulties of undocumented residents in Flint.³⁶⁹ 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.³⁷⁰ 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.³⁷¹ 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.

³⁶⁵ See, e.g., TIA HENDERSON ET AL., UPSTREAM PUBLIC HEALTH, THE CONNECTION BETWEEN MISSING SCHOOL AND HEALTH: A REVIEW OF CHRONIC ABSENTEEISM AND STUDENT HEALTH IN OREGON (2014), available at <http://www.attendanceworks.org/wordpress/wp-content/uploads/2014/10/Chronic-Absence-and-Health-Review-10.8.14-FINAL-REVISED.pdf>, archived at <https://perma.cc/LM5R-3X6T>.

³⁶⁶ See DeFer, *supra* note 296.

³⁶⁷ STEVE TOBOCMAN, 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; Acuirre, *supra* note 282.

³⁷⁰ See Vasquez, *supra* note 186; Scherman, *supra* note 314.

³⁷¹ See Warikoo, *supra* note 316.

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.

³⁷² See Oliver Milman & Jessica Glenza, *At Least 33 US Cities Used Water Testing 'Cheats' Over Lead Concerns*, THE GUARDIAN (June 2, 2016, 7:03 AM), <https://www.theguardian.com/environment/2016/jun/02/lead-water-testing-cheats-chicago-boston-philadelphia>, archived at <https://perma.cc/5PM8-DGB4>.

