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## ¿En Qué Te Puedo Ayudar?† When is a Crime Victim Helpful? Using California's Immigrant Victims of Crime Equity Act (Senate Bill 674) to Define the U Visa's Helpfulness Requirement

Yvette Lopez-Cooper

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**¿EN QUÉ TE PUEDO AYUDAR?† WHEN IS A CRIME VICTIM  
HELPFUL? USING CALIFORNIA’S IMMIGRANT VICTIMS OF  
CRIME EQUITY ACT (SENATE BILL 674) TO DEFINE THE U  
VISA’S HELPFULNESS REQUIREMENT**

YVETTE LOPEZ-COOPER\*

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† How can I help you?

\* The author practices immigration law in San Diego, California. She consults with domestic violence survivors at the San Diego Family Justice Center, a collaborative center between local government, including the San Diego Police Department, and nonprofit organizations for abused women and children. This Article benefitted greatly from her conversations with Cesar Luna, Esq. and Lieutenant Misty Cedrun. Their relentless commitment to helping survivors inspires her to continue in this work. The ideas in this Article are solely that of the author and not of the San Diego Family Justice Center or the San Diego Police Department.

## I. INTRODUCTION

In 1992, Miriam Medina paid a smuggler to help her cross the United States-Mexico border in the San Ysidro-Tijuana region.<sup>1</sup> Instead of finding the American dream for which she was searching, Miriam ended up in an abusive relationship. She married the father of her children in the United States and then things got really ugly: “He bruised her, raped her, turned her family against her and did everything in his power to control her life.”<sup>2</sup> According to Miriam, her husband had control over her “just because [she] was illegal.”<sup>3</sup> Years of abuse left her vulnerable and in the dark about the social and legal services available to her.<sup>4</sup> Like many domestic violence victims, she “didn’t want to make the situation worse than what it was.”<sup>5</sup> It was not until San Diego Child Protective Services intervened that she learned of the legal protections to which she and her children could have access.<sup>6</sup> “‘I got a lot of help,’ [Miriam] said. ‘Without them, I couldn’t have done it.’”<sup>7</sup> Her life changed when she obtained a restraining order, received legal custody of her sons, and applied for a U visa to regularize her undocumented immigration status. Today, she lives in San Diego with her sons and was recently promoted in her job. In her published interview, Miriam urged, “you have to have the courage [to take action].”<sup>8</sup>

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1. Kate Morrissey, *Immigration status can make matters worse for domestic violence victims*, SAN DIEGO UNION TRIB. (Jan. 7, 2017, 6:00 AM), <http://www.sandiegouniontribune.com/news/immigration/sd-me-domestic-violence-20170107-story.html>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* A comment to the San Diego Union Tribune article from Miriam’s neighbor describes the daily torment Miriam faced at the hands of her abusive husband and the mental challenges domestic violence survivors go through when determining when to seek help:

I lived in California and had the privilege of being their neighbor.

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While domestic violence crimes transcend cultures, religions, and social classes, undocumented Latina<sup>9</sup> women face additional barriers when trying to obtain the legal intervention critical to ending the domestic violence cycle.<sup>10</sup> Language obstacles, undocumented immigration status, and social isolation can all lead to significant challenges in obtaining the legal representation they need.<sup>11</sup> There is a shortage of social services available to Latina survivors of domestic

Yes[,] Miriam was here illegally but she has a family. Her boys and abusive jackass husband was all she had. No matter the fact she was here illegally[,] you all forget she was a [sic] abused woman. She has PTSD and this man controlled her like a mad man[—to] the point she was so scared to go and get her Visa and transition correctly because Juan would hold many things over her head. I could hear[, from] 20 apartments away[,] him beating her and the boys(which [sic] . . . were much younger than they are now)[.] I had to go over several times just to see if she was OK. My husband and I are both Active duty Navy and I stood up for her helping her with her Visa.

NGLVSC, Comment to *Immigration status can make matters worse for domestic violence victims*, SAN DIEGO UNION TRIB. (Jan. 2017), <http://www.sandiegouniontribune.com/news/immigration/sd-me-domestic-violence-20170107-story.html>.

9. This Article uses the terms “Hispanic” and “Latina” interchangeably. The U.S. Census Bureau uses the term “Hispanic” and “Latino” when describing people of Latin American origin as opposed to a race. See Elizabeth M. Grieco & Rachel C. Cassidy, *Overview of Race and Hispanic Origin: Census 2000 Brief*, U.S. CENSUS BUREAU 1-2, n.2 (Mar. 2001), <http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf>. The phrases “alien” and “illegal alien” can also cause some confusion. Although many consider the term “illegal alien” to carry derogatory implications, as it has been associated with racism towards people of Latin American heritage, the terms “illegal aliens” and “aliens” have historical legal origins and are used as legal terms of art. See Kevin R. Johnson, *“Aliens” and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 270 (1996-1997). Finally, although this Article focuses on Latina women there is no doubt that Latino men can also suffer abuse from their partners.

10. See Jenny Rivera, *Preliminary Report: Availability of Domestic Violence Services for Latina Survivors in New York State*, 16 PUB. INT. 1, 3 (1997-1998) (discussing the domestic violence obstacles facing Latinas). See generally Sarah M. Buel, *A Lawyer’s Understanding of Domestic Violence*, 62 TEX. B.J. 936, 937, 939 (1999) (arguing that lawyers have tremendous powers to help victims end domestic violence abuse through legal interventions such as protective orders, suing the abuser for damages, or prosecuting the abuser criminally).

11. Radha Vishnuvajjala, *Insecure Communities: How an Immigration Enforcement Program Encourages Battered Women to Stay Silent*, 32 B.C. J. L. & SOC. JUST. 185, 186, 190, 193 (2012).

violence.<sup>12</sup> Factors such as lack of knowledge of available services and fear of coming out of the shadows can further inhibit them from obtaining assistance.<sup>13</sup> Nonetheless, Latinas represent the largest number of victims that seek services at certain domestic violence support centers in the Southwestern United States.<sup>14</sup>

In most Latin American countries, domestic violence crimes are not considered as seriously<sup>15</sup> as they are in the United States.<sup>16</sup> In the countries where domestic violence is unlawful, societal norms, customs and lack of enforcement usually prevent these crimes from being prosecuted.<sup>17</sup> Many domestic violence survivors of Latino origin carry

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12. Jenny Rivera, *The Availability of Domestic Violence Services for Latinas in New York State: Phase II Investigation*, 21 BUFF. PUB. INT. L.J. 37, 43-44 (2002-2003).

13. See generally Vishnuvajjala, *supra* note 11, at 186-87.

14. In 2011, more than 65% of the San Diego Family Justice Center's clients were Latinas. Pablo Jaime Sáinz, *Mujeres Latinas: Víctimas de Violencia Doméstica*, LA PRENSA (Oct. 28, 2011), <http://laprensa-sandiego.org/featured/mujeres-latinas-victimas-de-violencia-domestica/>.

15. Liz Creel, *Domestic Violence: An Ongoing Threat to Women in Latin American and the Caribbean*, POPULATION REFERENCE BUREAU (2001), <http://www.prb.org/Publications/Articles/2001/DomesticViolenceAnOngoingThreattoWomeninLatinAmericaandtheCaribbean.aspx> (last visited Feb. 23, 2017) (noting that as of 2001, 30 countries in Latin America had enacted domestic violence laws "or have characterized the violence as a crime.").

16. The California Penal Code defines corporal injury upon a spouse as "[a]ny person who willfully inflicts corporal injury resulting in a traumatic condition upon a victim described in subdivision (b)." CAL. PENAL CODE § 273.5(a) (West 2017). Similarly, the Immigration and Nationality Act defines domestic violence as any crime of violence, as defined by 18 U.S.C. § 16,

against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or who has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs . . . .

INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i) (West 2008). Finally, the United Nations Declaration on the Elimination of Violence Against Women address domestic violence as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life." Declaration on the Elimination of Violence against Women, G.A. Res. 48/105 U.N. Doc A/RES/48/105, art. 1 (Dec. 20, 1993).

17. *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 389, 394 (B.I.A. 2014).

misconceptions that in the United States “family matter problems” will not be prosecuted. Most troubling, and contrary to conventional thinking, Latina undocumented victims often believe the abusers’ threat that by seeking assistance the victims are turning themselves over to immigration authorities.<sup>18</sup> It is of no surprise that such domestic violence victims are reluctant to come forward with information about crimes for various reasons that should be understood by our legal system.<sup>19</sup>

In discussing undocumented Latinas who are victims of domestic violence, it is important to understand that the Latino community in the United States is not monolithic, but rather a diverse group.<sup>20</sup> Hispanics settling in the United States come from all over Latin America, including the countries of Brazil, Chile, Peru, Venezuela, and the so-called northern triangle countries of Central America—El Salvador, Guatemala, and Honduras. Each country has its own culture, tradition, food, and even language.<sup>21</sup> Despite this diversity, Latinos share many cultural traits.<sup>22</sup> The notion of family is given significant value within

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18. Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, COLO. L., 28 Oct. 1999, at 26.

19. Buel, *supra* note 10 (listing the many valid reasons why domestic violence victims stay in abusive relationships).

20. Renee Stepler & Mark Hugo Lopez, *U.S. Latino Population Growth and Dispersion Has Slowed Since Onset of the Great Recession*, PEW RES. CTR. HISP. TRENDS (Sept. 8, 2016), <http://www.pewhispanic.org/2016/09/08/latino-population-growth-and-dispersion-has-slowed-since-the-onset-of-the-great-recession/> (including a metropolitan interactive map of the Hispanic population for the “[t]he 11 largest Hispanic origin groups: Mexicans, Puerto Ricans, Salvadorans, Cubans, Dominicans, Guatemalans, Colombians, Hondurans, Spaniards, Ecuadorans and Peruvians”).

21. See Berta Esperanza Hernández-Truyol, *VI. Law, Culture, and Equality-Human Rights’ Influence on Domestic Norms: The Case of Women in the Americas*, 13 FLA. J. INT’L L. 33 (2000).

22. The U.S. Latino community is diverse also in language. Latin American countries such as Brazil, Guyana, Suriname, and Belize speak Portuguese, English, Dutch, and Creole. There are hundreds of indigenous languages and dialects throughout Latin America. In Southern California, thousands of Mexicans and Guatemalans immigrants speak *Q’an’job’al* (also known as Kanjobal), a common issue in litigating cases where it is difficult to find a qualified interpreter. In Paraguay, there is a large community that speaks Guaraní. In Chile, close to one million indigenous Chileans speak *Mapudungen*, and *Quechua* is spoken by millions in Bolivia, Ecuador, and Peru. Many U.S. social service providers pride themselves in creating Spanish literature for the Hispanic population; however, in many cases

all Latino origins.<sup>23</sup> For Professor Berta Hernández-Truyol, in her analysis of women of the Americas:

*La familia* is of sacrosanct importance in the *cultura Latina*. It also is the site initially and continuously responsible for the creation, construction, and constitution of gendered identities.

Our families operate on the extended family model in which *abuelas y abuelos* are respected and revered, *tías y tíos* are effectively second sets of parents, and *primas/os* are like additional *hermanas/os*. This big tent is where we first learn about appropriate and proper conduct, including sex roles, from several generations.<sup>24</sup>

Early in their lives, Latinas experience subordination within the family structure that decades later prevents them from fleeing abuse and, too often, seeking legal protection.<sup>25</sup> It is this cultural dynamic—one of increasing importance to this country given its changing demographics—that this Article examines.

The growth and influence of the Latino population in the United States is undeniable. In 2016, California had the largest Hispanic population in the United States.<sup>26</sup> Hispanics in California make up 38.6% of the total state population.<sup>27</sup> Although the number of

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immigrants from Latin America cannot understand Spanish as they speak only indigenous languages.

23. Gretchen Zegarra, Educando A La Familia Latina: *Ideas for Making Parent Education Programs Accessible to The Latino Community*, 36 FAM. & CONCILIATION CTS. REV. 281, 285 (1998).

24. Hernández-Truyol, *supra* note 21, at 38-39.

25. See Patricia M. Hernandez, *The Myth of Machismo: An Everyday Reality for Latin American Women*, 15 ST. THOMAS L. REV. 859, 863 (2003) (describing how patriarchal *machismo* beliefs and culture are learned from early on in a girl's life).

26. In 2001, Hispanics became the largest minority group in the United States, comprising 55.3 million by 2014 and surpassing black residents. Renee Stepler & Anna Brown, *Statistical Portrait of Hispanics in the United States*, PEW RES. CTR. HISP. TRENDS Table 4 (Apr. 19, 2016), <http://assets.pewresearch.org/wp-content/uploads/sites/7/2016/04/Statistical-Portrait-of-Hispanics-in-the-United-States-2014-final.pdf>; Linette Clemetson, *Hispanics Now Largest Minority*, *Census Shows*, N.Y. TIMES (Jan. 22, 2003), <http://www.nytimes.com/2003/01/22/us/hispanics-now-largest-minority-census-shows.html>.

27. *Hispanic Victims of Lethal Firearm Violence in the United States*, VIOLENCE POL'Y CTR., June 2016, at 1, <http://www.vpc.org/studies/hispanic16.pdf>.

undocumented Mexican persons in the United States has declined since 2007, it still accounts for more than half (52%) of the undocumented population in the United States.<sup>28</sup> The vast majority of the undocumented population in the United States lives in California.<sup>29</sup> It is not surprising that the undocumented community has a significant impact and role in the United States-Mexico border region.<sup>30</sup> With this growth, the demands and challenges of representing Latinos affect many areas of the law, including business transactions, immigration, criminal, personal injury, family law, and trusts and estates. As other lawyers have noted, to effectively represent these clients, it is wise to understand the cultural norms that drive their behavior and decision-making.<sup>31</sup>

Several laws offer protection to domestic violence victims.<sup>32</sup> One of the most important is the Victims of Trafficking and Violence Protection Act of 2000 (“VTVPA”).<sup>33</sup> This law created a path to legalization for crime victims who cooperate with law enforcement officials in investigating and prosecuting crimes. Significantly, United States legislators recognized the important role victims have in making

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28. Jeffrey S. Passel & D’Vera Cohn, *Overall Number of U.S. Unauthorized Holds Steady Since 2009*, PEW RES. CTR. (Sept. 20, 2016), <http://www.pewhispanic.org/2016/09/20/overall-number-of-u-s-unauthorized-immigrants-holds-steady-since-2009/>.

29. *U.S. Unauthorized Immigration Population Estimates*, PEW RES. CTR. (Nov. 3, 2016), <http://www.pewhispanic.org/interactives/unauthorized-immigrants/>.

30. MATT S. MEIER & FELICIANO RIBERA, *MEXICAN AMERICANS/AMERICAN MEXICANS FROM CONQUISTADORS TO CHICANOS* 5 (rev. ed. 1993) (noting that Mexican Americans are “deeply rooted in the Southwest—that is, the five states of Arizona, California, Colorado, New Mexico, and Texas”).

31. Cf. Susan L. Brooks, *Meeting the Professional Identity Challenge in Legal Education Through a Relationship-Centered Experiential Curriculum*, 41 U. BALT. L. REV. 395, 433-34 (2012) (noting cross-cultural sensitivity is part of professionalism and ethical conduct). See generally Serena Patel, *Cultural Competency Training: Preparing Law Students for Practice in Our Multicultural World*, 62 UCLA L. REV. DISCOURSE 140 (2014).

32. Immigration and Nationality Act (INA) § 101(a)(15)(T), 8 U.S.C.A. 1101(a)(15)(T) (West 2014); Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162, 119 Stat. 2960 (2006) (codified as amended in scattered sections of 42 U.S.C.) [hereinafter VAWA 2005].

33. Pub. L. 106-386, 114 Stat. 1464 (2000) (codified as amended in scattered sections of 8, 20, 22, 27, 28, & 42 U.S.C.) [hereinafter VTVPA].

communities safer.<sup>34</sup> Not surprisingly, this law encouraged numerous partnerships between local community organizations and local law enforcement agencies to effectively respond to immigrant victims.<sup>35</sup>

The VTVPA created a new nonimmigrant classification called the “U visa” for immigrant victims of enumerated crimes, such as sexual assault, domestic violence, and kidnapping, who have suffered a substantial and physical hardship and who have cooperated with law enforcement officials in the detection, investigation, or prosecution stages.<sup>36</sup> Vital to establishing U visa eligibility is an executed certification by a law enforcement agency confirming the victim was helpful in the case.<sup>37</sup> Over the years, it became apparent that obtaining a U visa certification from law enforcement varied from county to county. In response to these discrepancies, on October 9, 2015, California Governor Jerry Brown signed into law the Immigrant Victims of Crime Equity Act, also known as Senate Bill 674,<sup>38</sup> mandating a timeline of 90 days for adjudicating U visa certification

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34. Yvette Lopez-Cooper, *San Diego Family Justice Center Assisting Undocumented Domestic Violence Survivors*, A.B.A. SEC. INT’L L. IMMIGR. & NAT’LITY L. NEWS, Summer 2016, at 11.

35. *Id.*

36. The U visa is a temporary status that allows victims of crimes to apply for a work permit and lawful permanent residence status. *See* INA § 1101(a)(15)(U), 8 U.S.C.S.A § 1101(a)(15)(U) (West 2014). In order to meet the eligibility requirements of the U visa the non U.S. citizen must be a victim of one of the listed crimes: rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, stalking, female genital mutilation, being held hostage, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, fraud in foreign labor contracting, or attempt, conspiracy, or solicitation to commit any of the above-mentioned crimes, or any similar activity in violation of federal, state, or local criminal law. *See* INA § 1101(a)(15)(U)(iii), 8 U.S.C.S.A § 1101(a)(15)(U)(iii) (West 2014).

37. In addition to the certification requirement, the victim must also demonstrate that he or she has suffered substantial physical or mental abuse as a result of the qualifying crime; he or she possesses information concerning the criminal activity; and the criminal activity violated the laws of the United States or occurred in the United States. INA § 1101(a)(15)(U)(i), 8 U.S.C.S.A § 1101(a)(15)(U)(i) (West 2014).

38. CAL. PENAL CODE § 679.10 (West 2017). The author will be using the S.B. 674 and the Immigrant Victims of Crime Equity Act interchangeably in this Article.

requests and creating a rebuttable presumption that the victim was helpful to law enforcement if certain requirements were met. This law aims to create a more uniform approach to the U visa process; however, whether it meets its goals remains undetermined.

This Article examines the legal framework for determining who meets the “helpfulness” requirement within the context of domestic violence crimes committed against undocumented Latinas in the United States. Building on borderlands literature, Part I explored the social need for the U visa in the context of familial relationships that span the United States-Mexico border. Part II next reviews the legislative history of the Victims of Trafficking and Violence Protection Act, specifically examining the creation of the U visa and the implementation of California’s Immigrant Victims of Crime Equity Act. After a general analysis of the federal and state statutes relating to U visas, Part III scrutinizes the definition of helpfulness by reviewing regulations, local policies, and statutes. Part IV addresses the cultural context dilemma in determining the U visa requirement of helpfulness. Finally, Part V proposes early intervention and education in immigrant communities, notes the importance of proper enforcement of the confidentiality provisions, and issues a call for adequate funding and statewide training in implementing the Immigrant Victims of Crime Equity Act.

## II. VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT

The Victims of Trafficking and Violence Protection Act of 2000 added the “U-visa,” a new nonimmigrant classification for victims of certain crimes.<sup>39</sup> This landmark legislation recognized that victims are more willing to report crimes if they know they will be protected.<sup>40</sup> However, there is an annual cap of 10,000 U visas for the principal victim of the enumerated crime.<sup>41</sup> The very nature of the cycle of

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39. The legislative intent of the U visa is, in part, “to create a new non-immigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence.” VTPVA § 1513(a)(2)(A), 8 U.S.C. § 1101 note (2000) (Protection for Certain Crime Victims of Crimes Against Women). Depending on their age, U visa applicants can also apply for derivative status for their spouses, children, parents, and siblings. *See* 8 C.F.R. § 214.14(a)(10) (West 2013).

40. *See* Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Framework*, 16 BERKELEY WOMEN’S L.J. 29, 56 (2001).

41. *See* 8 C.F.R. § 214.14 (d)(1) (West 2013).

abusive relationships makes providing legal protection to domestic violence victims essential.<sup>42</sup>

Contrary to conventional thinking, the U visa process can be quite technical and cumbersome. Certifying officials, such as law enforcement officers and prosecutors, are tasked with U visa certification requests, adding to an already busy work docket. Additionally, victims who do not know that they are eligible for the U visa miss important deadlines. These factors complicate the U visa application process.

#### A. *U Nonimmigrant Status Certification Requirement*

The U visa requires that every applicant obtain a signed Form I-918, Supplement B, U Nonimmigrant Status Certification (Form I-918B)<sup>43</sup> from a law enforcement agency, prosecutor, judge, or federal or state agency authorized to investigate or prosecute any of the qualifying crimes listed in the U visa statute.<sup>44</sup> Form I-918B establishes that the certifying official found the victim is being helpful, has been helpful, or is likely to be helpful in the criminal investigation or prosecution.<sup>45</sup>

Completing the form correctly is important to the success of the U visa application. The certifying official generally completes Form I-918B.<sup>46</sup> Apart from determining whether the victim was helpful, Form

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42. See generally H. Morley Swingle et al., *Unhappy Families: Prosecuting and Defending Domestic Violence Cases*, 58 J. MO. B. 220 (2002).

43. See 8 C.F.R. § 214.14(c)(1) (West 2013); see also I-918, *Petition for U Nonimmigrant Status, Form I-918 Supplement B, U Nonimmigrant Status Certification*, U.S. CITIZENSHIP & IMMIGR. SERV., <http://www.uscis.gov/i-918> (last visited Apr. 24, 2017) [hereinafter *Form I-918B*].

44. 8 C.F.R. § 214.14(a)(2) (West 2013). A certifying entity can also be any “other authority[] that has responsibility for the investigation or prosecution of a qualifying crime or criminal activity” or “agencies that have criminal investigative jurisdiction in their respective areas of expertise, including, but not limited to, child protective services, the Equal Employment Opportunity Commission, and the Department of Labor.” *Id.*

45. INA § 101(a)(15)(U)(i)(III), 8 U.S.C.S.A § 1101(a)(15)(U)(i)(III) (West 2014). “Victim of a qualifying criminal activity generally means an alien who has suffered direct and proximate harm as a result of the commission of qualifying criminal activity.” 8 C.F.R. § 214.14(a)(14) (West 2013).

46. A certifying official is any of the following: “(i) the head of the certifying agency, or any person(s) in a supervisory role who has been specifically designated

I-918B requires that the certifying official find the applicant to be a victim, list the qualifying criminal activity for the U visa, and explain how the victim has met the helpfulness requirement.<sup>47</sup> Significantly, the certifying official has no authority to grant U visa status, but is merely certifying that the individual was helpful in the case.<sup>48</sup> While on its face Form I-918B seems relatively straightforward, it has posed numerous challenges to obtaining U visa status.

Increasingly, local law enforcement agencies are creating their own policies on issuing certifications.<sup>49</sup> This has created disparities among different cities. Some offices prefer that the applicant partially complete the certification request with the information relating to the criminal violation while other offices do not accept certification requests that are completed by applicants or their attorneys.<sup>50</sup> This is problematic when the United States Citizenship and Immigration Services (USCIS) reviews the U visa application and discovers the form was incorrectly filled out.<sup>51</sup> Another problem may occur when the certifying official does not sufficiently describe the manner in which the victim was helpful in the case.

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by the head of the certifying agency to issue U nonimmigrant status certifications on behalf of that agency; or (ii) A Federal, State, or local judge.” *Id.* § 214.14(a)(3)(i)-(ii).

47. *Id.* § 214.14(a)(9).

48. *See I-918, Petition for U Nonimmigrant Status, Instructions for Form I-918, Supplement B*, U.S. CITIZENSHIP & IMMIGR. SERV., <http://www.uscis.gov/i-918> (last visited Apr. 24, 2017) [hereinafter *Instructions*]. The certification form is the initial determination that the victim was helpful; however, USCIS still reserves the right to make the final determination of the victim’s helpfulness based on the totality of the circumstances in the case. *Id.*; *see also* DEPT. FAIR EMP’T & HOUS., DIR. 317, COMPLETING U VISA CERTIFICATIONS IN DFEH CASES 3 (2016), <http://www.dfeh.ca.gov/files/2016/10/dfeh-Dir317-U-Visa.pdf> (“Signing the form does not indicate DFEH’s sponsorship for the complainant/immigrant.”).

49. ALAMEDA COUNTY SHERIFF’S OFF., TRAINING BULLETIN (2016) (on file with author). This is one example of the manner in which different counties create training materials on their individual certification process.

50. Unlike other forms of relief for battered immigrant women, in order to pursue a U visa nonimmigrant status, the victim *must* have a signed Form I-918B.

51. USCIS has jurisdiction to adjudicate the U visa application once the principal applicant obtains a signed certification form. *See Instructions, supra* note 48.

An additional problem that arises with Form I-918B is the failure to correctly state the qualifying criminal activity.<sup>52</sup> A qualifying criminal activity that has created confusion is the category of felonious assault. Some jurisdictions do not have a specific felonious assault statute, and immigration practitioners have used robbery, various state assault statutes, and assault with a deadly weapon to meet the felonious assault category, often with mixed results. There appears to be further confusion by some certifying agencies whether the violations listed in the police reports are mutually exclusive to the U visa list of qualifying crimes. The statute is clear that the criminal acts listed therein are general categories.<sup>53</sup> Although a specific state assault statute may not be listed directly in the federal law it should be considered a qualifying crime for purposes of the U visa.

In some jurisdictions local law enforcement offices have created their own factors in determining if a person is eligible for certification. Denials of U visa certifications have commonly cited that the person did not suffer sufficient “substantial mental or physical abuse.”<sup>54</sup> While this is required for the U visa adjudication at the USCIS stage, it does not appear to be a part of the certification process. The legislative history and the statute itself clearly state that the certifying official is determining helpfulness, and not whether or not the victim suffered substantial mental or physical abuse as a result of the criminal activity.<sup>55</sup>

While a necessary part, the certification process is only the first step in the long process of U visa approval. At any time, the certifying official can withdraw the certification if the victim is not helpful in the ongoing investigation. This is clearly stated in the USCIS instructions

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52. Gail Pendleton, *Winning U Visas: Getting the Law Enforcement Certifications*, LEXIS-NEXIS EXPERT COMMENT., Feb. 2008, at 5 (noting that crimes listed in the statute are general categories).

53. INA § 101(a)(15)(U)(iii), 8 U.S.C.S.A § 1101(a)(15)(U)(iii) (West 2014).

54. A certifying official does not determine the level of substantial mental or physical abuse suffered by the victim; however, they can note on Form I-918B any injuries that the victim sustained in the domestic violence offense. *See Form I-918B*, *supra* note 43 (providing a section for the certifying official to describe “any known or documented injury to the victim”).

55. Battered Immigrant Women Protection Act of 2000 § 1513(b)(3), 8 U.S.C.A. § 1101(a)(15)(U)(i) (West 2014) (stating that the Secretary of Homeland Security determines whether the victim suffered substantial physical or mental abuse).

to Form I-918B.<sup>56</sup> However, creating a distinct ad hoc policy and protocol concerning who is helpful undermines the congressional intent of creating a safe space for victims of crime and encouraging them to report crimes and cooperate with law enforcement.<sup>57</sup>

### B. *The Immigrant Victims of Crime Equity Act*

On February 27, 2015, California State Senator Kevin de León introduced Senate Bill 674, The Immigrant Victims of Crime Equity Act, (S.B. 674) to add section 679.10 to the California Penal Code, relating to victims of crime.<sup>58</sup> S.B. 674 was supported by a number of public interest groups including the Los Angeles Center for Law and Justice, the American Civil Liberties Union, and the California Partnership to End Domestic Violence.<sup>59</sup> The purpose of this bill was to address the inconsistent certification approvals across the state of California.<sup>60</sup> The Immigrant Victims of Crime Equity Act also created a mandatory rebuttable presumption that the victim met the helpfulness element if certain requirements were met.<sup>61</sup> The state law further put a timeframe on completing the certification form and mandated it be adjudicated within 90 days of receipt or, in the case of a person in removal proceedings, within 14 days.<sup>62</sup> In enacting this law, Governor

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56. *Instructions, supra* note 48 (providing that at the certifying official's "discretion, [the official] may withdraw or disavow a Form I-918, Supplement B at any time . . . if a victim unreasonably refuses to assist in the investigation or prosecution of the qualifying criminal activity").

57. Prosecutors have also created their own procedures for signing certification forms. See Timothy Taylor, *The U Visa: Why are State Prosecutors Involved in Federal Immigration Issues? Has the U Visa Outlived Its Intended Purpose?*, UTAH B.J., July-Aug. 2016, at 11, 13.

58. California State Senator Kevin De Leon was the author. California State Assembly member Toni Atkins was the principal coauthor. S.B. 674 took effect on January 1, 2016.

59. Other organizations that supported the bill were California Attorneys for Criminal Justice; California Immigrant Policy Center; The Immigrant Legal Resource Center; The Central American Resource Center; American Federation of State, County and Municipal; and YWCA of Glendale. See *Victims of Crime: Nonimmigrant Status: Hearing on S.B. 674 Before the S. Comm. on Pub. Safety*, 2015-2016 Reg. Sess. 1 (2015).

60. *Id.* at 3-4.

61. CAL. PENAL CODE § 679.10(f) (West 2017).

62. *Id.* § 679.10(h).

Jerry Brown joined governors around the country in enacting controversial state laws aimed at addressing immigration issues traditionally governed by federal law. The Immigrant Victims of Crime Equity Act was an important step in addressing the discrepancies in decisions being made in the certification process. Most importantly, it expedited decisions on certification requests.

### III. WHAT DOES “HELPFULNESS” MEAN?

The fear of deportation for an undocumented person is realistic and too often determinative in a victim’s decision to report a crime. The Victims of Trafficking and Violence Protection Act of 2000 (“VTVPA”) sought to address the concerns immigrant victims have in reporting crimes to law enforcement and cooperating in the investigation and prosecution. The VTVPA’s Findings and Purpose acknowledge that undocumented victims may be targeted as victims of crimes precisely because of their undocumented status. Congress’s legislative Findings and Purposes state:

(a) FINDINGS AND PURPOSE.—

(1) FINDINGS.—Congress makes the following findings:

(A) Immigrant women and children are often targeted to be victims of crimes committed against them in the United States, including rape, torture, kidnapping, trafficking, incest, domestic violence, sexual assault, female genital mutilation, forced prostitution, involuntary servitude, being held hostage or being criminally restrained.

(B) All women and children who are victims of these crimes committed against them in the United States must be able to report these crimes to law enforcement and fully participate in the investigation of the crimes committed against them and the prosecution of the perpetrators of such crimes.

(2) PURPOSE.—

(A) The purpose of this section is to create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes described in section 101(a)(15)(U)(iii) of the Immigration and Nationality Act committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States. This visa will encourage law enforcement

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officials to better serve immigrant crime victims and to prosecute crimes committed against aliens.

(B) Creating a new nonimmigrant visa classification will facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status. It also gives law enforcement officials a means to regularize the status of cooperating individuals during investigations or prosecutions. Providing temporary legal status to aliens who have been severely victimized by criminal activity also comports with the humanitarian interests of the United States.

(C) Finally, this section gives the Attorney General discretion to convert the status of such nonimmigrants to that of permanent residents when doing so is justified on humanitarian grounds, for family unity, or is otherwise in the public interest.<sup>63</sup>

It is clear Congress intended an avenue that would facilitate and encourage survivors of crimes to feel safe and work with law enforcement officials. By creating a mechanism for legal status, the VTVPA encourages undocumented victims to fully participate in the criminal justice system. Notably, the Findings and Purpose provisions focused on meeting the objectives of both victims and law enforcement officials.

The VTVPA defines the helpfulness requirement broadly. The U visa provisions require a victim to show that she or he “has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim.”<sup>64</sup> In other words, current involvement with the investigation or prosecution of the case is not necessary. However, the victim must have contacted law enforcement and the reporting led to the investigation or prosecution of the crime. As such, a victim who has suffered domestic violence for years but failed to report the offense would not be eligible for the U visa.

Sixteen years after the introduction of the U visa, California enacted S.B. 674 to go beyond offering guidance and broad examples of helpfulness to creating a rebuttable presumption that the victim was

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63. VTVPA § 1513(a)(2)(c), 8 U.S.C. § 1101 note (2000) (Protection for Certain Crime Victims of Crimes Against Women).

64. 8 C.F.R. § 214.14(a)(12) (West 2013). If the victim is an immigrant child under the age of 16, the parent, guardian or next friend of the child may possess information concerning the criminal activity. *Id.* § 214.14(b)(3).

helpful.<sup>65</sup> Presumptions have long existed in family law child custody cases.<sup>66</sup> Under section 604 of the California Evidence Code, a presumption is rebutted if there is sufficient evidence to contest the presumed fact. Specifically, California Penal Code section 679.10(f) states:

For purposes of determining helpfulness pursuant to subdivision (e), there is a *rebuttable presumption* that a victim is helpful, has been helpful, or is likely to be helpful to the detection or investigation or prosecution of that qualifying criminal activity, *if* the victim has not refused or failed to provide information and assistance reasonable requested by law enforcement.<sup>67</sup>

The establishment of a rebuttable presumption is consistent with the VTPVA's Findings and Purpose of aiding and encouraging victims of crimes. S.B. 674 prohibits the certifying entity from disclosing the immigration status of the applicant, except to comply with federal law or legal process, or with the applicant's consent.<sup>68</sup> Considered together, the rebuttable presumption of helpfulness and the confidentiality provision help victims feel secure in reporting crimes.<sup>69</sup>

Additionally, S.B. 674 requires certifying officials to certify helpfulness on Form I-918B if the victim was a victim of a qualifying criminal act and met the helpfulness requirements. The law further requires the certifying entity to state the specific details about the crime.<sup>70</sup> Interestingly, while the certification form is required to obtain

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65. According to some immigration lawyers, nationally, California has adopted the most comprehensive public policy response in addressing U visa certifications. *See generally* UTAH CHAPTER AM. IMMIGR. LAW. ASS'N, *The Broader U-niverse Response*, UTAH B.J., Nov-Dec. 2016, at 34, 37.

66. *See generally* Dana Harrington Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 AM. U. J. GENDER SOC. POL'Y & L. 163 (2009) (explaining the various state laws where there is a presumption against awarding custody to the abuser).

67. CAL. PENAL CODE § 679.10(f) (West 2017) (emphasis added).

68. *Id.* § 679.10(k).

69. California has been at the center of legislative reforms as it applies to noncitizens. For an in-depth analysis of the criminalization of immigrant enforcement in California and the laws that seek to change this phenomenon see Ingrid V. Eagly, *Criminal Justice in an Era of Mass Deportation: Reforms from California*, 20 NEW CRIM. L. REV. 12 (2017).

70. CAL. PENAL CODE § 679.10(g) (West 2017).

U visa status, the certifying entity is not obligated to complete the form. The U visa certification is entirely discretionary. However, under S.B. 674, a certifying official may only withdraw the certification if the victim refuses to provide information and assistance when reasonably requested.<sup>71</sup>

S.B. 674 further creates data collection procedures requiring certifying entities to report annually to the California legislature the number of victims that requested Form I-918B certifications and the number of certifications forms signed and denied.<sup>72</sup>

The Code of Federal Regulations added a requirement to the helpfulness element: victims cannot refuse to provide reasonable requested assistance throughout the U visa process.<sup>73</sup> The victim must continue to assist the law enforcement agency throughout the process and has an ongoing responsibility to be helpful.

The USCIS Instructions for Form I-918B provide the most guidance to certifying officials for determining helpfulness. The Instructions define helpful as assisting law enforcement authorities.<sup>74</sup> They further emphasize that the victim must possess information about the crime,<sup>75</sup> and stress the importance of having detailed information: “A petitioner is considered to possess information concerning qualifying criminal activity of which he or she is a victim if he or she has knowledge of details concerning the criminal activity that would assist in the investigation or prosecution of the criminal activity.”<sup>76</sup>

Similar to the regulations, the Instructions state the importance of victims remaining helpful throughout the investigation and prosecution. In fact, the certifying official has the authority to withdraw the certification form if the victim stops being helpful. However, the continuing responsibility to be helpful is only triggered if there is an ongoing need for the victim’s assistance.

Read together, the VTVPA, S.B. 674, the regulations, and the USCIS Instructions provide guidance for determining when a victim is helpful. Assisting and possessing detailed information, as well as

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71. *Id.* § 679.10(j).

72. *Id.* § 679.10(l).

73. 8 C.F.R. § 214.14(b)(3) (West 2013).

74. *Instructions, supra* note 48, at 2.

75. *Id.* at 4.

76. *Id.*

remembering the continued responsibility to aid in the investigation or prosecution, are key to obtaining a signed certification form. S.B. 674 provides a starting point to determining helpfulness.<sup>77</sup> Its rebuttable presumption implies that most victims that report crime want to be helpful, and, most importantly, it gives victims the assurance that their identity will not be disclosed to immigration officials, as their abusers commonly threaten. Examining the immigrant victims' culture can be instructive in devising ways to make victims feel safe reporting crimes.

#### IV. THE CULTURAL CONTEXT DILEMMA

Miriam Medina's abusive husband left her mentally fragile.<sup>78</sup> To this day, "she recalls the fear and helplessness she felt about being separated from her sons when the man threatened to get her deported as part of the abuse."<sup>79</sup> His threats became a reality when Miriam was deported to Mexico after her husband accused her of injuring his arm during an argument. Miriam claims she was defending herself.<sup>80</sup> Miriam re-entered the United States because she did not want to be separated from her sons. While back in San Diego, she had no option but to move in with her abuser. After Child Protective Services

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77. While S.B. 674 aims to create trust between immigrant communities and law enforcement, there are several federal policies that have set back this goal. In particular, federal programs such as INA § 287(g), Secure Communities, or Priority Enforcement Program (PEP), all of which aim to make law enforcement officials into immigration agents, have lately gained popularity in the new Presidential administration. Proponents of these programs argue that these measures aim to deport serious criminal aliens when in fact most immigrants that were previously removed under such program had low-level convictions, or no criminal records at all. Although there is no single definition of a "sanctuary city," the term generally refers to those jurisdictions that refuse to engage in these programs. Nonetheless, there is no state or federal law that prevents Immigration and Customs Enforcement from detaining undocumented individuals, or asking about immigration status in these so-called sanctuary jurisdictions. Supporters of sanctuary cities argue that Secure Communities-type programs do not make cities safer and fail to reduce crime. *See generally* Jasmine C. Lee et al., *What are Sanctuary Cities?*, N.Y. TIMES, <https://www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html> (last updated Feb. 6, 2017) (stating that some police officers oppose programs that would make them enforce federal immigration laws).

78. Morrissey, *supra* note 1.

79. *Id.*

80. *Id.*

encouraged her to leave her husband, Miriam garnered the strength to ask for help and report the abuse.<sup>81</sup> Miriam's story illustrates how difficult it can be for undocumented battered women to seek help and the complexities that surround their experiences. Victims can experience a plethora of feelings, including shame, fear, frustration, and confusion, that interfere with their desire to ask for help.<sup>82</sup> In cases in which there are children in the relationship, the victim may feel an additional sense of responsibility to stay with the abuser for the children's sake.<sup>83</sup> Understanding the dynamics of battering relationships and the cultural norms that affect it are necessary to creating trust and reducing violence in immigrant communities.

Merriam Webster's Dictionary defines "helpful" as "making it easier to do a job, deal with a problem; give help."<sup>84</sup> Latino immigrants in the United States pride themselves on being "of service to others" and "of helping others." A common phrase in tourist cities in Mexico is "*¿en qué te puedo ayudar?*" (How can I help you?). This sentiment has carried over to the hospitality industry in which Latinos are strongly represented.<sup>85</sup> Latinos naturally want to help, and often do. In the context of domestic violence, too often misplaced cultural fears and a history of lack of government protection has made investigating and prosecuting domestic violence cases very difficult.<sup>86</sup>

Domestic violence laws gained traction in the United States in the early 1990s.<sup>87</sup> As recently as the 1970s and 1980s, domestic violence

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81. *Id.*

82. Deborah Weissman, *Protecting the Battered Immigrant Woman*, FLA. B.J., Oct. 1994, at 81, 82.

83. Merle H. Weiner, *Domestic Violence and Custody: Importing the American Law Institute's principles of the Law of Family Dissolution into Oregon Law*, 35 WILLAMETTE L. REV. 643, 668 n.117 (1999).

84. *Helpful*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/helpful> (last visited Feb. 27, 2017).

85. *Hispanics and Latinos in Industries and Occupations*, U.S. DEPT. LABOR, BUREAU LABOR STAT. (Oct. 2015) <https://www.bls.gov/opub/ted/2015/hispanics-and-latinos-in-industries-and-occupations.htm>.

86. See Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas*, 34 HARV. INT'L L.J. 507, 507-08 (1993).

87. Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1667 (2004) (stating that by the mid-1990's every state in the country had enacted a civil protection order law).

was not considered an issue demanding strong enforcement attention.<sup>88</sup> Similarly, in some Latin American countries, domestic violence laws have been slowly implemented.<sup>89</sup> Latin American cultural stereotypes of the batterer prevent victims from feeling safe to report the crimes to their government authorities. Alarming, “out of the twenty-five countries with the highest femicide rates, thirteen are located in Latin America.”<sup>90</sup> It has been even more difficult for those Latin American countries that have suffered through dictatorships where domestic violence laws take longer to become implemented.<sup>91</sup> Some blame inefficient and corrupt Latin American governments or inadequate funding for their failure to enforce the domestic violence laws already in place.<sup>92</sup>

Although experts agree that domestic violence is a societal problem affecting all cultures and socio-economic classes, Latin America has historically considered domestic violence a family problem and not a societal one.<sup>93</sup> This is especially the case in families where traditional

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88. Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 47 (1992); Patricia Sully, *Taking it Seriously: Repairing Domestic Violence Sentencing in Washington State*, 34 SEATTLE U. L. REV. 963, 970 (2011) (noting that advocates and lawyers lobbied for domestic violence services in 1960’s and worked to educate the public about the seriousness of domestic violence offenses).

89. In 1974, Mexico changed article 4 of its Constitution to say “man and women are equal under the law. This will protect the institute and development of the family unity.” Constitución Política de los Estados Unidos Mexicanos, art. 4, <https://www2.juridicas.unam.mx/constitucion-reordenada-consolidada/en/vigente>. Despite the lack of government protection in Latin America, the women’s movement has been very active over the years throughout the Americas. See generally Culliton, *supra* note 86.

90. Noelle Jolin, *Gender-Based Violence in Colombia: New Legislation Targets Femicides and Acid Attacks*, 91 TUL. L. REV. 371, 373 (2016) (citing Matthias Nowak, *Femicide: A Global Problem*, SMALL ARMS SURV. RES. NOTES, Feb. 2012, at 1, 3).

91. Chile’s Domestic Violence Law, *Ley 20.066*, was enacted in 2005. This law expanded the civil law domestic violence provisions and provided that certain domestic violence violations would have criminal consequences. Law No. 20.066, Oct. 7, 2015, DIARIO OFICIAL [D.O.] (Chile).

92. Jolin, *supra* note 90, at 398-99.

93. Although in some Latin American countries domestic violence incidents equal those in the United States. See Katherine M. Culliton, *Legal Remedies for Domestic Violence in Chile and the United States: Cultural Relativism, Myths, and Realities*, 26 CASE W. RES. J. INT’L L. 183, 202 (1994).

gender roles are prominent and the belief that others, including government, should not interfere with family matters is strong.<sup>94</sup>

Furthermore, a significant number of Latina survivors have difficulty seeing themselves as victims or mistakenly believe other women are suffering similar abuse and their experience is the norm.<sup>95</sup> They see themselves as mothers, spouses, and primary caregivers.<sup>96</sup> This is exacerbated by the abuser's apologies after each domestic violence incident and promises to change. These apologies and promises in addition to the abuser's continuing financial support further confuse the victim.<sup>97</sup>

Many abused Latina women are accustomed to facing and overcoming significant challenges and hardships, and apply the same resilience to their domestic violence situation. They consider themselves strong and willing to subject themselves to the abuse for fear of separating their family or losing their sole financial provider.<sup>98</sup> Sometimes, victims focus on the abuser's role as a father.<sup>99</sup> They mistakenly believe that one day the abuser will change or work out the problems. Most importantly, battered Latinas worry that reporting the abuse will lead to deportation, which can further traumatize them and

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94. See Elizabeth M. Rieser-Murphy & Kathryn D. DeMarco, *The Unintended Consequences of Alabama's Immigration Law on Domestic Violence Victims*, 66 U. MIAMI L. REV. 1059, 1069 (2012).

95. Berta Esperanza Hernández-Truyol, *Las Olvidadas—Gendered Injustice/Gendered Injustice: Latinas, Fronteras and the Law*, 1 J. GENDER, RACE & JUST. 353, 359 (1998) (“over a quarter of working Latinas” are employed in service industries including as cooks and caregivers).

96. Lucy Panza, *The (Un)Holy Trinity: Unconscionable Contracts Between Latinas and the Family, Religion, and the State*, 2 GEO. J. L. & MOD. CRITICAL RACE PERSP. 299, 304 (2010) (describing that Latinas “tend to identify exclusively with the interests of their husband and children”).

97. Orly Rachmilovitz, *Bringing Down The Bedroom Walls: Emphasizing Substance over Form in Personalized Abuse*, 14 WM. & MARY J. WOMEN & L. 495, 503 (2008).

98. In my legal practice, this is the reason I hear cited often by survivors as an impediment for leaving their abusive relationship.

99. See generally Marry Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245 (2000) (discussing generally the barriers that victims face in leaving an abusive relationship).

their children.<sup>100</sup> They are paralyzed by the valid fear that deportation could result in the loss of their children.<sup>101</sup>

Domestic violence abuse can escalate and be far from an isolated incident,<sup>102</sup> exposing the entire family, including children, to the abuse.<sup>103</sup> Victims often worry disclosure will escalate the abuser's aggression. Victims face threats and death when trying to flee abusive partnerships.<sup>104</sup> The victim's personal interest to avoid future retaliation by not focusing on the instant case stands in stark contrast to the law enforcement objectives of prosecution. The emotional tie to his or her abuser often distracts and prevents the victim from disclosing the abuse.

Investigation of a domestic violence case cannot ignore a Latina's culture. Understanding the cultural context of the victim can facilitate investigation and prosecution. The Latina victim's primary concern is keeping her family intact, avoiding possible deportation to her home country, and remaining loyal to her Latino values, which includes being a caregiver to her family. Providing protection to domestic violence victims such as the U visa eases the victim's anxiety levels and increases her willing to cooperate with law enforcement. U visas allow victims to have courage and faith in the legal system that they will be protected.

#### V. A PROPOSAL FOR THE "HELPLESSNESS" REQUIREMENT

Ending the cycle of domestic violence poses several challenges to the Latina immigrant. The rebuttable presumption of California's Immigrant Victims of Crime Equity Act is a first step in analyzing how to determine "helpfulness" in the U visa process. But other questions

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100. *Id.* at 293.

101. See Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1031 (2000).

102. See Dutton et al., *supra* note 99, at 303.

103. Any discussion of Latin American women's experiences would be remiss without mentioning the influence of the Catholic Church on cultural norms. Hernandez, *supra* note 25, at 865 (quoting ROXANA LECAROS ETCHEVERRY, INVESTIGACIÓN VIOLENCIA DOMESTICA EN MUJERES DE POBLACIONES DE SANTIAGO 6, 7 (1992)) (explaining that when faced without their government's support a Latin American domestic violence survivor sees it as the "cross that God has sent me").

104. See Deborah Anker et al., *Women Whose Governments are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence may Qualify as Refugees Under United States Asylum Law*, 11 GEO. IMMIGR. L.J. 709, 726-27 (1997).

remain: Does the victim's report to the police suffice for meeting the requirement or does the victim have to continue providing assistance to law enforcement throughout the case? Is helpfulness at the incident of the scene enough? The USCIS instructions clearly state that a victim's helpfulness must be ongoing. However, is the victim prevented from meeting the helpfulness requirement if the responding officer failed to write the victim's correct telephone number on the police report and has trouble reaching her? Or, is the victim precluded from U visa eligibility if the investigating agency fails to pursue, or dismisses, the case?

California's new law states that unless there is evidence that the victim was not helpful, there is a presumption that she was helpful and, therefore, eligible for the certification.<sup>105</sup> Focusing on the statute, regulations, and USCIS instructions, along with the victim's cultural dynamics, helps meet the goals of the U visa and the Immigrant Victims of Crime Equity Act when determining helpfulness. Each domestic violence case should be considered on a case-by-case basis. Every situation is unique and although there are commonalities, there is not a one-size-fit-all approach.

#### *A. Providing Early Involvement and Education in Immigrant Communities*

Despite the challenges in reaching Latina immigrant victims, there may be some solutions. The San Diego Police Department is one example of the proactive manner in which law enforcement agencies are working with local communities to assist battered immigrant women and men to better enforce domestic violence and immigration laws.<sup>106</sup> The City of San Diego created a public safety initiative to assist domestic violence victims including many from immigrant communities.<sup>107</sup> As part of this initiative, the San Diego Family Justice Center has partnered with a wide array of community service providers—including lawyers, healthcare practitioners, and social service professionals—to help meet the needs of the victims of domestic violence.<sup>108</sup> In offering a one-stop location for victim services,

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105. CAL. PENAL CODE § 679.10(f) (West 2017).

106. See SAN DIEGO FAM. JUST. CTR., <https://www.sandiego.gov/sandiegofamilyjusticecenter> (last visited Feb. 23, 2017).

107. *Id.*

108. *Id.*

the San Diego Family Justice Center has created a safe place for immigrant victims. By diminishing the fear of deportation, law enforcement benefits from victim participation in building their cases.

It is necessary to conduct research on battered undocumented Latinas and the impact that the U visa status has on ending the domestic violence cycle.<sup>109</sup> According to Professor Donna Coker, few studies examine battered Latinas and their relationship with law enforcement.<sup>110</sup> Professor Coker further describes the importance of focusing research on the differences that exist within the various Latino communities in the United States.<sup>111</sup> Understanding the dynamics that arise in different Latina communities—Mexican, Central American, or South American—can facilitate learning about the reasons why certain victims do not disclose their abuse. Moreover, drawing upon the expertise of survivors can help develop a framework for addressing recantation issues.<sup>112</sup> Appropriate research can lead to methods for successful, early involvement in and education of immigrant groups.

Domestic violence centers, such as the many Family Justice Centers across the country, are vital to training workshops and know-your-rights clinics for immigrant victims.<sup>113</sup> Often, these centers are the first point of contact where immigrant victims learn of their immigration rights and available benefits. Collaboration between public and private institutions, such as hospitals, legal non-profit organizations, and therapists, is vital, and continued funding of these organizations is critical to providing the services needed.

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109. See Coker, *supra* note 101, at 1028.

110. *Id.* at 1041.

111. *Id.* at 1030.

112. Various community-policing methods have been used successfully to combat crime and create trust between citizens and police officers. See generally Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391 (2016) (advocating for organized copwatching as an effective means for traditionally powerless groups to have direct input into law enforcement decisions and hold police accountable).

113. Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231, 251-55 (1994) (explaining the importance of the need for social services within the Latino community).



crime.<sup>120</sup> Increasingly, local law enforcements agencies are entering into agreements with the federal government to assist in the deportation of undocumented individuals.<sup>121</sup> Such agreements create fear and mistrust within the very communities that have helped combat crime.

Professor Natasha Tidwell, a former police lieutenant, describes a theory behind getting people to trust and cooperate with local police.<sup>122</sup> Professor Tidwell explains that “people are motivated to cooperate with the police by their own self-interest: fear of punishment or expectation of benefit.”<sup>123</sup> She insightfully notes that parents have long known that “[c]ompliance secured by reward or fear of punishment rarely lasts.”<sup>124</sup> Professor Tidwell opines that based on this theory, opting out of agreements between Immigration and Customs Enforcement (“ICE”), officers and local enforcement agencies will “produce the desired result because the targeted community, undocumented immigrants, is shielded from federal immigration enforcement and thereby incentivized to trust in and cooperate with local police.”<sup>125</sup> This is particularly true in the case of undocumented survivors whose worst fear is being separated from their United States citizen children. As noted above in the case of Miriam, she did in fact “lose” her children after her husband contacted law enforcement and she was apprehended

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120. Natasha Tidwell, *Fragmenting the Community: Immigration Enforcement and the Unintended Consequences of Local Police Non-Cooperation Policies*, 88 ST. JOHN’S L. REV. 105, 105-06 (2014).

121. See, e.g., David Anderson, *Harford Sheriff to Begin Screening for Illegal Immigrants Coming Through His Jail*, BALT. SUN (Oct. 26, 2016, 8:34 PM) <http://www.baltimoresun.com/news/maryland/harford/aegis/ph-ag-ice-sheriff-mou-1028-20161026-story.html>.

122. Citing to social psychologist Tom Tyler’s work, Professor Tidwell states that a second theory “suggests that individual attitudes toward the police are shaped by perceptions of legitimacy or those properties of a police department that ‘lead [] people to feel that [the department] is entitled to be deferred to and obeyed.’” See Tidwell, *supra* note 120, at 126 (quoting Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC’Y REV. 513, 514 (2003) (alteration in original)).

123. *Id.* at 125 (referencing social psychologist Tom Tyler’s work in the discussion of the two theories of cooperation).

124. *Id.* at 126.

125. *Id.* at 125.

and deported.<sup>126</sup> These experiences exacerbate mistrust in immigrant victims and perpetuate the violence to which they are subject.

Immigration laws that protect domestic violence victims recognize the key to safeguarding victims' identities.<sup>127</sup> The importance of keeping immigrant victims' identities confidential cannot be overstated.<sup>128</sup> ICE agents are prohibited from using the victim's information if the abuser discloses it.<sup>129</sup> Furthermore, an immigration official is barred from using such information to "[m]ake an adverse determination of admissibility or deportability of an alien."<sup>130</sup> Similarly, U visa applicants can expect confidentiality protections when submitting a U visa petition to USCIS.<sup>131</sup> Too often immigrant victims fear the perpetrator will discover they reported the crime or that they are attempting to regularize their immigration status.<sup>132</sup> Under current law, victims can expect their information will not be disclosed to their abuser or any other person.<sup>133</sup> In the same vein, S.B. 674 contemplates

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126. Morrissey, *supra* note 1.

127. See generally Violence Against Women Act (VAWA), 42 U.S.C.A. § 13925 (West 2013). VAWA allows a domestic violence victim, among other qualifying relatives, who was abused by their U.S. citizen or lawful permanent resident spouse to apply for permanent residence status without having their spouse sponsor them.

128. VAWA 2005's confidentiality provisions provide that the perpetrator cannot obtain "information about their victims, including the existence of a VAWA immigrant petition." See H.R. REP. NO. 109-233, at 120 (2005), as reprinted in 2005 U.S.C.C.A.N. 1636 WL 2005.

129. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, PUB. L. NO. 104-208, § 384(a)(1), 110 Stat. 3009 (codified at 8 U.S.C.A. § 1367(a)(1)) [hereinafter *IIRIRA*].

130. *IIRIRA* § 384(a)(1), 8 U.S.C.A. § 1367(a)(1) (West 2013).

131. *IIRIRA* § 384(a)(2), 8 U.S.C.A. § 1367(a)(2) (West 2013).

132. The Los Angeles City Attorney's Office's policy is that pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), if a criminal case is open, the certification and the disposition of the request can be revealed to criminal defense counsel. See L.A. CITY ATT'Y'S OFF. PROCEDURES FOR REQUESTING U-VISA LAW ENFORCEMENT CERTIFICATIONS (2016) (on file with author).

133. For guidance on how to file a complaint with the Department of Homeland Security regarding any potential violations of the confidentiality provisions found in 8 U.S.C. § 1367, see the following document, *Violence Against Women Act (VAWA) Confidentiality Provisions at the Department of Homeland Security*, DEPT. HOMELAND SEC., [http://www.asistahelp.org/documents/resources/VAWA\\_notice\\_PDF\\_FE347B89584A0.pdf](http://www.asistahelp.org/documents/resources/VAWA_notice_PDF_FE347B89584A0.pdf).

confidentiality protection for immigrant victims who request certification forms from law enforcement: “A certifying entity is prohibited from disclosing the immigration status of a victim or person requesting the Form I-918 Supplement B certification, except to comply with federal law or legal process, or if authorized by the victim or person requesting the Form I-918 Supplement B certification.”<sup>134</sup>

Continuing to apply confidentiality provisions to U visas will help change the perception of law enforcement from agents of deportation to agents of security and assistance. Domestic violence victims and their children are traumatized by the cycle of violence and threats of deportation that they have experienced. Social service advocates, law enforcement officials, and attorneys can alleviate these fears and negate myths by reminding victims of confidentiality protection. Furthermore, law enforcement officials should receive reminders of the confidentiality protections to which they are subject.

*C. Coordinating Efforts that will Further the Goals of The Immigrant Victims of Crime Equity Act (Senate Bill 674)*

The Immigrant Victims of Crime Equity Act requires that certifying entities report annually to the California State Legislature the number of certifications received and denied.<sup>135</sup> Pursuant to California Penal Code section 679.10, law enforcement offices were required to report on or before January 1, 2017.<sup>136</sup> Recent data shows an interesting pattern in certification requests that have been approved or denied statewide.<sup>137</sup> While requiring annual reporting to the state Legislature creates additional tasks for an already strained law enforcement agency, the new requirements have the potential of making the U visa certification process more efficient and in compliance with the objectives of the Immigrant Victims of Crime Equity Act.

Interestingly, the recent data shows a disparity in the number of certification requests received across the state with some offices

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134. CAL. PENAL CODE § 679.10(k) (West 2017).

135. *Id.* § 679.10(l).

136. *Id.*

137. See Gustavo Solis, *U Visa Data Give Glimpse into Local Law Enforcement Immigration Relationship*, USA TODAY (Feb. 8, 2017, 7:18 PM), <http://www.usatoday.com/story/news/nation-now/2017/02/08/u-visa-immigrant-police-relationship/97666590/>.

receiving large number of certifications requests and others almost none.<sup>138</sup> The California Senate Third Reading of S.B. 674 notes that the purpose of the bill was to address the uneven success rates in obtaining certification.<sup>139</sup> What constituted being “helpful” in some counties was not considered significant enough to grant a certification request in other counties. Indeed, S.B. 674 aimed to halt this perceived practice by noting, “[w]hether you are a victim of crime in Kern County or Alameda County should not matter in terms of whether you obtain a U-Visa. This bill brings equity to immigrant victims of crime.”<sup>140</sup> The California Legislature also acknowledged that some police officers saw the certification process as an opportunity to exercise discretion over who was able to stay in the country.<sup>141</sup> Prior to S.B. 674, immigration lawyers saw certification denials based on discretion. For example, some certifying agencies would issue a denial based on the victim’s

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138. In 2016, the Grover Beach Police Department and the City of Rocklin Police Department reported receiving one certification at each department. In 2016, the Los Angeles County District Attorney’s Office received 417 certification requests. *S.B. 674 U Visa Data for 2016* (on file with author).

139. S. RULES COMM. OFF. OF S. FLOOR ANALYSES, S.B. 674 THIRD READING, 2015-2016 Reg. Sess. (Cal. 2015). [https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201520160SB674](https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB674).

140. ASSEMB. FLOOR ANALYSIS, ANALYSIS ON 674 S. 3D READING 7, 2015-2016 Reg. Sess., at 4 (Cal 2015), [http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb\\_0651-0700/sb\\_674\\_cfa\\_20150828\\_165122\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0651-0700/sb_674_cfa_20150828_165122_asm_floor.html). The California Senate also seem to call out certain agencies on their inconsistent certification records:

There are some local law enforcement agencies that do an exemplary job granting certifications. For example, the Oakland Police Department and L.A. Police Department.

There are other law enforcement agencies - the Kern County Sheriff, for example - that systematically deny certifications on the basis of political views on immigration matters. They are making the determination of whether one belongs in this county or not, irrespective of the crime that has been committed against an immigrant and irrespective of whether that victim was helpful to law enforcement.

*Id.* at 6-7.

141. One of the arguments in support of S.B. 674 was submitted by the Immigration Legal Resource Center. They argued that certain counties were placing “[t]heir own restrictions on which victims can receive the certification.” See *Victims of Crime: Nonimmigrant Status: Hearing on S.B. 674 Before the Assemb. Comm. on Appropriations*, 2015-2016 Reg. Sess. 4 (2015), [http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb\\_0651-0700/sb\\_674\\_cfa\\_20150818\\_102605\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0651-0700/sb_674_cfa_20150818_102605_asm_comm.html).

criminal record or because the criminal case was still pending. S.B. 674 appears to eliminate this discretion.

As the U visa certification process continues to be developed and implemented, research on the contributions survivors make to the United States, after being granted U visa status is necessary to combat the negative myths about immigrants.<sup>142</sup> Research would also demonstrate what domestic violence advocates long have known: Regularizing the victim's immigration status is a fundamental part of the survivor's ability to be free from the abuser's bondage. There is a dearth of studies on the impact of obtaining lawful permanent resident status on the immigrant victim's ability to leave the abusive relationship.

A valid concern for a certifying agency is the amount of resources and additional time pressures that S.B. 674 requires of the certifying official. This concern appeared to be noted during the California Senate bill analysis stage: "[t]here are 58 counties and 482 cities and each of them has at least one "agency" that qualifies as a certifying agency. It is reasonable to assume that the number of certifications statewide would be at least ten times those of the Cities of Los Angeles and Oakland combined."<sup>143</sup>

The fiscal impact on law enforcement agencies can be a real impediment to meeting the goals of S.B. 674. By the very nature of their work, law enforcement officials work under high stress.<sup>144</sup> Reviewing and completing the certification process in some counties requires a full time position. Adding another task to the officer's responsibilities can at times keep them away from other urgent matters. Indeed, certain law

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142. A study was conducted by Professor Tom Wong at University of California, San Diego where a nationwide survey found that Deferred Action for Childhood Arrivals (DACA) recipients are getting better jobs, earning higher wages, and finishing college. See Tom K. Wong & Carolina Valdivia, *In Their Own Words: A Nationwide Survey of Undocumented Millennials*, UNITED WE DREAM (May 20, 2014), <https://unitedwedream.org/words-nationwide-survey-undocumented-millennials/>.

143. ASSEMB. FLOOR ANALYSIS, ANALYSIS ON 674 S. 3D READING 7, 2015-2016 Reg. Sess., at 2 (Cal. 2015), [http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb\\_0651-0700/sb\\_674\\_cfa\\_20150828\\_165122\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0651-0700/sb_674_cfa_20150828_165122_asm_floor.html).

144. Rick Trinkner et al., *Justice From Within: The Relations Between a Procedurally Just Organizational Climate and Police Organizational Efficiency, Endorsement of Democratic Policing, and Officer Well-Being*, 22 PSYCHOL. PUB. POL'Y & L. 158, 161 (2016).

enforcement officials have decided to not participate in immigration matters such as local agreements between ICE and police departments.<sup>145</sup> As S.B. 674 continues to be implemented statewide, certifying entities will have to evaluate their existing policies to meet their obligations under the new law. Nonetheless, reviewing recent data and that to come, the California Legislature should devote further resources to agencies with the highest number of certification requests to diminish the fiscal impact already felt in those counties.<sup>146</sup>

There is also a need for statewide trainings of certifying officials on the U visa certification process. The Department of Homeland Security has published a research guide that is routinely used by law enforcement agencies around the state.<sup>147</sup> However, curricula should be created to educate agencies on the impact the U visa has on victims of domestic violence.<sup>148</sup> While S.B. 674's annual reporting requirement is a good start toward learning about certification practices across the state, collaborative efforts to share internal policies can lead to more consistent certification. For example, some law enforcement agencies keep detailed records that include the qualifying crime and the reason for denial. In the data collected, one law enforcement agency indicated

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145. Vernal Coleman, *Seattle Police Will Support Mayor's 'Sanctuary City' Commitment, Chief Says*, SEATTLE TIMES (Nov. 16, 2016), <http://www.seattletimes.com/seattle-news/politics/seattle-police-chief-would-defy-trump-administrations-efforts-to-deport-immigrants/> (lasted visited February 23, 2017).

146. The California Legislature noted that the annual reporting would likely cause minor costs for certifying offices. The Legislature noted “[t]o the extent local agency expenditures qualify as a reimbursable state mandate, agencies could only claim reimbursement of costs incurred if \$1,000 or more (General Fund).” See *Victims of Crime: Nonimmigrant Status: Hearing on S.B. 674 Before the S. Comm. on Appropriations*, 2015-2016 Reg. Sess. 2 (2015), [http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb\\_0651-0700/sb\\_674\\_cfa\\_20150504\\_112432\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0651-0700/sb_674_cfa_20150504_112432_sen_comm.html).

147. *U and T Visa Law Enforcement Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement, Prosecutors, Judges and Other Government Agencies*, DEPT. HOMELAND SEC., <https://www.dhs.gov/publication/u-visa-law-enforcement-certification-resource-guide>.

148. See *Georgia Domestic Violence Fatality Review Project*, GA. COMM'N ON FAM. VIOLENCE & GA. COALITION AGAINST DOMESTIC VIOLENCE 30-31 (2015), <http://www.familyjusticecenter.org/wp-content/uploads/2016/03/GCADV-AnnualReport-2015-SML.pdf> (recommending learning curriculum for domestic violence service providers about children exposed to domestic violence).

that a certification request was denied because the victim “interfered w/ investigation-arrest.”<sup>149</sup>

Knowing what constitutes “interference” could aid domestic violence advocates in helping the victim understand the importance of cooperating throughout the case. Advocates could further develop their own training workshops to demonstrate the cultural dynamics of domestic violence that could lead to the perception that the victim is not “helpful” in the investigation or prosecution of the case. Coordinating such efforts could lead to proactive solutions that use the certification process as a tool to combat domestic violence.

### CONCLUSION

The Immigrant Victims of Crime Equity Act is the first state law of its kind in the country. California led the way by creating a rebuttable presumption for determining helpfulness. Although the legislative analysis of S.B. 674 provides that a certifying official is not conferring an immigration benefit, it clearly recognizes the significant role that state officials have in the U visa process.<sup>150</sup> S.B. 674 is a good start to addressing the inconsistent certification practices in the state. Nonetheless, the California Legislature should create proper statewide law enforcement training that includes curricula on cultural sensitivities and stresses the importance of the confidentiality provisions.

The Legislature must further allocate funding to counties with the highest certification requests to alleviate the labor-intensive process that the U visa certification has become for law enforcement departments. S.B. 674 and the U visa have facilitated a symbiotic relationship between the many stakeholders in California. Fostering this relationship will help Latina undocumented survivors solve their immigration needs and safely resume their lives. This will, in turn, create safer communities consistent with the goals of the Immigrant Victims of Equity Act.

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149. Letter from City of Riverside Police Department to Secretary of the Senate State Capitol (Dec. 22, 2016) (on file with author).

150. ASSEMB. FLOOR ANALYSIS, ANALYSIS ON 674 S. 3D READING 7, 2015-2016 Reg. Sess., at 6 (Cal. 2015), [http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb\\_0651-0700/sb\\_674\\_cfa\\_20150828\\_165122\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0651-0700/sb_674_cfa_20150828_165122_asm_floor.html).