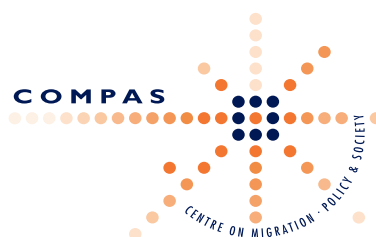




# Safe Reporting of Crime for Victims and Witnesses with Irregular Migration Status in the United States

Nicola Delvino

September 2019





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WITH IRREGULAR MIGRATION STATUS IN THE UNITED STATES**

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## About the author

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## Introduction

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In March 2019, local newspapers in Miami reported that Mabel – a Nicaraguan woman who had reached out to the Miami-Dade Police Department (MDPD) after suffering a sexual offence – was arrested and detained by US Immigration and Customs Enforcement (ICE) officers. Mabel was reported to ICE by MDPD officers while she was still in the police station and cooperating with them in the investigations.<sup>1</sup> A month earlier, *The Nation* reported the story of Nancy, a victim of rape who was deported from the United States to Mexico after reporting the crime to the police, testifying in court, and cooperating with US law enforcement authorities to ensure the prosecution and expulsion of the perpetrator.<sup>2</sup> In 2018, it was reported that Maria, a Colombian survivor of domestic violence, was briefly arrested by immigration authorities at the Mecklenburg County Courthouse, in North Carolina, where she appeared for a hearing related to her case.<sup>3</sup> Maria's case is not isolated, as it is widely reported that immigration arrests at courthouses in the United States in the recent past have been targeting crime victims as often as perpetrators.<sup>4</sup> In all these cases, the victims had suffered a crime while in the United States with an irregular migration status.<sup>5</sup>

Victims with irregular migration status may encounter a number of challenges when wishing to interact with public authorities, mainly due to the fear that, having been detected as an irregular (or 'undocumented') migrant, they will be removed. Reportedly, after two months in immigration

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<sup>1</sup> Miami New Times (18 March 2019), *Miami-Dade Police Reported Undocumented Crime Victim to ICE*, available at: [www.miaminewtimes.com/news/miami-dade-police-reported-undocumented-crime-victim-to-ice-11118932](http://www.miaminewtimes.com/news/miami-dade-police-reported-undocumented-crime-victim-to-ice-11118932) [last accessed 4 September 2019]; Telemundo (18 March 2019), *Una madre latina víctima de agresión sexual va a la policía. Y la reportan con la migra*, available at: [www.telemundo.com/noticias/2019/03/18/una-madre-latina-victima-de-agresion-sexual-va-la-policia-y-la-reportan-con-la](http://www.telemundo.com/noticias/2019/03/18/una-madre-latina-victima-de-agresion-sexual-va-la-policia-y-la-reportan-con-la) [last accessed 4 September 2019].

<sup>2</sup> The Nation (1 April 2019), *She Helped Convict Her Rapist. ICE Deported Her Anyway*, available at: [www.thenation.com/article/u-visa-immigration-ice-uscis/](http://www.thenation.com/article/u-visa-immigration-ice-uscis/) [last accessed 4 September 2019].

<sup>3</sup> NBC News (22 September 2018), *Immigration crackdown makes women afraid to testify against abusers, experts warn*, available at: [www.nbcnews.com/politics/immigration/immigration-crackdown-makes-women-afraid-testify-against-abusers-experts-warn-n908271](http://www.nbcnews.com/politics/immigration/immigration-crackdown-makes-women-afraid-testify-against-abusers-experts-warn-n908271) [last accessed 4 September 2019].

<sup>4</sup> American Civil Liberties Union (ACLU) (2018), *Freezing Out Justice: How immigration arrests at courthouses are undermining the justice system*, available at: [www.aclu.org/sites/default/files/field\\_document/rep18-icecourthouse-combined-rel01.pdf](http://www.aclu.org/sites/default/files/field_document/rep18-icecourthouse-combined-rel01.pdf); IDP (2019), *The Courthouse Trap: How ICE Operations Impacted New York's Courts in 2018*, available at: [www.immigrantdefenseproject.org/wp-content/uploads/TheCourthouseTrap.pdf](http://www.immigrantdefenseproject.org/wp-content/uploads/TheCourthouseTrap.pdf); ABC News (27 July 2018), *'Where can anyone seek justice?': Experts warn ICE courthouse arrests may mean witnesses, victims won't show up*, <https://abcnews.go.com/US/seek-justice-experts-warn-ice-courthouse-arrests-witnesses/story?id=56756506>; New York Times (30 June 2019), *When Paying a Traffic Ticket Can End in Deportation*, available at: [www.nytimes.com/2019/06/30/nyregion/ice-courthouse-arrests.html](http://www.nytimes.com/2019/06/30/nyregion/ice-courthouse-arrests.html) [all links last accessed 4 September 2019].

<sup>5</sup> In this report, 'migrants with irregular status' (or 'irregular migrants') refers to non-US nationals who have either entered the United States without proper authorisation, and thus in breach of US immigration laws (irregular entrants), or who entered in compliance with US laws, but subsequently did not comply with the conditions of their stay. The latter mostly include those migrants who have stayed in the country beyond the expiration date of their visas ('overstayers'), but also individuals who have lost their regular status following other events, such as a divorce from a US citizen or resident, or the refusal of an asylum application. In other cases, a migrant may have fallen into 'irregular status' by not complying with other conditions on their visa, such as working without proper employment authorization documents. Irregular migrants are often described as 'undocumented migrants' or 'illegal migrants'. This report tends to prefer the term 'irregular' over 'undocumented' (as some of those whose immigration status is irregular have documentation, such as a passport), but where used in this report, the term 'undocumented' is meant as a synonym of 'irregular'. The author, however, does not use the term 'illegal migrants' to avoid unwanted connotations stigmatising migrants as criminals (irregular status *per se* does not imply that a criminal offence has been committed); to ensure legal accuracy (where the act of entering or staying without authorisation is illegal, and not the perpetrators themselves); and to conform to the terminology favoured by many international institutions.

detention, when Mabel was asked if she would think twice before contacting the police in the future, she replied 'Sí' with no hesitations.<sup>6</sup>

Several studies showed that the fear of disclosing their status to authorities and the risk of subsequently being deported – whether real or apparent – deters many irregular migrants from seeking services, justice, or simply reporting a crime.<sup>7</sup> Besides this general fear, additional challenges may further prevent migrant crime victims from contacting the police and seeking protection. Victims with a residence authorisation which is tied to a relationship with a family member or employer hesitate to report their abusive spouses or labour exploiters, as they fear losing their residency rights.<sup>8</sup> In general, lack of linguistic and legal skills of the host country, social isolation, and cultural barriers further dissuade many immigrants from seeking protection and services from public authorities. At the same, an irregular migration status is itself an exposure to vulnerability and victimisation, as criminals may consciously target people with such status, knowing that the chances that their victims would report the crime to authorities are low.<sup>9</sup> Perpetrators, including traffickers, exploiters and abusive partners, use the threat of deportation to discourage a victim from reporting the crime, and repeat the victimisation.<sup>10</sup> This confluence of factors results in a systematic underreporting of crime from victims with irregular migration status,<sup>11</sup> which can have tremendous consequences for victims protection, as well as for public safety and the efficiency of law enforcement, as perpetrators go undetected, unpunished, and free to repeat crime. The

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<sup>6</sup> Miami New Times (23 April 2019), *Miami Crime Victim Detained by ICE Warns Others About Calling Police for Help*, available at: [www.miaminewtimes.com/news/crime-victim-warns-other-undocumented-immigrants-about-contacting-miami-dade-police-for-help-11154018](http://www.miaminewtimes.com/news/crime-victim-warns-other-undocumented-immigrants-about-contacting-miami-dade-police-for-help-11154018).

<sup>7</sup> Kittrie O. F. (2006), *Federalism, Deportation and Crime Victims Afraid to Call the Police*, in *Iowa Law Review*, Vol. 91, pp. 1449-1508, available at SSRN: <https://ssrn.com/abstract=926766>; Rodrigues R., Husain A., Couture-Carron A., Orloff L. E., & Ammar N. H. (2018), *Promoting Access to Justice for Immigrant and Limited English Proficient Crime Victims in an Age of Increased Immigration Enforcement: Initial Report from a 2017 National Survey*, Washington: NIWAP - American University Washington College of Law, available at: [library.niwap.org/wp-content/uploads/Immigrant-Access-to-Justice-National-Report.pdf](http://library.niwap.org/wp-content/uploads/Immigrant-Access-to-Justice-National-Report.pdf); Reina A. S., Lohman B. J., & Maldonado M. M. (2014), 'He said they'd deport me': Factors influencing domestic violence help-seeking practices among Latina immigrants, in *Journal of Interpersonal Violence*, 29, 593–615; Messing J. T., Becerra D., Ward-Lasher A., & Androff D. K. (2015), *Latinas' perceptions of law enforcement: Fear of deportation, crime reporting, and trust in the system*, in *Affilix Journal of Women and Social Work*, 30, 328–340; Gleeson S. (2010), *Labor rights for all? The role of undocumented immigrant status for worker claims making*, in *Law & Social Inquiry*, 35, 561–602; PICUM (2015), *Guide to the EU victims' directive: advancing access to protection, services and justice for undocumented migrants*, Brussels: PICUM, available at: [picum.org/wp-content/uploads/2017/11/VictimsDirectiveGuide\\_Justice\\_EN.pdf](http://picum.org/wp-content/uploads/2017/11/VictimsDirectiveGuide_Justice_EN.pdf).

<sup>8</sup> Reina A. S., Lohman B. J., & Maldonado M. M. (2014), *op. cit.*, note 7; Messing J. T., Becerra D., Ward-Lasher A., & Androff D. K. (2015), *op. cit.*, note 7; Gleeson S. (2010), *op. cit.*, note 7.

<sup>9</sup> See, for instance, the case of Latino migrants with irregular status who have been described as 'walking ATMs'. This group of migrants has been disproportionately subject to robberies due to their reluctance to report crime, and because their status does not allow them to open bank accounts (and therefore they must carry cash), hence the phrase 'walking ATMs'. See Barranco R.E. Shihadeh E.S. (2015), *Walking ATMs and the immigration spillover effect: The link between Latino immigration and robbery victimization*, in *Soc Sci Res.* 2015 Jul; 52:440-50. doi: 10.1016/j.ssresearch.2015.03.003.

<sup>10</sup> PICUM (2015) *op. cit.*, note 7; Bernat F. (2017), *Immigration and crime*, in H. Pontell (Ed.), *Oxford research encyclopedias: Criminology and criminal justice*, Oxford: Oxford University Press, available at: <https://oxfordre.com/criminology/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-93>; Fussell E. (2011), *The deportation threat dynamic and victimization of Latino migrants: Wage theft and robbery*, in *The Sociological Quarterly*, 52, 593–615.; Gutierrez C. M., & Kirk D. S. (2015), *Silence speaks: The relationship between immigration and the underreporting of crime*, in *Crime & Delinquency*, Vol. 63 issue: 8, pp.926-950.

<sup>11</sup> *Ibidem*.

problem is not only endemic to the United States, but affects other countries in receipt of large numbers of immigrants, including in Europe.<sup>12</sup>

Authorities on both sides of the Atlantic Ocean have, at times, recognised this problem and adopted legislation and initiatives aimed at providing victims with irregular migration status with opportunities to ‘safely’ report crime. This report focuses on ‘*safe reporting of crime*’, i.e., those legal and practical measures that enable irregular migrants to report crime without exposing them to immigration enforcement, and therefore encourage crime reporting from this group. National legislators in both the United States and Europe have, for instance, introduced special visas for victims of certain crimes who report to the police and cooperate with law enforcement, like the U and T visas in the US (see section three below), or the special permits for victims of trafficking, labour exploitation and domestic violence introduced by different directives of the European Union (EU) and the national laws of several EU Member States.<sup>13</sup> In other cases, local authorities have felt the need to ensure public safety by reducing deportation risks for irregular migrants wishing to report a crime to law enforcement authorities. While a few initiatives aimed at ensuring justice for victims with irregular status have been adopted by local authorities in Europe,<sup>14</sup> it is mostly in the United States that – thanks to its unique constitutional setting – a significant number of local governments commonly described as ‘Sanctuary cities’ have adopted a host of policies aimed at preventing outcomes wherein interactions between local police officers and victims with irregular status lead to the victims’ detection as removable migrants by immigration authorities.

### Structure of the report

This report describes measures allowing safe reporting of crime by irregular migrants in the United States. It covers measures adopted by US federal authorities, as well by local governments, focusing in particular on initiatives adopted in the cities of New York and San Francisco. It describes the functioning of safe reporting practices, as well as the legal and political conditions that make safe reporting practices possible in the United States, both at national and local levels. It thus aims to spell out the elements required for a broad assessment of the replicability in other national contexts of certain practices adopted in the USA.

This study was conducted in the framework of a project by the University of Oxford’s Centre on Migration, Policy and Society (COMPAS) exploring law, policy and practice surrounding ‘safe reporting’ of crime for victims and witnesses with irregular status in the United States and Europe (hereafter “the ‘safe reporting’ project”). In parallel to this report, studies on safe reporting of crime for irregular migrants have been conducted in four European countries (Belgium, Italy, Spain and the Netherlands).<sup>15</sup> The project ultimately aims to: provide authoritative evidence on and analysis of policies and best-practices enabling and encouraging ‘safe reporting’ in Europe and the USA; assess the legal and political replicability of practices and policies across different countries; and

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<sup>12</sup> PICUM (2015) op. cit., note 7.

<sup>13</sup> Delvino N. (2017), *The challenge of responding to irregular immigration: European, national and local policies addressing the arrival and stay of irregular migrants in the European Union*, pp. 51-56, COMPAS: Oxford, available at: [www.compas.ox.ac.uk/2017/autumn-academy-2017-report-the-challenge-of-responding-to-irregular-immigration/](http://www.compas.ox.ac.uk/2017/autumn-academy-2017-report-the-challenge-of-responding-to-irregular-immigration/).

<sup>14</sup> Delvino N. & Spencer S. (2019), *Migrants with Irregular Status in Europe: Guidance for Municipalities*, pp. 43-48, COMPAS: Oxford, available at: [www.compas.ox.ac.uk/wp-content/uploads/CMISE-Guidance-for-Municipalities-1.pdf](http://www.compas.ox.ac.uk/wp-content/uploads/CMISE-Guidance-for-Municipalities-1.pdf), pp. 43-48.

<sup>15</sup> Van Den Durpel A. (2019), *Safe reporting of crime for migrants with irregular status in Belgium*, COMPAS: Oxford; Taverriti S. B. (2019), *Safe reporting of crime for victims and witnesses with irregular migration status in Italy*, COMPAS: Oxford; González Beilfuss M. (2019), *Safe reporting of crime for migrants with irregular status in Spain*, COMPAS: Oxford; Timmerman R., Leerkes A., & Staring R. (2019), *Safe reporting of crime for migrants with irregular status in the Netherlands*, COMPAS: Oxford.

facilitate knowledge-exchange between European and US policymakers regarding the opportunities for replicating best practices across different national and local settings.

The first section of this report is introductory, and provides general information on immigration and crime in the United States. The second section focuses on the structure of both criminal and immigration law enforcement in the United States, in order to spell out some of the constitutional and structural elements that make certain 'firewalls' between different authorities possible in the US. Subsequently, this report focuses on measures introduced by national authorities (third section) or local authorities (fourth section) to enable and encourage 'safe reporting' of crime by irregular migrants.

A first necessary premise is that this report focuses in particular on measures related to the initial interactions between a victim with irregular migration status and police authorities, which result in the reporting of a crime, and not holistically on the host of proceedings leading to effective access to justice. This report touches on some proceedings following the reporting of a crime, only insofar as their effectiveness or ineffectiveness (and the related risks of arrests and deportation, as in the case of arrests in a courthouse) may influence the initial choice of an irregular migrant about whether to denounce a crime or not. A thorough assessment of such proceedings is, however, beyond the scope of this report.

A second necessary premise is that the report does not aim to offer an opinion in relation to the wider debate surrounding 'sanctuary cities' and local 'non-cooperation' policies (see section four). These policies are only presented in this report to the extent that, by limiting cooperation between local and federal law enforcement agencies, they offer an avenue for 'safe reporting' of crime to victims with irregular migration status (here the issue of focus). However, this report acknowledges that sanctuary policies are highly controversial within the US political landscape, recognises the existence of strongly opposite views, and does not disregard that such views have led to deep tensions between federal and local authorities, particularly in the period of writing under the federal administration of President Donald J. Trump.<sup>16</sup> This report does not take a side in this debate.

## Methods

The findings of this study have been collected through desk and empirical research conducted between December 2018 and June 2019. In a first phase, desk research focused on the constitutional, criminal and immigration-related legal frameworks regulating safe reporting of crime in the United States, as well as the legal, policy and academic debates surrounding 'sanctuary cities' and their 'non-cooperation' policies (see *infra*). Subsequently, 14 in-depth interviews were conducted, in New York and San Francisco, with 15 stakeholders selected according to their specific expertise in the reporting and prosecution of crime involving migrant victims; the usage of special visas and other protective measures for migrant crime victims; relevant local policies and initiatives; and their contact and experience with migrant victims of crime. In particular, interviews were conducted with two public prosecutors, within the offices of the Manhattan District Attorney and the San Francisco District Attorney; three law enforcement officials from the New York and the San Francisco police departments; five local authority officials of the cities of New York and San Francisco (including a city service provider for victims of domestic violence);<sup>17</sup> four attorneys

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<sup>16</sup> E.g. Warren C. C. (2017), *Sanctuary Lost: Exposing the Reality of the Sanctuary-City Debate & Liberal States-Rights' Litigation*, in Wayne L. Rev. 155 (2017-2018) Vol. 63 pp. 155-214.

<sup>17</sup> The New York City Mayor's Office of Immigrant Affairs (MOIA-NYC); the New York City Mayor's Office to End Domestic and Gender-Based Violence (ENDGBV-NYC); the San Francisco Human Rights Commission; and the San Francisco Department on the Status of Women.



providing legal services to immigrant victims of crime within non-profit service providers;<sup>18</sup> and one academic expert.<sup>19</sup> The interviews with non-profit organisations serving irregular migrant victims helped reflect to some extent the perspective of their clients, but the author recognises that this study generally lacks the perspective of migrant victims themselves. All interviews were conducted in May (New York) and June (San Francisco) 2019.

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<sup>18</sup> At Safe Horizon – Immigration Law Project (New York); the Urban Justice Center – Domestic Violence Project (DVP) (New York); the Asian Americans Advancing Justice – Asian Law Caucus (San Francisco); the Immigration Center for Women and Children (ICWC) (San Francisco).

<sup>19</sup> At the Brooklyn Law School, New York.

## 1. Migrants with irregular status and crime in the United States

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### 1.1 Migrants with irregular status in the United States

The most recent estimates suggest that, in 2017, the population of migrants with irregular status in the United States was around 10.5 million people, representing about 3.2% of the total US population.<sup>20</sup> The Pew Research Center reported that 57% of irregular migrants resided in six states, namely California, Texas, Florida, New York, New Jersey and Illinois. Interestingly, despite widespread media and political concern about a 'migration crisis' at the southern border of the USA,<sup>21</sup> estimates suggest both that in the decade 2007-2017 the total population of irregular migrants has been decreasing, rather than increasing (a drop of 14% from 12.2 million in 2007);<sup>22</sup> and that, at least between 2010 and 2017, visa overstays have been significantly exceeding irregular arrivals at the border.<sup>23</sup> In addition, the biggest (and rising) share of people with irregular status has consisted of long-term residents, with about two thirds (66%) of adults with irregular migration status having lived in the U.S. for more than a decade; the median length of time in the U.S. for adults with irregular migration status was estimated at 15.1 years.<sup>24</sup> This data helps contextualize the issue of focus of this report, as the long time-span of residence in the USA inevitably increases the chances for millions of individuals that they will suffer a crime while having an irregular migration status.

### 1.2 The criminal relevance of an irregular migration status

Before looking at the relationship between migrants and the commission of crimes, the criminal relevance of an irregular migration status itself should be clarified. In other words, can a migrant be considered a criminal solely because he or she has an irregular migration status? The short answer is that being present in the United States without a regular status is not in itself a crime, but a civil law violation. However, US law distinguishes between overstays and irregular entries. Unlawful presence *per se*, *i.e.* not complying with the terms and conditions of one's migration status, is not a criminal, but a civil law infraction,<sup>25</sup> which opens the door to administrative detention and removal by immigration officers, but not to arrest on criminal grounds.<sup>26</sup> For instance, this occurs when an immigrant overstays in the country beyond the expiration of a visa, or works without authorisation.

The act of irregular entry to the United States is, however, a misdemeanour under Title 8 of the United States Code (U.S.C.), § 1325 ('improper entry by alien'), punishable with a criminal fine and/or imprisonment up to 6 months (or two years in cases of subsequent attempts). Improper entry is not considered a 'continuing' offense, as the criminalised act is concluded with the entry into the country. This impacts on the possibility of police officers (who enforce criminal law) to arrest

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<sup>20</sup> Krogstad M. J., Passel J. S., Cohn D. (2019), *5 facts about illegal immigration in the U.S.*, Pew Research Center: Washington DC, available at: [www.pewresearch.org/fact-tank/2019/06/12/5-facts-about-illegal-immigration-in-the-u-s/](http://www.pewresearch.org/fact-tank/2019/06/12/5-facts-about-illegal-immigration-in-the-u-s/); Warren R. (2019), *US Undocumented Population Continued to Fall from 2016 to 2017, and Visa Overstays Significantly Exceeded Illegal Crossings for the Seventh Consecutive Year*, in CMS Essays, Center for Migration Studies: New York, available at: <https://cmsny.org/publications/essay-2017-undocumented-and-overstays/>.

<sup>21</sup> CNN (2 July 2019), *CNN Poll: Three-quarters of Americans say there's a crisis at the border*, [online], available at: <https://edition.cnn.com/2019/07/02/politics/cnn-poll-immigration-border-crisis/index.html>.

<sup>22</sup> Krogstad M. J., Passel J. S., Cohn D. (2019), *op. cit.*, note 20.

<sup>23</sup> Warren R. (2019), *op. cit.*, note 20.

<sup>24</sup> Krogstad M. J., Passel J. S., Cohn D. (2019), *op. cit.*, note 20.

<sup>25</sup> Unless it falls under the circumstances of an illegal re-entry under 8 U.S.C. § 1326, *i.e.* a foreigner is found in the US after being previously excluded or deported.

<sup>26</sup> Civil penalties include bars to re-enter the United States for 3 years, 10 years, or permanently, under Immigration and Nationality Act (INA) section 212(a)(9)(B)(i)(I) and (II), and INA 212(a)(9)(C)(i)(I).

an individual found to be in an irregular condition. Unless the irregular entry itself occurred in the presence of the officers, unlawful presence *per se* cannot imply that the crime of improper entry has been committed.<sup>27</sup>

Instead, re-entering (or attempting to re-enter) the country after previously being denied admission, excluded, deported or removed, is a felony under federal law (8 U.S.C., § 1326). Unlawful presence after an illegal re-entry is considered a continuing offense, and therefore could more easily lead to the arrest of a foreigner found unlawfully present in the US after being previously excluded or deported. 8 U.S.C. § 1325 and § 1326 are the most-prosecuted *federal* crimes in the United States.<sup>28</sup>

### 1.3 Immigration and crime in the United States

Talking about irregular migrants in his presidential candidature announcement speech of June 2015, Donald Trump notoriously claimed: '*When Mexico sends its people, they're not sending their best. ... They're sending people that have lots of problems, and they're bringing those problems with [sic] us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people*'.<sup>29</sup>

Whether there is a correlation between irregular migrants and crime has been the subject of numerous studies on immigrants and crime in the United States. An extensive collection of such studies by F. Bernat (2017)<sup>30</sup> has shed light on how the presence of immigrants *per se* translates in terms of the overall increase or decrease of crimes, underreporting of crime, and the victimisation of migrants. It was found that, while being foreign born is popularly associated with crime, research consistently showed that foreign-born individuals in the US are less likely to commit crime than naturalised citizens, and that immigration may instead lower crime within a community. The states with the highest rates of violent and property crime in 2015<sup>31</sup> were neither the most populous nor those housing the largest number of immigrants.<sup>32</sup> Research also showed that, in sampled US cities, an increase of the immigrant population corresponded to a decrease in the violent crime rate.<sup>33</sup> Several studies indeed found that an increase in immigrant populations favoured a decrease, rather than an increase, in crime rates, particularly in socially disadvantaged areas.<sup>34</sup> Some studies posited

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<sup>27</sup> Seghetti L., Viña S. R., & Ester K. (2004), *Enforcing Immigration Law: The Role of State and Local Law Enforcement*, Washington, D.C.: Congressional Research Service, Library of Congress, 04-RL32270, note 21; Washington State Office of the Attorney General Bob Ferguson (2017), *Guidance concerning immigration enforcement*, p. 17, Olympia: Washington State Office of the Attorney General, available at: <https://www.atg.wa.gov/immigrationguidance>.

<sup>28</sup> ACLU (2015), *Fact Sheet: Criminal Prosecutions for Unauthorized Border Crossing*, ACLU: Washington D.C., available at: <https://www.aclu.org/other/operation-streamline-issue-brief>.

<sup>29</sup> See Time (16 June 2015), *Here's Donald Trump's Presidential Announcement Speech*, available at: <https://time.com/3923128/donald-trump-announcement-speech/>.

<sup>30</sup> Bernat F. (2017), *Immigration and crime*, in H. Pontell (Ed.), *Oxford research encyclopedias: Criminology and criminal justice*, Oxford: Oxford University Press, available at:

<https://oxfordre.com/criminology/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-93>.

<sup>31</sup> Louisiana, Alabama, Alaska, Tennessee, Nevada, Oklahoma, South Carolina, Arkansas, Delaware, and Missouri; see Frohlich T. C., Stebbins, S., & Sauter M. B. (July 15, 2015), *America's most violent (and most peaceful) states*, in *24/7 Wall Street*, cited in Bernat F. (2017), *op. cit.*, note 30.

<sup>32</sup> Bernat F. (2017), *op. cit.*, note 30, p. 3.

<sup>33</sup> Stowell J. I., Messner S. F., McGeever K. F., & Raffalovich L. E. (2009), *Immigration and the recent violent crime drop in the United States: A pooled, cross-sectional time-series analysis of metropolitan areas*, in *Criminology*, 47, 889–928, cited in Bernat F. (2017), *op. cit.*, note 30.

<sup>34</sup> Martinez, Stowell, and Lee (2010) found that, while certain socially-disorganized neighbourhoods of San Diego tended to have higher rates of crime, when socially-disorganized neighbourhoods had an influx of immigrants there were fewer homicides, and therefore when recent immigrants settled in such neighbourhoods, the impact on the

that crime is abated in cities that increase social support (and therefore social control agents) for settling migrants, and that therefore immigrants contribute to the creation of a stabilising force in large cities.<sup>35</sup> Other studies found that a decrease in homicides was related to the reinvigoration of neighbourhoods favoured by the efforts of new immigrants in strengthening ties with neighbours, increasing community organisation and improving the local economy.<sup>36</sup>

With particular reference to irregular migrants, it was noted that public perception tends to link an irregular migration status in particular to criminality.<sup>37</sup> However, research found no empirical data supporting the argument of a particular connection between irregular status and crime. Instead, Barnet's collection of studies suggests that irregular migrants are less likely to engage in crime because they avoid drawing attention to themselves and focus on earning a living. In addition, when stopped, most irregular migrants are arrested for misdemeanours, rather than felonies.<sup>38</sup> A separate study found that in 2015, in Texas – where, significantly, the Department of Public Safety (DPS) keeps track of the immigration statuses of convicted criminals and the crimes that they committed – the homicide conviction rate for irregular migrants was 16 percent lower than for native-born Americans; that for sex crimes and larceny the conviction rates for irregular immigrants were, respectively, 7.9 percent and 77 percent below those of native-born Americans; and that overall, for all criminal convictions, irregular immigrants had a criminal conviction rate 50 percent below that of native-born Americans.<sup>39</sup>

Seen from the opposite perspective, i.e. when migrants are the victims, several studies suggested those with an irregular status are particularly exposed to victimisation, and that there is an increased risk that crime suffered by irregular migrants goes unreported. One study found that when a city faces rapid growth in the foreign-born population, the probability of reporting a violent crime decreases by about 15 percent.<sup>40</sup> Studies on Latina victims of domestic violence in the US found that the victims tended not to seek help from or report the crime to the police. Besides cultural barriers, shame, and fear of the police and the criminal justice system, having an irregular migration status played a central role in discouraging reports to the police, including because the victims were intimidated by the abuser with the threat of deportation. The irregular status of other persons involved, including of the abuser, equally plays as a deterrent.<sup>41</sup> Irregular status was also found to intensify the risks of abuses on the workplace, research showed that the majority of workers with irregular status refrain from reporting abuses because of the fear of being detected as 'undocumented' or losing their jobs.<sup>42</sup> Abuses in the workplace reported in a study from Fussell

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violent crime rate could be nullified; see Martinez R. Jr., Stowell J. I., & Lee M. T. (2010), *Immigration and crime in an era of transformation: A longitudinal analysis of homicides in San Diego neighborhoods, 1980–2000*, in *Criminology*, 48(3), 797–829, cited in Bernat F. (2017), *op. cit.*, note 30.

<sup>35</sup> Vélez M. B., & Lyons C. J. (2012), *Situating the immigration and neighborhood crime relationship in multiple cities*, in R. Martinez, M. S. Zatz, & C. E. Kubrin (Eds.), *Punishing immigrants: Policy, politics, and injustice* (pp. 159–177), New York: New York University Press, cited in Bernat F. (2017), *op. cit.*, note 30.

<sup>36</sup> Vélez M. B. (2009), *Contextualizing the immigration and crime effect: An analysis of homicide in Chicago neighborhoods*, in *Homicide Studies*, 13, 325–335; cited in Bernat F. (2017), *op. cit.*, note 30.

<sup>37</sup> Bernat F. (2017), *op. cit.*, note 30.

<sup>38</sup> Bernat F. (2017), *op. cit.*, note 30.

<sup>39</sup> Nowrasteh A. (2018), *Criminal Immigrants in Texas: Illegal Immigrant Conviction and Arrest Rates for Homicide, Sex Crimes, Larceny, and Other Crimes*, Washington DC: CATO Institute, available at: <https://www.cato.org/publications/immigration-research-policy-brief/criminal-immigrants-texas-illegal-immigrant>.

<sup>40</sup> Gutierrez C. M., & Kirk D. S. (2015), *Silence speaks: The relationship between immigration and the underreporting of crime*, in *Crime & Delinquency*, Volume: 63 issue: 8, page(s): 926-950, cited in Bernat F. (2017), *op. cit.*, note 30.

<sup>41</sup> Reina A. S., Lohman, B. J. & Maldonado M. M. (2014), *op. cit.*, note 7; Messing J. T., Becerra D., Ward-Lasher A., & Androff D. K. (2015), *op. cit.*, note 7, cited in Bernat F. (2017), *op. cit.*, note 30.

<sup>42</sup> Gleeson S. (2010), *op. cit.*, note 7, cited in Bernat F. (2017), *op. cit.*, note 30.

(2011) included wage theft (41%), worksite abuse by employers (22%), robbery (10%), and assault (9%).<sup>43</sup> Previous studies have shed light on the particular vulnerability of Latino migrants to robberies.<sup>44</sup> The crimes observed by attorneys or prosecutors interviewed for this study who work specifically with irregular migrant victims include criminal activities of any kind, but the most recurrent include domestic violence, sexual abuses, violent assaults, murders, robberies, and fraud (both immigration and general fraud).<sup>45</sup>

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<sup>43</sup> Fussell, E. (2011), *op. cit.*, note 7.

<sup>44</sup> See Barranco R.E. Shihadeh E.S. (2015), *op. cit.*, note 9.

<sup>45</sup> Prosecutor, Manhattan District Attorney's Office, New York, interviewed by the author, 3 April 2019; Non-profit legal service provider (lawyer), Immigration Center for Women and Children, San Francisco, interviewed by the author, 14 June 2019.

## 2. Criminal and immigration law enforcement in the United States

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In order to understand safe reporting of crime by migrants with irregular status, a preliminary understanding of the functioning of law enforcement in the United States in relation to both immigration and criminal law is necessary. It is important to notice that this section addresses the organisation of law enforcement in the USA only briefly and with the aim of providing basic information on how the separation of enforcement powers in the USA opens the space for ‘firewalls’ between immigration authorities and the local police, an issue of central focus in section 4, which is dedicated to ‘sanctuary’ or ‘non-cooperation’ policies. ‘Firewalls’ are normally defined as measures that strictly separate immigration enforcement activities from public service provision, criminal justice or labour law enforcement, to ensure that irregular migrants are not discouraged from accessing essential services and/or reporting crime.<sup>46</sup> A necessary premise to understand firewalls between criminal and immigration law enforcement authorities in the United States is that US federalism (and its ‘police federalism’)<sup>47</sup> establishes a strict separation between federal authorities – which are responsible for immigration enforcement – and sub-federal law enforcement authorities; the latter are the overwhelming majority of criminal law enforcement authorities in the US, and those with whom victims would normally interface to report crime.

### 2.1 Criminal law enforcement

Two main features of the criminal justice system of the United States are its fragmentation between federal, state, county and municipal authorities, and the near to absolute independence of sub-federal law enforcement agencies from the federal government. Both the federal government and the states have their own criminal statutes, courts, prosecutors, and police forces, but it is at the state and local levels of government that the vast majority of criminal prosecution takes place.<sup>48</sup>

Therefore, criminal justice in the United States is not the monopoly of the central government. Instead, it is largely left to the legislative and executive powers of the 50 states. The Tenth Amendment to the Constitution of the United States indeed reserves to the states any power (including those in the realm of criminal justice) not delegated to the federal government nor prohibited to the states by the Constitution itself. As a consequence, the vast majority of crime is legislated at state level, and federal jurisdiction on criminal matters remains limited to specific instances, as in areas specifically reserved to the federal government by the US Constitution, or in relation to crime that occurred on federal property or across different states.<sup>49</sup> Concomitantly, the power to police and enforce the states’ criminal legislation is largely left to the states, and it is most

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<sup>46</sup> In Crépeau and Hastie (2015) firewalls are defined as measures ‘*designed to ensure, particularly, that immigration enforcement authorities are not able to access information concerning the immigration status of individuals who seek assistance or services at, for example, medical facilities, schools and other social service institutions. Relatedly, firewalls ensure that such institutions do not have an obligation to inquire or share information about their clients’ immigration status.*’ See Crépeau and Hastie (2015), *The case for ‘firewall’ protections for irregular migrants: safeguarding fundamental rights*, in *European Journal of Migration and Law*, vol. 17, Nos. 2-3, p. 165

<sup>47</sup> T. Gardner (2019) defines police federalism as ‘*the relationship between the federal government and state and local governments with respect to “police” (that is, sworn law enforcement personnel at the subfederal level of government). The concept also encompasses the relationship between states in regard to their respective internal police institutions*’; see Gardner T. (2019), *Immigrant Sanctuary as the Old Normal: A Brief History of Police Federalism*, in *Columbia Law Review*, Vol. 119:1, pp. 1-84, note 1.

<sup>48</sup> T. Gardner (2019) reports that in fiscal year 2015, 18.1 million criminal cases entered state court systems while only 54,928 criminal cases were filed in federal court; *ibidem*.

<sup>49</sup> The distinction between federal and state crime, and whether a crime should be prosecuted by a state or by federal authorities, is complex and related to numerous factors, which however, are beyond the scope of this report.

often delegated by the states to county and municipal police. In contrast to European systems of national governance, the national government of the USA does not have a police power *per se*, but only a 'commerce power' to legitimise the federal criminal justice framework.<sup>50</sup>

As a consequence, and in contrast to the majority of industrialised countries (including the European countries included in the 'safe reporting' project), the United States does not have a centralised national police force. It has instead a decentralised and fragmented law enforcement apparatus made up of about 18,000 different and largely independent law enforcement agencies.<sup>51</sup> These include federal, state, county and local agencies with varying legal and geographic jurisdictions, ranging from police departments with one police officer to the New York Police Department (NYPD), numbering approximately 36,000 officers and 19,000 civilian employees.<sup>52</sup> Sub-federal agencies constitute by far the largest majority of law enforcement actors, with federal law enforcement agents representing only about ten percent of law enforcement personnel nationally.<sup>53</sup> According to the most recent data collected by the Bureau of Justice Statistics, in 2008 only 24 federal agencies employed 250 or more full-time personnel with arrest and firearm authority in the United States. In that year, the largest federal law enforcement agency was US Customs and Border Protection (CBP) within the Department of Homeland Security (DHS), followed by the Federal Bureau of Prisons (FBP) and the Federal Bureau of Investigation (FBI) within the Department of Justice (DOJ). ICE, the agency in charge of immigration enforcement, was fourth.<sup>54</sup>

Local police, including in particular municipal police departments and county sheriffs, constitute by far the lion's share of police authorities in the USA, with about 12,695 general-purpose local and county police departments and 3,066 sheriff's offices.<sup>55</sup> Local police and sheriffs are normally the ones endowed with the broadest mandates, including the enforcement of criminal laws, the maintenance of order, patrolling, and day-to-day policing services. They are the most visible law enforcement agencies to the public, those with the most direct contact with the population, and the ones that would normally intervene at a crime scene or take a crime report.

Sub-federal law enforcement agencies are subject to different state, county, and city laws. Given their fragmentation and independence, there is no universal standard for the governance of police departments in the United States.<sup>56</sup> However, it is municipal and county governments that exercise the greatest control over police departments. Local governments appoint police officials, and a mayor, for instance, may dismiss a police chief. Local police departments are regulated, financed and controlled by local governments officials, and are thus subject to the direct control and influence of mayors and locally elected officials. Local political control has been a distinctive feature of policing in the United States, a traditional aspect of democratic self-government, and a reason for legitimacy of local law enforcement agencies. Because of these factors, which are well rooted in American culture, the current system of policing has resisted recommendations to reform it towards

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<sup>50</sup> Gardner (2019), *op. cit.*, note 47.

<sup>51</sup> Brian A. Reaves for the U.S. Department of Justice, Bureau of Justice Statistics (2012), *Federal Law Enforcement Officers, 2008*, in BJS Bulletin – June 2012, available at: [www.bjs.gov/content/pub/pdf/fleo08.pdf](http://www.bjs.gov/content/pub/pdf/fleo08.pdf).

<sup>52</sup> NYPD [online], *About NYPD*, available at: <https://www1.nyc.gov/site/nypd/about/about-nypd/about-nypd-landing.page> [last accessed September 2019].

<sup>53</sup> Gardner (2019), *op. cit.*, note 47, p. 19.

<sup>54</sup> Brian A. Reaves for the U.S. Department of Justice, Bureau of Justice Statistics (2012), *op. cit.*

<sup>55</sup> Hyland S. for the U.S. Department of Justice, Bureau of Justice Statistics (2018), *Full-Time Employees in Law Enforcement Agencies, 1997-2016*, BJS Statistical Brief NCJ 251762, available at: [www.bjs.gov/content/pub/pdf/ftelea9716.pdf](http://www.bjs.gov/content/pub/pdf/ftelea9716.pdf) [last accessed September 2019].

<sup>56</sup> U.S. Department of Justice – Community Relations Service (2015), *Community Relations Services Toolkit for Policing – Policing 101*, available from: [www.justice.gov/crs/file/836401/download](http://www.justice.gov/crs/file/836401/download).

a less fragmented system.<sup>57</sup> Local control over police is one of the elements – together with the near-to-none influence that can be played by the federal government (see below in this section) – that allow local police departments to adopt ‘non-cooperation policies’ (see below, section four).

## 2.2 Immigration law enforcement

In contrast to criminal justice, immigration law and its enforcement are a monopoly of the US Congress and the federal government.<sup>58</sup> The structure of immigration enforcement in the United States has evolved into a complex ‘machinery’ involving several federal actors.<sup>59</sup> The federal agency leading immigration enforcement is the US Department of Homeland Security (DHS), the US equivalent to a ministry of interior or home affairs. Created in 2003 in the aftermath of the 9/11 attacks, DHS has general responsibility over public security, including immigration, border security, customs, and anti-terrorism.<sup>60</sup> Immigration judges – who adjudicate removal cases and can order the removal of non-citizens – operate, instead, within the US Department of Justice’s (DOJ) Executive Office of Immigration Review (EOIR).<sup>61</sup>

Within DHS, three sub-agencies are mainly responsible for immigration enforcement:

- The *U.S. Immigration and Customs Enforcement* (ICE) is responsible for the interior (post-entry) enforcement of immigration laws. ICE officers conduct investigations related to immigration offenses (within its Homeland Security Investigations directorate of HSI), and manage the enforcement process, including the identification, arrest, detention and removal of migrants with irregular status (within the directorate of Enforcement and Removal Operations, or ERO).<sup>62</sup>
- The *U.S. Customs and Border Protection* (CBP) is mandated to enforce border security and immigration enforcement at the borders and legal ports of entry. CBP is the United States’ largest federal agency.<sup>63</sup>
- The *U.S. Citizenship and Immigration Services* (USCIS), the government agency responsible for administering lawful immigration services, including applications for asylum, work authorisations, and naturalisations.<sup>64</sup> While USCIS was not specifically designated to have an enforcement role, USCIS officers can initiate removal proceedings for *e.g.* certain asylum seekers upon the rejection of their asylum claim, or other individuals who have had their application for legal status denied.<sup>65</sup>

ICE, CBP and USCIS officials (and ‘delegated’ officials) can all issue ‘notices to appear’ (NTAs) initiating a removal proceeding. Most NTAs are issued by ICE.<sup>66</sup> Under the Immigration and Nationality Act (INA), recipients of an NTA are placed in formal removal proceedings during which

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<sup>57</sup> Skogan W. G., & Frydl K. (2004), *Fairness and Effectiveness in Policing: The Evidence*, Washington, D.C.: National Academies Press.

<sup>58</sup> Rodriguez C. (2017), *Enforcement, Integration, and the Future of Immigration Federalism*, in *JMHS*, Vol. 5 N. 2: 509-540.

<sup>59</sup> Meissner D., Kewin D. M., Chishti M., & Bergeron C. (2013), *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, Washington D.C.: MPI [www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery](http://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery).

<sup>60</sup> See DHS [online], *Mission*, at: [www.dhs.gov/mission](http://www.dhs.gov/mission) [last accessed September 2019].

<sup>61</sup> *Ibidem*.

<sup>62</sup> See ICE [online], *Who we are*, at: [www.ice.gov/about](http://www.ice.gov/about) [last accessed September 2019].

<sup>63</sup> See CBP [online], *About CBP*, at: [www.cbp.gov/about](http://www.cbp.gov/about) [last accessed September 2019].

<sup>64</sup> See USCIS [online], *About us*, at: [www.uscis.gov/aboutus](http://www.uscis.gov/aboutus) [last accessed September 2019].

<sup>65</sup> Meissner D., Kewin D. M., Chishti M., & Bergeron C. (2013), *op. cit.*, note 59.

<sup>66</sup> *Ibidem*.



they can contest the removal before an immigration judge, who eventually decides whether to issue a removal order. However, migrants in certain circumstances can also be removed simply through the issuance of an administrative removal order issued by DHS – thus without any court hearing.<sup>67</sup> DHS officials can indeed issue removal orders to certain categories of non-citizens, including certain foreigners subject to expedited removal, certain criminal foreigners without lawful permanent residency, foreigners who agreed to waive their rights to a hearing before an immigration judge, and people who had previously received a removal order.<sup>68</sup> Significantly, the number of migrants receiving administrative removal orders by DHS in the recent years has greatly exceeded the number of people removed following a court proceeding, a gap that has been widening to the point where DHS processes yearly more than twice as many orders as immigration judges.<sup>69</sup>

### 2.3 The autonomy of police authorities: The Tenth Amendment and the ‘anti-commandeering’ doctrine

As seen in the previous sections, the enforcement of immigration and criminal law are delegated, in the main,<sup>70</sup> to authorities operating at different levels of governance and with different mandates. This section will address the coordination of these authorities within the legal and constitutional framework of the United States, mainly in relation to the following questions: *can the federal government rely on the cooperation of local police to carry out its immigration enforcement mandate? Most importantly, can the federal government impose such cooperation on local police forces?* These questions have central importance for the issue of focus of this report, first and foremost because, if there was an obligation on local police to cooperate on immigration enforcement, that would translate for victims with irregular migration status into a high risk of being reported to ICE officers when interacting with the police. If that was the case, the federal government might, for instance, impose on local police officers an obligation to inquire about the immigration status of the people they interact with, including victims, and to report those found with irregular status to ICE officers. The issue assumes particular relevance also from the government perspective. As we have seen, federal law enforcement officials make up only about 10% of the law enforcement forces in the United States. Following significant increases of federal resources dedicated to immigration enforcement, ICE can count on about 6,000 enforcement and deportation officers,<sup>71</sup> and about 8,500 special agents and intelligence analysts in its investigations directorate.<sup>72</sup> Yet these numbers are extremely low when compared to the approximately 765,000 sworn officers of sub-federal law enforcement agencies.<sup>73</sup> It is therefore easy to understand how great an interest the federal government might have in using the workforce of state and local police to accomplish its immigration enforcement mandate.

The answer is that, while the federal government and federal agents may *request* the cooperation of local police departments – and has intensively done so by creating federal programmes offering

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<sup>67</sup> Federal judges, too, may issue removal orders when they sentence certain foreigners for federal crimes. *Ibidem*.

<sup>68</sup> *Ibidem*.

<sup>69</sup> As reported by the Migration Policy Institute (MPI) in financial year 2011, for instance, DHS processed 391,953 orders, while immigration judges only processed 161,354. *Ibidem*, p. 121.

<sup>70</sup> Apart from criminal investigations operated by federal authorities, as *e.g.* the FBI.

<sup>71</sup> American Immigration Council (2014), Fact sheet – The Growth of the U.S. Deportation Machine, Washington DC: AIC, available at: [www.americanimmigrationcouncil.org/research/growth-us-deportation-machine](http://www.americanimmigrationcouncil.org/research/growth-us-deportation-machine).

<sup>72</sup> See USCIS [online], *About us*, available at: [www.uscis.gov/aboutus](http://www.uscis.gov/aboutus) [last accessed September 2019].

<sup>73</sup> Banks D, Hendrix J, Hickman M., & Kyckelhahn for the U.S. Department of Justice – Bureau of Justice Statistics (2016), National Sources of Law Enforcement Employment Data, available at: [www.bjs.gov/content/pub/pdf/nsleed.pdf](http://www.bjs.gov/content/pub/pdf/nsleed.pdf).

a framework for cooperation – it *cannot impose* on local police departments their cooperation for immigration enforcement purposes.

Indeed, there is no obligation for local police to cooperate with federal immigration authorities, and neither can this obligation be imposed by federal statutes for reasons that, again, rest with the particular form of federalism adopted by the US Constitution. Indeed, longstanding jurisprudence of the US Supreme Court has established the '*anti-commandeering doctrine*', which clarifies that the Tenth Amendment of the U.S. Constitution prevents the US Congress and the federal government from 'commandeering' (compelling) states and local governments, including their law enforcement agencies, to enact federal regulatory programmes.<sup>74</sup> In particular, the anti-commandeering doctrine and the Tenth Amendment prevent federal statutes from requiring states and local governments (as subdivisions of the state) to impose the active cooperation of their officials with the federal government. Equally, federal government officials cannot directly require state and local officials to take *affirmative actions*<sup>75</sup> to enforce federal regulatory programmes, without the consent of the state or local government,<sup>76</sup> as this would be incompatible with the system of dual sovereignty established by the US Constitution.

This particular aspect of the US constitutional setting is one of the legal elements allowing many local governments and/or their police departments officially to *refuse* to cooperate with immigration enforcement authorities, for reasons that will be explored in the section dedicated to sanctuary cities and local non-cooperation policies, including an interest of local police in gaining and keeping the trust of immigrant communities and immigrant victims of crime.

It must be noted that – while permissible under the constitutional framework presented above – the decision of some local authorities to refuse to cooperate with federal immigration authorities is, politically, a highly controversial issue. As we shall see in section four, the decisions of many local authorities to refuse to assist in enforcing immigration law are mainly driven by the need to ensure trust between local police officers and migrant communities, thus ensuring reporting of crime and public safety. On the other side, opponents to immigration and to local 'non-cooperation' policies claim that these policies are anti-federal, shield 'criminal aliens',<sup>77</sup> and threaten 'law and order', as they do not support the enforcement mandate of federal authorities over immigration.<sup>78</sup> The heated political debate has also been fed by misperceptions of what 'sanctuary' policies really are.<sup>79</sup>

Successive federal governments have actively sought the cooperation of local law enforcement agencies in the enforcement of immigration law. As seen, obtaining such cooperation would

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<sup>74</sup> See *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

<sup>75</sup> Inactions, i.e. prohibition of actions, may be imposed. Under the Supremacy Clause and the 'doctrine of preemption', federal law *preempts* state law when the laws conflict, and federal courts may require a state to stop a certain behaviour if it interferes with, or is in conflict with, federal law. See Coan A. B. (2015), *Commandeering, Coercion, and the Deep Structure of American Federalism*, in *Boston University Law Review*, Vol. 95:1, pp. 1-34.

<sup>76</sup> In particular, as reconstructed by Kittrie (2006), '*the anti-commandeering doctrine seems to preclude federal statutes that: (1) place requirements exclusively on state or local officials, rather than being generally applicable both to private parties and to state or local officials; (2) directly compel state or local officials, rather than merely conditioning state or local receipt of federal money on certain actions; (3) commandeer legislative or executive rather than judicial branch functions; (4) seek to control or influence the manner in which the states regulate private parties or "require state officials to assist in the enforcement of federal statutes regulating private individuals," rather than regulating state activities; (5) impose a requirement of affirmative action rather than a requirement of inaction; and (6) do not merely "regulate[] the States as the owners of databases."*' Kittrie O. F. (2006), *op. cit.*, note 7.

<sup>77</sup> Center for Immigration Studies (7 November 2018), *Sanctuary Cities* [online], available at: <https://cis.org/Fact-Sheet/Sanctuary-Cities>

<sup>78</sup> Warren C. C. (2017), *op. cit.*, note 16.

<sup>79</sup> *Ibidem*.

significantly increase the immigration enforcement workforce of the country, as local officers significantly outnumber federal officers mandated to enforce immigration law. Over the years, the federal government has mainly sought such cooperation by introducing federal legislation allowing cooperation agreements between DHS and state or local enforcement agencies. These agreements are possible under the framework of the '287(g) programme', which was introduced in 1996 by the Immigration Reform and Immigrant Responsibility Act (IRIRA), with the aim of offering a framework for partnerships between DHS and sub-federal authorities to effectively deputise local officers to conduct activities of immigration enforcement.<sup>80</sup> However, these agreements must be optional, based on a voluntary decision of local agencies, and cannot be legally imposed by federal authorities for the reasons explained above. In practice, these partnership agreements tend not to be very common. For instance, a study found that, in 2017, of 3,015 scrutinised counties only 56 had active 287(g) agreements in place. The same study found instead that many more counties decided to refuse to cooperate in immigration enforcement and instead adopt 'sanctuary policies'.<sup>81</sup>

While the refusal to cooperate has frustrated different federal administrations, it is under Trump's government that federal authorities have taken the strongest stand against 'sanctuary cities', with President Trump promising a 'crackdown' on sanctuary and threatening to cut federal funds to cities refusing to cooperate with ICE. However, such federal attempts have not succeeded in stopping 'non-cooperation' policies, as the autonomy of local authorities vis-à-vis federal commandeering has been reclaimed by several courts.<sup>82</sup>

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<sup>80</sup> Meissner D., Kewin D. M., Chishti M., & Bergeron C. (2013), *op. cit.*, note 59.

<sup>81</sup> Immigrant Legal Resource Center (2018), *The Rise of Sanctuary*, San Francisco: ILRC, available at: [www.ilrc.org/sites/default/files/resources/rise\\_of\\_sanctuary-lg-20180201.pdf](http://www.ilrc.org/sites/default/files/resources/rise_of_sanctuary-lg-20180201.pdf).

<sup>82</sup> Pierce A., Bolter J., Selee A. (2018), *Trump's First Year on Immigration Policy: Rhetoric vs. Reality*, p. 12-14, Washington DC: MPI, available at: [www.migrationpolicy.org/research/trump-first-year-immigration-policy-rhetoric-vs-reality](http://www.migrationpolicy.org/research/trump-first-year-immigration-policy-rhetoric-vs-reality).

### 3. Federal measures to enable ‘safe reporting’ of crime by victims and witnesses with irregular migration status

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#### 3.1 Special visas for victims and witnesses of crime with irregular migration status

The US Congress and the federal government have not remained insensitive to the problems that may derive from the fears of crime victims with irregular immigration status. For this reason, Congress has passed federal laws granting the issuance of special visas (a temporary ‘*non-immigrant status*’) for victims of trafficking (‘T visa’) and of other criminal activities (‘U visa’), as well as for certain crime informants (‘S visa’), thus providing immigration benefits intended to nullify the fears of removal and encourage reporting. Similarly, other immigration benefits have been introduced for victims of violence with an immigration status tied to a relationship with their abusers (‘VAWA petitions’). Rather than providing for a ‘firewall’, these measures require communication with immigration authorities. However, federal legislation established the prioritisation of humanitarian relief for victims and their cooperation with authorities in the enforcement of criminal law over the removal and deportation of victims and witnesses with irregular status. As acknowledged by DHS, Congress created special visas for victims:

*‘...out of recognition that victims without legal status may otherwise be reluctant to help in the investigation or prosecution of criminal activity. Immigrants, especially women and children, can be particularly vulnerable to criminal activity like human trafficking, domestic violence, sexual assault, stalking, and other crimes due to a variety of factors, including but not limited to: language barriers, separation from family and friends, lack of understanding of U.S. laws, fear of deportation, and cultural differences’.*<sup>83</sup>

In particular, the T and U visas were first introduced in 2000 with the Victims of Trafficking and Violence Prevention Act (VTVPA). As one of the aims of the ‘safe reporting’ project is to assess broadly the political replicability of measures allowing safe reporting of crime across different national contexts, it is worth noting that this legislation has been amended multiple times by different majorities in Congress, but that the rules concerning these visas have constantly received wide *bipartisan* support of both Democrats and Republicans.<sup>84</sup> The rationales for these measures have been able to obtain support from forces across the political spectrum. Even under the federal administration of Donald J. Trump – who has strongly prioritised restricting immigration and has taken a number of actions to restrict existing immigration programmes, including asylum protections<sup>85</sup> – the U and T visa programmes have not been amended, nor have they been a target of the administration’s crackdown on immigration programmes.<sup>86</sup> The visas have indeed a dual purpose: strengthening the abilities of law enforcement agencies to investigate and prosecute serious crimes (including trafficking), thus improving public safety, and offering protection and humanitarian relief from deportation to migrant victims. Accordingly, the law aimed to strengthen relations between law enforcement and immigrant communities.<sup>87</sup> The protection and law

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<sup>83</sup> Department of Homeland Security (2016), *U and T Visa Law Enforcement Resource Guide*, p. 4 and 9, available at: [https://www.dhs.gov/sites/default/files/publications/U-and-T-Visa-Law-Enforcement-Resource%20Guide\\_1.4.16.pdf](https://www.dhs.gov/sites/default/files/publications/U-and-T-Visa-Law-Enforcement-Resource%20Guide_1.4.16.pdf).

<sup>84</sup> Cade J. A., Flanagan M. L. (2017), *Five Steps to a Better U: Improving the Crime Fighting Visa*, 21 Rich. Pub. Int. L. Rev. 85.

<sup>85</sup> Pierce A., Bolter J., Selee A. (2018), *op. cit.*, p. 12-14.

<sup>86</sup> Non-profit legal service provider (lawyer), Immigration Center for Women and Children, San Francisco, interviewed by the author, 14 June 2019.

<sup>87</sup> *Ibidem*. See also Tahja L. Jensen (2009), *U Visa Certification: Overcoming the Local Hurdle in Response to a Federal Statute*, 45 Idaho L. Rev. 691; Department of Homeland Security (2016), *U and T Visa Law Enforcement Resource*

enforcement components have therefore been able to attract political support across the spectrum of US political forces.

### 3.2 The U visa for victims of certain crimes

The 'U status', commonly known as 'U visa', is a lawful status accorded to victims of certain crimes who are (or are likely to be) cooperative with law enforcement authorities. U visas provide victims with a *non-immigrant* (i.e. non-permanent) *status* for four years, authorisation to work, and the possibility of obtaining 'derivative' U status for certain immediate family members of the victims. In addition, after three years of continuous lawful permanence, U visa-holders can apply for permanent residency (i.e. a green card).

The U visa is the widest recognition at federal level of the need to provide 'safe reporting' mechanisms for victims with irregular migration status, because while there are limitations to the number of visas provided per year, the breadth of qualifying crimes is relatively extensive and comprehensive. U visas can indeed be offered to victims of any of one or more of the following criminal activities in violation of Federal, State, or local legislation:<sup>88</sup>

List of qualifying crimes for a U visa		
• rape	• female genital mutilation	• false imprisonment
• torture	• being held hostage	• blackmail
• trafficking	• peonage	• extortion
• incest	• involuntary servitude	• manslaughter
• domestic violence	• slave trade	• murder
• sexual assault	• kidnapping	• felonious assault
• abusive sexual contact	• abduction	• witness tampering
• prostitution	• unlawful criminal restraint	• obstruction of justice
• sexual exploitation		• perjury <sup>89</sup>

In addition, 'similar activities' (i.e. criminal offenses in which the nature and elements of the offenses are substantially similar to the statutorily-enumerated list of criminal activities) can also be considered as qualifying crimes, as well as the attempt, conspiracy, or solicitation to commit any of the above-mentioned crimes.<sup>90</sup>

The VTVPA introduced the U visa with particular consideration for the situations of migrant victims of domestic violence who are not the partners of US citizens (as explained below, other protections had been in place since 1994 for partners of US citizens). Indeed, victims of domestic violence, sexual assault and human trafficking comprise roughly 75 percent of U visa holders.<sup>91</sup> These victims are

Guide, available at: [https://www.dhs.gov/sites/default/files/publications/U-and-T-Visa-Law-Enforcement-Resource%20Guide\\_1.4.16.pdf](https://www.dhs.gov/sites/default/files/publications/U-and-T-Visa-Law-Enforcement-Resource%20Guide_1.4.16.pdf).

<sup>88</sup> The crime must have occurred in the United States, or otherwise in violation of US law.

<sup>89</sup> 8 CFR § 214.14.

<sup>90</sup> *Ibidem*.

<sup>91</sup> Orloff L. E., & Feldman P. E., for The National Immigrant Women's Advocacy Project and Legal Momentum, The Women's Legal Defense and Educational Fund (2011), '*National Survey on Types of Criminal Activities Experienced by U-Visa Recipients*', available at: <http://library.niwap.org/wp-content/uploads/2015/National-Survey-on-Types-of-Criminal-Activities-Updated2011.pdf>; cited in Police Executive Research Forum (2017), *U Visas and the Role of Local Police In Preventing and Investigating Crimes Against Immigrants*, in *Newsletter of the police executive research*

particularly vulnerable to victimisation while in an irregular status, because abusers often use the threat of denunciation to immigration authorities as a tool to control victims and discourage them from reporting the crime. Previous studies found, indeed, that more than a quarter of U Visa applicants had been at some point reported to immigration authorities by their abusers.<sup>92</sup>

In addition to being the victim of a qualifying crime, victims are eligible for U status if they:

- suffered *substantial physical or mental abuse*<sup>93</sup> as a result of having been a victim of criminal activity;
- have information about the criminal activity; and
- Were *helpful, are being helpful, or are likely to be helpful* to law enforcement, prosecutors, judges, or other officials in the detection, investigation, prosecution, conviction, or sentencing of the criminal activity.<sup>94</sup>

This last requirement, in particular, reflects the law enforcement component of the U visa. In particular, to receive U status a victim must obtain a *certification* from a law enforcement authority attesting the victim's helpfulness. This certification (called a I-918 Supplemental B form) can be released by a 'certifying official' within a federal, state, or local law enforcement agency, or by the prosecutor, judge, or other authority with responsibility for investigating or prosecuting the qualifying criminal activity.<sup>95</sup> This definition includes a number of different actors, including for example, the department of labour, child protective services, the Equal Employment Opportunity Commission, and (as we shall see below) a variety of local agencies. The law enforcement certification may make the U visa resemble the special visas for victims of crime released in European countries, which normally are requested and/or issued by law enforcement authorities for victims who are cooperative and needed for investigation purposes.<sup>96</sup>

In reality, however, the U visa is significantly different (and as we shall see the T visa even more so), in that the process to obtain this visa is initiated and led by the victims themselves (normally with the support of attorneys and non-profit organisations), and not by the officials interested in offering the visa as a law enforcement tool (which may often be the case in European models). In the US model, the involvement of law enforcement officials is necessary (as obtaining the certification is required for a U visa), but limited to certifying the helpfulness of the victim when requested. The final decision on whether to issue the U visa then rests with USCIS, which decides on the basis of an application and the evidence provided by the victim to prove that the above mentioned eligibility requirements have been met. The difference in the procedure is not irrelevant – especially when

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*forum*, Vol. 31:2, note 11, available at:

[www.policeforum.org/assets/docs/Subject\\_to\\_Debate/Debate2017/debate\\_2017\\_junaug.pdf](http://www.policeforum.org/assets/docs/Subject_to_Debate/Debate2017/debate_2017_junaug.pdf).

<sup>92</sup> Szabo E. & Orloff L. E. (2014), *The Central Role of Victim Advocacy for Victim Safety While Victims' Immigration Cases are Pending*, The National Immigrant Women's Advocacy Project, June 2014; cited in Police Executive Research Forum (2017), *U Visas and the Role of Local Police In Preventing and Investigating Crimes Against Immigrants*, in *Newsletter of the police executive research forum*, Vol. 31:2, note 11, available at: [www.policeforum.org/assets/docs/Subject\\_to\\_Debate/Debate2017/debate\\_2017\\_junaug.pdf](http://www.policeforum.org/assets/docs/Subject_to_Debate/Debate2017/debate_2017_junaug.pdf).

<sup>93</sup> Defined as '*injury or harm to the victim's physical person, or harm to or impairment of the emotional or psychological soundness of the victim*'.

<sup>94</sup> 8 CFR § 214.14.(b).

<sup>95</sup> Cade J. A., Flanagan M. L. (2017), *op. cit.*, note 84.

<sup>96</sup> Van Den Durpel A. (2019), *Safe reporting of crime for migrants with irregular status in Belgium*, COMPAS: Oxford; Taverriti S. B. (2019), *Safe reporting of crime for victims and witnesses with irregular migration status in Italy*, COMPAS: Oxford; González Beilfuss M. (2019), *Safe reporting of crime for migrants with irregular status in Spain*, COMPAS: Oxford; Timmerman R., Leerkes A., & Staring R. (2019), *Safe reporting of crime for migrants with irregular status in the Netherlands*, COMPAS: Oxford.

analysed under the lens of ‘safe reporting’ – because in European models, generally, a special permit can be offered by law enforcement officials only *after* the latter have discovered the crime. Instead, in the USA, victims can apply themselves. This possibility, and the hope of obtaining a lawful status, can thus encourage many victims to come out of the shadows and report criminal activities that law enforcement officials may not have been aware of otherwise. In this way, the U visa offers a strong incentive for the reporting of crime, and has fostered the creation of a net of non-profit organisations which encourage eligible victims to report crime, provide legal support throughout the procedure to obtain U status, and often act as partners of police officials and as bridges between immigrant victims and law enforcement authorities.<sup>97</sup>

The expansive nature of the U visa, and its use as a law enforcement tool, is also shown by the fact that it can be petitioned by ‘indirect victims’, which include witnesses of a crime – but only as long as they meet all the eligibility requirements, including the suffering of substantial harm. One example is, for instance, that of a pregnant woman who has a miscarriage as a consequence of the trauma caused by witnessing a qualifying crime.<sup>98</sup> In addition, indirect victims could be qualifying family members of the direct victim, including for instance parents of victims who were under 21 years old when they suffered the crime; or spouses of victims of manslaughter; or spouses of incompetent or incapacitated victims. In all these cases, while the main victim may not be able to cooperate with investigations or prosecutions (because they were killed or incapacitated, or too young), these indirect victims are allowed U status in order to cooperate with prosecutions on behalf of the main victim. Interviews with attorneys assisting migrants in obtaining U visas confirmed, for instance, that a frequent situation where U status for indirect victims proves crucial for prosecutions is that of abuses on children – in most cases US citizens – which can only be prosecuted if their parents (in an irregular status) are enabled to report the crime and cooperate in the investigations on behalf of their children through the incentives given by a U visa.<sup>99</sup>

However, while with the VTPA Act Congress acknowledged the need to encourage victims to come forward by offering a lawful status, it also decided to set a limit on the issuance of such visas to 10,000 a year for main applicants (the cap does not apply to derivative visas).<sup>100</sup> That number, as we shall see below, proves inadequate vis-à-vis the number of victims and the potential for cooperation from them.

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<sup>97</sup> For example, the Immigration Center for Women and Children (ICWC) is a non-profit legal organisation whose mission is to provide immigration legal services to migrant victims of crime. ICWC was created in California following the passage of the VTPA Act which introduced the U and T visas. ICWC partners with the City and County of San Francisco and with the officials of the San Francisco Police Department (SFPD) responsible for issuing law enforcement certifications. ICWC attorneys often encourage their clients to report the crime, and connects them with the relevant SFPD officer, so that an application for a U visa can be initiated; Non-profit legal service provider (lawyer), Immigration Center for Women and Children, San Francisco, interviewed by the author, 14 June 2019.

<sup>98</sup> Prosecutor, Manhattan District Attorney’s Office, New York, interviewed by the author, 3 April 2019. Non-profit legal service provider (lawyer), Immigration Center for Women and Children, San Francisco, interviewed by the author, 14 June 2019.

<sup>99</sup> Non-profit legal service provider (lawyer), Immigration Center for Women and Children, San Francisco, interviewed by the author, 14 June 2019.

<sup>100</sup> After the annual cap is reached USCIS continues to adjudicate applications, but cases that qualify only receive a ‘conditional approval’. This does not confer any *strictu sensu* immigration status, but only a ‘deferred action’ on removal until a U visa becomes available in the following years. Applicants who obtain deferred action also receive work authorisation; see Department of Homeland Security (2016), *op. cit.*, p. 5.

### 3.3 The T visa for victims of human trafficking

The T visa was also adopted in the VTVPA in 2000 under the same rationale as the U visa: a recognition of the need to offer immigration benefits to victims of trafficking with irregular migration status, in order to overcome reluctance to report, provide humanitarian relief to victims, and strengthen relations between law enforcement and immigrant communities. The T status was created in particular for victims of severe forms of human trafficking, out of the recognition that immigrants are particularly vulnerable to this heinous crime.

The T visa resembles the U visa in that it also offers a temporary *non-immigrant status* for four years, work authorisation, the possibility to obtain derivative status for certain family members, and the possibility of adjusting status to permanent residence and obtaining a green card after three years of stay in the USA, or upon completion of the investigations or prosecution, whichever occurs earlier.<sup>101</sup>

Eligibility for T status requires that the victim:

- Is or was a victim of a severe form of trafficking in persons, including either sex trafficking<sup>102</sup> or labour trafficking,<sup>103</sup> as defined by federal law; and
- Is in the United States, American Samoa, the Commonwealth of the Northern Mariana Islands; or at a US port of entry on account of such trafficking (including a foreigner being allowed entry to the US to participate in investigations and judicial processes concerning the trafficking); and
- Complies with any reasonable request from a law enforcement agency for assistance in the investigation or prosecution of human trafficking; and
- Would suffer extreme hardship involving unusual and severe harm if removed from the United States.<sup>104</sup>

As in the case of U status, T status includes a requirement that reflects its nature as a tool of law enforcement, namely the need to comply with any 'reasonable' requests for assistance by law enforcement authorities. Such assistance is an ongoing duty. Assistance, however, is not required from victims under the age of 18, or victims who suffered a physical or psychological trauma preventing them from complying with a reasonable request.

The same law enforcement agencies authorised to issue a U visa certifications can also issue a *T visa declaration* (Form I-914B) to attest that the person is or was the victim of a severe form of trafficking in persons and that they comply with reasonable requests of assistance in the investigation or prosecution. T visa declarations are useful pieces of evidence to prove the reasonable assistance requirement. However, in contrast to U visa certifications, T visa declarations are not a required element of an application to obtain a T visa.

In addition, for T status, the application for the visa is initiated by the victims themselves who have to prove to USCIS the subsistence of the eligibility requirement, and USCIS retains the exclusive

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<sup>101</sup> *Ibidem*.

<sup>102</sup> Sex Trafficking, as defined in the United States under 22 U.S.C. § 7102(10), occurs if someone recruits, harbors, transports, provides, solicits, patronizes, or obtains a person for the purpose of a commercial sex act, where the commercial sex act is induced by force, fraud, or coercion, or the person being induced to perform such act is under 18 years of age.

<sup>103</sup> Labour Trafficking, as defined in the United States under 22 U.S.C. § 7102(9), occurs if someone recruits, harbors, transports, provides, or obtains a person for labour or services through the use of force, fraud, or coercion for the purpose of involuntary servitude, peonage, debt bondage, or slavery.

<sup>104</sup> 8 U.S.C. § 1101 (a)(15)(T).



responsibility for issuing a T visa. Therefore, when a law enforcement declaration is lacking (because the victim did not request one or because law enforcement authorities did not issue any), T visa applicants can prove their compliance with the assistance requirement using other forms of credible evidence. These may include personal statements explaining the lack of a law enforcement declaration, and documenting any assistance provided and the applicant's good-faith attempts to obtain a declaration.<sup>105</sup> Ultimately, it is USCIS' responsibility to determine the 'reasonableness' of any requests (and therefore any refusal to provide assistance), by taking into consideration several factors, including '*general law enforcement and prosecutorial practices; the nature of the victimization; and the specific circumstances of the victim, including fear, severe traumatization, and the age and maturity of young victims*'.<sup>106</sup> The possibility of replacing a declaration from law enforcement with alternative evidence, together with the possibility for the victims independently to initiate a T visa application, may help overcome the 'geographic roulette' effect (see below) that affects the U visa (and similar visas in Europe) created by the reluctance of certain local law enforcement officials to sign a certification (or in certain European countries, sponsor a visa).

An annual cap is set for T visas too, but considering the smaller number of potential victims, this is set to only 5,000 a year for main applicants. This number has, however, never been reached.<sup>107</sup>

### 3.4 Limitations and successes in the implementation of U and T visas

The U and T visas have offered to thousands of migrant victims of crime in the United States a lifesaving path to protection and crime reporting. In the period of the fiscal year 2009 to March 2019, around 85,000 U visas for main applicants were granted,<sup>108</sup> while only around 6,500 T visas for main applicants have been granted from 2008 to the first quarter of 2019.<sup>109</sup> One reason of the success of the U visa was already highlighted above, i.e. the possibility for victims (and their attorneys) to apply directly to USCIS and follow through the procedure to obtain the visas, rather than leaving it to authorities as a mere tool of law enforcement. This key feature of the procedure (together with the comprehensive list of crimes qualifying for a U status) may explain the significant numbers of requests for these special visas, compared to the low numbers in those European countries where equivalent visas are available.<sup>110</sup>

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<sup>105</sup> Department of Homeland Security (2016), *op. cit.*, p. 11.

<sup>106</sup> *Ibidem*, p. 12.

<sup>107</sup> *Ibidem*, pp. 9-10.

<sup>108</sup> USCIS (26 June 2019), *Form I-918, Petition for U Nonimmigrant Status, by Fiscal Year, Quarter, and Case Status (Fiscal Year 2019, 2nd Quarter, Jan. 1-Mar. 31, 2019)*, available at:

[https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u\\_visastatistics\\_fy2019\\_qtr2.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2019_qtr2.pdf).

<sup>109</sup> USCIS (26 June 2019), *Form I-914, Application for T Nonimmigrant Status by Fiscal Year, Quarter, and Case Status (Fiscal Year 2019, 2nd Quarter, Jan. 1-Mar. 31, 2019)*, available at:

[https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I914t\\_visastatistics\\_fy2019\\_qtr2.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I914t_visastatistics_fy2019_qtr2.pdf).

<sup>110</sup> See FRA (2015), *Severe Labour Exploitation: Workers Moving Within or Into the European Union – States' Obligations and Victims' Rights*, Luxembourg: Publications Office of the European Union, available at:

<http://fra.europa.eu/en/publication/2015/severe-labour-exploitationworkers-moving-within-or-european-union>.

Approval rates for U visas have constantly been over 80%,<sup>111</sup> and an average of 75% for T visas over the last five years<sup>112</sup> – an element testifying to the genuine nature of the vast majority of applications, which counteracts concerns over the possibility of fraud and abuses of the U visa programme. Risks of abuses are, in any case, prevented from the early involvement of law enforcement agencies (through certifications and declarations), and are finally averted by USCIS' scrutiny of each application.

However, the implementation of the U visa in practice offers lessons to learn in relation to its flaws. The first limitation in the implementation of the U visa is related to the imbalance between the number of applications and the limited availability of visas, as imposed by the annual cap of 10,000 per year. The cap (and a significant delay between the adoption of the VTPA in 2000 and the actual start of processing of the applications in 2009) provoked the creation of an immense backlog of pending applications. Indeed, as of March 2019, almost 135,000 applications for a U visa for main applicants are pending.<sup>113</sup>

The backlog is a great limitation to the functioning of the U visa programme, as it risks undermining its main purpose, i.e. making victims feel safe in reporting crime and providing them with immigration benefits to encourage cooperation. Indeed, U visa applicants would now need to wait several years before their applications are even taken into consideration. Considering USCIS has adjudicated on average about 12,000 applications<sup>114</sup> from main applicants in the last three years, it would now take more than 11 years for USCIS to clear the current backlog if the annual cap is not increased<sup>115</sup> and USCIS' adjudication pace is not improved. While USCIS has the power to grant conditional approvals beyond the annual cap and grant 'deferred action' from removal for those conditionally approved, reportedly the agency has not prioritised resources to this end and the backlog has been increasing over the years.<sup>116</sup> Therefore, a large majority of applicants may receive no immigration benefits for several years. Attorneys interviewed for this study reported that their clients currently obtaining conditional approvals, in 2019, are those who filed their applications

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<sup>111</sup> Percentage calculated by the author from data of USCIS (26 June 2019), *Form I-918, Petition for U Nonimmigrant Status, by Fiscal Year, Quarter, and Case Status (Fiscal Year 2019, 2nd Quarter, Jan. 1-Mar. 31, 2019)*, available at: [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u\\_visastatistics\\_fy2019\\_qtr2.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2019_qtr2.pdf).

<sup>112</sup> Percentage calculated by the author from data of USCIS (26 June 2019), *Form I-914, Application for T Nonimmigrant Status by Fiscal Year, Quarter, and Case Status (Fiscal Year 2019, 2nd Quarter, Jan. 1-Mar. 31, 2019)*, available at: [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I914t\\_visastatistics\\_fy2019\\_qtr2.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I914t_visastatistics_fy2019_qtr2.pdf).

<sup>113</sup> USCIS (26 June 2019), *Form I-918, Petition for U Nonimmigrant Status, by Fiscal Year, Quarter, and Case Status (Fiscal Year 2019, 2nd Quarter, Jan. 1-Mar. 31, 2019)*, available at: [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u\\_visastatistics\\_fy2019\\_qtr2.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2019_qtr2.pdf).

<sup>114</sup> This average was calculated on the basis of data from USCIS (26 June 2019), *Form I-918, Petition for U Nonimmigrant Status, by Fiscal Year, Quarter, and Case Status (Fiscal Year 2019, 2nd Quarter, Jan. 1-Mar. 31, 2019)*, available at: [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u\\_visastatistics\\_fy2019\\_qtr2.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2019_qtr2.pdf).

<sup>115</sup> Cade and Flanagan in 2017 found that a reasonable annual cap would be 34,000 visas. This number was calculated by subtracting from the number of applications filed by primary victims per year the average number of applications denied per year (averages calculated on applications filed and denied in 2016 and 2017); see Cade J. A., Flanagan M. L. (2017), *op. cit.*, note 84.

<sup>116</sup> Cade J. A., Flanagan M. L. (2017), *op. cit.*, note 84.

about 4-5 years ago.<sup>117</sup> During this waiting period, applicants are exposed to immigration enforcement as if they had never filed an application for a U visa – no matter their eligibility – and this could lead them to stop cooperating and go back into the shadows of society. The backlog thus jeopardises the core goal of the U visa programme, i.e. the possibility of victims to be relieved from immigration enforcement when reporting crime and cooperating with law enforcement. Particularly in a moment of increased focus on immigration enforcement, victims may decide not to come forward and share their details with federal authorities, knowing that relief from enforcement may only come several years later.<sup>118</sup>

Another limitation in the implementation of the U visa is the ‘geographic roulette’<sup>119</sup> determined by whether local law enforcement agencies are willing or not to issue the required law enforcement certification. Law enforcement officers are not obliged to issue these certifications and nothing prevents them from using their discretion to decide not to issue a certification, even for the most cooperative victims whose eligibility is clear. This has led to a geographically inconsistent implementation of the U visa program, with some local police departments very engaged in facilitating the issuance of certifications, and police departments in other areas unaware of, untrained in, or simply unwilling to issue any certifications, thus effectively preventing many victims from accessing the protections offered by the U visa.<sup>120</sup> Previous studies have indeed highlighted the lack of coordinated training and oversight from federal authorities regarding the role of law enforcement agencies on the U visa certification process, as well as the lack of an appellate review of certification refusals.<sup>121</sup> The current legislation does not prevent local law enforcement officials from, for instance, imposing on victims requirements not provided in federal law, or simply from refusing to sign a certification because of personal opinions on immigration.<sup>122</sup> Some of these shortcomings have been addressed locally in some municipalities with an interest in enabling their immigrant communities to access the local police forces (see section four). However, these efforts are limited to certain states or cities.

It is interesting to note that this geographic roulette is also a problem in the European Union (EU), both across different countries in relation to visas provided by EU law,<sup>123</sup> and also within different areas of the same country, where the use of a protective visa is left to the absolute discretion of a local law enforcement agency.<sup>124</sup> In the United States, however, the possibility of receiving the U visa certification from a multitude of agencies (and not simply from the police department) may mitigate the problem. A possible solution to this problem may be offered by the example of the T visa, for which the law establishes the involvement of law enforcement officials through the issuance of a declaration to attest the victim’s cooperation, but also provides victims with alternatives to prove their cooperation in the lack of such a declaration.

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<sup>117</sup> Non-profit legal service provider (lawyer), Immigration Law Project – Safe Horizon, New York, interviewed by the author, 2 April 2019; Non-profit legal service provider (lawyer), Immigration Center for Women and Children, San Francisco, interviewed by the author, 14 June 2019; Non-profit legal service provider (lawyer), Domestic Violence Project (DVP) of the Urban Justice Center (UJC), New York, interviewed by the author, 4 April 2019.

<sup>118</sup> *Ibidem*.

<sup>119</sup> Cade J. A., Flanagan M. L. (2017), *op. cit.*, note 84.

<sup>120</sup> *Ibidem*.

<sup>121</sup> *Ibidem*. However, DHS in 2016 has published a Resource Guide on U and T Visas for Federal, State, Local, Tribal and Territorial Law Enforcement, Prosecutors, Judges, and Other Government Agencies, available at:

[https://www.dhs.gov/sites/default/files/publications/U-and-T-Visa-Law-Enforcement-Resource%20Guide\\_1.4.16.pdf](https://www.dhs.gov/sites/default/files/publications/U-and-T-Visa-Law-Enforcement-Resource%20Guide_1.4.16.pdf).

<sup>122</sup> Cade J. A., Flanagan M. L. (2017), *op. cit.*, note 84.

<sup>123</sup> See FRA (2015), *op. cit.*, note 110.

<sup>124</sup> Taverriti S. (2019), *op. cit.*, note 15.

### 3.5 The S visa for criminal and terrorist informants

The S visa was introduced in 1994 with the Violent Crime Control and Law Enforcement Act to provide temporary *non-immigrant* lawful status to foreigner informants who possess critical, reliable information concerning a criminal organisation or enterprise (S-5 visa) or terrorist organisation, enterprise or operation (S-6 visa), and are willing to cooperate with the related prosecution. After three years S visa holders may adjust to permanent status and obtain a green card under certain circumstances and if the US attorney General determines that the foreigner's testimony has substantially contributed to the prosecution of the crime.<sup>125</sup> Certain family members of the main informants may also be admitted to S status (S-7).

In particular, two categories of informants can obtain S status:

- Criminal informants (S-5 status), i.e. foreign nationals who are determined by the US Attorney General: 1) to possess critical reliable information concerning a criminal organisation or enterprise; 2) to be willing to supply or have supplied such information to Federal or State law enforcement authorities or a Federal or State court; and 3) whose presence in the United States is determined by the US Attorney General to be essential to the success of an authorised criminal investigation or successful prosecution;
- Terrorist informants (S-6 status), i.e. foreign nationals who are determined by the US Attorney General and the Secretary of State: 1) to possess critical reliable information concerning a terrorist organization, enterprise, or operation; 2) to be willing to supply or have supplied such information to Federal law enforcement authorities or a Federal court; 3) to be or have been placed in danger as a result of providing such information; and 4) to be eligible to receive a monetary reward provided by section 2708(a) of title 22 to certain terrorist informants.<sup>126</sup>

Due to its very different purpose, the procedure for issuing an S visa (also known as the 'snitch visa') is not initiated by the individual, but only by a state or federal law enforcement agency which can file a request, and must assume responsibility for the alien from their time of entry until departure or adjustment of status.<sup>127</sup>

A cap of a maximum 200 S-5 visas per year is established for criminal informants, while no more than 50 S-6 visas per year can be issued to terrorist informants. No specific caps are imposed on family members (S-7). However, the S visa programme has not proven particularly effective in reaching out to a significant number of immigrant informants. While data on these visas is scarce, the most recent available reports show that between 1995 and 2001 only 511 S main visas for informants were issued. These were only for S-5 criminal informants, as it is reported that between 1996 and 2005 no S-6 visa for terrorist informants was issued. Previous studies suggest that the limited successes of the S visa programme and in particular the S-6 visa may be related to the cumbersome procedures and the particularly strict requirements for the issuance of the S-6 visa,<sup>128</sup> as well as the limited scope of these visas (i.e. criminal and terrorist organisations).<sup>129</sup> A 2014 study by Stabile also reported the tendency of the FBI to prefer a more aggressive use of immigration law

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<sup>125</sup> Kittrie O. F. (2006), *op. cit.*, note 7.

<sup>126</sup> 8 U.S.C. §1101(a)(15)(S).

<sup>127</sup> Ester K. (2005), *Immigration: S Visas for Criminal and Terrorist Informants, Congressional Research Services Report for Congress*, available at: <https://fas.org/sgp/crs/terror/RS21043.pdf>

<sup>128</sup> Stabile E. (2014), *Recruiting terrorism informants: The problems with immigration incentives and the s-6 visa*, in *California Law Review*, 102(1), 235-276.

<sup>129</sup> Kittrie O. F. (2006), *op. cit.*, note 7.

(e.g. through the threat of deportation) to force potential foreign informants to cooperate in the prosecution of terrorist organisations. This technique is not without criticisms, as it is alleged to produce unreliable information from foreigners willing to provide false statements under the pressure of imminent deportation; to have led to racial profiling; and to distress in and distrust from, in particular, people in the Muslim and Middle-Eastern communities.<sup>130</sup> The same study suggests that a more rewarding system for the informants (as in an amended and expanded S visa) would produce more reliable information and incentivise the immigrant communities to work effectively with law enforcement and report suspicious activities.<sup>131</sup>

### 3.6 Special Immigrant Juvenile Status (SIJ)

SIJ status is a lawful status and type of humanitarian relief granted to certain immigrant children (under 21) in the United States who have been victims of abuses, and/or have been abandoned or neglected by a parent. Upon receiving SIJS status, children may immediately apply for a green card and receive permanent residency in the United States. Therefore, SIJS status may allow for a safe reporting of these abuses, as children may be relieved from immigration consequences when they report qualifying criminal behaviours of their parent(s) against them. Some non-profit attorneys assisting immigrant victims of crime interviewed for this study declared that SIJS status is indeed one of the main avenues they seek to enable their child clients to receive protection.<sup>132</sup>

In particular, eligibility for SIJS status (through a Form I-360 to be filed with USCIS) requires the applicant to:

- be under 21 years of age and unmarried;
- be physically present in the United States; and<sup>[ref]</sup>
- have an order from a state court with jurisdiction over the child: 1) declaring that the child is a dependent of the court/dependent on the court, or legally committing or placing the child under the custody of either a state agency or department, or an individual or entity appointed by a juvenile court; (2) declaring that reunification with one or both of the child's parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law; and (3) finding that it would not be in the child's best interest to be returned to his or her country of origin.<sup>133</sup>

### 3.7 Other forms of immigration relief for victims and witnesses of crime

#### Violence Against Woman Act (VAWA) Self-Petitions

Six years before the introduction of the U visa, the Violence Against Women Act (VAWA) of 1994 had already introduced a mechanism to protect migrant victims of domestic violence with lawful status, but whose status was tied to their relationship with an abusive spouse, parent, or descendant. Although not having an irregular migration status, these victims would face the same fears of immigration enforcement when reporting a crime, because the reporting would lead to them losing their ties with the abuser, and thus their lawful immigration status. In particular, the VAWA Act introduced a 'self-petition' process to allow foreigner spouses, parents or children of a US citizen or permanent resident to adjust their status to an independent immigration status,

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<sup>130</sup> Stabile E. (2014), *op. cit.*, note 128.

<sup>131</sup> *Ibidem*.

<sup>132</sup> Non-profit legal service provider (lawyer), Immigration Center for Women and Children, San Francisco, interviewed by the author, 14 June 2019.

<sup>133</sup> U.S.C. 8 1101(a)(27)(J).

namely permanent residence (a green card), without the abuser's knowledge or consent.

Eligibility for VAWA self-petitions is based on a long list of requirements. These include, among others, that the self-petitioner shows that:

- they are in a qualifying relationship with the abusive US citizen or permanent legal resident, including being the spouse, the 'intended spouse', the parent, the child of the abuser, or the non-abused spouse who is the parent of an abused child;
- the abuser is a US citizen or permanent legal residence;
- they and/or their child have been battered or have been the subject of extreme cruelty by the abuser;
- That they have at some point resided with the abuser;
- That the petitioner's deportation would result in extreme hardship to either themselves or their children;

For spouse petitioners, the list of requirements increases, as that they also have to show that the marriage was legal and entered into in good faith.<sup>134</sup> The self-petitioner does not need to be a woman.

Self-petitions are submitted to USCIS (Form I-360), and the processing times can take anywhere between 150 days to 10 months<sup>135</sup> – a significantly shorter period of time than for U visas. There is no annual cap on VAWA self-petitions, and no law enforcement certifications is needed. Between 2010 and 2018, an average of about 5,700 VAWA self-petitions by battered spouses per year were approved.<sup>136</sup>

#### Continued Presence and Significant Public Benefit Parole

Continued presence (CP) and Significant Public Benefit Parole (SPBP) are two law enforcement tools that do not offer *stricto sensu* a lawful status to victims or witnesses, but are nevertheless aimed at temporarily allowing the presence in trials of foreigners who are otherwise irregular or inadmissible.

CP in particular is a temporary immigration relief used as a law enforcement tool by federal law enforcement agents for the purpose of sponsoring the presence of individuals identified as victims of human trafficking and potential witnesses for an investigation or prosecution. Federal agents can apply for CP immediately upon the identification of the victim/witness, and their presence is eventually authorised by ICE-HSI. CP allows the victims/witnesses to remain (and work) in the United States for one year (renewable with one-year increments), and terminates at the end of the investigations. Victims with CP, however, may also independently apply for T or U status. Recipients of CP are also granted social service benefits to ensure stability, protection, and thus improve

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<sup>134</sup> National Immigrant Justice Center (2019), *VAWA pro bono manual a pro bono attorney manual on legal immigration protections for immigrant survivors of domestic violence under the Violence Against Women Act (VAWA)*, available at: [www.immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2019-04/VAWA\\_ProBono\\_Manual\\_2019-04\\_Final.pdf](http://www.immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2019-04/VAWA_ProBono_Manual_2019-04_Final.pdf).

<sup>135</sup> Amuedo-Dorantes C. & Arenas-Arroyo E. (2019), *Immigration Enforcement, Police Trust and Domestic Violence (Preliminary Draft)*, 16 March 2019, available at: [conference.iza.org/conference\\_files/JuniorSenior\\_2019/arenas-arroyo\\_e24280.pdf](http://conference.iza.org/conference_files/JuniorSenior_2019/arenas-arroyo_e24280.pdf)

<sup>136</sup> Average calculated by the author on the basis of data from USCIS (2019), *Number of Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, by Fiscal Year, Quarter, and Case Status (VAWA) (Fiscal Year 2019, 2nd Quarter, Jan. 1-Mar. 31, 2019)*, available at: [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I360\\_VAWA\\_performancedata\\_fy2019\\_qtr2.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I360_VAWA_performancedata_fy2019_qtr2.pdf).

victims' cooperation with law enforcement. Local and state law enforcement agencies may not apply for CP, but may request the cooperation of ICE-HSI agents to sponsor CP on their behalf.<sup>137</sup>

SPBP is another tool built on immigration law that law enforcement agencies may use, and is designed to permit individuals *outside* of the United States who would normally be inadmissible (*e.g.* a previously deported irregular migrant) to enter the country temporarily for reasons related to public benefit, which includes serving as a witness, defendant, or cooperating source. If necessary in extremely limited cases, the individual's immediate family members may also be admitted. Law enforcement agents can request SPBP to USCIS. However, SPBP is granted for very short periods of time, and only for the time required to serve the individual's function in the trial.<sup>138</sup>

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<sup>137</sup> Department of Homeland Security (2016), *op. cit.*

<sup>138</sup> *Ibidem.*

#### 4. ‘Safe reporting’ of crime at the local level: ‘Sanctuary cities’ and local non-cooperation policies

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In the United States, sub-federal authorities – mostly counties and cities, but also some states – have taken a leading role in ensuring that migrant communities can trust the local police and that anyone, regardless of migration status, can feel confident in interacting with them to report crime occurring in the area. Accordingly, a significant number of local authorities, including most of the US larger cities (such as, among others, Baltimore, Chicago, Denver, Detroit, Houston, Los Angeles, Minneapolis, New York City, Philadelphia, San Francisco, Seattle, and Washington, D.C.),<sup>139</sup> and/or their police departments, have adopted some form of formal policies to ensure that local police officers and sheriffs refrain from getting involved in the enforcement of federal rules on immigration.

These local authorities are popularly described as ‘sanctuary cities’ (or sanctuary counties), and the measures they adopt to limit their involvement in immigration enforcement are described as ‘sanctuary policies, laws, or practices’. However, there is no exact definition of a ‘sanctuary city’ or a ‘sanctuary policy’. The term is considered by many (including by local authorities themselves) as a misnomer, as it is used today to describe a variety of different policies and practices which have in common the aim of limiting the cooperation and involvement of local officials in the enforcement of immigration law, but do so in various forms and to different extents. For this reason, some prefer the term ‘non-cooperation policies’.<sup>140</sup> This report uses the terms ‘sanctuary’ and ‘non-cooperation’ policies interchangeably to describe sub-federal measures limiting the cooperation of local law enforcement authorities with federal officials on the enforcement of immigration law.

Non-cooperation policies establish strict firewalls between criminal law enforcement agents operating at local level and federal immigration authorities. They generally operate according to a ‘*don’t ask; don’t tell; or don’t enforce*’ model.<sup>141</sup> In particular, sanctuary policies prohibit or limit the possibility of local officials, including officers of the city and county police departments and sheriffs, of:

- Inquiring about the immigration status of the person they are interacting with (the ‘*don’t ask*’ component of a sanctuary policy); and/or
- Communicating information about someone’s immigration status to federal immigration authorities (the ‘*don’t tell*’ component); and or
- Arresting or detaining individuals solely for a violation of immigration law; complying with requests from immigration authorities; or using local resources to comply with such requests (the ‘*don’t enforce*’ component).

Sanctuary policies vary significantly at the local level, and some localities may impose only one of the ‘*don’t ask, don’t tell, don’t enforce*’ components, while other local authorities might impose all of them. For example, the San Francisco City Administrative Code (Sec. 12H.2) states that ‘*No department, agency, commission, officer or employee of the City and County of San Francisco shall use any City funds or resources to assist in the enforcement of federal immigration law [Don’t*

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<sup>139</sup> Kittrie O. F. (2006), *op. cit.*, note 7.

<sup>140</sup> Pham H. (2006), *The Constitutional Right Not to Cooperate?: Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1374; Carlberg C. (2009), *Cooperative Noncooperation: A Proposal for an Effective Uniform Noncooperation Immigration Policy for Local Governments*, in *The George Washington Law Review*, Vol. 77 No. 3, p. 740-765.

<sup>141</sup> Kittrie O. F. (2006), *op. cit.*, note 7.



enforce] or to gather [Don't ask] or disseminate [Don't tell] information regarding the immigration status of individuals in the City and County of San Francisco unless such assistance is required by federal or State statute, regulation or court decision'.<sup>142</sup>

However, even in municipalities with the most stringent non-cooperation policies, exceptions are normally made for foreign nationals who have committed certain crimes (normally a felony)<sup>143</sup> who can be reported to immigration authorities by local officials. Taking again the example of the City and County of San Francisco, Sec. 12I.3 of the San Francisco Administrative Code indeed provides exceptions to its sanctuary ordinance for individuals convicted of violent or otherwise serious felonies. In New York City, a local law (2014/059) introduced a list of 170 serious crimes (felonies including various forms of assault, arson and sex offenses) that would allow local law enforcement authorities, including NYPD, to cooperate with ICE and honour ICE's requests (known as detainer requests, or simply 'detainers') to hold individuals who have been convicted for one of the crimes in the list;<sup>144</sup> or if an arrested foreigner is a possible match on the terrorist watch list.<sup>145</sup>

The term 'sanctuary' often fed the misconception that sanctuary cities provide deportable migrants (including criminals) with a 'sanctuary' from any form of immigration enforcement. In reality, federal officials are not prevented in any way from enforcing immigration rules by sanctuary laws; it is also the case, as seen above, that under certain circumstances local officials may cooperate (within the limits imposed by the local policy) with ICE to facilitate the detection and deportation of, for

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<sup>142</sup> San Francisco Administrative Code, Sec. 12H.2: 'No department, agency, commission, officer, or employee of the City and County of San Francisco shall use any City funds or resources to assist in the enforcement of Federal immigration law or to gather or disseminate information regarding release status of individuals or any other such personal information as defined in Chapter 12I in the City and County of San Francisco unless such assistance is required by Federal or State statute, regulation, or court decision. The prohibition set forth in this Chapter 12H shall include, but shall not be limited to:

(a) Assisting or cooperating, in one's official capacity, with any investigation, detention, or arrest procedures, public or clandestine, conducted by the Federal agency charged with enforcement of the Federal immigration law and relating to alleged violations of the civil provisions of the Federal immigration law, except as permitted under Administrative Code Section 12I.3.

(b) Assisting or cooperating, in one's official capacity, with any investigation, surveillance, or gathering of information conducted by foreign governments, except for cooperation related to an alleged violation of City and County, State, or Federal criminal laws.

(c) Requesting information about, or disseminating information, in one's official capacity, regarding the release status of any individual or any other such personal information as defined in Chapter 12I, except as permitted under Administrative Code Section 12I.3, or conditioning the provision of services or benefits by the City and County of San Francisco upon immigration status, except as required by Federal or State statute or regulation, City and County public assistance criteria, or court decision.

(d) Including on any application, questionnaire, or interview form used in relation to benefits, services, or opportunities provided by the City and County of San Francisco any question regarding immigration status other than those required by Federal or State statute, regulation, or court decision. Any such questions existing or being used by the City and County at the time this Chapter is adopted shall be deleted within sixty days of the adoption of this Chapter'.

<sup>143</sup> The criminal legislation of US states tends to distinguish between infractions, misdemeanours and felonies, according to the gravity and seriousness of the crime and the subsequent punishment. While there is no unique definition of these terms, infractions tend to be the least serious offenses while felonies the most serious crimes. Misdemeanours generally involve jail time, but for no more than a year.

<sup>144</sup> However, other conditions apply, e.g. that the person has also committed an illegal re-entry. Cumulatively, these conditions make NYPD-ICE cooperation on 'detainer' requests quite rare; source: Police Official, New York Police Department (NYPD) – Legal Bureau, New York, interviewed by the author, 16 April 2019.

<sup>145</sup> Cardonzo Law & Immigrant Defense Project (2014), *New York City New Detainer Discretion Law Chart and Practice Advisory*, available at: [www.immigrantdefenseproject.org/wp-content/uploads/2013/09/Practice-Advisory-2014-Detainer-Discretion-Law-PEP.pdf](http://www.immigrantdefenseproject.org/wp-content/uploads/2013/09/Practice-Advisory-2014-Detainer-Discretion-Law-PEP.pdf) [last accessed September 2019].

instance, migrants who have committed serious crimes.<sup>146</sup> Non-cooperation policies simply restrict the possibilities of local officials getting involved in the enforcement of rules which, as seen in section two, fall within the remit of federal authorities.

Municipal non-cooperation policies also differ significantly in their form: they have been adopted as city council resolutions, municipal ordinances, mayoral executive orders, police chief memoranda, and so forth.<sup>147</sup> In many cases they are adopted as a city-wide policy covering any local employee. In other cases, they are adopted as formal policies of a single local agency (e.g. a local police department). For instance, the first local non-cooperation policy was reportedly adopted through a 'special order' of the then-chief of the Los Angeles Police Department (LAPD), Daryl F. Gates, on November 27, 1979.<sup>148</sup>

In addition, the term must not be confused with the very different use of the word 'sanctuary' outside the United States, for example in the United Kingdom, where 'cities of sanctuary' simply describes a general commitment made by certain British cities to welcome asylum seekers and refugees, and does not refer to any non-cooperation policies.<sup>149</sup>

The role played by cities and counties in this field is significant: as seen in section two, municipal and county police departments and sheriffs constitute by far the lion's share of police authorities in the United States, and are the ones with whom the wider public normally interacts to report crime. In addition, it is city and county governments that exercise the greatest control over these police agencies. As one of the aims of the 'safe reporting' project is to assess the replicability of practices and policies adopted at local level, this report mostly focuses on the policies adopted at the city and county level, and not on state legislation.

It is noteworthy to mention that, while there's no agreement on how many the sanctuary cities are in the USA, the number is not small. A study by opponents of 'sanctuary cities' found that, out of 300 localities involved in the research, at least 239 jurisdictions had sanctuary policies or practices instituted by law enforcement agencies.<sup>150</sup> Reports on county-level sanctuaries from supporters of non-cooperation policies found that in 2018, out of 3,015 scrutinised counties, at least 760 (24%) had policies against holding migrants at the request of ICE (a 'detainer'), 114 (4%) had a general ban on using resources or time on immigration enforcement (a form of 'don't enforce' policy), and 119

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<sup>146</sup> Tramonte L. (2011), *Debunking the myth of 'sanctuary cities' – community policing policies protect American communities*, Washington DC: Immigration Policy Center, available at: [www.immigrationresearch.org/report/immigration-policy-center/debunking-myth-sanctuary-cities-community-policing-policies-protect](http://www.immigrationresearch.org/report/immigration-policy-center/debunking-myth-sanctuary-cities-community-policing-policies-protect).

<sup>147</sup> Kittrick O. F. (2006), *op. cit.*, note 7.

<sup>148</sup> Sullivan L. (2009), *Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database*, in *California Law Review*, Vol. 97:567.

<sup>149</sup> Bauder, H. (2016), *Sanctuary Cities: Policies and Practices in International Perspective*, in *International Migration*, doi: 10.1111/imig.12308. Even within the United States, the term sanctuary was initially adopted to describe a different civil movement around immigration, focusing in particular on the treatment of asylum seekers from Central America in the 1980s; see Mancina P. (2012), *The birth of a sanctuary-city – A history of governmental sanctuary in San Francisco*, in Lippert R., Rehaag S. (eds.), *Sanctuary Practices in International Perspectives*, London: Routledge.

<sup>150</sup> In addition, the study found that: 23 jurisdictions had sanctuary resolutions; 15 jurisdictions had sanctuary laws or ordinances, including statewide laws in California, Connecticut, and Oregon; 5 jurisdictions had sanctuary executive orders; and 18 jurisdictions either had multiple forms of sanctuary policies or practices in place, or had policy or practice that simply fit no other classification. See Federation for American Immigration Reform (FAIR) (2017), *Sanctuary Policies. Across the U.S. - January 2017 | A Report by FAIR's State and Local Department*, available at: [https://www.fairus.org/sites/default/files/2017-08/Sanctuary\\_Policies\\_Across\\_America\\_Report.pdf](https://www.fairus.org/sites/default/files/2017-08/Sanctuary_Policies_Across_America_Report.pdf) [last accessed July 2019]. It is noteworthy that this report explicitly focused on a sub-category of sanctuary policies, namely is those known under the name of 'anti-detainer' policies.

(4%) had a 'don't ask' policy. This report also found that the number of sanctuary counties is significantly rising, despite, and in concomitance with, the reinforced focus on immigration enforcement by the current federal government.<sup>151</sup> As seen above, most of the largest US cities, from Los Angeles to New York, from Seattle to Washington DC, and many other cities in between, have some form of sanctuary policy.

Adopting a formal position of non-cooperation between law enforcement agencies (local and federal) might seem counterintuitive for some readers more accustomed to centralised law enforcement systems. That includes the European countries involved in the 'safe reporting' project, where obligations of cooperation between law enforcement bodies are established in law, and especially where the same law enforcement agency is competent for both criminal and immigration law enforcement. Indeed, even within the United States, sanctuary policies are very controversial, as many argue they are anti-federal. In reality, it is indeed the particular legal (and political) system of the United States that allow sanctuary policies to exist (and to survive from federal attempts to gain cooperation from local agents). The following paragraphs are dedicated to explaining the rationales which are used by authorities for adopting non-cooperation policies, and the legal conditions and political context in the United States that has made it possible for them to do so.

#### 4.1 Rationales for local non-cooperation policies and political background of the sanctuary movement

As mentioned above, sanctuary policies are motivated by the aim of reassuring migrants, regardless of status, from the fear of detection and deportation if they interact with the local police. Ensuring that migrant victims and witnesses report crime, fighting crime, and protecting local public security are the main rationales supporting the adoption of non-cooperation policies. This was confirmed in all of the interviews conducted with representatives of local authorities and local law enforcement officials in both New York and San Francisco.<sup>152</sup> In this sense, sanctuary policies coincide with the model – particularly popular among law enforcement agencies in the United States – of '*community policing*', the policing strategy based on building ties and trust with local communities and thus gaining the cooperation of local residents in preventing and fighting crime.<sup>153</sup> In this context, the idea behind sanctuary policies is to de-link in the imaginations of migrant communities the idea that the police are enforcers of immigration law, thus encouraging migrants to report crime without fear, and cooperate with the police to ensure the safety of all residents. The underlying rationale is that, if migrants do not report their perpetrators, the latter will be free in the streets of the city to harm others, whether migrants or US citizens.

In the words of one interviewee from the New York City's Mayor's Office of Immigrant Affairs:

*[the city's main rationales] 'came out of a widespread recognition that making sure that everyone feels comfortable in reporting crime, accessing medical care, getting benefits for their families if they are eligible... that goes to serve the greater good and to ensure the public safety, health, and wellbeing of the whole community. New York*

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<sup>151</sup> Immigrant Legal Resource Center (ILRC) (2018), *op. cit.*, note 81.

<sup>152</sup> City Official, New York City, Mayor's Office of Immigrant Affairs (MOIA), New York, interviewed by the author, 4 April 2019; City Official, City and County of San Francisco, San Francisco Human Rights Commission, interviewed by the author, 12th June 2019; City Officials (2), City and County of San Francisco, San Francisco Department on the Status of Women, interviewed by the author, 13 June 2019; Police Official, New York Police Department (NYPD) – Legal Bureau, New York, interviewed by the author, 16 April 2019; City Official, New York City, Mayor's Office to End Domestic and Gender-Based Violence (ENDGBV), New York, interviewed by the author, 3 April 2019; See also Pham H. (2006), *op. cit.*, note 140; Kittrie O. F. (2006), *op. cit.*, note 7; Carlberg C. (2009), *op. cit.*, note 140.

<sup>153</sup> Tramonte L. (2011), *op. cit.*, note 146.

*is the safest big city in the United States. Our leadership across the administration believe that these things are connected. Our Police Commissioner is very committed to these policies, and we believe that our confidentiality policies play a role in this, as well as the importance we put in continuing working with our immigrant communities, in not creating barriers with that community. There's recognition amongst our law enforcement leaders that this is good for their mission, the community and public safety'.<sup>154</sup>*

It is because concerns for public security play a major role in determining sanctuary policies that, in the aftermath of the terrorist attacks of September 11 (committed by nineteen foreign nationals), the number of cities adopting such policies rapidly accelerated rather than diminishing.<sup>155</sup> Terrorism concerns have been, for instance, pivotal in driving the policies of New York, the city that suffered the 9/11 attacks.<sup>156</sup>

Apart from encouraging migrants' cooperation with local police departments, other factors played a role in the adoption of sanctuary policies. These include:

- the need to avoid local police, who are not trained in immigration matters, operating through racial profiling;
- the intention to take a political stance of disapproval as regards federal immigration policies;
- the desire to maintain local control over local social policies and over the local police; and
- concerns that the enforcement of immigration law diverts the limited resources and time of local police from their mandate of ensuring public safety and enforcing criminal law.<sup>157</sup>

Importantly, serious legal concerns have led many municipalities to adopt non-cooperative positions, as there is widespread concern that local police officials might be liable for detaining someone for immigration purposes when they do not have the power to do so. Indeed, concerns over respect of the Fourth Amendment of the US Constitution (which *inter alia* protects from arbitrary arrests) have led many local police departments to adopt non-cooperation policies out of concerns that enforcing immigration law without proper judicial warrants would lead to civil liability of their officers.<sup>158</sup> These concerns are not only theoretical, as a number of lower courts have ruled as violations of the constitutional provision instances when police authorities have held migrants in custody only because of a 'detainer' request from immigration authorities.<sup>159</sup>

## 4.2 Political background of the sanctuary movement

After addressing the rationales of modern sanctuary policies, it is important to note, however, that today's sanctuary policies originated in a very different socio-political scenario. While today sanctuary policies are normally intended as a means to ensure reporting of crime by irregular immigrants, irrespective of whether they have an asylum background and their nationality, the first 'sanctuary ordinances' were adopted in the early 1980s as a reaction against the policies of the

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<sup>154</sup> City Official, New York City, Mayor's Office of Immigrant Affairs (MOIA), New York, interviewed by the author, 4 April 2019.

<sup>155</sup> Kittrie O. F. (2006), *op. cit.*, note 7, p. 1455.

<sup>156</sup> Mostofi B. (2017), *The Right Balance: Smart Policing and Inclusive Immigration Policies in New York City*, [presentation] in *Autumn Academy 2017: Strategic Approaches to Migrants with Irregular Status in Europe*, held in Oxford 18-22 September 2017.

<sup>157</sup> Kittrie O. F. (2006), *op. cit.*, note 7; Sullivan L. (2009), *op. cit.* note 148.

<sup>158</sup> Non-profit legal service provider (lawyer), Asian Americans Advancing Justice – Asian Law Caucus, San Francisco, interviewed by the author, 7 June 2019.

<sup>159</sup> Rodriguez C. (2017), *op. cit.*, p. 520.

federal government *vis-à-vis* Central American asylum seekers, and the US external activity in El Salvador and Guatemala. In that period, the United States was militarily and economically supporting authoritarian regimes in these countries, regimes which were responsible for widespread human rights violations. This led to significant flows of asylum seekers from Guatemala and El Salvador to the USA, but the US government generally rejected their asylum claims. As a result, these asylum seekers ended up living in the United States with an irregular migration status. The ‘sanctuary movement’ was then started by congregations of churches, civil society groups, and university campuses to assist those rejected asylum seekers with legal advice, housing, transportation, and so forth.

It was later that local authorities adopted the first ‘city of refuge’ ordinances, as a local endorsement of the sanctuary movement. These ordinances were mostly politically symbolic, rather than imposing real firewalls. However, they started the process of limiting local entanglement in immigration enforcement.<sup>160</sup> In San Francisco, for example, the ‘City of Refuge’ resolution (1985) and the ‘City of Refuge’ ordinance (1989) set in motion an apparatus providing city services to all city residents, including rejected asylum seekers with irregular migration status; and requiring city employees to cease any participation in immigration policing.<sup>161</sup> The public security concerns on underreporting of crime were developing concomitantly. As noted, in Los Angeles LAPD adopted its special order in 1979. It was only at a later stage that ensuring reporting of crime by migrants with irregular status became the prevalent rationale of the policy. Sanctuary policies were not withdrawn after Guatemalans and Salvadorans became eligible for asylum in 1996.<sup>162</sup> These policies rather stayed dormant until the New York terrorist attacks of 9/11, when the debates on immigration and security came to the forefront of the policy agenda, reinvigorating the debate and practice of non-cooperation policies.<sup>163</sup>

### 4.3 Legal conditions allowing local non-cooperation policies in the United States

The scope for sub-federal entities to adopt policies of non-cooperation with the federal government lies with the legal and constitutional setting specific to the United States. As one of the aims of the ‘safe reporting’ project is to assess the legal replicability of firewalls practices across the countries involved in the project, this section summarises the three principal legal conditions that made the development of sanctuary policies possible in the USA, with the aim of facilitating the assessment of such legal replicability.

A first condition that makes firewalls between (local) criminal law enforcement officers and immigration enforcement authorities is the *strict separation between these actors at different tiers of governance*. As seen in section two, the United States has a form of ‘police federalism’ that sees most of criminal law enforcement happening at the sub-federal level, and the lion’s share of criminal law enforcement agents being county or city officials. Immigration law enforcement, on the other hand, is the monopoly of federal agents. This law enforcement structure differs highly from law enforcement systems traditionally adopted in European countries, including those involved in the ‘safe reporting’ project, where there is a centralised national police force that carries out both immigration and criminal law enforcement.<sup>164</sup> Although in these countries immigration law

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<sup>160</sup> Ridgley, J. (2013), *Cities of Refuge: Immigration Enforcement, Police, and the Insurgent Genealogies of Citizenship in U.S. Sanctuary Cities*, in *Urban Geography*, 29:1, 53-77, DOI: 10.2747/0272-3638.29.1.53.

<sup>161</sup> Mancina P. (2012), *op. cit.*, note 149.

<sup>162</sup> Carlberg C. (2009), *op. cit.*, note 140.

<sup>163</sup> Ridgley J. (2013), *op. cit.*; Kittrie O. F. (2006), *op. cit.*; Carlberg C. (2009), *op. cit.*, note 140.

<sup>164</sup> Van Den Durpel A. (2019), *op. cit.*, note 15; Taverriti S. B. (2019), *op. cit.*, note 15; González Beilfuss M. (2019), *op. cit.*, note 15; Timmerman R., Leerkes A., & Staring R. (2019), *op. cit.*, note 15.

enforcement is often mandated to specific divisions, these are still part of the same national police organisation that interacts with people involved in criminal matters as victims and witnesses.<sup>165</sup> Therefore, although some limitations in communication between different divisions could be implemented (as in the ‘free, free in out’ policy in the Netherlands<sup>166</sup>), these firewalls are not as strong as those implemented by sanctuary cities.

The second precondition for the survival of non-cooperation policies against federal attempts to obtain the cooperation of local police forces lies with *the almost absolute autonomy of local enforcement agents from federal authorities*. As seen above, the Tenth Amendment of the U.S. Constitution and the ‘anti-commandeering doctrine’ prevents the federal government from requiring sub-federal officials to take affirmative actions to enforce federal regulatory programmes. This particular constitutional setting therefore has protected non-cooperation policies from federal endeavours to compel local agents to operate as immigration enforcers, particularly under the administration of President Donald J. Trump who has promised a ‘crack down’ on sanctuary cities. Such federal attempts have so far had no success, as they have been stopped by the decisions of several judges across the country.<sup>167</sup> As a consequence, there is no legal obligation on local law enforcement agents to cooperate with federal officers. In this case the situations in the European countries involved in the ‘safe reporting’ project are again different, because even where there are no specific obligations for police officers to report irregular migrants to the police division in charge of enforcing immigration law, general legal principles of cooperation between police bodies exist. This is the case even between police forces operating at different levels of governance, as, for instance, in Spain, where local, regional and national police bodies are bound by a general principle of mutual cooperation.<sup>168</sup>

Thirdly, the tendency of local police officers to refrain from enforcing immigration law is also provided for by the generally non-criminal nature of an irregular migration status. As explained above, irregular stay per se is only a civil, not a criminal, law violation. This translates to making ‘irregular stay’ outside of the scope of action of criminal law enforcement agents, and in particular local officers, who have the mandate to enforce state and local laws. In some European contexts, as in Italy, irregular entry and irregular stay are both sanctioned by criminal law,<sup>169</sup> a condition that could, in theory, further complicate the possibility of police officers refraining from enforcing immigration (and therefore criminal) law.

#### **4.4 How effective are sanctuary policies in encouraging ‘safe reporting’ for victims and witnesses of crime with irregular migration status?**

In response to critical accounts arguing that sanctuary policies shield criminals and thus threaten the security of the city, supporters of sanctuary policies often reply that non-cooperation policies actually increase public security, by increasing reporting of offences, prosecution of crime and reducing risks of repetition of crime by perpetrators.<sup>170</sup> However, in the absence of authoritative research, both sides of the debate have had difficulty providing significant evidence for their arguments, and have relied on anecdotal evidence. On one side, critical accounts report single cases of foreign criminals who could have been removed before the crime was committed if cooperation

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<sup>165</sup> *Ibidem*.

<sup>166</sup> Timmerman R., Leerkes A., & Staring R. (2019), *op. cit.*, note 15.

<sup>167</sup> See Pierce S., Bolter J. Selee A. (2018), *Trump’s First Year on Immigration Policy: Rhetoric vs. Reality*, Washington DC: Migration Policy Institute, p. 12-13.

<sup>168</sup> González Beilfuss M. (2019), *op. cit.*, note 15.

<sup>169</sup> Taverriti S. B. (2019), *op. cit.*, note 15.

<sup>170</sup> Tramonte L. (2011), *op. cit.*, note 146.

between local and federal law enforcement agencies had occurred at an earlier moment.<sup>171</sup> On the other side, these accounts tend to disregard the ‘chilling effect’ that cooperation between the police and immigration authorities can have on migrant victims and witnesses. Promoters of sanctuary cities have been accused of not being able to provide data on the correlation between their policies and increases in police reports or decreases in crime.<sup>172</sup> Proving a direct correlation, however, is difficult, as sanctuary policies normally include a ‘don’t ask’ component, which proscribes city employees and police officers from gathering information about the immigration status of people reporting crime.<sup>173</sup>

In 2017, however, one of the first systematic statistical analyses comparing the violent and property crime rates in sanctuary and non-sanctuary counties was published. It found that *crime is statistically significantly lower in sanctuary counties* compared to non-sanctuary counties. In particular, the study found that there are, on average, 35.5 fewer crimes committed per 10,000 people in sanctuary jurisdictions compared to non-sanctuary ones. Using advanced statistical methods matching comparable counties (for example, according to differences in population; the foreign-born population percentage; etc.) this study found that large central metro counties show the most pronounced difference in crime rates, with large central metro sanctuary counties having 65.4 crimes fewer per 10,000 people than large central metro non-sanctuary counties. While this statistical analysis cannot show a direct correlation between sanctuary policies and reporting of crime, it did support the argument made by law enforcement executives that communities are safer in cities where the local police do not become entangled in immigration enforcement; and disproved the argument made by opponents of non-cooperation policies that such policies lead to an increase in crime in sanctuary jurisdictions.<sup>174</sup>

Interviews with non-profit providers of immigration legal support to victims of crime tended to confirm that the sanctuary policies in both cities play a central role in encouraging their clients to report crime. NGO interviewees in both New York and San Francisco asserted that they generally trusted that NYPD and SFPD officers would not report irregular migrant victims to immigration authorities. This trust is passed on by the NGO providers to the immigrant communities. NGOs inform their clients on the city policy, and they thus encourage the migrants to reach out to local police authorities. The trust of legal advisors and their clients towards the local sanctuary policies and local police departments also plays a central role in the success of the federal T and U visa programmes. Interviewed attorneys assisting migrants with T and U visa applications usually rely on the ‘safe reporting’ possibilities offered by the city to encourage migrants to report the crime and thus start the procedure for a visa.<sup>175</sup> At the same time, local authorities use some indicators to

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<sup>171</sup> See, for instance, Fox News (3 September 2019), *Harmeet Dhillon: Kate Steinle’s killer escapes punishment – Sanctuary for illegal immigrants endangers us all*, available at [www.foxnews.com/opinion/harmeet-dhillon-kate-steinle-killer-escapes-punishment-sanctuary-for-illegal-immigrants-endangers-us-all](http://www.foxnews.com/opinion/harmeet-dhillon-kate-steinle-killer-escapes-punishment-sanctuary-for-illegal-immigrants-endangers-us-all).

<sup>172</sup> Vaughan J. M. & Griffith B. (2017), *Immigration Brief: Sanctuary Cities*, Washington DC: Center for Immigration Studies, <https://cis.org/Vaughan/Immigration-Brief-Sanctuary-Cities>.

<sup>173</sup> Police Official, New York Police Department (NYPD) – Legal Bureau, New York, interviewed by the author, 16 April 2019; City Official, New York City, Mayor’s Office of Immigrant Affairs (MOIA), New York, interviewed by the author, 4 April 2019; City Official, City and County of San Francisco, San Francisco Human Rights Commission, interviewed by the author, 12th June 2019; Police Commander, San Francisco Police Department (SFPD), San Francisco, interviewed by the author, 31 May 2019.

<sup>174</sup> Wong T. (2017), *The Effects of Sanctuary Policies on Crime and the Economy*, Washington DC: Center for American Progress, available at: <https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/> [last accessed July 2019].

<sup>175</sup> Non-profit legal service provider (lawyer), Asian Americans Advancing Justice – Asian Law Caucus, San Francisco, interviewed by the author, 7 June 2019; Non-profit legal service provider (lawyer), Immigration Law Project – Safe

assess whether the policy is working; these include obtaining feedback from NGOs working with migrants, or monitoring increases or decreases in crime reports in immigrant-dense areas of the city.<sup>176</sup>

While it is hard to know if crime is being reported *because* migrants were aware of the local sanctuary laws, it is possible to identify what in practice can limit the effectiveness of sanctuary policies. Sanctuary policies, in their stated aim of reducing underreporting of crime, can only be effective if irregular migrants are aware of the policy and truly feel confident in going to the police to report crime. Several studies have identified a general unawareness of sanctuary policies, which in practice nullifies their effectiveness. It has been found, for instance, that often local non-cooperation policies are poorly publicised to the wider public.<sup>177</sup> In addition, it has been noted that non-cooperation policies might be confusing and difficult to understand for migrants, who might prefer refraining from contacting the police if they have doubts whether by doing so they will be exposed to deportation.<sup>178</sup> This confusion is exacerbated by the fact that only some localities have sanctuary policies; and that sanctuary jurisdictions may be neighbouring localities which do not have sanctuary policies, or localities with policies of active cooperation with ICE. In some cases, sanctuary municipalities can be within non-sanctuary counties;<sup>179</sup> and in this case, contacting one police post rather than the other might result in totally opposite outcomes. In addition, even between sanctuary cities the policies might differ significantly, which leads to further confusion on what living and contacting the police in a sanctuary city really means.<sup>180</sup>

In addition, lack of proper training of police officers may also nullify the effectiveness of sanctuary policies. One mistake from a police officer and the subsequent word-of-mouth within migrant communities can have long-lasting detrimental effects on the trust of migrants towards the police. This was, for instance, the case in San Francisco, where, notwithstanding strict sanctuary policies and specific training within the San Francisco Police Department (SFPD),<sup>181</sup> in 2015 a man from El Salvador reached out to officers of the SFPD to report his car stolen, only to be handed to immigration authorities by SFPD officers – a case that received a lot of publicity and might have deterred others from reporting crime.<sup>182</sup>

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Horizon, New York, interviewed by the author, 2 April 2019; Non-profit legal service provider (lawyer), Immigration Center for Women and Children, San Francisco, interviewed by the author, 14 June 2019; Non-profit legal service provider (lawyer), Domestic Violence Project (DVP) of the Urban Justice Center (UJC), New York, interviewed by the author, 4 April 2019.

<sup>176</sup> City Official, New York City, Mayor's Office of Immigrant Affairs (MOIA), New York, interviewed by the author, 4 April 2019.

<sup>177</sup> Kittrie O. F. (2006), *op. cit.*, note 7, p. 1483.

<sup>178</sup> Kittrie O. F. (2006), *op. cit.*, note 7.

<sup>179</sup> For example, Carlberg reports that, while the Los Angeles Police Department has a longstanding non-cooperation policy, Orange County has been actively seeking to send its local sheriff's deputies for special training by federal ICE on how they can locally enforce federal immigration law; yet within Orange County itself, the city of Irvine has enacted noncooperation policies; see Carlberg C. (2009), *op. cit.*, note 140.

<sup>180</sup> Kittrie O. F. (2006), *op. cit.*, note 7.

<sup>181</sup> Police Commander, San Francisco Police Department (SFPD), San Francisco, interviewed by the author, 31 May 2019.

<sup>182</sup> Non-profit legal service provider (lawyer), Asian Americans Advancing Justice – Asian Law Caucus, San Francisco, interviewed by the author, 7 June 2019; See also The Washington Times (29 June 2017), *Lawyer: San Francisco to pay illegal \$190,000 for violating sanctuary city policy*, available at: [www.washingtontimes.com/news/2017/jun/29/pedro-gueroa-zarceno-awarded-190000-san-francisc/](http://www.washingtontimes.com/news/2017/jun/29/pedro-gueroa-zarceno-awarded-190000-san-francisc/).



Yet, as we shall see below, local authorities can (and have) taken a number of initiatives to mitigate those challenges and encourage reporting of crime – including outreach activities, training of police officers and immigration legal advice for victims of crime.

#### 4.5 Additional local initiatives encouraging reporting of crime

The importance local authorities have placed on ensuring public safety by addressing underreporting of crime by irregular immigrants has led some authorities to adopt – besides non-cooperation/sanctuary policies – a number of initiatives encouraging effective access to justice for these migrants. Most of these initiatives serve to complement federal legislation on T and U visas or local sanctuary policies, and aim to address the problems in the actual implementation of these programmes. Providing a full overview of all these initiatives goes beyond the scope of this report; therefore, this section presents only some of these initiatives.

As most information on this topic was collected through interviews conducted with local authorities in either New York City or the City and County of San Francisco, this section focuses on initiatives undertaken in these cities. However, as we have seen, sanctuary jurisdictions are numerous, and other initiatives have been adopted in other municipalities and counties, as well as at state level.<sup>183</sup> In both cities, ensuring that victims of crime have access to the local police ranks high in the priorities of local authorities. In New York – a city with approximately 477,000 residents with irregular migration status<sup>184</sup> – the Mayor’s Office of Immigrant Affairs (NYC-MOIA) under the De Blasio administration has officially declared ‘access to justice’ for immigrants (including irregular migrants) its priority number two, only after ‘enhancing immigrant New Yorkers’ economic, civic, and social integration’.<sup>185</sup>

##### Local initiatives specifically supporting the issuance of U and T visas for victims

Local authorities have no power to issue a visa for foreign nationals, yet they can play a crucial role in supporting the issuance of protective visas, such as U and T visas, provided by national legislation.

One main opportunity to play a role is provided by federal law itself, as the procedures for the issuance of U and T visas require (for the U), or provide the possibility of (for the T), the issuance of a law enforcement certification or declaration stating the helpfulness of the victim to the investigation and prosecution of the crime. As much of law enforcement in the US happens at a local level, cities and counties have a central role in the granting the issuance of U and T visas certifications and declarations.

In both New York and San Francisco, one main measure adopted to support the issuance of visas has been making sure that as many local agencies with law enforcement duties as possible are enabled to issue law enforcement certifications or declarations. In New York, these include the city’s Administration for Children’s Services, the City Commission of Human Rights,<sup>186</sup> the New York City’s

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<sup>183</sup> California, for instance, is considered a ‘Sanctuary state’ for its legislation restricting local and state law enforcement agencies from entangling with immigration enforcement. For more information, see Mancina P., Chan A. (2019), *Turning the Golden State into a Sanctuary State: A Report on the Impact and Implementation of the California Values Act (SB 54)*, available at: <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2019/03/turning-golden->

<sup>184</sup> New York City Mayor’s Office of Immigrant Affairs (MOIA) (2019), *State of our immigrant city - MOIA annual report for calendar year 2018*, New York: MOIA, available at: [https://www1.nyc.gov/assets/immigrants/downloads/pdf/moia\\_annual\\_report%202019\\_final.pdf](https://www1.nyc.gov/assets/immigrants/downloads/pdf/moia_annual_report%202019_final.pdf).

<sup>185</sup> *Ibidem*.

<sup>186</sup> The New York City’s agency enforcing the city’s Human Rights Law. See <https://www1.nyc.gov/site/cchr/enforcement/enforcement.page>.

Law Department, and the city's Department of Consumer Affairs,<sup>187</sup> besides the NYPD and New York's District Attorneys.

As seen above, one main challenge in the implementation of the T and U programmes is lack of understanding on the part of local law enforcement of these visas and their role in securing them. As a consequence, each agency may impose procedures and requirements for the issuance of law enforcement certifications/declarations that are hardly accessible by migrants. Local authorities have thus taken several initiatives to increase police awareness, streamline the internal procedures of each agency to issue certifications, and make sure those procedures are accessible to victims. For instance, through Local Law 185 in 2017, the city of New York conferred on one agency, NYC-MOIA, the official responsibility to advise local law enforcement agencies about the U and T visa certifications process. At the same time, NYC-MOIA, together with the Mayor's Office of Criminal Justice (MOCJ), and the Mayor's Office to End Domestic and Gender-based Violence (ENDGBV) formed a working group on T and U visas convening the city's law enforcement agencies certifying U and T certifications/declarations to find ways to strengthen the transparency of procedures to request certifications or declarations, and reduce red tape for migrants.<sup>188</sup>

In addition, within each law enforcement agency, an effective practice has been that of conferring the role of managing the procedures for the issuance of U and T certifications and declarations to a specific unit, so as to develop a specific expertise on the process. In San Francisco, for instance, SFPD deputized a human trafficking investigator to be the department's certifying officer and oversee all U and T visa certification requests. This sergeant oversees and coordinates SFPD's programme on these visas; liaises with other law enforcement agencies (particularly with the District Attorney) on cases where a U or T visa certification is appropriate in order to ensure an integrated effort;<sup>189</sup> and partners with NGOs assisting migrant victims. The officer has thus become a clear contact point in SFPD for organisations assisting victims and other law enforcement agencies, and has developed extensive expertise on the U and T visa programmes, which he uses for conducting training for other local officers, but also other law enforcement agencies throughout the country.<sup>190</sup> In this way, SFPD avoids inconsistencies on certifications work, but also addresses challenges in the implementation of the visa programmes that may happen where local officers lack knowledge of U and T visas. The expertise developed also allowed for the identification of best practices in the use of these visas. For instance, in cases of domestic violence, the officer would not deny certifications if the victim did not want to testify in court, knowing that this is a common occurrence for this type of crime, and that helpfulness may materialise in other forms.<sup>191</sup>

Finally, while federal law does not provide for an appeal in case of denials of law enforcement certifications or declarations, a formal possibility for appeals against denials was introduced locally, to ensure transparency and fairness in the issuance of certifications. In New York, in particular, the police department introduced a formal appellate procedure, and deputised the NYPD Legal Bureau

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<sup>187</sup> New York City's Department of Consumer Affairs licenses businesses and enforces key consumer protection, licensing, and workplace laws. See MOIA (2019), *op. cit.*, note 184.

<sup>188</sup> See MOIA (2019), *op. cit.*, note 184.

<sup>189</sup> Police Executive Research Forum (2017), *U Visas and the Role of Local Police in Preventing and Investigating Crimes Against Immigrants*, in *Newsletter of the police executive research forum*, Vol. 31:2, available at: [www.policeforum.org/assets/docs/Subject\\_to\\_Debate/Debate2017/debate\\_2017\\_junaug.pdf](http://www.policeforum.org/assets/docs/Subject_to_Debate/Debate2017/debate_2017_junaug.pdf).

<sup>190</sup> Interviews with Police official, San Francisco Police Department (SFPD), San Francisco, interviewed by the author, 11 June 2019; Non-profit legal service provider (lawyer), Immigration Center for Women and Children, San Francisco, interviewed by the author, 14 June 2019; Police Commander, San Francisco Police Department (SFPD), San Francisco, interviewed by the author, 31 May 2019; see also Police Executive Research Forum (2017), *op. cit.*, note 189.

<sup>191</sup> Police Executive Research Forum (2017), *op. cit.*, note 189, p. 7.

(which is separate from the U certification office) to review appeals against denial decisions taken by NYPD and take a final on-the-merits decision.<sup>192</sup>

Other initiatives presented below, such as immigration legal support or outreach activities, equally favour the implementation of the T and U visa programmes, but are not specific to these programmes only.

### Immigration legal support for victims of crime

Any immigration rules that could favour victims of crime, including U, T, SIJS visas and VAWA petitions, would not be effective if migrants were not able to know about such measures, navigate the system, or access professional legal support. Both the cities of New York and San Francisco have significantly invested in the provision of free legal immigration support, including for victims of crime with an irregular immigration status. Both cities have adopted a community-based model to provide immigration legal services, based on partnerships with local NGOs that receive municipal funding to provide migrants with free legal services.

New York, for example, operates through its initiative 'ActionNYC', a citywide network of non-profits providing access to immigration legal services, including full representation in some complex cases, such as SIJS and U visas.<sup>193</sup> Created through a partnership between NYC-MOIA, the City University of New York (CUNY), and the Human Resources Administration, 'ActionNYC' provides comprehensive training and technical assistance to small and medium-sized community-based organisations to provide immigration legal services; and conducts outreach to immigrant communities. Immigrants, including victims of crime, can therefore access these organisations, and be referred to immigration legal services according to their immigration needs. The city of San Francisco funds a network of 15 non-profit organisations, known as the *San Francisco Immigration Legal Defense Collaborative* (SFILDC), to serve San Francisco immigrant residents who are, in particular, facing removal in immigration court.<sup>194</sup> While ActionNYC provides immigration legal services broadly, including for example on obtaining a green card or nationality, SFILDC is focused on removal proceedings. However, some organisations in the network focus specifically on victims of crime.<sup>195</sup> In particular, the Immigration Center for Women and Children (ICWC) focuses exclusively on assisting victims of crime (most of whom have an irregular migration status) and children who have been abused, abandoned or neglected by one or both of their parents, in obtaining immigration relief. ICWC therefore specialises in legal support on applications for U, T, and SIJS visas, VAWA self-petitions, and legal procedures related to those statuses (e.g. applications for work authorizations, green cards, and so forth).<sup>196</sup> Besides receiving funding from the city, the organisation works in partnership with SFPD's officer responsible for the U and T visa certifications. ICWC was created following the introduction of the U and T visa programmes.<sup>197</sup> It is thus a clear example of how the possibility that migrant victims may themselves apply for such visas (rather than leaving it to law enforcement authorities) favours the development of organisations supporting migrants in reporting crime and seeking a visa. In addition, San Francisco city's Department on the

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<sup>192</sup> Police Executive Research Forum (2017), *op. cit.*, note 189.

<sup>193</sup> New York City Mayor's Office of Immigrant Affairs (MOIA) (2018), *State of our immigrant city - Annual Report March 2018*, New York: MOIA.

<sup>194</sup> In particular, SFILDC is funded by the San Francisco Mayor's Office of Housing and Community Development. See SFILDC [online] *About us*, available at: <https://sfildc.org/> [last accessed September 2019].

<sup>195</sup> *Ibidem*.

<sup>196</sup> Non-profit legal service provider (lawyer), Immigration Center for Women and Children, San Francisco, interviewed by the author, 14 June 2019.

<sup>197</sup> *Ibidem*.

Status of Women – which works to end gender-based violence – funds a network of 27 non-profit organisations to assist women who are victims of domestic violence, sexual assault and trafficking. These community-based organisations including, for instance, the *Asian Pacific Islander Legal Outreach* or *Mujeres Unidas y Activas*, which provides immigration legal support and outreach regarding U and T visas to members of that community, or refers victims of gender-based violence to other organisations in the network. The idea behind partnering with a network of community-based organisations lies in the recognition that victims of gender-based violence, especially irregular migrants, would be more likely to reach out to such organisations, rather than to the police, or to other government institutions.<sup>198</sup> Depending on the case, victims may then be encouraged to reach out to the police.

#### Immigrants' awareness raising: outreach

When asked 'what more could be done to encourage crime reporting by irregular migrants in your city?' almost all the local authorities, law enforcement and civil society interviewees mentioned the importance of continuous outreach to migrant communities and awareness raising on non-cooperation policies and protective visas.<sup>199</sup> Making sure that migrants are aware of their opportunities to report a crime safely is a necessary premise for any measure aimed at encouraging reporting of crime by migrant victims. For this reason, local authorities and law enforcement agencies have invested in outreach to migrant communities regarding 'safe reporting' mechanisms introduced at both national and local level.

In 2018, in New York, for example, NYC-MOIA and its community partners conducted about 681 'Know Your Rights' forums and shared information on immigration matters at approximately 1,575 events regularly attended by migrant communities.<sup>200</sup> In addition, info-desks on immigration matters have been established to provide information to migrants and refer them to the proper agency within ActionNYC.<sup>201</sup> While not always specific to the rights of crime victims, these outreach events do include information on the policies on crime reporting, and officials of NYPD (as well as other city leaders) are invited to speak at such outreach and community events.<sup>202</sup>

In other cases, outreach events are specific to victimisation. For example, NYC-MOIA and the Department of Consumer Affairs of New York City have invested in preventing immigration fraud through outreach activities aimed at raising awareness about common immigration scams.<sup>203</sup> Crime prevention is another important aspect of outreach activities. This is particularly true for immigration fraud, a crime particularly common in immigrant communities, and for which

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<sup>198</sup> City Officials (2), City and County of San Francisco, San Francisco Department on the Status of Women, interviewed by the author, 13 June 2019.

<sup>199</sup> Prosecutor, Manhattan District Attorney's Office, New York, interviewed by the author, 3 April 2019; Police Official, New York Police Department (NYPD) – Legal Bureau, New York, interviewed by the author, 16 April 2019; Police Commander, San Francisco Police Department (SFPD), San Francisco, interviewed by the author, 31 May 2019; City Official, City and County of San Francisco, San Francisco Human Rights Commission, interviewed by the author, 12 June 2019; City Official, New York City, Mayor's Office of Immigrant Affairs (MOIA), New York, interviewed by the author, 4 April 2019.

<sup>200</sup> See MOIA (2019), *op. cit.*, note 184.

<sup>201</sup> *Ibidem*.

<sup>202</sup> City Official, New York City, Mayor's Office of Immigrant Affairs (MOIA), New York, interviewed by the author, 4 April 2019; Police Official, New York Police Department (NYPD) – Legal Bureau, New York, interviewed by the author, 16 April 2019.

<sup>203</sup> See MOIA (2019), *op. cit.*, note 184.

prosecution is particularly hard as victims normally do not have a regular immigration status, and the crime does not feature in the list of those qualifying for a U visa.<sup>204</sup>

Single law enforcement agencies have also arranged their own outreach activities. NYPD partners with NYC-MOIA, as well as with advocates and lawyers, participate in outreach events to communicate the non-cooperation policy of the agency and the U and T visa programmes. This information is also widely discussed in the monthly 'community councils' hosted by each NYPD precinct with local residents and members of the public.<sup>205</sup> NYPD has invested in such outreach in line with the community (or neighbourhood) policing approach adopted by the agency since 2014.<sup>206</sup> The Manhattan District Attorney (DA) Office has even established a legal outreach team within its Special Victims Bureau and Immigrant Affairs Unit. The unit does continuous outreach to immigrant populations about the possibilities to report crime and reassure them regarding the fear of deportation. The DA office realised that, because of that fear, many foreign nationals would rather report a crime to a community organisation or to their consulates in New York. Therefore, the DA's office developed key partnerships with small non-profit organisations and several consulates, and trained the frontline staff of these bodies on the policies of New York City. Victims are thus reassured and referred to the NYPD and the DA's office.<sup>207</sup>

Finally, law enforcement agencies also adopted policies requiring officers to inform victims about the possibilities of 'safe reporting'. For instance, the San Francisco DA office has a policy to inform each victim they interact with (irrespective of whether there are suspicions that the person might not be a US citizen) of the possibility to request a U or a T visa.<sup>208</sup> SFPD has a 'U visa policy' mandating that, whenever a patrol officer encounters an immigrant victim of certain crimes, the officer must conduct a preliminary investigation, inform the victim about the possibility of obtaining a U Visa application, and refer the victim to the relevant unit in SFPD.<sup>209</sup>

#### Training of local law enforcement officers

As seen above, lack of proper training of law enforcement officials on existing 'safe reporting' policies can deeply undermine the actual implementation of such policies. Therefore, training for local officials is carried out in both New York<sup>210</sup> and San Francisco.<sup>211</sup> The non-cooperation policies are included in the patrol guide of NYPD and the general orders of SFPD, which each police officer is responsible for knowing. U and T visa programmes are also part of bulletins that police officers are expected to know. In San Francisco, for instance, SFPD's U Visa policy is contained in a 'Class A' bulletin, meaning that all officers are responsible for understanding the policy.<sup>212</sup> By inserting the non-cooperation policies and 'visa policies' in the official patrol guides and orders of departments, the policies assume strong relevance as officers might be disciplined if they don't act according to the official policy. In addition, periodic trainings are conducted for officers, either specifically on the

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<sup>204</sup> Prosecutor, Manhattan District Attorney's Office, New York, interviewed by the author, 3 April 2019.

<sup>205</sup> Police Official, New York Police Department (NYPD) – Legal Bureau, New York, interviewed by the author, 16 April 2019.

<sup>206</sup> Police Official, New York Police Department (NYPD) – Legal Bureau, New York, interviewed by the author, 16 April 2019.

<sup>207</sup> Prosecutor, Manhattan District Attorney's Office, New York, interviewed by the author, 3 April 2019.

<sup>208</sup> Prosecutor, San Francisco District Attorney's Office (SFDA), interviewed by the author, 10 June 2019.

<sup>209</sup> Police Executive Research Forum (2017), *op. cit.*, p. 9.

<sup>210</sup> Police Official, New York Police Department (NYPD) – Legal Bureau, New York, interviewed by the author, 16 April 2019.

<sup>211</sup> Police official, San Francisco Police Department (SFPD), San Francisco, interviewed by the author, 11 June 2019.

<sup>212</sup> Police Executive Research Forum (2017), *op. cit.*, note 189.

‘policy on immigration’ of the agency, or simply on the general orders and patrol guide, which include the department ‘policy on immigration’.<sup>213</sup>

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<sup>213</sup> Police Official, New York Police Department (NYPD) – Legal Bureau, New York, interviewed by the author, 16 April 2019; Police Commander, San Francisco Police Department (SFPD), San Francisco, interviewed by the author, 31 May 2019; Police official, San Francisco Police Department (SFPD), San Francisco, interviewed by the author, 11 June 2019.

## Conclusion

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This report was prepared in the context of the ‘safe reporting’ project, the ultimate aims of which include providing authoritative evidence on and analysis of policies and best-practices enabling and encouraging ‘safe reporting’ in the United States and Europe. This report has explored both national and local measures adopted in the USA to encourage interactions between irregular immigrants and criminal law enforcement authorities, and thus encourage reporting of crime by victims and witnesses with irregular migration status. The second aim of the ‘safe reporting’ project is to assess the legal and political replicability of practices and policies on ‘safe reporting’ across the different countries involved in the project. To allow this assessment – which will be done in a separate paper – this report has set out the main legal and political conditions that led to the adoption of both federal and local ‘safe reporting’ measures in the United States.

A first observation to make is that the challenges of irregular migrant victims and witnesses in accessing the police and reporting crime have not been disregarded by authorities in the United States – rather, measures facilitating ‘safe reporting’ for this group have been adopted by both federal and sub-federal authorities. This simple remark is a confirmation that the dilemma faced by victims and witnesses with irregular migration status is not just an issue of academic debate, but has been cause of real concern for authorities at all levels of governance. The significant number of U visa applicants (and the high acceptance rate of U visas) is itself a demonstration of the need for measures ensuring ‘safe reporting’ for victims with irregular status. The notable backlog of about 135,000 pending applications for these visas shows that this need is probably even greater than foreseen. The US experience could offer lessons for other countries in receipt of large numbers of immigrants, which in the absence of ‘safe reporting’ devices comparable to the U visa may not have sight on the scope of the issue. Despite the heated debate around sanctuary policies, the bipartisan support for federal legislation introducing special visas to crime victims is a further testimony that ‘safe reporting’ measures are needed, no matter the positioning of governments on the political spectrum. Measures ensuring ‘safe reporting’ of crime respond not only to the protection needs of the victims, but also to general security and law enforcement concerns.

Due to the transnational breadth of the ‘safe reporting’ project, this report explored the limitations and successes of measures adopted in the United States with the goal of extracting lessons that the US experience could offer to other countries. In relation to federal measures, the report has highlighted the limitations and successes of the U and T visas, the federal measures most directly aimed at allowing ‘safe reporting’. The U visa, in particular, can be considered a successful measure to the extent that, in the last ten years, it allowed around 85,000 victims with irregular status to come forward, report a crime, and obtain protection and a residence permit. Even more migrants have reported a crime in the hope of receiving U status, but have not yet received a response to their applications. Besides the actual need for such a visa, there are other reasons for its success, including the relatively wide list of qualifying crimes. As seen, a key feature of the U visa is the possibility for victims to apply directly to USCIS and lead on the procedure to obtain the visa. This possibility encourages many (supported by their legal service providers) to report crime, as a first step to obtain protection and a regular status. In this, the U visa differs from equivalent visas of other countries where the procedure is initiated and led exclusively by law enforcement authorities at their discretion, which ultimately does not encourage victims to come forward as the latter are left in the dark regarding whether an application for a protective visa will follow the reporting of a crime. At the same time, the U programme does not disregard the fundamental law enforcement component of the visa, as it requires a law enforcement certification of the victim’s helpfulness to law enforcement.

The U and T visas have also shown their deficiencies. The backlog of U visa applications caused by the annual cap is the most evident. For the T visa, on the contrary, its main deficiency is the low numbers of applicants, which may be related to the more limited scope and the specificities of the kinds of crime it applies to. The '*geographic roulette*' of the U visa is another challenge (one that is also common in relation to equivalent visas in the other countries involved in this study) where local law enforcement authorities may have different attitudes in different parts of the country towards releasing or refusing the required law enforcement certifications. Yet, the U visa programme allows applicants to obtain this certification from a variety of law enforcement actors, which may mitigate the problem. At the same time, the T visa offers an example for a solution, in that, if a T visa applicant cannot obtain a law enforcement declaration of their helpfulness, they are allowed to prove their cooperation with law enforcement in alternative ways.

In relation to local measures, this report has focused on the 'non-cooperation' policies of 'sanctuary' cities. It has explored the legal conditions that allow sub-federal authorities – who play a major role in the enforcement of criminal law in the United States – to refrain from cooperating with federal authorities in the enforcement of immigration law. It was seen how 'non-cooperation' policies are possible because of the unique constitutional setting of the United States, where the system of dual sovereignty set by the 10<sup>th</sup> Amendment of the US Constitution (and the 'Anti-commandeering doctrine') prevents federal authorities – who are in charge of enforcing immigration rules – from imposing on local governments and police forces an obligation to cooperate in identifying and deporting irregular migrants. It was observed that the main features allowing sanctuary policies are: 1) a strict separation between immigration law enforcement authorities at the federal level and criminal law enforcement actors at the sub-federal level; 2) the almost absolute autonomy of local enforcement agents from federal authorities; and 3) the generally non-criminal nature of an irregular migration status in the United States. These particular conditions are unique to the United States, which means that strict local 'non-cooperation' policies may hardly be replicated in countries where a national police organisation is responsible for both immigration and criminal law enforcement; or where national authorities can mandate the cooperation of local police forces.

While local 'non-cooperation' policies may be unique to the USA, their rationale and functioning could inspire reforms elsewhere – mostly at a national level – setting firewalls between law enforcement bodies dedicated to immigration law enforcement and those mandated to enforce criminal law. In addition, 'non cooperation' policies in the USA have been complemented by a number of other initiatives which also aim to facilitate 'safe reporting' of crime, and which could more easily be replicated in other countries. These include local initiatives supporting irregular migrants' access to the measures offered by national legislation, such as the U and T visas; local initiatives raising awareness of migrant victims' rights, through outreach activities and immigration counselling; as well as multi-stakeholder partnerships, including between police bodies and NGOs. NGOs can act as intermediaries between the migrant population and authorities, and thus encourage migrants to report crime where this would open the door to obtaining protection, support and regularisation of status. The 40-year long experience of US municipalities with 'sanctuary policies' also has lessons to offer on the effectiveness of 'safe reporting' initiatives, and tells us that, whatever measure is implemented, making both migrants and law enforcement actors aware of policies is the first step to effectively facilitating access to justice.





The Global Exchange on Migration and Diversity is an ambitious initiative at the Centre on Migration, Policy and Society (COMPAS) opening up opportunities for knowledge exchange and longer term collaboration between those working in the migration field.

