THE SANCTUARY OF PROSECUTORIAL NULLIFICATION

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INTRODUCTION

In the aftermath of the 2016 election, the shortcomings of existing sanctuary protections came sharply into focus.1 Historically, cities enacted sanctuary protections to extricate their law enforcement agencies from activities related to federal immigration enforcement. In sanctuary cities, local government agencies are typically restricted from sharing information with federal immigration authorities or from cooperating in apprehending individuals targeted for removal.2 After the White House issued an Executive Order (EO) in late January 2017, many immigrant rights advocates recognized that external facing policies that proscribed direct cooperation would not suffice.3 The EO announced that Immigration and Customs Enforcement (ICE) would prioritize removing any undocumented person charged or convicted of a crime, no matter how serious.4 Recognizing the vital role state criminal courts play and would continue to play in fueling deportations, public defenders in New York City (“City”) identified a new actor with the power to enact stronger protections: the prosecutor.5

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2 See, e.g., id.

3 See Lasch et al., supra note 1, at 1713–14, 1718.


5 See 5 Boro Defs., Call for a Moratorium on Broken Windows Prosecutions, MEDIUM (Jan. 30, 2017), https://medium.com/@5BoroDefenders/call-for-a-moratorium-on-broken-windows-prosecutions-729e3764411a [hereinafter 5 Boro Defs., Call for a Moratorium].
Prosecutors are the most powerful actors in the American criminal legal system. Their imperial discretion shapes how the law gets applied, who gets punished, and who is forgiven. It has always been true that a prosecutor’s charging, bail, and plea bargaining practices regularly expose noncitizens to the risk of removal. Skillful defense negotiations can sometimes mitigate those consequences. But, after January 25, 2017, the mere accusation of a crime, no matter how serious, created a heightened risk of removal for undocumented individuals. Under this new enforcement regime, prosecutors became a more obvious focus for reform, as the actors responsible for leveling criminal charges. They remain an underappreciated source for sanctuary protections, however.

This Article examines the role local prosecutors can play to isolate cities and states from the federal immigration enforcement regime, by describing a campaign launched days after the January 25, 2017 EO’s promulgation. The #NYCdontprosecute campaign demanded that local district attorneys (DAs) suspend prosecutions for broken windows offenses because of the heightened risk of removal prompted by a criminal charge. Public defenders, who recognized the inadequacy of their standard tactics to mitigate the collateral consequences of contacts between law enforcement and noncitizens launched the campaign. They asked the public to exert pressure on their adversaries in order to win greater protections for their clients.

Since the White House announced new immigration priorities in 2017, immigrant rights and criminal justice reform advocates have called for cities to broaden protections for their most vulnerable

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8 See Jason A. Cade, The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court, 34 CARDOZO L. REV. 1751, 1754 (2013); 5 Boro Defs., FAQ, MEDIUM (Feb. 6, 2017), https://medium.com/@5BoroDefenders/faq-d8159da6af76 [https://perma.cc/5DQA-ZDLJ] [hereinafter 5 Boro Defs., FAQ].
9 See Cade, supra note 8, at 1754.
10 See Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,800 (Jan. 25, 2017); 5 Boro Defs., Call for a Moratorium, supra note 5.
11 See 5 Boro Defs., Call for a Moratorium, supra note 5.
12 See id.
13 See id.
14 5 Boro Defs., Call for a Moratorium, supra note 5; 5 Boro Defenders, Medium, https://medium.com/@5BoroDefenders [https://perma.cc/4EHW-TN7K].
15 See 5 Boro Defs., Call for a Moratorium, supra note 5.
residents. Platforms, such as the Expanded Sanctuary and Freedom City, try to expand the scope of sanctuary protections. Decriminalization of low-level offenses feature prominently in their vision. The #NYCdontprosecute campaign was an early example of this broader vision for sanctuary protections, which targeted the discretion of district attorneys, as the site for de facto decriminalization. The campaign offers a case study to explore the advantages of asking prosecutors to nullify low-level offenses to create these broader protections.

I examine the substantive elements and strategic merits of the campaign under two different frameworks for criminal law reform: a liberal and an abolitionist. I do so to draw out the differences in these approaches to legal change, and to stay true to the spirit animating the campaign that borrowed elements of both.

Nullification is the decision by a prosecutor not to charge an offense or category of offenses because she disagrees with “the wisdom of the law or [with] the desirability of punishing a culpable wrongdoer.” From the perspective of a liberal law reform agenda, when a prosecutor nullifies low-level offenses, it can be argued that it corrects for criminal law’s apparent deviation from its core purpose of adjudicating real crimes. Broken windows offenses criminalize poor communities of color and lack any semblance of normative guilt. Prosecutions for such charges are often resolved without a legal finding of guilt. Each of these characteristics poses a challenge to the myths that the criminal legal system tells about itself: that it is fair, color blind, and holds individuals accountable for their bad acts. We

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18 See RITCHIE & MORRIS, supra note 17, at 3; UNZUETA, supra note 17, at 2.
19 See 5 Boro Defs., Call for a Moratorium, supra note 5.
20 See Amna A. Akbar, Toward a Radical Imagination of Law, 93 N.Y.U. L. REV. 405, 409–10 (2018) (contrasting the 2016 policy platform of the Movement for Black Lives with the Department of Justice reports on Ferguson and Baltimore to draw out the differences between “traditional liberal approaches to criminal law reform” with a “decarceral agenda rooted in an abolitionist imagination”).
can think of nullification as a corrective measure that cleans house. Nullification similarly advances a liberal immigration agenda that seeks to expel “[f]elons, not families.” Furthermore, the aggressive enforcement of broken windows offenses in New York City has been a distinctly local and urban phenomenon. When a local prosecutor declines to prosecute, her decision arguably realigns the criminal and immigration systems with their intended purpose, but in a way that is geographically and institutionally contained. Nullification embraces the traditional liberal view of the prosecutor as the actor best placed to make decisions about local criminal enforcement.

But abolitionist principles also animated the campaign. The movement for prison abolition works to decrease the power and reach of carceral institutions, from the prison to the immigration detention center. “Abolitionists refuse to abide the paradigm where ‘prisons [serve] as catchall solutions to social problems.’” Practically speaking, activists in this tradition fight against prison and jail expansions, increases in police budgets and sentences, and advocate in favor of decriminalization and clemency. As resources are divested away from law enforcement, an abolitionist agenda advocates for resources to be reinvested into services and institutions that address the root causes of harm and violence. For our

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Even as we are a nation of immigrants, we’re also a nation of laws. Undocumented workers broke our immigration laws, and I believe that they must be held accountable—especially those who may be dangerous. That’s why, over the past six years, deportations of criminals are up 80 percent. And that’s why we’re going to keep focusing enforcement resources on actual threats to our security. Felons, not families. Criminals, not children. Gang members, not a mom who’s working hard to provide for her kids. We’ll prioritize, just like law enforcement does every day.

Id.


26 Id.

27 See id.

purposes, an abolitionist praxis begins by scrutinizing and dismantling the legal processes that generate categories like *alien* and *criminal*, which serve to advance an agenda of racial, ethnic, and class exclusion.\textsuperscript{29} The campaign’s aim of shrinking the ambit of criminalization helps to prevent undocumented persons from being detected and noncitizens acquiring grounds for their removal. It proposed a policy that goes further than conventional sanctuary protections.\textsuperscript{30} Nullification alone, however, is not an end state for abolition, but a stop along the way. Nullification without legislative change or a reduction in prosecutors’ budgets threatens to enhance rather than diminish prosecutorial power because nullification is the maximal expression of prosecutorial discretion. Most significantly, and in contrast to a liberal law reform approach, an abolitionist ethic emphasizes the importance not of portraying broken windows offenses as an aberration of an otherwise healthy system, but an expression of its core features. Subscription to the abolitionist ethic requires pointing to the continuities between the treatment of low-level offenses and serious crimes by the crimmigration system.

As a matter of process, the campaign models a way to expand the otherwise narrow opportunities for prosecutorial accountability. Asking members of the public to call the DA’s office created a new form of engagement with prosecutorial policy that is unmediated, direct, and underappreciated.\textsuperscript{31} While a public call for prosecutors to nullify can appear anti-democratic, the campaign built on the gains of over a decade of sustained organizing that questioned the empirical and normative claims advanced by the theory of broken windows policing. This grassroots effort ushered in a new consensus that has helped to redefine public safety.\textsuperscript{32} Although the campaign

\textsuperscript{29} See Dylan Rodriguez, *Abolition as a Praxis of Human Being: A Foreword*, 132 Harv. L. Rev. 1575, 1575, 1586 (2019) (“By any historical measure, the institutional formation of incarceration within the purviews of U.S. criminal justice statecraft has produced a social logic, jurisprudence, cultural structure, and militarized policing apparatus that naturalize the condition of state captivity for criminalized people, populations, and geographies.”).

\textsuperscript{30} See 5 Boro Defs., *Call for a Moratorium*, supra note 5.

\textsuperscript{31} See, e.g., 5 Boro Defenders (@5borodefenders), FACEBOOK (June 3, 2017), https://www.facebook.com/5borodefenders/ [https://perma.cc/87QW-HWZW] [hereinafter 5 Boro Defenders, FACEBOOK (June 3, 2017)].

\textsuperscript{32} See Joo-Hyun Kang, *Fighting Broken Windows Policing in New York City in the ’90s and...*
was disruptive, it built on the achievements of longstanding social movements actively reshaping the City’s law enforcement agencies.\textsuperscript{33} The campaign was ultimately a modest one: it lasted only three months. A few months after the campaign ended, two DAs promised to stop prosecuting some categories of cases, without revealing their motivations.\textsuperscript{34} Yet, despite its limited success, the campaign spurred other initiatives that have since gained wider traction locally and nationally.\textsuperscript{35} As cities contemplate decriminalization as a sanctuary strategy, this article hopes to offer advocates guidance for the road ahead.

The motivations for writing this piece are also personal: I was one of the public defenders who helped to organize the campaign. We launched the campaign without the benefit of planning, and in a climate of fear on behalf of our clients. This Article offers an opportunity to critically assess the policy proposed and the tactics deployed. The Article begins by narrating the organizers’ rationale for the campaign, and then attempts to test its assumptions and predictions, by engaging with scholarship on crimmigration, prosecutorial discretion, and abolition.

I. CITY SANCTUARY PROTECTIONS

As the federal government has come to rely more and more on municipalities, counties, and states to enforce immigration law, New York City tried to resist this trend. The City enacted sanctuary protections that have been progressively strengthened over the years.\textsuperscript{36} Indeed, the results of the 2016 election sparked new interest


in fortifying protections for noncitizens.\textsuperscript{37} And yet, despite several waves of legislation in New York City, there remain significant gaps in coverage.\textsuperscript{38}

At their most basic level, sanctuary protections try to shield some noncitizens under some circumstances, from detection and removal when they interact with local law enforcement.\textsuperscript{39} These protections attempt to insulate the City’s local criminal legal system from entanglements with the federal government that have given rise to the nationwide crimmigration system.\textsuperscript{40}

Since the 1980s, and more so after September 11, 2001, scholars and activists have witnessed the consolidation of a crimmigration system—the merging of previously distinct institutions, the criminal legal system and the civil immigration system.\textsuperscript{41} This integration occurred along two axes: horizontally, across agencies within the federal government and vertically between state criminal legal...
systems and the federal government.\textsuperscript{42} César Cuauhtémoc García Hernández narrates the emergence of the crimmigration system:

Beginning in the 1980s...the dominant distinguishing characteristic between prospective immigrants who have been welcomed and those who have been shunned has turned on criminal activity. Convictions for a growing list of offenses result in removal—the technical umbrella term for exclusion and deportation. Sometimes commission—rather than conviction—of such an offense is sufficient. At the same time, immigration law enforcement has increasingly adopted the securitized approach of criminal law enforcement.\textsuperscript{43}

State courts came to play a pivotal role in adjudicating who remains and who is expelled, by supplying the bulk of convictions used as grounds for removal.\textsuperscript{44} What counts as a criminal conviction under immigration law has also broadened.\textsuperscript{45} “Almost every immigration statute passed since [the 1980s]...has expanded the list of crimes leading to exclusion and deportation.”\textsuperscript{46} Categories of convictions that serve as grounds for removal, such as “aggravated felonies, crimes involving moral turpitude, and controlled substance convictions” included what many would consider minor offenses.\textsuperscript{47} As the Supreme Court recognized in \textit{Padilla v. Kentucky},\textsuperscript{48} “involvement in criminal activity now frequently leads to ‘presumptively mandatory’ removal.”\textsuperscript{49}

The federal immigration enforcement system not only depends on state convictions to create grounds to expel noncitizens, but also on state law enforcement’s contact with noncitizens to identify individuals eligible for removal.\textsuperscript{50} At the time of any arrest, as a

\textsuperscript{42} See id. at 91–93.
\textsuperscript{44} See id. at 1513–15.
\textsuperscript{46} Id. at 383.
\textsuperscript{47} Cade, supra note 8, at 1758.
\textsuperscript{49} Hernández, supra note 43, at 1467; see also Padilla, 559 U.S. at 369; Cade, supra note 8, at 1810 (“Once noncitizens enter the criminal justice system, the odds of being funneled to deportation proceedings through federal enforcement programs are high. Inevitably, the government deports many noncitizens, including those with lawful status and substantial community ties, on the basis of minor crimes of which the individual should not have been convicted.”).
\textsuperscript{50} See Hernández, supra note 43, at 1483–84.
matter of course, the arresting agency, often the local police, will send all arrestees’ fingerprints to the FBI. Ever since the Bush administration created the Secure Communities Program, briefly replaced by the Priority Enforcement Program under President Obama, the FBI has shared those fingerprints with the Department of Homeland Services (DHS). With this biometric sharing, DHS can identify whether someone in state custody—at a police precinct, jail or prison—is eligible for removal, allowing the federal agency to request that the local agency hold that person until ICE arrives.

In response to this consolidation, sanctuary protections seek to create a series of wedges between these increasingly integrated institutions. In their survey of sanctuary protections, Christopher Lasch and his co-authors identify several mechanisms that sanctuary protections employ to isolate cities and states from the federal government:

1. barring investigation of civil and criminal immigration violations by local law enforcement,
2. limiting compliance with immigration detainers and immigration warrants,
3. refusing U.S. Immigration and Customs Enforcement (“ICE”) access to local jails,
4. limiting local law enforcement’s disclosure of sensitive information, and
5. precluding local participation in joint operations with federal immigration enforcement.

In New York City, in the past five years, City Council passed several pieces of legislation regulating city law enforcement agencies achieving each of the five goals above. Two crucial points of contact remain untouched: when the New York Police Department (NYPD)
shares biometric data with the FBI and DHS, and any contact made by DA offices. These shortcomings are not unique to the City, but point to the limits of the dominant sanctuary framework, and the difficulty of regulating county actors like DAs. Detainer requests from DHS are a central target of sanctuary legislation. If DHS suspects that someone in state custody is eligible for removal, it can send a detainer, requesting that local authorities detain that individual for up to 48 hours longer than she would otherwise be held so that ICE can apprehend her. By 2017, ICE issued nearly one million detainer requests nationally, “with thousands issued to authorities in New York City.” In 2012, City Council passed legislation limiting the circumstances under which the Department of Corrections (DOC) can honor ICE detainers: only when the individual has a criminal record, prior immigration violations, or poses a safety threat. The legislation, however, authorized more detainer requests than lawmakers expected. City Council narrowed the grounds for cooperation.

After the Third Circuit and federal district courts ruled that ICE detainers were not binding, City Council passed legislation in


58 See Vasquez, supra note 38.


61 See Kandel, supra note 52, at 11–12.


64 See N.Y.C. COUNCIL COMM. ON IMMIGRATION ET AL., supra note 62, at 12–13.


66 See Lasch et al., supra note 1, at 1732 (discussing litigation challenging the legality of detainers); see also Galarza v. Szalczuk, 745 F.3d 634, 643 (3d Cir. 2014) (ruling that ICE detainer requests are not binding on states and localities, who may share liability when they participate in wrongful immigration detentions).
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October 2014, once again limiting the circumstances under which the NYPD or DOC could honor such requests from ICE. The law required ICE to present the NYPD and DOC a warrant from an Article III judge, with one exception. The legislation also constrained the DOC's ability to share information with ICE. Advocates noted there were greater protections afforded to noncitizens in DOC than in NYPD custody. Unlike the DOC, for example, the law did not forbid the NYPD or the Department of Probation from sharing information with DHS.

In the aftermath of the 2016 election, City Council created more protections. A series of bills passed in 2017 tried to ensure uniformity across city agencies. These laws barred all city agencies from cooperating with federal immigration enforcement except in “limited circumstances,” such as in counter-terrorism operations. The legislation also banned local employees from being “deputized by ICE

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67 See N.Y.C., N.Y., Council Int. No. 989; N.Y.C., N.Y., Council Int. No. 982 (eliminating detainers lodged against those with open misdemeanor cases and those with misdemeanor convictions that were more than ten years old).

68 See N.Y.C., N.Y., Council Int. No. 486-A § 2 (2014) (codified as N.Y.C., N.Y., ADMIN. CODE § 9-131(b)(1), (2) (2019)). Under this law, DOC is prohibited from honoring an ICE detainer request, unless it is accompanied by a judicial warrant from an Article III federal judge, and the individual has been convicted of a “violent or serious crime” within five years of the instant arrest or is a possible match on the terrorist watch list. See N.Y.C., N.Y., ADMIN. CODE § 9-131(a)(2), (b); see also KATHRYN O. GREENBERG IMMIGRATION JUSTICE CLINIC, NEW YORK CITY NEW DETAINER DISCRETION LAW CHART AND PRACTICE ADVISORY 1 (2014), https://www.immigrantdefenseproject.org/wp-content/uploads/2013/09/Practice-Advisory-2014-Detainer-Discretion-Law-PEP.pdf [hereinafter GREENBERG] (explaining New York City’s detainer discretion laws that took effect in 2014).

69 See GREENBERG, supra note 68, at 1.

70 See id.

71 See id.

72 See N.Y.C., N.Y., Council Int. No. 486-A, § 4; GREENBERG, supra note 68, at 1.


74 See N.Y.C., N.Y., Council Int. No. 1558-A § 1; see also Press Release, Office of the Mayor, supra note 73 (“City agencies, including the NYPD, will continue to cooperate with federal law enforcement agencies in certain circumstances, including... by sharing information about individuals in the City’s criminal custody who have been convicted of one of approximately 170 qualifying violent or serious felonies under the City’s existing laws on immigration detainer requests.”).
to perform immigration enforcement,” under what are known as 287(g) agreements.75

Significantly, these City laws have never regulated DA offices. DA offices are not City agencies, but county actors.76 Like many other county level actors, DAs are notably absent from conversations about policing and sanctuary protections.77 “Generally, city ordinances do not govern county level agencies or officials, and sanctuary city laws can be undermined by county policy and practice.”78 Thus, as some City law enforcement agencies have moved towards greater autonomy from the federal government, DA offices have lagged. In fact, the press revealed that the Manhattan District Attorney has a policy of referring individuals to ICE under certain circumstances, including after an acquittal at trial.79

Besides a complete absence of sanctuary protections governing DAs, the initial point of contact between the NYPD and DHS remains untouched—the NYPD still shares arrestees’ fingerprints with the FBI, and in turn with DHS.80 The NYPD could decline to transmit the fingerprints to the FBI, as there is no obligation for the NYPD to do so.81 But no municipality or state has explored the option.82 Commentators have noted that such an outcome is unlikely because local police officers rely heavily on the FBI’s crime database.83

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75 Press Release, Office of the Mayor, supra note 73; see also N.Y.C., N.Y., Council Int. No. 1568-A (2017).
76 Article XIII of the New York State Constitution regulates the terms of district attorneys. See N.Y. CONST. art. XIII, § 13(a) (“In each county a district attorney shall be chosen by the electors once in every three or four years as the legislature shall direct.”). A DA is removable by the governor. N.Y. CONST. art. XIII, § 13(b) (“Any district attorney who shall fail faithfully to prosecute a person charged with the violation in his or her county of any provision of this article which may come to his or her knowledge, shall be removed from office by the governor, after due notice and an opportunity of being heard in his or her defense.”); accord Hoerger v. Spota, 997 N.E.2d 1229, 1230 (N.Y. 2013) (per curiam) (“[A] district attorney is subject to removal from office, not by county officials, but by the Governor.”). Because the office is created by the constitution, the DA’s office is considered a state office. Drake v. City of Rochester, 408 N.Y.S.2d 847, 853, 854 (Sup. Ct. 1978), aff’d, 429 N.Y.S.2d 394 (App. Div. 1980). Nonetheless, the county is liable for a DA’s tortious conduct, and pays the office’s salary. See Whitmore v. State, 389 N.Y.S.2d 443, 444 (App. Div. 1976) (citing Fisher v. State, 176 N.E.2d 72 (N.Y. 1961); Ritter v. State, 128 N.Y.S.2d 830 (App. Div. 1954); Fishbein v. State, 125 N.Y.S.2d 845 (App. Div. 1953)).
77 See Graber & Marquez, Searching for Sanctuary, supra note 59, at 1, 3 (“Counties, not cities, are the most important policy-makers in terms of establishing sanctuary policies.” (emphasis removed)).
78 Id. at 16.
79 See Brown, supra note 57.
80 See Devereaux & Knefel, supra note 57.
82 See id.
83 See, e.g., id.
The City’s sanctuary protections also do not cover individuals with certain criminal histories. The City will heed detainer requests for anyone convicted of “one of approximately 170 qualifying violent or serious felonies.”

II. President Trump’s January 25, 2017, Executive Order

On January 25, 2017, President Trump signed two EOs governing immigration policy. The one discussed here prioritized removing any individual without lawful immigration status accused or convicted of a crime under federal law. It exposed noncitizens to heightened and new risks, against which current sanctuary policies offered little protection.

The EO threatened to expose far more people to removal than under the previous administration, which itself set a record, earning President Obama the title of Deporter-in-Chief. Under the Obama administration, although misdemeanor convictions were also grounds for removal, the kind and number of convictions mattered. Individuals with an aggravated felony as defined in Section 1101(a)(43)(G) of the Immigration and Nationality Act were “Priority 1,” which could entail a single theft offense with a suspended one-year

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84 See Press Release, Office of the Mayor, supra note 73.
86 In executing faithfully the immigration laws of the United States, the Secretary of Homeland Security (Secretary) shall prioritize for removal those aliens described by the Congress in sections 212(a)(2), (a)(3), and (a)(6)(C), 235, and 237(a)(2) and (4) of the INA (8 U.S.C. 1182(a)(2), (a)(3), and (a)(6)(C), 1225, and 1227(a)(2) and (4)), as well as removable aliens who: (a) Have been convicted of any criminal offense; (b) Have been charged with any criminal offense, where such charge has not been resolved; (c) Have committed acts that constitute a chargeable criminal offense.
89 See Muzaffar Chishti et al., The Obama Record on Deportations: Deporter in Chief or Not?, MIGRATION POLY INST. (Jan. 26, 2017), https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not [https://perma.cc/X92Y-NPM3].
year sentence, without any jail time.90 “Priority 2” included individuals with three or more misdemeanor offenses, amongst other grounds.91 This hierarchy in removability gave expression to the Obama administration’s “felons, not families” policy, which perpetuated a securitized approach to immigration enforcement.92

Although the Obama administration’s priorities exposed individuals to removal for minor offenses, the 2017 EO went further. Even “[d]ispositions considered to be . . . 'non-criminal’” in New York State or a pending charge could make the individual a priority for deportation.93 Criminal immigration specialists cautioned that the EO made “no distinction between the types of crime or level of offenses that will make a person a target for deportation.”94 “For example, DHS considers New York violations to be misdemeanor convictions.”95 Violations, specifically New York Penal Law section 240.20—disorderly conduct—is a common charge used to resolve misdemeanor cases, which does not give or create a criminal record in New York State.96 A disorderly conduct plea serves as an essential currency for resolution of low-level cases.97 But it can lead to removal based on how federal law categorizes this offense, depending on the individual’s immigration status.98

The Trump administration’s announced priorities did not change immigration law and therefore did not alter who is legally removable.

92 See 2014 Obama Immigration National Address, supra note 23.
94 Id. at 2 (emphasis removed).
95 Id. (emphasis removed).
96 See N.Y. PENAL LAW § 240.20 (McKinney 2019); Frankie Herrmann, Building A Fair and Just New York: Decriminalize Transactional Sex, 15 HASTINGS RACE & POVERTY L.J. 51, 73 (2018).
98 See Juan C. Quevedo, The Troubling Case(s) of Noncitizens: Immigration Enforcement Through the Criminal Justice System and the Effect on Families, 10 TENN. J.L. & POL’y 386, 405, 406–07 (2015) (noting that immigration courts have characterized relatively minor crimes as crimes involving moral turpitude, which are removable offenses).
But the EO signaled that enforcement would expand significantly, putting more people at risk for removal. Criminal immigration specialists warned, “any ‘removable’ person who has been accused or convicted of a crime is now a priority for deportation.” The EO also directed ICE to seek detainers for any removable person, unlike the previous administration’s written policy which purported to target only those who fell within the enumerated priorities.

The lowered threshold for removal under the 2017 EO underscored the inadequacy of the main tools a defense attorney has to prevent her client from being deported.

As part of the consolidation of the crimmigration system, DHS makes decisions about granting residency, citizenship, or relief from adverse action based on an individual’s criminal record. The “cleaner” the record the better the chances of getting the desired immigration benefit. Each interaction with law enforcement leaves a mark, however fleeting. A pending criminal charge leaves a mark that will later be erased if the case is dismissed or the person is acquitted at trial. No charge at all is better than a charge, even if temporary. A temporary charge is better than a conviction, which leaves an indelible mark in New York State. In the context of civil immigration enforcement, a conviction can create grounds for removal, or else it alerts immigration authorities to someone being in the country without documentation.

In response, a defense attorney is required to inform her client of the potential immigration consequences of taking a specific a plea or going to trial. But as an attorney might explain to a client, “I don’t have a crystal ball” to predict how immigration authorities might act, particularly if the immigration benefit is granted by an act of

100 See ADVISING IMMIGRANT CLIENTS, supra note 93, at 1.
101 See id. at 1–2; MORGAN-TROSTLE ET AL., supra note 89, at 14; 2014 Obama Immigration National Address, supra note 23.
103 See id. at 2.
104 See Quevedo, supra note 98, at 392–95.
105 In New York State, records from any criminal prosecution terminated in an individual’s favor or by way of a noncriminal conviction shall be sealed. See N.Y. CRIM. PROC. LAW §§ 160.50, 160.55, 170.55, 170.56 (McKinney 2019); see also Schwabe v. Bd. of Bar Exam’rs, 353 U.S. 232, 241 (1957) (“The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense.”).
106 N.Y. CRIM. PROC. LAW § 160.59 (McKinney 2019).
107 See 5 Boro Defs., Call for a Moratorium, supra note 5.
discretion. A defense attorney is also expected try to strike a harm reducing plea.\textsuperscript{109} But there is no equality of arms in the American criminal legal system. A good outcome will depend on the prosecutor’s inclination. The defense has limited leverage in plea negotiations.\textsuperscript{110} In sum, these measures have never assured the safety of noncitizens facing criminal prosecution. The EO announced DHS’s mandate for mass expulsion targeting undocumented persons for removal as soon as they stand criminally accused.\textsuperscript{111} This increased urgency impelled the organizers to advance more comprehensive protections earlier in the life of a criminal case.

\textbf{A. A New Demand for Sanctuary}

At frequent demonstrations in January 2017, both before and after Donald Trump’s inauguration, demonstrators exhorted state and city representatives to take steps, when possible, to thwart the new administration’s policy priorities.\textsuperscript{112} In particular, there was a broad and energetic interest in strengthening sanctuary city protections, both in private institutions, like private universities, and in cities and states at large.\textsuperscript{113} Over 400 jurisdictions, including those that make up New York City, took steps to enhance “limitations on engaging in immigration enforcement.”\textsuperscript{114} To those with some familiarity of the crimmigration system, it was also clear, however, that the noncooperation alone—the dominant approach for devising sanctuary protections—would do little to stymie the federal

\begin{footnotes}
\item[110] See, e.g., id. at 373.
\item[111] See ADVISING IMMIGRANT CLIENTS, supra note 93, at 1.
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government’s plans for mass removal. To public defenders, tinkering with information sharing or cooperation protocol processes appeared inadequate. Rather than regulating law enforcement, organizers wanted to push for measures that would shrink the pool of individuals at risk for removal by shrinking prosecutors’ carceral reach. This preference for shrinking reflected the organizers’ normative commitment to abolition and its empirical foundations.

Both those who organized and many who endorsed the campaign recognized the harms created by a securitized approach to immigration, and rejected the categorical and irreversible exclusion of individuals from membership because of their criminal history, nationality, or race. Given the administration’s focus on individuals charged and convicted with crimes, prosecutors seemed like an obvious target. While they were notably missing from the conversation about sanctuary policies, they had the power to fortify state autonomy.

New York City’s DAs publicly acknowledged the new social and political climate after the 2016 election. Specifically, five of the city’s DAs declared they would aggressively prosecute hate crimes after the election. Similarly, after the Trump administration rescinded the Deferred Action for Childhood Arrivals (DACA) program, Manhattan DA Cyrus Vance issued a statement that criticized the move, stating it jeopardized the cooperation of undocumented crime witnesses. Public defenders sought to

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115 See Welch, supra note 102, at 561.
116 See 5 Boro Defs., Weekly Update #5, supra note 112.
117 See Quevedo, supra note 98, at 406–07; 5 Boro Defs., Call for a Moratorium, supra note 5.
118 See Advising Immigrant Clients, supra note 93, at 1; Quevedo, supra note 98, at 386 (stating that deportation of non-citizens tears families apart).
119 See IMMIGRANT LEGAL RES. CTR., supra note 114, at 2.
123 See id.

(“Most distressingly, this action will surely widen the gap between law enforcement and a vulnerable population that is already disproportionately affected by crime, dissuading victims and witnesses from reporting real crimes and public safety threats for fear of deportation. I
capitalize on their adversaries’ shared concerns about the new federal administration and brought them into the citywide conversation about strengthening sanctuary protections.125

Public defenders in New York City are organized in two ways. Most are members of a union, the Association of Legal Aid Attorneys, which is a local of the United Autoworkers.126 More informally, since 2002, some public defenders have coalesced under the banner of 5 Boro Defenders, which provides a space for attorneys to reflect on the political and ethical dimensions of their work, and to share strategies to creatively counter the systemic injustices of the criminal legal system.127 Under both banners, public defenders in New York City are actively involved in political mobilization, whether legislative advocacy, support for clemency, or direct action.128

Launched on January 30, 2017, by 5 Boro Defenders, the #NYCdontprosecute campaign asked members of the public to call their elected DA and ask them to no longer prosecute broken windows offenses.129

We are calling on you to contact your borough’s District Attorney, and ask them for a moratorium on broken windows prosecutions. These include offenses like: jumping the subway turnstile, selling DVD’s on the street, forgetting to pay a fine, trespassing in a NYCHA building and having a small amount of marijuana.

These arrests and prosecutions do not make us safer, and already disproportionately burden poor communities of color, specifically [B]lack people, through mass incarceration. But now under Trump these prosecutions are having devastating consequences for our non-citizen community members. In fact, under the new Executive Order, just being accused of a...
crime could lead to deportation. Until we know what this means for Trump’s immigration enforcement, we are asking the District Attorneys to stop prosecuting broken windows offenses.\textsuperscript{130}

Over forty-three organizations endorsed the call, representing a wide range of progressive voices, from grassroots community-based organizations to unions of legal aid professionals.\textsuperscript{131} Organizers suggested callers follow the script below when they called their local DA’s office:

Hi, my name is _____. Your office represents “the people of the state of NY” in the borough of ____ and I’m calling as one of your constituents. With Donald Trump’s latest Executive Order, all non-citizen New Yorkers face new and grave threats of deportation just by being charged with a crime. I’m calling on you to uphold your duty to protect the people of New York with a moratorium on prosecuting broken windows offenses and quality of life crimes. The harm of deportation now arises at the charging stage, even if the case is later dismissed or the person given a non-criminal violation offer. The DA’s office has enormous discretionary power to act on behalf of the people of this state, and we ask you to use your discretion in service of our collective interests for a strong, diverse and welcoming New York.\textsuperscript{132}

\textsuperscript{130} Id. (emphasis omitted).


\textsuperscript{132} Id.
By the end of March 2017, the campaign logged 769 calls.\(^{133}\)

The campaign asked specifically for a moratorium on broken windows prosecutions to draw attention to the heightened sense of urgency for noncitizens, and the change in federal enforcement priorities.\(^{134}\) Prosecutors could decide in their Early Case Assessment Bureau (ECAB), where cases are initially screened and complaints are drafted, to decline to prosecute cases, without judicial or external interference.\(^{135}\) Organizers believed that if a moratorium were successfully implemented, showing that not prosecuting such offenses did not threaten public safety, there would be greater support for permanently nullifying, if not legislatively decriminalizing such charges.\(^{136}\)

The campaign explained the call for a moratorium on broken windows prosecutions:

Under broken windows policing, poor folks of color, particularly Black and Latinx, already struggling to get by, are systematically targeted by law enforcement. This kind of policing began at a time when social welfare spending in New York City was reaching new lows, pushing those already on the margins into the streets, and into economic precarity. They are stigmatized as being undesirable to the city and unruly. Being poor and being involved in the informal sector became criminalized; selling DVD’s on Canal Street, jumping the turnstile to get to work, and sleeping in the bank vestibule all have become crimes, for which individuals face arrest after arrest, conviction after conviction.

The lives of those targeted by broken windows policing are made further precarious from this regular involvement of the police and the courts. They are constantly indebted owing jail time, fees, surcharges and days of community service. Many who have studied this history and reality have noted this kind of policing leads to the criminal courts managing and supervising poor communities of color, of which immigrants make up a sizeable proportion. These prosecutions serve as a

\(^{133}\) See 5 Boro Defs., Weekly Update #5, supra note 112.

\(^{134}\) See 5 Boro Defs., Call for a Moratorium, supra note 5.


\(^{136}\) See 5 Boro Defs., FAQ, supra note 8.
means of marking Brown and Black bodies with criminal records, and as a means of instituting state supervision and discipline. The harm of these prosecutions is now heightened for non-citizens, as they face the additional threat of deportation for these low level offenses.  

The public call to action described the problem of broken windows policing by referring to the lived experiences of those directly impacted. Rather than taking the police and prosecutor’s view of broken windows as a necessary tool to preserve public order, the public call framed the broken windows policing strategy as one designed to manage a population of New Yorkers who were deemed unworthy of services, support, and care.

III. STANDING ON SHOULDERS

Importantly, the campaign emerged out of a rich tradition of local organizing in opposition to broken windows policing and the carceral state more broadly. The campaign’s unique contribution was to amplify concerns from the police accountability and immigrant rights movements, and identify a new kind of remedy from an actor whose role has remained underappreciated. In identifying the prosecutor as a source for new protections, the campaign married defenders’ insights into how broken windows prosecution unfolds in court with the consensus built by over a decade of community mobilization about the harms of zero-tolerance policing and the unique vulnerabilities noncitizens faced.

A. A Brief History of Broken Windows Policing and Its Opposition

Police Commissioner William Bratton and Mayor Rudy Giuliani introduced broken windows policing to New York City in the early 1990s. Police Strategy No. 5 established this new policing regime, which identified “low-level offenses as an intrinsically important
enforcement priority.”141 The strategy document embraced the eponymous theory authored by academics George L. Kelling and James Q. Wilson, declaring that “disorder and crime are usually inextricably linked, in a kind of developmental sequence.”142 As Issa Kohler-Hausmann explains, “[T]he new policing tactics rolled out in the early 1990s under the Broken Windows banner called for not only more frequent enforcement actions against low-level offenses, but also more formal and intense police responses.”143 Crime statistics increasingly drove officer and precinct performance, which gave rise to secret quotas for low-level arrests and summonses.144 The new approach was first applied to subway stations where commanding officers encouraged officers on patrol to issue summonses or perform arrests for fare evasion.145 The approach was then applied to the streets where officers aggressively enforced rules against riding bicycles on the sidewalk or urinating in public.146

In 2017, at the time of the campaign, the NYPD identified the following charges as quality-of-life offenses, the term it uses for low-level offenses: vandalism; possession of controlled substances, marijuana, or unstamped cigarettes; theft of transportation services (not paying subway or bus fare); petit larceny; gambling; trespassing; public lewdness; loitering, including for the purposes of prostitution’ begging; panhandling; promoting (i.e., patronizing) prostitution; resisting arrest; unlicensed general vending; and unlicensed driving.147

Bratton’s new enforcement approach led to an explosion of arrests for low-level offenses.148 Misdemeanor arrests in the city surged drastically.149 There were 187,385 misdemeanor arrests in 1994, the year Bratton implemented his new methods.150 By 2010, there were 292,219 misdemeanor arrests per year.151 These numbers do not include the thousands of stops performed and summonses issued that

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142 Id. at 27.
143 Id. at 37.
144 See id. at 40–41, 281 n.71.
146 See id. at 1, 3, 27.
147 See id. at 6.
148 See id. at 2.
149 See id.
150 Id. at 12.
151 Id.
were not reported until recently. Importantly, these figures also do not capture the disruptions, fines, lost time, pain and humiliation of these arrests and charges for those targeted and their families. Since 2010, the number of misdemeanor arrests have decreased, an outcome of NYPD’s self-described “recalibration,” prompted by community pressure and federal court monitoring.

From its inception, broken windows policing was inherently excessive in several ways. Law enforcement directed its resources to managing public disorder rather than apprehending normatively culpable actors. Unruly conduct was criminalized not because it was inherently criminal or caused interpersonal harm, but because of the potential for serious crime it represented. The punishment for broken windows offenses was, thus, not supposed to be proportionate to the instant offense because it always contemplated future criminality and deterrence. The policing strategy also had a disproportionate impact on communities of color. Its empirical claims were gradually debunked, making its costs harder to justify. Since 1994, those arrested for low-level offenses have been consistently and overwhelmingly Black, Latinx, and indigent. “Black and Latinx New Yorkers are ... more likely to be issued summonses than be let go with a warning.” In a study of 1.5 million


153 Cf. Bratton, Quality-of-Life Policing, supra note 145, at 10, 11 (“The report ... explains, in detail, what types of arrests are made and what types of summons are issued—in what numbers and for what offenses.”).


155 See Bratton, Quality-of-Life Policing, supra note 145, at 1–2, 3.


158 See Fritsch, supra note 156, at 774; 5 Boro Defs., FAQ, supra note 8.

159 See Bratton, Broken Windows Is Not Broken, supra note 154, at 29; Fritsch, supra note 156, at 775; 5 Boro Defs., FAQ, supra note 8.

summons issued by the NYPD between 2002 and 2013, “nearly 85 percent of summons recipients were [B]lack or Latin[x].”161 “More summons are issued in neighborhoods with high concentrations of Black and Latinx residents, a fact the NYPD concedes.”162 Although “marijuana use is more prevalent among White people than people of color, Black and Latin[x] New Yorkers comprise 86 percent of those charged with misdemeanor marijuana offenses in New York City.”163 Similarly, Black men are most likely to be arrested for fare evasion than any other racial category, even controlling for poverty levels.164 These disparities have persisted, despite the NYPD’s recalibration.165

The NYPD has consistently attributed the historic decrease in the City’s general crime and homicide rates to broken windows policing.166 “By applying summons to violations and arrests to misdemeanors, rather than looking the other way because

161 Id. (alteration in original).
162 Id.

The most common offenses were: consumption of alcohol (1.6 million), disorderly conduct (1 million), public urination (334,000), bicycling on the sidewalk (296,000) and operation of a motor vehicle in violation of the safety rules (213,000). The News found the correlation between race and summonses was not strong for offenses like motor vehicle violations and unlawful possession of alcohol for a minor. But others—like spitting, disorderly conduct, loitering, open container and failure to have a dog license—were more likely to be doled out in predominately black and Hispanic precincts.


163 Brief of the Legal Aid Society et al., supra note 160, at 29; see also DRUG POLICY ALL. & MARIJUANA ARREST RESEARCH PROJECT, UNJUST AND UNCONSTITUTIONAL: 60,000 Jim Crow Marijuana Arrests in Mayor de Blasio’s New York 3, 6, 7 (2017), https://www.drugpolicy.org/sites/default/files/Marijuana-Arrrests-NYC—Unjust-Unconstitutional—July2017_2.pdf [https://perma.cc/2JYH-F5HH] (finding that the targeting of Black and Latinx youth for marijuana and other low-level arrests has persisted at the citywide level for nearly thirty years); Erin Durkin, NYPD Under Fire After Stats Reveal 86% of Marijuana Arrests in City Are of Black or Latino People, N.Y. DAILY NEWS (Feb. 26, 2018, 6:13 PM), https://www.nydailynews.com/new-york/summons-broken-windows-racial-disparity-garner-article-1.1890567 [https://perma.cc/5NHF-FLG7] (“Despite a large drop in marijuana busts, the overwhelming majority of those arrested—86%—are black and Latino.”); Testimony Before City Council Public Safety & Courts and Legal Services Committees, supra note 157 (“Black and Latino New Yorkers comprise 86 percent of those charged with misdemeanor marijuana offenses in New York City.”).


165 See Brief of the Legal Aid Society et al., supra note 160, at 33; BRATTON, BROKEN WINDOWS IS NOT BROKEN, supra note 154, at 31.

166 See BRATTON, BROKEN WINDOWS IS NOT BROKEN, supra note 154, at 29, 30, 31.
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the number of quality
level arrests and
serious violent or property
crimes.

Nor did the decrease in low-level
arrests and summonses lead
to an increase in the felony
crime rate.

The NYPD's own
inspector general noted the lack of any
association between low-level
arrests and the felony crime rate.

Out of the growing frustration and pain from the police’s zero
tolerance approach, several movements for accountability and reform
have emerged. A comprehensive account of the history of activism
against broken windows policing needs to be written, but some of the
most prominent threads over the last ten years provide insight into
the power of those movements and the gains they achieved. They set

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167 N.Y. ADVISORY COMM. TO THE U.S. COMM’N ON CIVIL RIGHTS, THE CIVIL RIGHTS
IMPLICATIONS OF “BROKEN WINDOWS” POLICING IN NYC AND GENERAL NYPD ACCOUNTABILITY
TO THE PUBLIC iv (2018) [hereinafter THE CIVIL RIGHTS IMPLICATIONS OF “BROKEN WINDOWS”
POLICING IN NYC] (quoting BRATTON, QUALITY-OF-LIFE POLICING, supra note 145, at 3).

168 See, e.g., Fritsch, supra note 156, at 774; Nicole Kayley Michelle Melenka, Exploring the
Long-Term Impact of a Foot Patrol Policing Initiative in North Vancouver, British Columbia,
summit.sfu.ca/system/files/items1/16418/etd9585_NMelenka.pdf [https://perma.cc/6BNK-KK8P].

City and a Five-City Social Experiment, 73 U. CHI. L. REV. 271, 315 (2006) [hereinafter Harcourt
& Ludwig, Broken Windows]; Bernard E. Harcourt & Jens Ludwig, Reefer Madness: Broken
Windows Policing and Misdemeanor Marijuana Arrests in New York 2–3 (Chi. Pub. Law
/viewcontent.cgi?article=1250&context=public_law_and_legal_theory [https://perma.cc/6VYC-
N85D] [hereinafter Harcourt & Ludwig, Reefer Madness] (demonstrating no relationship
between arrest for marijuana in public view offenses in New York City with reductions in
serious violent or property crimes in the city).

INVESTIGATION, AN ANALYSIS OF QUALITY-OF-LIFE SUMMONSES, QUALITY-OF-LIFE
MISDEMEANOR ARRESTS, AND FELONY CRIME IN NEW YORK CITY, 2010-2015, at 4 (2016)
[hereinafter OIG-NYPD].

171 The NYPD Inspector General’s Report demonstrates an absence of any correlation
between the number of quality-of-life arrests and felony crime rate, which is key empirical
foundation for broken windows policing. See id. at 45; see also J. Phillip Thompson, Broken
(explaining crime reduction may have been a function of demographic changes, decreased crack
use, increased police hiring, and a more favorable economy). But see BRATTON, BROKEN
WINDOWS IS NOT BROKEN, supra note 154, at 13 (responding to the report of the OIG-NYPD).

172 See, e.g., The Issue, COMMUNITIES UNITED FOR POLICE REFORM, https://www.
changethenypd.org/issue [https://perma.cc/589D-P4UV].
the stage for demands for decriminalization, such the #NYCdontProsecute campaign.\textsuperscript{173}

The successful grassroots challenge to the NYPD’s Stop and Frisk program\textsuperscript{174} undermined a pillar of NYPD’s broken windows strategy.\textsuperscript{175} The NYPD’s stop and frisk practices were so obviously racially biased that a federal court inferred that the NYPD operated with discriminatory intent.\textsuperscript{176} At its height, the NYPD stopped and frisked 685,724 individuals in 2011.\textsuperscript{177} From 2002 to 2015, over eighty percent of the NYPD’s stop targets were innocent of any wrongdoing.\textsuperscript{178} At least half were Black, and around thirty percent were Latinx.\textsuperscript{179} Although the NYPD justified its practice by claiming it kept guns off the street, the number of New Yorkers found empty handed belied this claim.\textsuperscript{180} In response, three lawsuits filed in 2008, 2010, and 2012, challenged various aspects of the department’s stop and frisk policies and practices.\textsuperscript{181} Eventually, all three cases went to trial in 2013, putting the department under a type of rigorous scrutiny to which it was unaccustomed.\textsuperscript{182} The federal court for the Southern District of New York found the NYPD had engaged in a pattern and practice of racial profiling and unconstitutional stops.\textsuperscript{183} Judge Scheindlin appointed an independent monitor to implement reforms and ordered a remedial process that included community input in developing additional reforms.\textsuperscript{184}

\textsuperscript{173} See id.

\textsuperscript{174} See Bratton, QUALITY-OF-LIFE POLICING, supra note 145, at 5; Kang, supra note 32, (“Discriminatory stop-and-frisk abuses come directly out of the framework of broken windows theory that the NYPD has employed for the past two decades. It didn’t fall from the sky.”).

\textsuperscript{175} See, e.g., N.Y.C., N.Y., Local Law No. 70, Council Int. No. 1080 (2013); Floyd v. City of New York, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013).

\textsuperscript{176} See Floyd, 959 F. Supp. 2d at 661 (“In order to establish an equal protection violation based on an intentionally discriminatory application of a facially neutral policy, plaintiffs ‘must prove that the defendants’ actions had a discriminatory effect and were motivated by a discriminatory purpose.’ In this case, plaintiffs’ statistical evidence of racial disparities in stops is sufficient to show a discriminatory effect.”).


\textsuperscript{178} See id.

\textsuperscript{179} See id.


\textsuperscript{183} See Floyd, 959 F. Supp. 2d at 561–62; Ligon, 925 F. Supp. 2d at 486.

\textsuperscript{184} See Floyd, 959 F. Supp. 2d at 563.
The success of the stop and frisk litigation was a testament to the extensive organizing that occurred in the lead up to the trial. Beginning in 2012, Communities United for Police Reform (CPR) formalized and unified decades of disparate organizing around police brutality and discriminatory policing. CPR brought together a “movement of community members, lawyers, researchers and activists . . . from all walks of life and represent many of those most unfairly targeted by the NYPD” fighting for police reform. CPR organized court packing for the stop and frisk court hearings, publicizing the discoveries made over the course of the trial. The energetic presence of community activists in the solemn hallways of federal court communicated the public’s hunger for change. CPR also supports family members of individuals killed by the NYPD, seeking accountability in disciplinary proceedings and in federal court. CPR was instrumental in delivering legislation in New York City Council that forced changes to the department’s patrol guide, such as requiring officers to explain and document street stops.

Outside of CPR’s formal organizing efforts, mass protests erupted in 2014, after NYPD Officer Daniel Pantaleo killed Eric Garner. While arresting Garner for selling a single unstamped cigarette, Pantaleo choked him, using a maneuver banned by the NYPD. Garner told Pantaleo “I can’t breathe” eleven times, as he was being arrested, to no avail. Garner died on the sidewalk in Staten Island and never made it to the precinct. Under the banner of #BlackLivesMatter, the demonstrations drew attention to the Department’s zero-tolerance approach to broken windows offenses.

186 Our Campaign, COMMUNITIES UNITED FOR POLICE REFORM, https://www.changethenypd.org/campaign [https://perma.cc/7XC3-W659].
188 See id.
191 See Ashley Southall, N.Y.P.D. Fires Officer in 2014 Chokehold Case, N.Y. TIMES, Aug. 20, 2019, at A1; Zhou, supra note 190.
192 See Ashley Southall, Officer in Garner’s Death Was ‘Untruthful’ to Investigators, Judge Says, N.Y. TIMES, Aug. 19, 2019, at A21.
193 See id.
194 See Zhou, supra note 190.
Community leaders have also fashioned innovative strategies for resisting the criminalization of poverty. Notably, the Coalition to End Broken Windows hosts #SwipeItForward events, recruiting members of the public to stand outside turnstiles at subway stations, and swipe in passengers who cannot afford the fare. The campaign harnesses mutual aid to protect New Yorkers from the risk of arrest and detention for fare evasion. Riders who possess unlimited fare Metrocards are instructed to swipe their cards for passengers without means onto the train, which comes at no cost to the cardholder. The Coalition to End Broken Windows is the author of other public interventions to bring attention to the needs and concerns of those heavily policed. Its platform underscores the importance of decriminalization hand in hand with public investment in services that address community needs for safety and health. In a different vein, but similarly rooted in community action, the Police Reform Organizing Project (PROP) monitors arraignments for broken windows offenses, noting the outcomes and racial disparities in who gets prosecuted and for what. PROP publishes its findings and for a time was the only independent police monitor sitting in criminal court.

Parallel with these organizing efforts at the grassroots level, there has been a robust academic and policy effort dedicated to debunking the empirical claims underpinning the theory of broken windows. As a result of this multi-pronged approach in the streets and in

197 See id.
199 Coalition to End Broken Windows, How to End ‘Broken Windows’ The People’s Agenda (on file with author).
201 Id.
academic and policy circles, the NYPD recalibrated its efforts and DA offices made minor changes to their charging policy. Misdemeanor arrests also continue to plunge. And, while public polls suggest many still support zero tolerance enforcement, the policing strategy is also discussed as a civil rights violation. Despite these developments, the NYPD still promotes the outcomes espoused by the theory, rejects claims that it fuels racial disparities, and has been accused of skirting the new reporting requirements mandated by the stop and frisk settlement.

Across New York City, there is a spirit of reform. The depth of the critique varies by stakeholder as do the proposals for delivering change. For example, some members of the New York City Council have supported replacing arrests for quality of life offenses with civil summonses, which carry fines instead of jail time and convictions and avoid immigration consequences. The Coalition to End Broken Windows and other community groups opposed this proposal because it would still result in penalizing the City’s poor and communities of

203 See Bratton, Broken Windows Is Not Broken, supra note 154, at 31; Janon Fisher, Manhattan and Bronx Prosecutors Agree to Drop all Petty Summonses After Request from Councilman Lancman, N.Y. DAILY NEWS (Mar. 18, 2019), https://www.nydailynews.com/news/politics/ny-pol-minor-summons-quality-of-life-offenses-lancman-vance-clark-20190317-story.html [https://perma.cc/6FDQ-VCNT] (“The district attorneys of Manhattan and the Bronx have agreed to clear all summonses for petty offenses—so-called quality of life crimes—from their books after Queens Councilman Rory Lancman urged all city prosecutors abandon prosecuting ‘broken windows’ offenses.”). The number civil summonses, which replaced arrests for some criminal offenses after 2016 legislation, have also declined in the past two years: “Since the passage of CJRA and the full implementation of its provisions in June 2017, the number of criminal summonses issued in New York for such offenses has dropped 94.5%—from 134,902 in 2016 to 7,425 in 2018.” Fisher, supra note 203. Summonses for transit offenses have also declined, as have arrests for theft of services, from 18,040 in 2017 to 5,905 in 2018. See Jeanmarie Evelly, Does Less Policing = More Fare Beating on New York City Subways?, CITY LIMITS (Jan. 30, 2019), https://citylimits.org/2019/01/30/does-less-policing-more-fare-beating-on-new-york-city-subways/ [https://perma.cc/ZI4B-3U8W].

204 See Press Release, Quinnipiac Univ. Poll, New York City Voters Want Their Broken Windows Fixed, Quinnipiac University Poll Finds; ‘No Excuse’ for Garner Death, Voters Say Almost 3-1 (Aug. 27, 2014), https://cbsnewyork.files.wordpress.com/2014/08/quinnipiac.pdf [https://perma.cc/4NGV-G5JX] (“Police issuing summonses and making arrests for low-level offenses improves the quality of life in a neighborhood, 56 percent of New York City voters say, while 35 percent say these police actions add to tensions in a neighborhood, according to a Quinnipiac University poll released today. Police action improves the quality of life, 49 percent of black voters say.”).

205 See Bratton, Broken Windows Is Not Broken, supra note 154, at 1, 5; Jenn Rolnick Borchetta et al., Don’t Wreck Stop-and-Frisk Reforms, N.Y. TIMES, Apr. 10, 2018, at A27.

color, saddling them with debts they could not afford to repay. The Manhattan and Brooklyn DAs expanded pre-charge diversion programs for some category of low-level offenses: in exchange for dropping charges, the DA requires individuals arrested for criminal possession of a controlled substance to participate in a drug counseling session. A grassroots coalition of medical professionals and drug users, End Overdose NY, has instead asked DAs to decline charges for possession of controlled substance and paraphernalia, and support the creation of safe injection sites. End Overdose NY declares unequivocally, “[t]he court’s role is to ensure the health, safety, and welfare of the community, not to subject an individual to a system designed to exacerbate addiction, trauma, and incarceration, nor should it be the role of the courts to impose or interfere with medical decisions.” Similarly, the Lippman Commission, under the direction of the former chief judge of the New York Court of Appeals, recommended the permanent closure of New York City’s Rikers Island jail, and its replacement with four modern jails located inside of neighborhoods, attributing the cruelty of conditions in the city’s notorious jail to lethal combination of geography, architecture, and regulatory failure. The No New Jails campaign formed in opposition, rejected the creation of any new jails. It proposes that funds allocated for construction pay for


209 See Guard Against Failed War on Drugs Approaches, END OVERDOSE N.Y., http://endoverdoseny.com/action-steps/guard-against/ [https://perma.cc/9UQQ-8TQJ].

210 Id.

211 See INDEP. COMM’N ON N.Y.C. CRIMINAL JUSTICE & INCARCERATION REFORM, A MORE JUST NEW YORK CITY 14 (2017), https://static1.squarespace.com/static/5b6de4731ae81a1d914f43628/t/5b96c6f81ae6fb5e9c5f1b6d/1536607993842/Lippman%2BCommission%2BReport%2BFINAL%2BSingles.pdf [https://perma.cc/3CUH-U3J6] (“The Commission has concluded that shuttering Rikers Island is an essential step toward building a more just New York City. Refurbishing Rikers is not enough. Our current approach to incarceration is broken and must be replaced. . . . The Commission believes that confinement is necessary when individuals are a threat to others, but that its use should be a last resort.”); Corey Johnson & Jonathan Lippman, We Must Seize Today’s Path to Actually Closing Rikers: It May Not Be Here Tomorrow, GOTHAM GAZETTE (Apr. 23, 2019) http://www.gothamgazette.com/opinion/8465-seizing-path-to-actually-closing-rikers-jails-corey-johnson-lippman [https://perma.cc/7ADC-RNND].

“public housing, homeless shelters, public schools, and expanded mental health services for incarcerated people.”

These disagreements reflect broader ideological and strategic fault lines in the battle for criminal legal reform, with liberal law reform efforts preferring policies that “lighten the touch” of the carceral institutions and abolitionist advocates seeking to shrink their footprint. Underlying this difference are distinct critiques of policing and incarceration. Abolitionist organizing sees law enforcement as currently carried out as illegitimate. Change can only occur by divesting from prisons, police, and prosecutors, and reinvesting in other institutions. The #NYCdontprosecute campaign entered this city-wide debate, building on the successes of mobilization and centering the unique and intersectional concerns of noncitizens.

B. Broken Windows in Court

The campaign built on the new common sense about the harms of zero tolerance policing but added observations from court to show what happened once arrests were translated into criminal charges. While police officers were responsible for the arrests, prosecutors continued the process by pressing charges. Until recently, the police reform community overlooked the role of the prosecutor in legitimizing these arrests, and extracting convictions, surcharges, fines and days of community service. The campaign drew attention to the prosecutor’s role in the City’s broken windows strategy.

At the time of the campaign, and to this day, broken windows arrests in Manhattan were labeled as “quality-of-life offenses,”

213 See id.
214 See 5 BoroDefs., FAQ, supra note 8.
215 See id.
217 See 5 BoroDefs., Call for a Moratorium, supra note 5.
prosecuted by an eponymous bureau dedicated to such cases.²¹⁸ In that bureau, a supervisor strictly controlled the plea offers made available to resolve such cases.²¹⁹ Offers most reliably depend on prior “contacts” or arrests.²²⁰ A dedicated court room staffed not by a judge, but a judicial hearing officer hears these cases.²²¹ The court room, called the Bench Trial Part 1 (BTP1) was created to expedite resolutions of broken windows offenses.²²² Although most cases are class A misdemeanors, which entitle the accused to a jury trial, if such cases go to trial, prosecutors reduce the top count to a class B misdemeanor. Trials for B misdemeanors are bench trials.²²³ In Manhattan, under the previous DA, Robert Morgenthau, low-level offenses were regularly dismissed because Assistant District Attorneys (ADAs) could not bring the cases to trial on time, exceeding the speedy trial period.²²⁴ These dismissals occurred because such cases made up only a small portion of a prosecutor’s caseload, which inevitably included more serious offenses.²²⁵ As a result, ADAs did not prioritize broken windows offenses, many of which were eventually dismissed.²²⁶ Both a dedicated unit in the DA’s office, and a court room were created to avoid such dismissals.²²⁷ This specialization is significant because it illustrates the commitment of the Manhattan DA’s office commitment to prosecuting these offenses, while the police force weathered criticism for the very policing approach responsible for bringing those charges to the DA’s desk.

²¹⁸ MODELS FOR INNOVATION, supra note 135, at 20.
²¹⁹ See id.
²²¹ See MODELS FOR INNOVATION, supra note 135, at 20.
²²² See Office of the Chief Clerk of N.Y.C. Criminal Court, Criminal Court of the City of New York Annual Report 5, 6 (2014), http://www.courts.state.ny.us/COURTS/nyc/criminal/cc_annl_rpt_2014.pdf [https://perma.cc/DC6Q-PHUM]; see also MODELS FOR INNOVATION, supra note 135, at 6 (“In 2009, the Office’s dismissal rate, excluding dismissals following a six-month period of being arrest-free (an Adjournment in Contemplation of Dismissal or ACD), was 21%; in 2017, the comparable dismissal rate was 15%. In 2009, 46% of dismissals involved an ACD; in 2017, 68% of dismissals involved an ACD.”).
²²³ See N.Y. CRIM. PROC. LAW § 340.40(2) (McKinney 2019) (“In any local criminal court a defendant who has entered a plea of not guilty to an information which charges a misdemeanor must be accorded a jury trial . . . except that in the New York city criminal court the trial . . . must be a single judge trial.”); KÖHLER-HAUSMANN, supra note 141, at 169.
²²⁴ See N.Y. CRIM. PROC. LAW § 30.30(1) (McKinney 2019); MODELS FOR INNOVATION, supra note 135, at 2, 4.
²²⁵ See MODELS FOR INNOVATION, supra note 135, at 4.
²²⁶ See id.
²²⁷ See id. at 4, 20–21.
Ironically, two of the city’s DA offices, Manhattan and Brooklyn, often positioned themselves as more progressive than the NYPD.\textsuperscript{228} Each made minor but symbolic changes to their charging practices of low-level offenses, signaling some degree of shared awareness of the problems associated with broken windows policing.\textsuperscript{229} All five borough DAs still prosecuted low-level charges, and aggressively so until recently.\textsuperscript{230}

The decreasing arrest numbers in the past five years has meant prosecutors can give those cases more attention than before. Attention, however, does not guarantee diligence or judicious discretion. From a prosecutor’s perspective, quality-of-life cases are


In addition to prosecuting the most violent offenders, my Office is redoubling our efforts to reduce the number people charged with low-level offenses prosecuted in Manhattan. These efforts have culminated in a 27 percent reduction in the number of misdemeanor and violation cases referred to us by the NYPD alongside a simultaneous reduction in violent crime. To put this remarkable decline into context, in 2010, my first year as District Attorney, the NYPD made 92,585 misdemeanor and violation arrests in Manhattan; last year there were 67,246 arrests. This reduction, which we believe we can continue driving down, is a result of a number of innovative approaches. . . . Second, as of March 2016, my office stopped the practice of prosecuting most low-level, non-violent violations and infractions in criminal court unless there is a demonstrated public safety reason to do so. As a result, 11,000 fewer low-level cases have been sent to us from the NYPD, preventing thousands of people from unnecessarily being arrested, detained and going before a judge in a criminal courthouse.

hard to distinguish from one another. The only discovery in these cases are a police officer’s paperwork. The descriptions in the police forms are often boilerplate, nondescript, and frequently unreliable.231 A police officer, like anyone else can conflate memories of unremarkable events, like seeing someone smoke marijuana on the street.232 The police are also under pressure to meet arrest quotas, which can lead to mistakes, exaggeration, and fabrication.233

Prosecutors judge the worth of a low-level case according to the defendant’s prior arrests and convictions rather than the conduct alleged.234 Most cases are resolved not by criminal convictions, but by subcriminal marks—resolutions that do not technically create or add to a criminal record.235 As Kohler-Hausmann has argued, these reduced outcomes serve to manage urban, poor communities of color rather than adjudicate criminal activity.236 When a prosecutor sees that the accused has multiple arrests, she may decide not to offer a plea bargain, requiring a trial or a plea to a misdemeanor, creating or adding to a criminal record.237 But for the vast majority of those arrested for broken windows offenses, their cases result in subcriminal outcomes, without any legal finding of guilt, but that can still trigger negative immigration consequences for noncitizens.238 About half of all cases result in some kind of dismissal.239

Specifically, in criminal court, defendants most commonly resolve their quality of life cases by accepting an Adjournment in Contemplation of Dismissal (ACD), under New York Criminal Procedure Law section 170.56, or a plea to disorderly conduct under

231 See, e.g., Natapoff, supra note 24, at 1332.
232 See, e.g., id. at 1338.
234 See KOHLER-HAUSMANN, supra note 141, at 165, 168, 169.
235 See id. at 143, 165, 170 ("The marks defendants bear as they enter and traverse misdemeanorland trigger a series of organizational, professional, and political pressures on court actors and activate standard responses in the field.").
236 See id. at 4.
237 See id. at 163–71.
238 See id. at 69; 5 Boro Defs., FAQ, supra note 8.
239 See KOHLER-HAUSMANN, supra note 141, at 68–69 ("The significant increase in misdemeanor arrests did not translate into proportionate convictions. The misdemeanor justice system converted an ever-decreasing share of misdemeanor case filings into criminal convictions as the total volume of cases increased. In 1985, approximately 44 percent of misdemeanor arrests terminated in misdemeanor criminal convictions, while in 1993 the percentage was 33 percent, and it has not exceeded 20 percent since 2010."). Dismissals in Kohler-Hausmann’s study includes a prosecutor’s decision to decline to prosecute. See id. at 69.
The Sanctuary of Prosecutorial Nullification

New York Penal Law section 240.20. Days of community service, a fine, or a program—the term used for a class or counseling session—will often accompany an ACD or disorderly conduct plea.

An ACD entails having the case adjourned for a period of time, most often a year or six months. If the accused incurs no new arrest, or in the court’s vernacular, if the accused “stay[s] out of trouble,” for that period of time, the case is dismissed and sealed. If there were no conditions attached to the ACD, the accused person need not appear in court for the dismissal. During that time, the case appears as an open case. ACDs “represent[] roughly 23 to 30 percent of all misdemeanor arrest dispositions in recent years.”

Disorderly conduct is not a misdemeanor under New York State law, but a violation that carries a maximum of fifteen days in jail and/or $250 in fines. There is also a mandatory court surcharge of $120. After a year, the underlying arrest record is sealed, and only the mark of a disorderly conduct violation is apparent.

For noncitizens, however, although the offense is not a crime under state law, disorderly conduct can be grounds for denial of an immigration benefit that is awarded on the basis of discretion. With the fifteen-day-maximum jail time, under DACA guidelines, disorderly conduct can count as a misdemeanor under federal law.

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240 See N.Y. CRIM. PROC. LAW § 170.56 (McKinney 2019); N.Y. PENAL LAW § 240.20 (McKinney 2019); KOHLER-HAUSMANN, supra note 141, at 147, 148, 153.
241 See KOHLER-HAUSMANN, supra note 141, at 148.
242 See id. at 147.
243 See id. at 148.
244 See id.
245 See id.
246 See id. at 150.
247 Id. at 147.
248 See N.Y. PENAL LAW §§ 70.15(4), 80.05(4), 240.20(4) (McKinney 2019).
249 See Penal § 60.35(1)(a)(ii).
250 See KOHLER-HAUSMANN, supra note 141, at 158.
Noncitizens charged with broken windows offenses, not only are targets of a local policing strategy designed to manage an urban underclass, but face a heightened risk of removal.253

IV. NO CLEAR VICTORY

The results of the campaign were less important than the legal and policy questions raised by the demands it made and mechanism for pressure it employed. As abolitionist organizer Miriame Kaba explains, “Organizing is mostly about defeats. Often when we engage in a campaign, we lose but any organizer worth their salt knows that it’s much more complex than a simple win-lose calculus.”254 As Amna Akbar writes, “Radical social movements are important not simply for what changes they effectuate in law, but in what they imagine and where they fail.”255

The campaign lasted three months, until the end of April 2017.256 No DA’s office acknowledged the existence of the campaign, and most broken windows offenses were still prosecuted after the campaign concluded. While the campaign did not achieve a clear victory, it was also not failure. Receptionists in DAs’ offices in three boroughs grew so accustomed to public calls that they often interrupted callers mid script, telling them they knew why they were calling, and promising to register their concern.257 In the absence of any official recognition or inside knowledge, it is difficult to assess the campaign’s impact. In the months that followed, the Manhattan and Brooklyn DA offices announced some shifts in their practices.258

In September 2017, the Manhattan DA promised to no longer prosecute individuals for theft of services, or the A misdemeanor charge associated with fare evasion.259 In 2018, the office followed

253 See Transcript of the Minutes of the Committee on Immigration Jointly with the Committee on Education and Committee on Public Safety, supra note 251, at 206–07.
255 Akbar, supra note 20, at 476.
256 See Press Release, Manhattan Dist. Attorney’s Office, supra note 34; 5 Boro Defs., Weekly Update #5, supra note 112.
257 See Google Survey (on file with author).
258 See Press Release, Manhattan Dist. Attorney’s Office, supra note 34; Bankoff, supra note 34.
259 Press Release, Manhattan Dist. Attorney’s Office, supra note 34 (“Beginning in September 2017, the Manhattan District Attorney’s Office will no longer prosecute the overwhelming majority of individuals charged with Theft of Services for subway-related offenses, unless there is a demonstrated public safety reason to do so.”).
with promises to stop prosecuting unlicensed general vending, possession of marijuana in open view, and unlicensed operation of a motor vehicle in some circumstances. These promises have not been uniformly kept. On the campaign trail in the summer of 2017, Acting DA Eric Gonzalez of Brooklyn vowed to end some low-level prosecutions, but did not make specific commitments. DA Gonzalez inherited an office policy not to prosecute marijuana charges from his late predecessor—a policy, however, that was not consistently applied. Acting DA Gonzalez also vowed to expand pre-charge diversion programs.

Both the Manhattan and Brooklyn DAs’ offices promised to hire in-house immigration counsel to “minimiz[e] collateral immigration consequences of criminal convictions, particularly for misdemeanor and other low-level offenses . . . in an effort to avoid disproportionate collateral consequences, such as deportation, while maintaining public safety.” Gonzalez clarified his decision:

I want to emphasize that our Office is not seeking to frustrate the federal government’s function of protecting our country by removing non-citizens whose illegal acts have caused real harm and endangered others. Rather, our goal is to enhance public safety and fairness in the criminal justice system and this policy complements, but does not compromise, this goal. We will not stop prosecuting crimes, but we are determined to

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260 See MODELS FOR INNOVATION, supra note 135, at 8, 9, 11.
262 See James C. McKinley Jr., For Manhattan Fare-Beaters, a One-Way Ticket to Court May Be Gone Soon, N.Y. TIMES, June 30, 2017, at A18 (“Brooklyn’s acting district attorney, Eric Gonzalez, also applauded Mr. Vance for finding a way to keep theft of services cases out of criminal court. ‘A similar policy will be implemented in Brooklyn,’ he said. The Queens District attorney, Richard A. Brown, said he would closely monitor Manhattan’s initiative.”).
263 See Fertig & Ye, supra note 228.
see that case outcomes are proportionate to the offense as well as fair and just for everyone.266

Similarly, DA Cyrus Vance of Manhattan created a Collateral Consequences Counsel position in his office.267

In Staten Island, the Bronx, and Queens, the borough DAs did not make any promises to change their charging practices.

V. LESSONS FROM THE CAMPAIGN

The campaign, although bold in its demands, was modestly organized. Organizers responded spontaneously to the promulgation of an EO, which carried the threat of mass expulsion.268 Public defenders translated the fear they felt on behalf of their clients into a proposal for concrete legal change.269 The campaign was sustained solely by volunteer hours in between court appearances, jail visits, and the daily rhythms of public defense work. Without the benefit of a strategic plan, some of broader institutional dynamics and political questions implicated by the campaign’s demands were never explicitly discussed.

On reflection, the campaign is a case study in implementing expanded sanctuary protections. First, prosecutorial nullification of broken windows offenses can serve as an important first step prosecutors can take to recognize and mitigate against the consolidation of the crimmigration system. As scholars have observed, the growth of a more punitive and securitized immigration enforcement regime has historically relied on the local expansion of carceral technologies, specifically order maintenance policing.270

Decriminalization thus protects noncitizens from one of the core drivers of removal.

Nullification of low-level crimes is a flexible strategy that offers jurisdictions the chance to test out decriminalization, relying on the

266 Id.
267 See MODELS FOR INNOVATION, supra note 135, at 17.
269 See Prison Culture, supra note 254.
270 See, e.g., César Cuauhtémoc García Hernández, Deconstructing Crimmigration, 52 U.C. DAVIS 197, 223 (2018) (“For all indignity and physical maltreatment that securitization and imprisonment policies inflict on migrants, crimmigration law’s adverse impact extends to a more intangible forum . . . . Crimmigration law’s foundation in criminal law norms means that it is perhaps not surprising that the local governments that operate most of the law enforcement agencies in the United States are integral components of contemporary policing of migration.”).
plenary discretion afforded to prosecutors.\textsuperscript{271} In the short term, before there is legislative reform, however, nullification could arguably exacerbate the unchecked discretion of prosecutors. That prosecutors can lawfully nullify charges is itself a reflection of their unfettered power. To exploit their discretion in an effort to shrink the ambit of criminalization may be counterproductive. To avoid this pitfall, advocates can follow their campaign for nullification with successive campaigns for legislative decriminalization, a reduction in the DAs’ budgets, and reparations for those harmed by broken windows prosecutions. Furthermore, multiple and reinforcing layers of democratic support may help assuage concerns of prosecutorial bias and overreach. Communities most affected by criminalization endorsed the #NYCdontprosecute campaign. Their support helped to legitimize the campaign’s demand for bold prosecutorial action. As a matter of process, the campaign also planted the seeds for a new form of public engagement with DAs, outside of elections that are rarely contested or the site for substantive engagement on law and justice.

A. The Merits of Decriminalization

At the time of the campaign, decriminalization was not a prominent feature of sanctuary policy platforms. Scholars have failed to consider such policies as sanctuary city policies.\textsuperscript{272} More recently, community organizations led by directly impacted individuals, such as the Black Youth Project 100 (BYP100), Mijente, and the Black Alliance for Just Immigration (BAJI) have advocated to expand the parameters of sanctuary city policies. Specifically, their platforms aim to go beyond shielding noncitizens, and towards actively “dismant[ling] the current policing apparatus that acts as a funnel to mass incarceration and the deportation machine.”\textsuperscript{273}

As Tania Unzueta, an activist with Mijente, a group that provides a hub for Latinx organizing on issues relating to immigrant justice and policing, explains,

[L]imiting whether police actively investigate someone’s immigration status, or if immigration authorities have access to jails to do the same, represents the minimum today . . . . If

\textsuperscript{271} See Maria A. Fufidio, Note, “You May Say I’m a Dreamer, But I’m Not the Only One”: Categorical Prosecutorial Discretion and Its Consequences for US Immigration Law, 36 Fordham Int’l L.J. 976, 985 (2013).

\textsuperscript{272} See Lasch et al., supra note 1, at 1708–10.

\textsuperscript{273} UNZUETA, supra note 17, at 1; accord Ritchie & Morris, supra note 17, at 3.
sanctuary is a pledge to make our cities truly safe for their residents than there are more agencies to address than simply ICE and more people in need of refuge than solely undocumented immigrants. Sanctuary as a concept must evolve and be expanded. It can be a call that unites broad swaths of institutions and civil society if it is based in the belief that collective protection should extend to all communities facing criminalization and persecution and defend against all the agencies that threaten us.²⁷⁴

The Expanded Sanctuary City and Freedom City campaigns, amongst others, “call for an end to all policing and immigration enforcement practices that target Black and Brown communities, immigrant and U.S. born.”²⁷⁵ Liberal public policy and public defender organizations have echoed these community calls.²⁷⁶ The Immigrant Legal Resource Center endorses a broad vision for sanctuary policies: A “[s]anctuary is fundamentally about public safety: the need for everyone in the community to feel safe.”²⁷⁷ Similarly, the Fair Punishment Project makes the following recommendation:

Local officials—mayors, city council members, county commissioners, prosecutors, and the police—now have a critical opportunity to thwart his plans and acknowledge the inextricable link between the deportation pipeline and the criminal justice system, and to finally reform their criminal justice systems. It is already smart policy to stop sending people to jail en masse; localities’ punitive policies disproportionately send people of color, including immigrants, to languish in jail or prison. But to make good on their

²⁷⁴ Unzueta, supra note 17, at 1, 4–5.
²⁷⁵ Ritchie & Morris, supra note 17, at i.
²⁷⁷ See Graber & Marquez, Searching for Sanctuary, supra note 59, at 23.
laudable sanctuary goals, local officials must heed the advice of criminal justice reformers, immigration advocates, and their communities, and institute sweeping change.\(^{278}\)

A centerpiece of the Expanded Sanctuary City and Freedom City platforms is decriminalization of low-level offenses or, in the alternative, deprioritizing low-level arrests.\(^{279}\)

The Expanded Sanctuary City and Freedom City movements represent a paradigm shift in the conversation about sanctuary city protections. Rather than address a jurisdiction’s external orientation to the federal government, these platforms encourage a re-examination of the internal landscape of criminalization: who gets arrested, prosecuted, marked, and incarcerated, and for what.\(^{280}\)

Similarly, the #NYCdontprosecute campaign tried to change internal landscape of the state criminal legal system.\(^{281}\) Decriminalization, however, can take a range of different forms. In this emerging paradigm, the role of prosecutors in decriminalization remains under-theorized and underappreciated with a notable exception.\(^{282}\)

What follows is an attempt to examine the merits of achieving decriminalization through prosecutorial nullification of broken windows offenses, using both a traditional liberal law reform framework and one rooted in an abolitionist ethic. This analysis proceeds in two parts—first, I examine the significance of broken windows prosecutions for noncitizens, and second, the rewards of using prosecutorial nullification as a mechanism to achieve decriminalization.

1. Broken Windows Offenses and Removals

Since the 1980s, the immigration system has relied heavily on state law enforcement to identify targets for removal. Gradually, those targeted included individuals with convictions for misdemeanor offenses.\(^{283}\) In 1986, approximately two thousand people were deported “for criminal and narcotics violations,” which accounted for

\(^{278}\) Fair Punishment Project et al., supra note 276, at 3.

\(^{279}\) See id. at 4.

\(^{280}\) See Ritchie & Morris, supra note 17, at i–ii, 4, 6 (explaining that Expanded Sanctuary and Freedom City campaigns focus on protecting immigrant communities from racial profiling, discriminatory and abusive policing, and targeted criminalization).

\(^{281}\) See 5 Boro Defs., Call for a Moratorium, supra note 5.

\(^{282}\) Cf. Ritchie & Morris, supra note 17, at 16 (suggesting as an alternative to decriminalization, prosecutors should deprioritize and refuse to prosecute minor offenses).

4 percent of the total number of people removed that year. Two years later, that percentage increased to 23.1%. By 1996, criminal convictions triggered more than half of all removals. Legislative changes complemented this more punitive turn in enforcement. In the 1990s, Congress extended the categories of convictions that would lead to removal to include minor offenses.

As federal immigration law lowered the threshold for removal by making low-level offenses grounds for adverse action, local police departments in cities like New York also ramped up their enforcement of those very offenses. In New York City from 1988 to 1994, felony arrests exceeded misdemeanor arrests by a small margin. After 1994, misdemeanor arrests increased relative to felony arrests by at least a factor of two. This trend persisted in New York City and was replicated throughout the country. In a survey of thirty-three states and the District of Columbia, there were 9.5 million misdemeanor criminal cases, as compared to 2.4 million felony cases. To this day, misdemeanors, and broken windows offenses specifically, remain the most frequent reason for contact with criminal court.

While there are insufficient data to establish whether convictions and arrests for broken windows offenses are a leading cause for removal, low-level policing and immigration enforcement target the

284 Hernández, supra note 43, at 1470.
285 Id.
286 Id.
287 See Cade, supra note 8, at 1758.
289 KOHLER-HAUSMANN, supra note 141, at 25.
290 Id. at 41 fig.1.3.
291 See id. at 2.
same demographics. Black and Latinx individuals are the most frequent targets of broken windows policing in New York City. “In 2015, 46 percent of misdemeanor arrests were of Black individuals, 35 percent of Hispanic individuals, 13 percent of White individuals, and 5 percent of other racial or ethnic individuals.” Unsurprisingly, Black and Latinx are also more likely to face adverse decisions in their immigration proceedings. “More than one out of every five noncitizens facing deportation on criminal grounds before the Executive Office for Immigration Review is Black.”

Alina Das argues this demographic overlap is not a coincidence, but consistent with a century long history of racially motivated immigration enforcement. Although a criminal record is facially neutral criterion for adjudicating a person’s right to remain, Das’s

295 See Howell, supra note 139, at 291–92.
296 See id. at 291.
297 Kohler-Hausmann, supra note 141, at 51 (referencing data from the Department of Criminal Justice Statistics); see also Howell, supra note 139, at 291 (“The data indicate that about 86% of people arrested for misdemeanors in New York City in the years 2000–2005 were nonwhite. About 48–50% were reported to be black and another 32–34% Hispanic. The 2001 census estimates that blacks and Latinos make up 27.09% and 27.80% of New Yorkers, respectively.”). In the context of stop and frisk, Blacks and Hispanics relative to Whites have significantly higher stops per crime ratios at all levels of reported crime. See Peter L. Zimroth, NYPD Monitor, Monitor’s Fifth Report—Analysis of NYPD Stops, 2013–2015, at 2 (2017).
298 Id. at 5. It is also worth noting that black immigrants are less likely to be in the U.S. unlawfully as compared to immigrants from other regions and countries. According to a 2013 census, there were “575,000 Black immigrants were living in the U.S. without authorization in 2013, according to the Pew Research Center study, making up 16% of all Black immigrations population.” Id. pt. I, at 14. Despite their overrepresentation in removal proceedings, “[t]he percentage of Black immigrants whose case was terminated (24%) was 10 points higher than the percentage of termination among all people in removal proceedings in 2015.” Id. at 16.
300 See Martha Escobar, Captivity Beyond Prisons: Criminalization of Latina (Im)Migrants 52 (2016).
review of the historical record suggests the use of criminal convictions has disguised an immigration policy inflected with racial bias.  

Demographic overlap aside, recent data from ICE confirm that both criminal convictions and pending criminal charges account for at least half of deportations. These criminal contacts include low-level offenses, including drug possession and traffic violations. ICE apprehended over 138,000 people in 2018 because of criminal conviction or pending charges. Almost 33,000 were apprehended because of pending criminal charges. Selling marijuana and larceny were amongst the top ten offenses that triggered removal. The 1700% increase in courthouse arrests since 2016 underscores the risk of detection posed by a mere accusation. Twenty-eight percent of individuals apprehended by ICE in courthouses did not have a criminal record, and were in court for a minor offense, often a traffic offense.

How are these deportation outcomes produced? As explained in Section IV.B, many cases are not resolved by misdemeanor convictions but by ACDs or disorderly conduct pleas, which are subcriminal. These can alert immigration to contact with local law enforcement and detract from the strength of a non-citizen’s application for an immigration benefit or for relief from removal. When it comes to convictions, in New York State, until April 2019, the maximum sentence for misdemeanors was 365 days, which “frequently trigger[ed] certain removal grounds, render[ed] individuals ineligible for certain forms of relief from removal, or even

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303 See id.
305 See id. at 4 tbl.1.
306 Id. at 2.
307 Id. at 3 fig.2.
308 Id. at 3 fig.2, 11 fig.11.
309 See Matt Sedensky, Trump’s Immigrant Roundups Increasingly Net Noncriminals, AP NEWS (Sept. 20, 2018), https://apnews.com/8969468fb8b2485a87ff1ff4f48397ba0 [https://perma.cc/GTR6-VQRM].
310 See IMMIGRANT DEF. PROJECT, THE COURTHOUSE TRAP: HOW ICE OPERATIONS IMPACTED NEW YORK’S COURTS IN 2018, at 3 (2019); see also IMMIGRANT DEF. PROJECT & CTR. FOR CONSTITUTIONAL RIGHTS, ICEWATCH: ICE RAIDS TACTICS MAP 5 (2018) (“Under Trump, ICE has identified courthouses as a preferred site to arrest non-citizens. IDP documented a 1200% increase in ICE courthouse arrests from 2016 to 2017.”).
subject[ed] them to mandatory detention.”312 Convictions for theft, controlled substances, and marijuana qualify as crimes involving moral turpitude under federal law, that trigger removal.313

These data suggest an overlap between order maintenance policing and civil immigration enforcement. Without more information about the breakdown of types of convictions and charges that lead to removal, the extent to which order maintenance policing and prosecution contribute to civil immigration enforcement remains unknown. We know that convictions for low-level offenses are responsible for at least some removals.314

2. Limitations of Current Protections

There are three main ways noncitizens in New York who are prosecuted for low-level offenses can be shielded from the risk of removal: (1) limits on information sharing imposed on some law enforcement agencies, (2) harm-reducing pleas, and (3) altering state penal codes to avoid statutory overlap with federal grounds for removal, inadmissibility, or ineligibility for relief or benefits.315 I address the benefits and limitations of each.

a. Limits on information sharing

As discussed in Part I, New York City’s sanctuary laws do not regulate all law enforcement agencies operating in the five boroughs. They also do not target all the points of potential contact with federal immigration authorities. The detection protections have exceptions for individuals with certain felony convictions, or purported terrorist


314 See Cade, supra note 8, at 1754.

or gang affiliations. One worthwhile reform may include closing those gaps in coverage, particularly those relating to DA conduct. While preventing information sharing between local and federal law enforcement can thwart detection, it does not prevent individuals from being targets for removal in the first instance. For example, these protections do not address whether noncitizens caught with marijuana should face the risk of adverse immigration consequences. That normative decision largely falls to immigration law and whether police, prosecutors, judges, and defense attorneys are mindful of collateral consequences in state court.

b. Harm-reducing pleas

Another category of reform targets the role that defense attorneys can play to mitigate the immigration risks for their noncitizen clients facing criminal prosecution. For example, the Immigrant Legal Resource Center proposes that local jurisdictions reinforce defense attorneys’ “constitutional duty under the Sixth Amendment of the U.S. Constitution to affirmatively and competently advise of the immigration consequences of criminal offenses.”

Reforms in this vein would increase funding to defense organizations to hire more staff, including immigration specialists. In a related vein, the Brooklyn and Manhattan DAs both publicly announced their intention to hire immigration specialists to advise their staffs on the immigration consequences of dispositions in criminal court.

Since the U.S. Supreme Court’s decision in Padilla v. Kentucky, defense attorneys have an obligation to advise their non-citizen clients of the immigration consequences of a plea. Prosecutors and defense attorneys are in the habit of engaging in discussions that weigh immigration consequences against criminal conduct alleged, and debate whether the collateral consequences are proportionate to

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316 See Press Release, Office of the Mayor, supra note 73 (“City agencies, including the NYPD, will continue to cooperate with federal law enforcement agencies in certain circumstances, including as part of inter-governmental criminal task forces focusing on topics such as gangs, human trafficking, and terrorism, and by sharing information about individuals in the City’s criminal custody who have been convicted of one of approximately 170 qualifying violent or serious felonies under the City’s existing laws on immigration detainer requests.”).
317 See Brown, supra note 57.
318 See, e.g., Lasch et al., supra note 1, at 1724–25.
320 Graber et al., supra note 276.
the conduct at issue.\textsuperscript{323} But an accurate understanding of the consequences does not guarantee better outcomes for the defendant. While the risks of adverse immigration consequences can be mitigated most successfully for lower level offenses, where both sides may agree that removal is a disproportionate consequence, it is far more difficult to eliminate the immigration risks for a crime the prosecutor considers to be serious or for a person with previous felonies or convictions for violent crime.

Even with a diligent attorney who carries out their \textit{Padilla} obligations, time pressure, unequal leverage, and impediments to getting discovery “frustrate the ability to bargain for immigration-safe dispositions.”\textsuperscript{324} These very limitations motivated the organizers to launch the campaign, as discussed in Part II. There are also pressures to resolve misdemeanor cases at the first appearance, which leaves for no time to investigate collateral consequences for individuals whose immigration status is murky or complicated. Forty percent of cases are settled at arraignments in the five boroughs.\textsuperscript{325}

The prosecutors staffing arraignments, in particular, are the least experienced and newest hires in a DA’s office,\textsuperscript{326} and therefore may be prone to faithfully follow guidelines from supervisors about what plea bargains to strike. This means that the defense may not be able to prevail upon the prosecutor to offer a better plea at that first appearance. More immigration specialists would not address the pressure to plea and the inequality of arms in the courtroom.

Negotiations for an immigration-safe plea, particularly for low-level offenses, are inherently imbalanced. An accused is likely to plea to avoid the collateral costs of fighting the cases—missed days at work, civil immigration, or employment consequences of a conviction, obviated by a sub-criminal outcome. Jail is rarely imposed in these cases. But the bargain is anything but fair. The prosecutors are rarely alleging a moral trespass. Even theft charges are crimes of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{324} See Cade, \textit{supra} note 8, at 1776.
\item \textsuperscript{325} See LINDSAY, \textit{supra} note 293, at 28.
\item \textsuperscript{326} See, e.g., \textit{Career Opportunities}, Queens Dist. Attorney, http://www.queensda.org/Career Opportunities/ada_career.html [https://perma.cc/GTF5-S9R6] (noting that the newest ADAs are assigned to intake).
\end{itemize}
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poverty. The case resolution reached is a tax for being considered a public nuisance. The risk of removal is so severe that noncitizens are likely to do anything to avoid that risk stripping them of any leverage.

In practical terms, empowering the defense would only address risks that arise at and after the moment of arraignment, when the right to counsel attaches. Defense centered reforms could not ameliorate the risks presented by the mere charging of a crime that attracts ICE’s attention after the 2017 EO.

Actions taken to empower the defense also cannot control for the shifting landscape of federal immigration enforcement. As Jason Cade has observed, “[I]mmigration-safe’ pleas are something of a moving target because Congress can make immigration consequences retroactive.”

Most significantly, more funding to the defense would not address the underlying sociological reality of these charges: they reflect the intense concentration of policing and prosecution resources on Black and Latinx New Yorkers. Once in court, defense attorneys have limited tools to challenge the concentration of police resources in those communities or to attack legislative choices that determine outcomes in court. Although relevant, these arguments about institutional choices and systemic bias have limited purchase in the scope of direct representation.

c. Eliminating statutory overlap

Altering statutory definitions of crimes and corresponding punishments in state penal codes offer another path to insulate noncitizens at risk of removal from federal detection. After lobbying efforts by The One Day to Protect New Yorkers campaign, legislators reduced the maximum penalty for class A misdemeanors in New York State from 365 to 364 days. “Previously, the one-year potential sentence associated with some misdemeanors in New York meant that convictions would frequently trigger certain removal

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327 See Rosa Goldensohn, New York ‘s Most Desperate Caught Up in ‘Crimes of Poverty’, CITY (Oct. 14, 2019), https://thecity.nyc/2019/10/new-yorks-most-desperate-caught-up-in-crimes-of-poverty.html [https://perma.cc/E2WZ-WV5K ]; see also Cade, supra note 8, at 1802, 1804 (“As discussed above, poverty and detention cut noncitizens off from support networks, potential witnesses, and income that may be critical to their legal defense and family’s survival.”).
328 See, e.g., Cade, supra note 8, at 1804, 1810.
329 Id. at 1815.
331 See N.Y. PENAL LAW § 70.15(1), (3) (2019); One Day to Protect New Yorkers, FORTUNE SOC’Y, https://fortunesociety.org/one-day-to-protect-ny/ [https://perma.cc/3DXG-6NZT].
[thresholds], . . . render individuals ineligible for certain forms of relief from removal, or even subject them to mandatory detention.”332 Criminal immigrant specialists heralded the change for shielding “thousands of [immigrant] New Yorkers” from “extraordinarily harsh and disproportionate [immigration] consequences” arising from such convictions.333 The legislation applies retroactively and makes it easier to vacate misdemeanor convictions.334 But, these protections for noncitizens are outward facing. These do not affect how noncitizens interact with local law enforcement or how they are treated in court.

3. The Case for Decriminalization

None of these measures address the specific heightened risk of removal after being accused of a crime. Further, each tempers the crimmigration system at points of its perceived excesses. The policies prevent individuals in some law enforcement agencies from directly cooperating with their DHS counterparts, and remove explicit areas of overlap between federal and state law for low-level crimes. When noncitizens are accused of violent conduct, these protections end. Reforms aimed at enhancing the capacity of defense attorneys to ensure the accused knows of the negative immigration consequences of a particular plea bargain, without addressing the balance of power in plea negotiations or the uncertainty of changes in federal enforcement priorities. Each of these measures is ultimately modest: none disturb the deep entanglement between state criminal and federal civil law enforcement agencies. These protections preserve the hallmark of the crimmigration system—the expulsion of noncitizens for their criminal history, but peels away an exceptional category of immigrants, for whom removal would be disproportionate.335 This group may be a large demographic, but it is presented as morally exceptional and deserving of reprieve. Further, the core activities of local law enforcement are largely left untouched.

Decriminalization, whether by executive or legislative action, addresses some of these shortcomings. It addresses the new harm.

334 Id.
335 See Press Release, Brooklyn Dist. Attorney, Non-Citizen Defendants, supra note 265.
posed by the 2017 EO because it stems the risk at the charging stage. Decriminalization tries to disrupt the crimmigration phenomenon at its root. Unlike the patchwork of information silos, it offers uniformity: everyone accused of low-level offenses benefits—citizens and noncitizens alike—including undocumented immigrants. Decriminalization through nullification also accelerates the process of dismissal for the many cases that prosecutors dismiss when they offer ACDs.

Nullification of broken windows offenses is a partial and temporary measure for decriminalization. Nullification is not as protective, for example, as comprehensive decriminalization achieved, for example, by repealing criminal statutes. A prosecutor’s decision not to prosecute a category of offenses does not necessarily mean that police officers will not arrest those individuals, at least in the short term, until the police realizes its time is best spent elsewhere. My experience in criminal court suggests that prosecutors’ inaction can yield changes in police enforcement, but this is not inevitable. A police officer could arrest someone, knowing all the while that the arrest will not amount to a charge or issue a civil summons which does not trigger biometric sharing. Until those arrests cease, however, noncitizens will be fingerprinted, permitting DHS and ICE to identify them. The local arrest, thus, still permits federal detection. We do not know how frequently DHS relies on this initial biometric inquiry to determine whom to apprehend. If police fingerprinting exposes noncitizens to a higher risk of detection than a criminal charge, nullification may be less effective.

Despite the imperfections of the nullification strategy, decriminalization in its various forms expresses a broader view of what it means to offer sanctuary to noncitizens. Expanded sanctuary city protections, such as decriminalization, try to improve the quality of life for immigrants across their various spheres of life. This intersectional approach centers the lived experiences of those without the privileges of U.S. citizenship. It is not only the force of the black letter immigration law that determines whether someone remains in a new country, but her conditions of employment, interactions with law enforcement, her access to affordable and safe housing and quality health care. Non-citizen interactions with police and the criminal legal system can create grounds for removal, but

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336 See CAHN, supra note 276, at 1; Fairfax, supra note 21, at 1272–73, 1274–75.
337 See Fairfax, supra note 21, at 1273–74; KOHLER-HAUSMANN, supra note 141, at 147.
338 See Cade, supra note 8, at 1815–17.
339 See id. at 1800.
harassment by law enforcement also makes life difficult to bear.\textsuperscript{340} As K-Sue Park documents, nativist forces in state and federal government have long understood that voluntary departures, compelled by hostile living conditions for immigrants, can achieve the same result as legally enforced removals.\textsuperscript{341} Thus, if one strategy deployed by such groups is to undermine noncitizens’ ability to remain by orchestrating a climate that leaves noncitizens in a precarious position, it is incumbent on sanctuary cities, in response, to enact policies that allow noncitizens not merely to remain legally, but also to thrive.

While these broader, intersectional concerns animated the #NYCdontprosecute campaign and Expanded Sanctuary City platforms, both speak explicitly only about decriminalizing low-level offenses. They do not specify a limiting principle. They do not address whether they endorse deportation for some category of offenses and for some persons. Mijente’s platform suggests that it does not, when it calls for “dismantl[ing] the current policing apparatus that acts as a funnel to mass incarceration and the deportation machine.”\textsuperscript{342} By contrast, current New York City sanctuary protections shield noncitizens from the disproportionate consequences of a criminal conviction. Liberal policy think tanks similarly focus on the harshness of being deported for minor offenses. That proportionality test is relatively easy to apply for such offenses, which is precisely where the campaign drew the line. Where and if one draws the line for decriminalization reflects a deeper political cleavage between liberal and abolitionist agenda for law reform.\textsuperscript{343}

Following a liberal law reform agenda, decriminalization is most appropriate for low-level offenses. If criminal law is intended to adjudicate morally culpable conduct, broken windows offenses have no justifiable place—they neither consistently produce outcomes that

\textsuperscript{340} See, e.g., LAURIE BERG, MIGRANT RIGHTS AT WORK: LAW’S PRECARIOUSNESS AT THE INTERSECTION OF IMMIGRATION AND LABOUR, at xiv, xvi (2016).
\textsuperscript{342} UNZUETA, supra note 17, at 1; RITCHIE & MORRIS, supra note 17, at 3.
\textsuperscript{343} See Rodriguez, supra note 29. Rodriguez compares the Brennan Center for Justice’s approach to addressing the growth in the American prison population with We Charge Genocide’s organizing in Chicago against police violence led by directly impacted youth to draw out the differences between liberal and abolitionist analyses and agenda. Rodriguez writes, “[t]he reformist promise animating the Brennan Center’s work pivots on the liberal belief that racist state violence is not a fundamental and systemic (or otherwise-intended) production of the U.S. racial/racist state.” Id. at 1595–96. By contrast, We Charge Genocide does not frame police violence as an “episodic” instance of police brutality that lives outside of the law. Rather it views police violence as “systemic, institutionalized, [and] juridically condoned,” which thus require solutions that live outside of the law as it is written. Id. at 1603.
reflect legal guilt nor moral culpability.\textsuperscript{344} Their dominance in criminal court reflects a legal regime that elevates rule compliance over moral innocence. Decriminalization of low-level offenses removes a category of offense that has distorted the institution’s purported purpose.\textsuperscript{345} Similarly, if criminal convictions help to distinguish “good” from “bad” immigrants, quality-of-life offenses are a poor filter because these charges reflect the outcomes of local population management strategy rather than a reliable and legitimate finding of individual wrongdoing. Low-level offenses are poor fuel for an immigration policy purportedly motivated by national security concerns. The crimmigration system’s reliance on these offenses suggests that it has failed on its own terms. Decriminalization of low-level offenses realigns the criminal and immigration systems with myths perpetuated about their core purposes. Such a measure would not only alter the scope of the current administration’s enforcement priorities, but also that of its predecessor. Pursuant to President Obama’s “families, not felons” policy, individuals convicted of low-level offenses were also deported.\textsuperscript{346} A liberal challenge to the “families, not felons” policy would turn on bringing to light the types of crimes triggering removal. This exposition would demonstrate that individuals who commit these offenses are not actually all felons, whether under state law or in popular understanding. Thus, this kind of reform would preserve the goals of the policy but would demand an overhaul of who counts as a “felon,” and who is a deserving family member. Expulsion would remain a legitimate expression of state authority, but would be reserved and rationalized for individuals accused of a residual category of serious crimes.

In contrast, whereas for abolitionist organizing it may be strategically savvy to launch a decriminalization campaign beginning with low-level offenses; it is not the place to end. It is easy to decry broken window offenses. These offenses elevate the quality of the lives of White, middle class New Yorkers at the expense of the city’s poor, Black, and Latinx residents. It becomes clear whom the law serves and who are objects of its regulation. As Alexandra

\textsuperscript{344} See Peter Arenella, Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability, 39 UCLA L. Rev. 1511, 1527, 1535 (1992); Fairfax, supra note 21, at 1252, 1254, 1274–75.

\textsuperscript{345} See Kohler-Hausmann, supra note 141, at 2; Fairfax, supra note 21, at 1252, 1254; Natapoff, supra note 22, at 81 (“[T]he notion that the criminal process articulates shared moral concepts and reinforces social solidarity depends on the idea that criminal prosecutions and convictions represent moral judgments about defendant behavior.”).

\textsuperscript{346} See 2014 Obama Immigration National Address, supra note 23.
Natapoff articulates, using the metaphor of a penal pyramid, at the lowest and largest slice of the pyramid, “legal theory has less explanatory power... [n]otions of social control and institutional power... offer more persuasive explanation for case outcomes.”

At that lowest level, the application of the law is most clearly motivated by race, gender, and class. With increased severity in charge, the moral force of the law is at its apex. “At the top, fidelity to legal principle holds out the promise of a certain kind of fairness.” The abolitionist challenge is to pivot seamlessly from critically scrutinizing how criminal law is applied at the lower tiers of the pyramid to its upper echelons. Thus, while the explanatory force of sociological units of race and class may be more obvious for broken window offenses, the law at the top of the pyramid does not operate neutrally. The law may instead be better at concealing its social agenda, and there may be conflicting forces animating legal processes. “[D]epending on the severity of the offenses and their corresponding spot on the pyramid, different socio-legal descriptions gain or lose purchase.” But while the descriptions may vary, the inherently social force of penal law persists at all levels of its enactment.

On this count, the campaign’s vision was incomplete. Organizers did not highlight the continuities between broken windows offenses and violent crime. And yet, while the campaign did not portray broken windows offenses as an exceptionally troubling feature of the criminal legal system, it was silent about sanctuary protections higher up the penal pyramid.

Ultimately, across the tiers of the penal pyramid, the social question that criminal law tries to answer is, what keeps us safe? The carceral fix for guaranteeing collective safety is the criminal record, jail, prison, detention center and deportation. These tools negate the reality of rehabilitation and erase the hope for redemption. Instead of deportations and prison sentences,
abolitionist oriented organizing places trust in systems of accountability that acknowledge harm when it has actually occurred, but offers the chance at repair through dialogue.\textsuperscript{352}

Just as community organizing in New York City helped to debunk the morality and empirical postulates behind broken windows policing, we know have a similar opportunity to question how immigration enforcement addresses both low-level and serious offenses. That process begins with critically examining the reliance on deportations and detention as the tools for collective security and developing notions of safety that are distinct from state narratives of national security. Stressing the harms of expulsion and to whom it befalls, can also help to dispel the myths of the rational neutrality of the law, even at the top of the pyramid.

\section*{VI. JUSTIFICATIONS FOR NULLIFICATION}

Having considered the benefits of decriminalization, I now assess the merits of nullification. From where does such a move draw its legitimacy? What is its limiting principle? Nullification is justified here because it enacts a more inclusive vision for public safety that is responsive to the local realities lived by communities most affected by criminalization.\textsuperscript{353}

Prosecutorial nullification sits at the outer bound of a prosecutor’s discretion, but it implicates the same concerns as any exercise of discretion. As a general matter, under both federal\textsuperscript{354} and New York

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\textsuperscript{354} Although \textit{Yick Wo v. Hopkins} established in theory that racially selective enforcement violates equal protection of the laws, no claim has satisfied its threshold in the century since. \textit{Yick Wo v. Hopkins}, 118 U.S. 356, 373–74 (1886). In \textit{Yick Wo}, the Supreme Court invalidated a statute, which was facially racially neutral, but was administered by public authority in such a way as to manifest discriminatory intent. \textit{Id.} at 374. The case established the rule that the decision to prosecute cannot be based on arbitrary classification, such as race. \textit{See id.} In the years since \textit{Yick Wo}, the viability of such a claim has been further narrowed. To make such a claim of selective prosecution, there must be both discriminatory effect and purpose by showing others similarly situated were not subject to the same criminal penalties. \textit{See United States v. Armstrong}, 517 U.S. 456, 465 (1996) (citing \textit{Wayte v. United States}, 470 U.S. 598, 608 (1985)). Such a showing must precede discovery, which is virtually impossible to establish. Claims of selective prosecution are inherently difficult to document because records of what charges prosecutors do not bring may not exist. Furthermore, there is a presumption in favor of the government. In the federal context, the Supreme Court grants the executive “broad discretion” and “latitude” as part of the delegated authority of the President. \textit{Armstrong}, 517 U.S. at 464
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State law, a prosecutor’s discretion is not subject to judicial review.\textsuperscript{355} Because the law affords prosecutors virtually unchecked discretion, soft values offer more guidance than black letter law. The core values grounding scholarly discussion of prosecutorial discretion include: independence, separation of powers, lack of bias, consistency, and accountability.\textsuperscript{356} These core values of liberal government are often in tension with one another.\textsuperscript{357} Scholars have also proposed various mechanisms for arriving at the right balance between these values: self-regulation,\textsuperscript{358} judicial commissions,\textsuperscript{359} legislative guidelines,\textsuperscript{360} and repealing immunity.\textsuperscript{361} One point of pressure for regulating

\footnotesize{\textsuperscript{(quoting Wayte, 470 U.S. at 607). “As a result, ‘the presumption of regularity supports’ their prosecutorial decisions and, ‘in the absence of clear evidence to the contrary, courts presume that they have properly discharged their . . . duties.” Armstrong, 517 U.S. at 464 (quoting United States v. Chemical Found., Inc., 272 U.S. 1, 14–15 (1926)). Imbler v. Pachtman has insolated state prosecutors from civil liability and declared a broad doctrine of prosecutorial immunity. Imbler v. Pachtman, 424 U.S. 409, 427, 430–31 (1976). \textsuperscript{355} N.Y. COUNTY LAW § 700 (McKinney 2019) (“Except as provided in section seven hundred one of this chapter, it shall be the duty of every district attorney to conduct all prosecutions for crimes and offenses cognizable by the courts of the county for which he or she shall have been elected or appointed; except when the place of trial of an indictment is changed from one county to another, it shall be the duty of the district attorney of the county where the indictment is to conduct the trial of the indictment so removed, and it shall be the duty of the district attorney of the county to which such trial is changed to assist in such trial upon the request of the district attorney of the county where the indictment was found. He or she shall perform such additional and related duties as may be prescribed by law and directed by the board of supervisors.”); In re Coleman, 148 N.Y.S.2d 753, 757 (N.Y. Sup. Ct. 1956) (citing People v. Fielding, 53 N.E. 497, 498 (N.Y. 1899)); McDonald v. Goldstein, 83 N.Y.S.2d 620, 622 (N.Y. Sup. Ct. 1948) (“It might be well to observe that the District Attorney is a quasi-judicial officer, and as such has wide discretion in the manner in which his duties shall be performed.”); 1965 N.Y. Op. Att’y Gen. 118 (“From a study of the above cases it would appear that the courts have recognized the discretion of a district attorney in any given case as to whether or not he will prosecute [minor crimes and misdemeanors].”). \textsuperscript{356} See W. RANDOLPH TESLIK, NAT’L INST. OF LAW ENF’T & CRIMINAL JUSTICE, PROSECUTORIAL DISCRETION: THE DECISION TO CHARGE 1, 5 (1975); Daniel Epps, Adversarial Asymmetry in the Criminal Process, 91 N.Y.U. L. REV. 762, 771 (2016); Bruce A. Green & Fred C. Zacharias, Prosecutorial Neutrality, 2004 Wis. L. REV. 837, 843, 851, 852, 853–54; Rebecca Krauss, The Theory of Prosecutorial Discretion in Federal Law: Origins and Development, 6 SETON HALL CRIM. L. REV. 1, 3 (2009). \textsuperscript{357} See Teslik, supra note 356, at 5; Green & Zacharias, supra note 356, at 893. \textsuperscript{358} See Green & Zacharias, supra note 356, at 840 (“[P]rosecutors should make decisions based on articulable principles or subprinciples that command broad societal acceptance. This insight poses a challenge, for prosecutors have never, either individually or collectively, undertaken the task of identifying workable norms for the array of discretionary decisions that their offices make each day.”); Marc L. Miller & Ronald F. Wright, The Black Box, 94 IOWA L. REV. 125, 196 (2009). \textsuperscript{359} See Bennett L. Gersham, New Commission to Regulate Prosecutorial Misconduct, HUFFINGTON POST (May 20, 2014, 12:09 PM), https://www.huffingtonpost.com/bennett-l-gersham/new-commission-to-prosecutorial-misconduct_b_5353570.html [https://perma.cc/MP7A-Z8BG]. \textsuperscript{360} See PFAFF, supra note 216, at 206–07. \textsuperscript{361} See Bennett L. Gersham, The Most Dangerous Power of the Prosecutor, 29 PACE L. REV. 1, 21–22 (2008); Evan Bernick, It’s Time to End Prosecutorial Immunity, HUFFINGTON POST}
discretion remains under-appreciated: public participation, of which
the case study offers one illustration.\textsuperscript{362}

Before parsing through the soft values behind discretion, it is
helpful to be specific about the kind of discretion at issue. Whether
in an individual case or an entire category of cases, a prosecutor’s
office enjoys the greatest flexibility with low-level offenses.\textsuperscript{363} Low-
level offenses lack “normative guilt”; thus, prosecutors enjoy greater
public legitimacy when exercising their discretion.\textsuperscript{364} For serious
offenses, prosecutors are traditionally more constrained by public
outcry.\textsuperscript{365} Public pressure can limit their discretion at the higher
end.\textsuperscript{366} The campaign’s focus on low-level offenses exploit this
dichotomy.

Prosecutors, even when in possession of sufficient proof, are not
commanded to prosecute every single infraction of law contemplated
by the legislature.\textsuperscript{367} Their independence from the legislature
preserves the separation of powers. For example, “[c]ourts have
consistently . . . ruled in categorical terms that writs of mandamus
can never be issued to compel prosecution.”\textsuperscript{368} Resource constraints
alone would prevent mandatory enforcement. More importantly, the
traditional view of the prosecutor entrusts the position with the
executive expertise to determine which charges should be filed and
which ones should not, even when there is probable cause.\textsuperscript{369}
Considerations against pressing charges could include protecting
witnesses or delaying prosecution until after the completion of a long-
term investigation.\textsuperscript{370} These kinds of reasons for not prosecuting
reflect concerns about law enforcement and fall squarely in the realm
of ordinary discretion. Nullification, by contrast, is when a
prosecutor decides not to prosecute because she disagrees with “the
wisdom of the law or of the desirability of punishing a culpable
wrongdoer.”\textsuperscript{371} Such decisions about the desirability of a law are

\textsuperscript{362} See, e.g., 5 Boro Defs., Call for Moratorium, \textit{supra} note 5.
\textsuperscript{363} See Vorenberg, \textit{supra} note 6, at 1531.
\textsuperscript{364} See Josh Bowers, Legal Guilt, Normative Innocence, and the Equitable Decision Not to
Prosecute, 110 COLUM. L. REV. 1655, 1657–58 (2010); Vorenberg, \textit{supra} note 6, at 1531.
\textsuperscript{365} See Vorenberg, \textit{supra} note 6, at 1526.
\textsuperscript{366} See id. at 1526–27.
\textsuperscript{367} See Green & Zacharias, \textit{supra} note 356, at 874–75.
\textsuperscript{368} Sarat & Clarke, \textit{supra} note 7, at 401–02.
\textsuperscript{370} See United States v. Lovasco, 431 U.S. 783, 794–95 (1977); Sarat & Clarke, \textit{supra} note 7,
at 391.
\textsuperscript{371} Fairfax, \textit{supra} note 21, at 1262.
conventionally associated with legislative action. Under the current institutional framework, however, nullification is not “ultra vires,” but part of the parcel of expansive prosecutorial discretion. The wisdom and advisability of nullification is a separate matter.

There are several reasons why nullification can be appropriate. While the #NYCdontprosecute campaign asked the DAs to reconsider punishing individuals for minor offenses, the request was made in a context of aggressive enforcement. The statutes enforced by the DAs’ offices existed long before 1994 when the NYPD initiated its new policing strategy. The broken windows strategy was not characterized by the creation of new criminal statutes, but by the unrelenting enforcement of existing statutes in certain communities. While legislative repeal would be equally effective in ending broken windows policing and prosecution, such statutory change takes a long time to achieve. Statutory change alone misses an important moment for accountability. Local law enforcement, specifically, the NYPD and City DAs deployed state criminal statutes to apply its policing strategy. Nullification thus performs an important service of acknowledging the damaging role law enforcement played.

Nullification also provides an opportunity to test future plans for legislative decriminalization. Executive officers, such as prosecutors, are nimble and flexible in their ability to make significant policy changes. A policy of prosecutorial nullification is only as permanent as the elected official wants it to be. Prosecutorial nullification serves as a stepping stone towards permanent legislative change.

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372 See id. at 1267.
373 See Richard A. Bierschbach & Alex Stein, Overenforcement, 93 GEO. L.J. 1743, 1744 (2005); 5 Boro Defs., Call for Moratorium, supra note 5.
374 See MODELS FOR INNOVATION, supra note 135, at 20; Jeremy Kaplan-Lyman, Note, A Punitive Bind: Policing, Poverty, and Neoliberalism in New York City, 15 YALE HUM. RTS. & DEV. L.J. 177, 204–05 (2012); e.g., N.Y. PENAL LAW §§ 140.05, 155.25, 221.05 (McKinney 2019).
375 See Mila Sohoni, Crackdowns, 103 VA. L. REV. 31, 66 (2017).
administration, or from political moment to moment, permits experimentation. City policies have often been the laboratory for statewide policies in New York.\textsuperscript{379} For example, partial marijuana decriminalization in Brooklyn under DA Kenneth Thompson and his successor, DA Eric Gonzalez, set the stage for Governor Cuomo’s announced plan for legalization statewide.\textsuperscript{380}

Nullification also expresses a different separation of powers—the local versus state government divide.\textsuperscript{381} “The history of the development of the office of prosecutor has the clear theme . . . of 'local representation applying local standards to the enforcement of essentially local laws.”\textsuperscript{382} Nullification gives expression to local concerns about the application of statewide criminal statutes.\textsuperscript{383} The zero-tolerance approach to policing is unique to urban environments like New York City, where there is a high concentration of noncitizens who are middle or lower class, and non-White, who face aggressive policing and severe consequences, as compared to other parts of New York State.\textsuperscript{384}

The second possible concern raised by the #NYCdontprosecute campaign’s demands is that it erodes the independence of the prosecutor. Independence has several facets. The first concern may be that the prosecutor is being swayed by a momentary outcry.\textsuperscript{385} The theory of broken windows policing has been slowly and systematically debunked by a range of actors, from within government and from civil society, over the course of a decade.\textsuperscript{386} The brief history in Section III.A narrates the sustained struggle by social movements, and the intergovernmental consensus they achieved: a ruling by a federal court, legislation in New York City Council, findings by the Office of the Inspector General for NYPD, and changes in NYPD enforcement, specifically, its recalibration.\textsuperscript{387} #NYCdontprosecute relied on and built on these lasting to changes city government.

\textsuperscript{379} See Paul, supra note 376.
\textsuperscript{380} See id.
\textsuperscript{382} Id. at 731.
\textsuperscript{383} See Fairfax, supra note 21, at 1268; Misner, supra note 381, at 718–19, 731.
\textsuperscript{385} See Green & Zacharias, supra note 356, at 869–70.
\textsuperscript{386} See Kaplan-Lyman, supra note 374, at 206.
\textsuperscript{387} See THE CIVIL RIGHTS IMPLICATIONS OF “BROKEN WINDOWS” POLICING IN NYC, supra note 167, at v, vii.
Another kind of concern about independence arises when a prosecutor is swayed by the loudest or most powerful voice. There is a reasonable expectation that a DA will not be swayed by arbitrary factors—like who has access, who enjoys favor, or shares partisan affiliations. Awarding preferential treatment to defendants because of their access to the prosecutor creates inconsistent outcomes that cannot be justified. But this concern is also easily dispelled here. First, nullification does not create the risk of disparate outcomes. It has the benefit of being uniform. The campaign asked for equal treatment—namely that no one be charged with a quality of life offense.

Second and more significantly, concerns about independence assume two facts: there are channels for meaningful public engagement with DA offices, and that prosecutors adequately consider a diverse range of perspectives when they apply the law. Neither of these are true.

DA offices have been historically insulated from public scrutiny. Prosecutors’ immunity from accountability is well-documented. Prosecutorial discretion is also unreviewable in court. Most elections are uncontested, heavily favor incumbents, and are rarely the site for substantive discussion about law, policy, or justice. Although, in the last year, some prosecutors across the country have opened their doors to community input, these steps remain informal, and do not approximate systematic public oversight. In New York State, prosecutors have in fact challenged judicial oversight over their offices. The New York State District Attorney’s

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388 See Green & Zacharias, supra note 356, at 861–62, 869–70.
389 See id. at 852–53 (stating that a prosecutor must act in a nonbiased fashion and avoid decisions based on impermissible criteria).
391 5 Boro Defs., Call for a Moratorium, supra note 5.
393 See, e.g., Gershman, supra note 361, at 19.
394 See Misner, supra note 381, at 774–75; Ronald F. Wright, Beyond Prosecutor Elections, 67 SMU L. REV. 593, 600 (2014).
Association recently sued after the state legislature created a judicial commission designed to detect and prevent wrongful convictions.396

As Jocelyn Simonson has explained, although the prosecutor is formally the representative of the people in court, in practice she is largely selective of which voices she amplifies in the positions she takes.397 Namely, the prosecutor takes most of her cues from victims and the tough on crime public, although this is changing in small ways.398 While it is impossible for a prosecutor to weigh all demands placed on her office equally,399 there must at least be channels for a diverse range of constituents to communicate their concerns. The experiences and desires of individuals who are directly impacted and their families are, however, typically ignored.400 The defense, at best, can only represent the perspective of the individual accused.401 Even to the extent the interests of the accused person’s community are conveyed in plea negotiations or in court, the defense is the weakest actor in court, at least in New York City.402 Prosecutorial independence is hard to achieve if only some voices are heard.

The campaign proposes a model for engagement to address this deficit in public participation from directly impacted communities.403 For noncitizens who cannot vote, picking up the phone may be one of the few avenues for engagement. The script for the campaign, and the telephone calls were disruptive.404 In the absence of other channels for input and oversight, disruption may be the only choice, particularly where the concerns about prosecutorial behavior are time sensitive and implicate potentially irreversible consequences. Disruption not only grants access to groups excluded from prosecutors’ decision-making calculus, but it also rebalances the adversarial system. Public defenders asked for external support because of their weakness relative to their adversaries in shaping outcomes in their clients’ favor.

A final independence concern is that the campaign subjects technical and administrative matters to the meddling of an inexpert

398 See id. at 278, 286–87.
399 See Green & Zacharias, supra note 356, at 867.
400 See Simonson, supra note 353, at 265–66.
402 See Simonson, supra note 353, at 252, 269; Bowers, supra note 364, at 1705–06.
403 See Simonson, supra note 353, at 286.
404 See 5 Boro Dels., Calls for a Moratorium, supra note 5.
public. First, the campaign relied on the expertise of public defenders to explain the urgency of the moratorium and the insufficiency of current strategies to mitigate collateral consequences.\textsuperscript{405} Second, professional prosecutors rarely deploy their legal expertise to prosecute these cases.\textsuperscript{406} Broken windows charges are reflexively leveled because prosecutors need only to rely on police observations to bring charges.\textsuperscript{407} These cases are “advantageous, quick-and-dirty pleas with minimal resource outlay.”\textsuperscript{408} There is also strong solidarity with the police department. In turn, DA offices rarely perform their own investigations in these cases. “The data bear out these assumptions, demonstrating that prosecutors charge petty public order offenses most frequently.”\textsuperscript{409}

The absence of lay scrutiny is arguably what has perpetuated the scale of broken windows prosecutions. The absence of journalists, trials—or at the very least, jury trials—and meaningful discovery, for these offenses mean that many of the facts underlying the charges rarely see the light of day.\textsuperscript{410} Many of these cases are resolved at the accused’s first appearance.\textsuperscript{411} The absence of public scrutiny has been essential in sustaining the status quo.\textsuperscript{412} Community court watch programs have grown in part to force transparency on criminal courts.\textsuperscript{413}

The demand for nullification made by the campaign ultimately drew its legitimacy from public participation, in several reinforcing ways. The campaign relied on members of the public to call their DA office.\textsuperscript{414} A broad coalition of civil society organizations supported the action.\textsuperscript{415} Finally, the campaign built on an emerging understanding about the harms of the broken windows policing.\textsuperscript{416} The campaign models a mechanism for regulating prosecutorial discretion that is substantially different from other proposals: disruptive public

\textsuperscript{405} See id. at 269.
\textsuperscript{406} See Bowers, supra note 364, at 1703–04.
\textsuperscript{407} See id. at 1716, 1718.
\textsuperscript{408} Id. at 1716.
\textsuperscript{409} Id.
\textsuperscript{410} See id. at 1705–06.
\textsuperscript{411} See id. at 1705.
\textsuperscript{412} See id. at 1705–06, 1713–14.
\textsuperscript{414} See 5 Boro Defs., Call for a Moratorium, supra note 5.
participation. Such a mechanism for engagement is particularly well-suited to give voices to groups that are *de facto* or *de jure* disenfranchised—here, noncitizens, who are members of communities that are policed and poor, are Black or Latinx.

The demand for nullification is perhaps more controversial when analyzed from the perspective of an abolitionist agenda. Nullification shrinks the footprint of enforcement without shrinking the prosecutor’s power. The prosecutor retains control over the decision to nullify, and it is a decision at the outermost bounds of its unregulated discretion. Therefore, organizers should pursue nullification in parallel with legislative change and campaigns to shrink the DAs’ budgets in light in their reduced caseload, and redirect funds to address the underlying social problems broken windows policing unsuccessfully tried to address: the lack of economic opportunity, healthcare, housing, and political power.

**CONCLUSION**

Prosecutors have a powerful tool at their disposal to enact more robust sanctuary protections and disrupt the crimmigration system at its root. But nullification is unlikely to take place without sustained external pressure; without a forceful demand, prosecutors are unlikely to decline to prosecute. Removing low-level offenses from the ambit of state criminalization stands to benefit noncitizens, not only by ensuring better immigration outcomes but also by improving their overall quality of life. Because decriminalization is also a policy with benefits for noncitizens and citizens alike, such a campaign creates the possibility of building a broad coalition that brings together communities which are over-policed and those which are at risk for removal. By redefining public safety, social movements led by directly impacted communities can encourage local elected officials to experiment with policies like nullification. This kind of issue-based participation may also plant the seed for sustained public engagement with prosecutors who have evaded accountability for too long. To solidify any gains achieved and truly shrink the ambit of criminalization, a successful campaign will seek a reduction in law enforcement budgets, redistribution of resources to communities, and lasting decriminalization at the legislative level.

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417 See 5 Boro Defs., *Call for a Moratorium*, supra note 5 (encouraging the public to call or tweet at local DAs and ask for a moratorium on broken windows prosecutions).