

THE SANCTUARY OF PROSECUTORIAL NULLIFICATION

*Zohra Ahmed**

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

* Clinical Teaching Fellow, Cornell Center on the Death Penalty Worldwide, Cornell Law School, and member of 5 Boro Defenders. This Article is dedicated to the co-organizers of #nycdontprosecute campaign, in particular Rage Kidvai, Ying-Ying Ma and Madeline Porta, who hatched the plan for the campaign on the Sunday evening after the 2017 anti-inauguration protest in New York City, and to Naila Siddiqui, Alexandra Smith, Anna Ulrich and Alisha Williams who were each instrumental in sustaining the campaign. I am also grateful for Mary Ann Krisa, Jay Oddi, and the editors at the *Albany Law Review* for their editorial support.

¹ See, e.g., Christopher N. Lasch et al., *Understanding “Sanctuary Cities”*, 59 B.C. L. REV. 1703, 1705, 1708–09, 1751–52 (2018).

² See, e.g., *id.*

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

⁴ See Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,799, 8,800 (Jan. 25, 2017).

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> [<https://perma.cc/3RM8-8M5V>] [hereinafter 5 Boro Defs., *Call for a Moratorium*].

Prosecutors are the most powerful actors in the American criminal legal system.⁶ Their imperial discretion shapes how the law gets applied, who gets punished, and who is forgiven.⁷ It has always been true that a prosecutor's charging, bail, and plea bargaining practices regularly expose noncitizens to the risk of removal.⁸ Skillful defense negotiations can sometimes mitigate those consequences.⁹ But, after January 25, 2017, the mere accusation of a crime, no matter how serious, created a heightened risk of removal for undocumented individuals.¹⁰ Under this new enforcement regime, prosecutors became a more obvious focus for reform, as the actors responsible for leveling criminal charges.¹¹ They remain an underappreciated source for sanctuary protections, however.¹²

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.¹³ 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.¹⁴ They asked the public to exert pressure on their adversaries in order to win greater protections for their clients.¹⁵

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

⁶ See James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1522 (1981).

⁷ See Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387, 390–91 (2008).

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.¹⁶ Platforms, such as the Expanded Sanctuary and Freedom City, try to expand the scope of sanctuary protections.¹⁷ Decriminalization of low-level offenses feature prominently in their vision.¹⁸ 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.¹⁹ 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.²⁰

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.”²¹ 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.²² 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

¹⁶ See John Carlos Frey, *How ‘Sanctuary Cities’ are Helping Immigrants Outwit ICE*, MARSHALL PROJECT (June 20, 2017), <https://www.themarshallproject.org/2017/06/19/how-sanctuary-cities-are-helping-immigrants-outwit-ice> [<https://perma.cc/8M4Z-Q84K>].

¹⁷ See ANDREA J. RITCHIE & MONIQUE W. MORRIS, NAT’L BLACK WOMEN’S JUSTICE INST., CENTERING BLACK WOMEN, GIRLS, GENDER NONCONFORMING PEOPLE AND FEM(ME)S IN CAMPAIGNS FOR EXPANDED SANCTUARY AND FREEDOM CITIES 3 (2017), <https://forwomen.org/wp-content/uploads/2017/09/Centering-Black-women-final-draft6.pdf> [<https://perma.cc/3W62-CWA6>]; TANIA A. UNZUETA, MIJENTE, EXPANDING SANCTUARY: WHAT MAKES A CITY A SANCTUARY NOW? 1 (2017); *The Platform*, FREEDOM CITIES, <https://freedomcities.org/platform/> [<https://perma.cc/2BDB-7D9S>].

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”).

²¹ Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1262 (2011).

²² See Alexandra Natapoff, *The Penal Pyramid*, in THE NEW CRIMINAL JUSTICE THINKING 4, 80–81 (Sharon Dolovich & Alexandra Natapoff eds., 2017); Fairfax, *supra* note 21, at 1274.

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.”²³ Furthermore, the aggressive enforcement of broken windows offenses in New York City has been a distinctly local and urban phenomenon.²⁴ 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.²⁵ “Abolitionists refuse to abide the paradigm where ‘prisons [serve] as catchall solutions to social problems.’”²⁶ 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.²⁷ 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.²⁸ For our

²³ See Barack Obama, President of the U.S., Address to the Nation on Immigration (Nov. 20, 2014) [hereinafter 2014 Obama Immigration National Address], <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> [<https://perma.cc/CV8V-X5BC>].

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.

²⁴ See LINDSEY DEVERS, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1 (2011); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1314, 1316 (2012); Shankar Vedantam et al., *How a Theory of Crime and Policing Was Born, and Went Terribly Wrong*, NPR (Nov. 1, 2016), <https://www.npr.org/2016/11/01/500104506/broken-windows-policing-and-the-origins-of-stop-and-frisk-and-how-it-went-wrong> [<https://perma.cc/DPR7-2QKR>].

²⁵ See Dan Berger et al., *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration> [<https://perma.cc/UB7U-S7KE>].

²⁶ *Id.*

²⁷ See *id.*

²⁸ See Liz Samuels & David Stein, *Perspectives on Critical Resistance*, in ABOLITION NOW! TEN YEARS OF STRUGGLE AGAINST THE PRISON INDUSTRIAL COMPLEX 1, 1–14 (2008) (“Abolition

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.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.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.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.³² Although the campaign

defines both the end goal we seek and the way we do our work today. Abolition means a world where we do not use prisons, policing, and the larger system of the prison industrial complex as an 'answer' to what are social, political, and economic problems. Abolition is not just an end goal but a strategy today."); Chris Hayes & Mariame Kaba, *Thinking About How to Abolish Prisons with Mariame Kaba*, NBC NEWS (Apr. 10, 2019, 12:58 PM), <https://www.nbcnews.com/think/opinion/thinking-about-how-abolish-prisons-mariame-kaba-podcast-transcript-nena992721> [https://perma.cc/GH3M-RVBG].

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.").

³⁰ See 5 Boro Defs., *Call for a Moratorium*, *supra* note 5.

³¹ See, e.g., 5 Boro Defenders (@5borodefenders), FACEBOOK (June 3, 2017), <https://www.facebook.com/5borodefenders/> [https://perma.cc/87QW-HWZV] [hereinafter 5 Boro Defenders, FACEBOOK (June 3, 2017)].

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.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.³⁴ Yet, despite its limited success, the campaign spurred other initiatives that have since gained wider traction locally and nationally.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.³⁶ Indeed, the results of the 2016 election sparked new interest

'00s: A Recent History with Joo-Hyun Kang, VERSO BOOKS (May 24, 2016), <https://www.versobooks.com/blogs/2655-fighting-broken-windows-policing-in-new-york-city-in-the-90s-and-00s-a-recent-history-with-joo-hyun-kang> [<https://perma.cc/D96T-SXWR>].

³³ See *id.*

³⁴ See Press Release, Manhattan Dist. Attorney's Office, District Attorney Vance to End Criminal Prosecution of Approximately 20,000 Low-Level, Non-Violent Misdemeanors per Year (June 30, 2017), <https://www.manhattanda.org/district-attorney-vance-end-criminal-prosecution-approximately-20000-low-level-non-vio/> [<https://perma.cc/W2XU-V7KC>]; Caroline Bankoff, *Brooklyn D.A. Will Try to Prevent Immigrants from Being Deported for Minor Crimes*, N.Y. MAG. (Apr. 24, 2017), <http://nymag.com/intelligencer/2017/04/brooklyn-d-a-wants-to-avoid-deportations-for-minor-crimes.html> [<https://perma.cc/G3PJ-QGUM>].

³⁵ See Press Release, Manhattan Dist. Attorney's Office, *supra* note 34; 5 Boro Defenders, FACEBOOK (June 3, 2017), *supra* note 31; 5 Boro Defenders (@5borodefenders), FACEBOOK (May 17, 2017), <https://www.facebook.com/5borodefenders/> [<https://perma.cc/D232-KMSL>] [hereinafter 5 Boro Defenders, FACEBOOK (May 17, 2017)]; 5 Boro Defenders (@5borodefenders), FACEBOOK (Aug. 23, 2017), <https://www.facebook.com/5borodefenders/> [<https://perma.cc/W3PV-MVFP>] [hereinafter 5 Boro Defenders, FACEBOOK (Aug. 23, 2017)].

³⁶ See Exec. Order No. 13,768, 50 Fed. Reg. 8,799 (Jan. 25, 2017); Carlos Menchaca & Julissa Ferreras-Copeland, *New York: A Sanctuary City with a Plan*, GOTHAM GAZETTE, <http://>

in fortifying protections for noncitizens.³⁷ And yet, despite several waves of legislation in New York City, there remain significant gaps in coverage.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.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.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.⁴¹ This integration occurred along two axes: horizontally, across agencies within the federal government and vertically between state criminal legal

www.gothamgazette.com/?id=6660:new-york-a-sanctuary-city-with-a-plan [<https://perma.cc/HY48-TVMU>].

³⁷ See George Joseph, *Mapping Trump's Coming War on Immigrant Sanctuary Cities*, CITYLAB (Nov. 21, 2016), <https://www.citylab.com/equity/2016/11/mapping-trumps-coming-war-on-sanctuary-cities/507785/> [<https://perma.cc/CJ7P-M57S>].

³⁸ See Tina Vasquez, *The Who, What, Where, and Weaknesses of Sanctuary Cities (Updated)*, REWIRE NEWS (Nov. 23, 2016, 3:06 PM), <https://rewire.news/article/2016/11/23/weaknesses-sanctuary-cities/> [<https://perma.cc/5GPU-85NR>]; *infra* notes 56–84 and accompanying text.

³⁹ See Azadeh Shahshahani & Amy Pont, *Sanctuary Policies: Local Resistance in the Face of State Anti-Sanctuary Legislation*, 21 CUNY L. REV. 225, 229–30 (2018).

The term ‘sanctuary’ as it relates to sanctuary policies, originates from the United States in the 1980s when religious institutions protected Central American refugees from the threat of deportation. At the end of the 20th century, Central American refugees fled war-ravaged countries such as El Salvador and Guatemala. At the time, the Reagan Administration supported the repressive governments from which the individuals were fleeing, and as such, refugees’ asylum claims were not approved. Religious institutions provided legal assistance, food, medical care, and employment. Current sanctuary policies are a mixture of legislation, ordinances, and policies adopted by states, localities, and sheriffs’ offices across the country. Sanctuary policies impose varying limitations on cooperation with ICE, ranging from prohibiting law enforcement agencies from using funds or personnel “to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes” to prohibiting the release of any information regarding a person’s release date or court appearance dates in response to federal inquiries.

Id.

⁴⁰ See Tal Kopan, *What Are Sanctuary Cities, and Can They Be Defunded*, CNN (Mar. 26, 2018), <https://www.cnn.com/2017/01/25/politics/sanctuary-cities-explained/index.html> [<https://perma.cc/2VB2-KS4T>].

⁴¹ See Teresa Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 94 (2005).

systems and the federal government.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.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.⁴⁴ What counts as a criminal conviction under immigration law has also broadened.⁴⁵ “Almost every immigration statute passed since [the 1980s] . . . has expanded the list of crimes leading to exclusion and deportation.”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.⁴⁷ As the Supreme Court recognized in *Padilla v. Kentucky*,⁴⁸ “involvement in criminal activity now frequently leads to ‘presumptively mandatory’ removal.”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.⁵⁰ At the time of any arrest, as a

⁴² See *id.* at 91–93.

⁴³ César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1458 (2014).

⁴⁴ See *id.* at 1513–15.

⁴⁵ See Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 383–84 (2006).

⁴⁶ *Id.* at 383.

⁴⁷ Cade, *supra* note 8, at 1758.

⁴⁸ *Padilla v. Kentucky*, 559 U.S. 356 (2010).

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.”).

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.⁵¹ 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).⁵² 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.⁵³

In response to this consolidation, sanctuary protections seek to create a series of wedges between these increasingly integrated institutions.⁵⁴ 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.⁵⁵

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.⁵⁶ Two crucial points of contact remain untouched: when the New York Police Department (NYPD)

⁵¹ See James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y. 177, 181–82 (2008).

⁵² See WILLIAM A. KANDEL, CONG. RESEARCH SERV., R44627, INTERIOR IMMIGRATION ENFORCEMENT: CRIMINAL ALIEN PROGRAMS 1, 11 (2016), <https://fas.org/sgp/crs/homesecc/R44627.pdf> [<https://perma.cc/86HD-R8DT>]. For examples of New York City Council legislation addressing fingerprinting and civil detainers, see N.Y.C., N.Y., Council Int. No. 1558-A, § 1 (2017) (codified as N.Y.C., N.Y., ADMIN. CODE § 9-205(2) (2019)); N.Y.C., N.Y., Council Int. No. 1566-A, § 1 (2017) (codified as N.Y.C., N.Y. CHARTER §§ 18(b), (d)(2)–(3)); N.Y.C., N.Y., Council Int. No. 1578-A, § 1 (2017) (codified as N.Y.C., N.Y. CHARTER § 18(g)(1)).

⁵³ See KANDEL, *supra* note 52, at 11.

⁵⁴ See Lasch et al., *supra* note 1, at 1745–46.

⁵⁵ *Id.* at 1707.

⁵⁶ See, e.g., N.Y.C., N.Y., Council Int. No. 1568-A, § 1 (2017) (codified as N.Y.C., N.Y., ADMIN. CODE § 10-178(b) (2019)); N.Y.C., N.Y., Council Int. No. 487-A, § 1 (2014) (codified as N.Y.C., N.Y., ADMIN. CODE § 14-154(b) (2019)); N.Y.C., N.Y., Council Int. No. 486-A, § 4 (2014) (codified as N.Y.C., N.Y., ADMIN. CODE § 9-131(h)(2) (2019)).

shares biometric data with the FBI and DHS, and any contact made by DA offices.⁵⁷ These shortcomings are not unique to the City,⁵⁸ but point to the limits of the dominant sanctuary framework, and the difficulty of regulating county actors like DAs.⁵⁹

Detainer requests from DHS are a central target of sanctuary legislation.⁶⁰ 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.⁶¹ By 2017, ICE issued nearly one million detainer requests nationally, “with thousands issued to authorities in New York City.”⁶² In 2012, City Council passed legislation limiting the circumstances under which the Department of Corrections (DOC) can honor ICE detainees: only when the individual has a criminal record, prior immigration violations, or poses a safety threat.⁶³ The legislation, however, authorized more detainer requests than lawmakers expected.⁶⁴ City Council narrowed the grounds for cooperation.⁶⁵

After the Third Circuit and federal district courts ruled that ICE detainees were not binding,⁶⁶ City Council passed legislation in

⁵⁷ See Stephen Rex Brown, *Manhattan DA Vance Alone Among City’s District Attorneys in Referring Defendants to ICE*, N.Y. DAILY NEWS (Jan. 14, 2019, 6:00 AM), <https://www.nydailynews.com/new-york/ny-metro-vance-ice-20190110-story.html> [<https://perma.cc/D547-ZTJN>]; Ryan Devereaux & John Knefel, *ICE Evades Sanctuary Rules by Using NYPD Fingerprints to Find Immigrants and Send Them Call-In Letters*, INTERCEPT (Apr. 16, 2018, 3:28 PM), <https://theintercept.com/2018/04/26/ice-sends-threatening-letters-to-immigrants-increasing-climate-of-fear-in-new-york-city/> [<https://perma.cc/T937-PF6N>].

⁵⁸ See Vasquez, *supra* note 38.

⁵⁹ See LENA GRABER & NIKKI MARQUEZ, IMMIGRANT LEGAL RES. CTR., SEARCHING FOR SANCTUARY: AN ANALYSIS OF AMERICA’S COUNTIES & THEIR VOLUNTARY ASSISTANCE WITH DEPORTATIONS 1, 16 (2016) [hereinafter GRABER & MARQUEZ, SEARCHING FOR SANCTUARY], https://www.ilrc.org/sites/default/files/resources/sanctuary_report_final_1-min.pdf [<https://perma.cc/AKY8-SV4V>].

⁶⁰ See Liz Robbins, *In a ‘Sanctuary City,’ Immigrants Are Still at Risk*, N.Y. TIMES (Feb. 27, 2018), <https://www.nytimes.com/2018/02/27/nyregion/sanctuary-cities-immigrants-ice.html> [<https://perma.cc/CSJ2-26HX>].

⁶¹ See KANDEL, *supra* note 52, at 11–12.

⁶² N.Y.C. COUNCIL COMM. ON IMMIGRATION ET AL., COMMITTEE REPORT OF THE GOVERNMENTAL AFFAIRS AND HUMAN SERVICES DIVISIONS 8 (Apr. 26, 2017).

⁶³ See N.Y.C., N.Y., Council Int. No. 656-A § 1 (2011) (codified as N.Y.C., N.Y., ADMIN. CODE § 9-131(6) (2019)).

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

⁶⁵ See *id.*; N.Y.C., N.Y., Council Int. No. 989 (2012) (codified as N.Y.C., N.Y., ADMIN. CODE § 9-131(b)(1) (2019)); N.Y.C., N.Y., Council Int. No. 982 (2012) (codified as N.Y.C., N.Y., ADMIN. CODE § 14-154 (b)(1) (2019)).

⁶⁶ See Lasch et al., *supra* note 1, at 1732 (discussing litigation challenging the legality of detainees); see also *Galarza v. Szalczyk*, 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).

October 2014,⁶⁷ once again limiting the circumstances under which the NYPD or DOC could honor such requests from ICE.⁶⁸ The law required ICE to present the NYPD and DOC a warrant from an Article III judge, with one exception.⁶⁹ The legislation also constrained the DOC's ability to share information with ICE.⁷⁰ Advocates noted there were greater protections afforded to noncitizens in DOC than in NYPD custody.⁷¹ Unlike the DOC, for example, the law did not forbid the NYPD or the Department of Probation from sharing information with DHS.⁷²

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,"⁷³ such as in counter-terrorism operations.⁷⁴ The legislation also banned local employees from being "deputized by ICE

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> [<https://perma.cc/R352-EFV6>] [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.

⁷³ See N.Y.C., N.Y., Council Int. No. 1568-A § 1 (2017) (codified as N.Y.C., N.Y., ADMIN. CODE § 10-178 (2019)) (prohibiting, inter alia, City employees from accepting requests from federal law enforcement to assist in immigration enforcement, such as 278(g) agreements with ICE); N.Y.C., N.Y., Council Int. No. 1579-A § 1 (2017) (codified as N.Y.C., N.Y., ADMIN. CODE § 12-208 (2019)) (preventing City agencies from granting access to federal and out of state law enforcement from accessing non-public areas without a warrant or cooperation with NYPD, or other limited circumstances); N.Y.C., N.Y., Council Int. No. 1558-A § 1 (2017) (codified as N.Y.C., N.Y., ADMIN. CODE § 9-205 (2019)); Press Release, Office of the Mayor, De Blasio Administration Announces Citywide Guidance and NYPD Protocol to Codify Restrictions on Assistance with Federal Immigration Enforcement (Jan. 31, 2018), <https://www1.nyc.gov/office-of-the-mayor/news/075-18/de-blasio-administration-citywide-guidance-nypd-protocol-codify-restrictions-on> [<https://perma.cc/XM5H-MHQ7>].

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

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.

⁸¹ *See* Christine N. Cimini, *Hands Off Our Fingerprints: State, Local, and Individual Defiance of Federal Immigration Enforcement*, 47 CONN. L. REV. 101, 135 (2014).

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."⁸⁴

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.⁸⁵ It exposed noncitizens to heightened and new risks, against which current sanctuary policies offered little protection.⁸⁶

The EO threatened to expose far more people to removal than under the previous administration,⁸⁷ which itself set a record, earning President Obama the title of *Deporter-in-Chief*.⁸⁸ Under the Obama administration, although misdemeanor convictions were also grounds for removal, the kind and number of convictions mattered.⁸⁹ 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-

⁸⁴ See Press Release, Office of the Mayor, *supra* note 73.

⁸⁵ Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,800 (Jan. 25, 2017).

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.

Id.

⁸⁶ See AM. IMMIGRATION COUNCIL, SUMMARY OF EXECUTIVE ORDER "ENHANCING PUBLIC SAFETY IN THE INTERIOR OF THE UNITED STATES" 1 (2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/summary_of_executive_order_enhancing_public_safety_in_the_interior_of_the_united_states.pdf [<https://perma.cc/H3Z9-NYAE>].

⁸⁷ See Betsy Woodruff, *Trump Looks Ready to Outdo 'Deporter-in-Chief' Obama*, DAILY BEAST (Feb. 14, 2017, 1:03 AM) <https://www.thedailybeast.com/trump-looks-ready-to-outdo-deporter-in-chief-obama> [<https://perma.cc/E4QK-2WEZ>].

⁸⁸ 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>].

⁸⁹ See JULIANA MORGAN-TROSTLE ET AL., THE STATE OF BLACK IMMIGRANTS, pt. II, at 14 (2018), <http://www.stateofblackimmigrants.com/assets/sobi-fullreport-jan22.pdf> [<https://perma.cc/8FWG-ANRX>] [hereinafter MORGAN-TROSTLE ET AL., THE STATE OF BLACK IMMIGRANTS].

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.

⁹⁰ See 8 U.S.C. § 1101(a)(43)(G) (2012); Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Customs & Border Prot., R. Gil Kerlikowske, Comm’r, U.S. Customs & Border Prot., Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., & Alan D. Bersin, Acting Assistant Sec’y for Policy, U.S. Dep’t of Homeland Sec. 3 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [<https://perma.cc/MSX8-SLBY>] (“Policies for the Apprehension, Detention and Removal of Undocumented Immigrants.”).

⁹¹ See Memorandum from Jeh Charles Johnson to Thomas S. Winkowski, R. Gil Kerlikowske, Leon Rodriguez, & Alan D. Bersin, *supra* note 90, at 3–4.

⁹² See 2014 Obama Immigration National Address, *supra* note 23.

⁹³ IMMIGRANT DEF. PROJECT, ADVISING IMMIGRANT CLIENTS AFTER PRESIDENT TRUMP’S 1.25.17 EXECUTIVE ORDERS: FAQs FOR CRIMINAL DEFENSE ATTORNEYS 2 (2017) [hereinafter ADVISING IMMIGRANT CLIENTS], <https://immigrantdefenseproject.org/wp-content/uploads/2017/01/IDP-Post-Trump-EOs-FAQs-for-defenders-1.27.17.pdf> [<https://perma.cc/W464-M3A9>].

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).

⁹⁷ See Mari Byrne, *Baseless Pleas: A Mockery of Justice*, 78 FORDHAM L. REV. 2961, 2968, 2972 (2010).

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.⁹⁹ Criminal immigration specialists warned, “any ‘removable’ person who has been accused or convicted of a crime is now a priority for deportation.”¹⁰⁰ 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.¹⁰¹

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.¹⁰²

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.¹⁰³ Each interaction with law enforcement leaves a mark, however fleeting.¹⁰⁴ A pending criminal charge leaves a mark that will later be erased if the case is dismissed or the person is acquitted at trial.¹⁰⁵ 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.¹⁰⁶ 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.¹⁰⁷

In response, a defense attorney is required to inform her client of the potential immigration consequences of taking a specific plea or going to trial.¹⁰⁸ 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

⁹⁹ See Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).

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.

¹⁰² See Jennifer Welch, Comment, *Defending Against Deportation: Equipping Public Defenders to Represent Noncitizens Effectively*, 92 CALIF. L. REV. 541, 561 (2004).

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 *Schwartz 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.

¹⁰⁸ See *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010).

discretion. A defense attorney is also expected try to strike a harm reducing plea.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.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.¹¹¹ This increased urgency impelled the organizers to advance more comprehensive protections earlier in the life of a criminal case.

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.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.¹¹³ Over 400 jurisdictions, including those that make up New York City, took steps to enhance "limitations on engaging in immigration enforcement."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

¹⁰⁹ NAT'L LEGAL AID & DEF. ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL REPRESENTATION 8.4(a)(4) (1995), http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines.

¹¹⁰ See, e.g., *id.* at 373.

¹¹¹ See ADVISING IMMIGRANT CLIENTS, *supra* note 93, at 1.

¹¹² See 5 Boro Defs., *Weekly Update #5: The Toll of Broken Windows Policing & Prosecution (March 31, 2017)*, MEDIUM (Mar. 31, 2017), <https://medium.com/@5BoroDefenders/weekly-update-5-the-toll-of-broken-windows-policing-prosecution-march-31-2017-2f510ba9ca77> [<https://perma.cc/EJ5D-BSSB>] [hereinafter 5 Boro Defs., *Weekly Update #5*]; *Protesters Across U.S. Denounce Trump Immigration Order*, CBS NEWS (Jan. 29, 2017, 3:16 PM), <https://www.cbsnews.com/news/donald-trump-immigration-order-sows-chaos-at-airports-outrage-at-protests/> [<https://perma.cc/M8NC-US3K>].

¹¹³ See, e.g., Ashley Cleek, *Weighing the Risks of a 'Sanctuary' Campus*, PRI (Feb. 16, 2017, 5:00 PM), <https://www.pri.org/stories/2017-02-16/weighing-risks-sanctuary-campus> [<https://perma.cc/WZ8G-HTAL>]; Phil McCausland, *'Sanctuary Cities' Vow to Resist Trump Order Despite Funding Threat*, NBC NEWS (Jan. 25, 2017, 10:21 PM), <https://www.nbcnews.com/news/us-news/sanctuary-cities-vow-resist-trump-order-despite-funding-threat-n712251> [<https://perma.cc/MT9H-PQ4Z>]; Katy Steinmetz, *7 Ways California Is Fighting Back Against President Trump's Administration*, TIME (Apr. 6, 2017), <http://time.com/4725971/california-resisting-trump-administration/> [<https://perma.cc/JLF7-JCMN>].

¹¹⁴ See IMMIGRANT LEGAL RES. CTR., THE RISE OF SANCTUARY 1, 18 (2018), <https://www.ilrc.org/rise-sanctuary> [<https://perma.cc/T7HQ-KX2E>].

government's plans for mass removal. To public defenders, tinkering with information sharing or cooperation protocol processes appeared inadequate.¹¹⁵ 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.¹¹⁶ This preference for shrinking reflected the organizers' normative commitment to abolition and its empirical foundations.¹¹⁷ Both those who organized and many who endorsed the campaign recognized the harms created by a securitized approach to immigration,¹¹⁸ and rejected the categorical and irreversible exclusion of individuals from membership because of their criminal history, nationality, or race.¹¹⁹ Given the administration's focus on individuals charged and convicted with crimes,¹²⁰ 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.¹²¹

New York City's DAs publicly acknowledged the new social and political climate after the 2016 election.¹²² Specifically, five of the city's DAs declared they would aggressively prosecute hate crimes after the election.¹²³ 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.¹²⁴ Public defenders sought to

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.

¹²⁰ See, e.g., Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,800 (Jan. 25, 2017).

¹²¹ Cf. Richard Gonzales, *Federal Appeals Panel Upholds California 'Sanctuary State' Law*, NPR (April 18, 2019, 6:55 PM), <https://www.npr.org/2019/04/18/714882333/federal-appeals-panel-upholds-california-sanctuary-state-law> [<https://perma.cc/L7YD-2NLW>].

¹²² See Press Release, Manhattan Dist. Attorney's Office, Statement by District Attorneys Richard A. Brown, Cyrus R. Vance, Jr., Darcel D. Clark, Michael E. McMahon, and Eric Gonzalez (Nov. 15, 2016), <https://www.manhattanda.org/statement-district-attorneys-richard-brown-cyrus-r-vance-jr-darcel-d-clark-michael-e-m/> [<https://perma.cc/7ALG-9NCZ>].

¹²³ See *id.*

¹²⁴ See Press Release, Manhattan Dist. Attorney's Office, Statement by Manhattan District Attorney Cyrus R. Vance, Jr. on Decision Regarding Deferred Action for Childhood Arrivals Policy (Sept. 5, 2017), <https://www.manhattanda.org/statement-manhattan-district-attorney-cyrus-r-vance-jr-decision-regarding-deferred-act/> [<https://perma.cc/29K5-4Z4J>] (“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

want to assure undocumented New Yorkers today that my Office remains a safe place to report crime.”).

¹²⁵ See, e.g., 5 Boro Defs., *Call for a Moratorium*, *supra* note 5.

¹²⁶ See *About*, ASS'N LEGAL AID ATT'YS, <http://www.alaa.org/index.php/about/> [<https://perma.cc/GF7P-4JMR>].

¹²⁷ See *5 Boro Defenders*, MEDIUM, <https://medium.com/@5BoroDefenders> [<https://perma.cc/4ECU-RQ3X>].

¹²⁸ See Gwynne Hogan, *Public Defenders Walk Out of Bronx Courthouse After College Student Detained By ICE*, WNYC NEWS (Feb. 8, 2018), <https://www.wnyc.org/story/public-defenders-walk-out-bronx-courthouse-after-college-student-detained-ice/> [<https://perma.cc/S7JP-3VU4>]; Noah Hurowitz & Felipe de la Hoz, *Legal Aid Lawyers Stage Walkout After Yet Another ICE Court Arrest*, VILLAGE VOICE (Nov. 28, 2017), <https://www.villagevoice.com/2017/11/28/legal-aid-lawyers-stage-walkout-after-yet-another-ice-court-arrest/> [<https://perma.cc/V2RY-ENK6>].

¹²⁹ See 5 Boro Defs., *Call for a Moratorium*, *supra* note 5.

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.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.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.¹³²

¹³⁰ *Id.* (emphasis omitted).

¹³¹ Supporting organizations included: Attorneys of Color Caucus—ACLA, Arab American Association of New York, Audre Lorde Project, Black Alliance for Just Immigration, Black Movement-Law Project, Brooklyn Community Bail Fund, The Bronx Defenders, CAAAV (Organizing Asian Communities), Cardozo Criminal Defense Clinic, Immigration Justice Clinic, Cardozo School of Law, Cardozo Minority Law Student Alliance, Coalition To End Broken Windows, Communities United for Police Reform (CPR), Community Voices Heard Action, Community Voices Heard Power, CUNY Defenders Clinic, DRUM—Desis Rising Up & Moving, El Grito, Equality for Flatbush: E4F, FIERCE!, Gay Asian Pacific Islander Men of New York (GAPIMNY), ICE-FREE NYC, Immigrant Defense Project, Jews for Racial and Economic Justice [JFREJ], JustLeadership USA, Legal Services Staff Association UAW/NOLSW Local 2320, MORE UFT (Movement of Rank and File Educators), Muslim Democratic Club of New York, National Lawyers Guild New York City, New York City Anti-Violence Project, New York Civil Liberties Union—NYCLU, The New York Immigration Coalition, New York State Immigrant Action Fund, NYC Metro Area Law Student Coalition, NYCoRE (New York Collective of Radical Educators), New Yorkers for Social Justice PAC, Peter Cicchino Youth Project (PCYP), Riders Alliance, Sylvia Rivera Law Project (SRLP), Teachdream, Trans Justice Funding Project, UnLocal, Inc., Urban Justice Center, and the War Resisters League. *Id.*

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.

¹³⁵ See MANHATTAN DIST. ATTORNEY'S OFFICE, MODELS FOR INNOVATION: THE MANHATTAN DISTRICT ATTORNEY'S OFFICE 2010–2018, at 4 (2018), <https://www.manhattanda.org/wp-content/uploads/2018/03/Models-For-Innovation-Report-1.pdf> [<https://perma.cc/MA9G-RYMF>] [hereinafter MODELS FOR INNOVATION]; John Eligon, *In a Complaint Room, a Prosecutor's-Eye View of Crime*, N.Y. TIMES, Aug. 22, 2010, at A16.

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.¹³⁷

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.¹³⁸ In identifying the prosecutor as a source for new protections, the campaign married defenders' insights into how broken windows prosecutions unfold 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.¹³⁹

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.¹⁴⁰ Police Strategy No. 5 established this new policing regime, which identified "low-level offenses as an intrinsically important

¹³⁷ *Id.* (emphasis omitted).

¹³⁸ See 5 Boro Defs., *Call for a Moratorium*, *supra* note 5.

¹³⁹ See K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 300–02, 306 (2009); 5 Boro Defs., *Call for a Moratorium*, *supra* note 5; 5 Boro Defs., *FAQ*, *supra* note 8.

¹⁴⁰ See William McGurn, *The Idea that Made America's Cities Safer*, WALL STREET J. (Dec. 29, 2018, 11:43 AM), <https://www.wsj.com/articles/the-idea-that-made-americas-cities-safer-11546039296> [<https://perma.cc/66NT-UMHP>].

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

¹⁴¹ ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* 26 (2018).

¹⁴² *Id.* at 27.

¹⁴³ *Id.* at 37.

¹⁴⁴ *See id.* at 40–41, 281 n.71.

¹⁴⁵ *See* WILLIAM J. BRATTON, *N.Y.C. POLICE DEP’T, BROKEN WINDOWS AND QUALITY-OF-LIFE POLICING IN NEW YORK CITY* 1 (2015), http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/qol.pdf [<https://perma.cc/527B-8FXX>] [hereinafter BRATTON, *QUALITY-OF-LIFE POLICING*].

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.¹⁵² 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.¹⁵³ 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.¹⁵⁴

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.¹⁵⁵ Unruly conduct was criminalized not because it was inherently criminal or caused interpersonal harm, but because of the potential for serious crime it represented.¹⁵⁶ 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.¹⁵⁷ Its empirical claims were gradually debunked, making its costs harder to justify.¹⁵⁸

Since 1994, those arrested for low-level offenses have been consistently and overwhelmingly Black, Latinx, and indigent.¹⁵⁹ "Black and Latinx New Yorkers are . . . more likely to be issued summonses than be let go with a warning."¹⁶⁰ In a study of 1.5 million

¹⁵² See *Criminal and Civil Court Summons Reports*, N.Y.C. POLICE DEP'T, <https://www1.nyc.gov/site/nypd/stats/reports-analysis/c-summons.page> [https://perma.cc/7RAS-A7NF]; *Stop, Question and Frisk Data*, N.Y.C. POLICE DEP'T, <https://www1.nyc.gov/site/nypd/stats/reports-analysis/stopfrisk.page> [https://perma.cc/XL64-TFTS].

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.").

¹⁵⁴ See *id.* at 12; WILLIAM J. BRATTON, N.Y.C. POLICE DEP'T, BROKEN WINDOWS IS NOT BROKEN: THE NYPD RESPONSE TO THE INSPECTOR GENERAL'S REPORT ON QUALITY-OF-LIFE ENFORCEMENT 27, 31 (2016) https://www1.nyc.gov/assets/nypd/downloads/pdf/broken_windows_is_not_broken.pdf [https://perma.cc/V2UK-LHGV] [hereinafter BRATTON, BROKEN WINDOWS IS NOT BROKEN] ("The NYPD is shifting away from quantity-driven enforcement towards targeted, quality arrests.").

¹⁵⁵ See BRATTON, QUALITY-OF-LIFE POLICING, *supra* note 145, at 1–2, 3.

¹⁵⁶ See *id.*; Brittany Fritsch, Note, *Broken Windows Is a Broken Policy*, 47 U. TOL. L. REV. 767, 773–74 (2016).

¹⁵⁷ See 5 Boro Defs., FAQ, *supra* note 8; *Testimony Before City Council Public Safety & Courts and Legal Services Committees on Summons Court Operations and Impact*, N.Y. C.L. UNION (Dec. 15, 2014), <https://www.nyclu.org/en/publications/testimony-city-council-public-safety-courts-and-legal-services-committees-summons-court> [https://perma.cc/FYU7-7PZ9] [hereinafter *Testimony Before City Council Public Safety & Courts and Legal Services Committees*].

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.

¹⁶⁰ Brief of the Legal Aid Society et al. in Support of Plaintiff-Appellant at 26, *Vargas v. City of New York*, No. 150556–2011 (N.Y. App. Div. May 14, 2018).

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 summonses to violations and arrests to misdemeanor crimes, 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.

Sarah Ryley et al., *Daily News Analysis Finds Racial Disparities in Summonses for Minor Violations in ‘Broken Windows’ Policing*, N.Y. DAILY NEWS (Aug. 4, 2014, 2:00 AM), <https://www.nydailynews.com/new-york/summons-broken-windows-racial-disparity-garner-article-1.1890567> [<https://perma.cc/92QC-Q3T7>].

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-Arrests-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>] (“[D]espite 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.”).

¹⁶⁴ *See* HAROLD STOLPER & JEFF JONES, CMTY. SERV. SOC’Y, THE CRIME OF BEING SHORT \$2.75: POLICING COMMUNITIES OF COLOR AT THE TURNSTILE 2 (2017), https://smhttp-ssl-58547.nexcesscdn.net/nycss/images/uploads/pubs/Fare_Evasion_FINAL_10_6_17_smaller.pdf [<https://perma.cc/A7UV-K2XU>].

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.

these offenses are “too insignificant,” officers were correcting conditions early,’ the NYPD reported in 2015, noting that there were 60,000 fewer felony arrests in 2014 than there were twenty years earlier.”¹⁶⁷ Since its inception, scholars have called into question the theory’s empirical claims.¹⁶⁸ In particular, there is no evidence the increase in low-level arrests reduced serious violent or property crimes.¹⁶⁹ Nor did the decrease in low-level arrests and summonses lead to an increase in the felony crime rate.¹⁷⁰ The NYPD’s own inspector general noted the lack of any association between low-level arrests and the felony crime rate.¹⁷¹

Out of the growing frustration and pain from the police’s zero tolerance approach, several movements for accountability and reform have emerged.¹⁷² 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

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, Canada 9, 10 (Apr. 21, 2016) (unpublished M.A. thesis, Simon Fraser University), http://summit.sfu.ca/system/files/iritems1/16418/etd9585_NMelenka.pdf [<https://perma.cc/6BNK-KK8P>].

¹⁶⁹ See Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York 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 & Legal Theory, Working Paper No. 142, 2006), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1250&context=public_law_and_legal_theory [<https://perma.cc/6VYC-SNGD>] [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).

¹⁷⁰ See OFFICE OF THE INSPECTOR GEN. FOR THE N.Y.C. POLICE DEP’T, N.Y.C. DEP’T OF 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 Policing: The Origins of the “Broken Windows” Policy*, 24 NEW LAB. F., May 2015, at 42, 46 (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.¹⁷³

The successful grassroots challenge to the NYPD's Stop and Frisk program¹⁷⁴ undermined a pillar of NYPD's broken windows strategy.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.¹⁷⁶ At its height, the NYPD stopped and frisked 685,724 individuals in 2011.¹⁷⁷ From 2002 to 2015, over eighty percent of the NYPD's stop targets were innocent of any wrongdoing.¹⁷⁸ At least half were Black, and around thirty percent were Latinx.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.¹⁸⁰ In response, three lawsuits filed in 2008, 2010, and 2012, challenged various aspects of the department's stop and frisk policies and practices.¹⁸¹ Eventually, all three cases went to trial in 2013, putting the department under a type of rigorous scrutiny to which it was unaccustomed.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.¹⁸³ Judge Scheindlin appointed an independent monitor to implement reforms and ordered a remedial process that included community input in developing additional reforms.¹⁸⁴

¹⁷³ *See id.*

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.")

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).

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.")

¹⁷⁷ *Stop-and-Frisk Data*, N.Y. C.L. UNION, <https://www.nyclu.org/en/stop-and-frisk-data> [<https://perma.cc/DE3Q-58QW>].

¹⁷⁸ *See id.*

¹⁷⁹ *See id.*

¹⁸⁰ *See Stop and Frisk Facts*, N.Y. C.L. UNION, <https://www.nyclu.org/en/stop-and-frisk-facts> [<https://perma.cc/A8HR-BX22>].

¹⁸¹ *See Floyd*, 959 F. Supp. 2d at 556, 622–23; Ligon v. City of New York, 925 F. Supp. 2d 478, 483, 485 (S.D.N.Y. 2013); Davis v. City of New York, 902 F. Supp. 2d 405, 408 (S.D.N.Y. 2012).

¹⁸² *See Floyd*, 959 F. Supp. 2d at 557; N.Y.C. POLICE DEP'T, TRUST: BRIDGING THE POLICE /COMMUNITY DIVIDE 1 (2019), <https://www1.nyc.gov/html/nypd/html/home/POA/pdf/Trust.pdf> [<https://perma.cc/ZBU8-S3CP>].

¹⁸³ *See Floyd*, 959 F. Supp. 2d at 561–62; Ligon, 925 F. Supp. 2d at 486.

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.¹⁸⁵ 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.¹⁸⁶ CPR organized court packing for the stop and frisk court hearings, publicizing the discoveries made over the course of the trial.¹⁸⁷ The energetic presence of community activists in the solemn hallways of federal court communicated the public’s hunger for change.¹⁸⁸ 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.¹⁸⁹

Outside of CPR’s formal organizing efforts, mass protests erupted in 2014, after NYPD Officer Daniel Pantaleo killed Eric Garner.¹⁹⁰ While arresting Garner for selling a single unstamped cigarette, Pantaleo choked him, using a maneuver banned by the NYPD.¹⁹¹ Garner told Pantaleo “I can’t breathe” eleven times, as he was being arrested, to no avail.¹⁹² Garner died on the sidewalk in Staten Island and never made it to the precinct.¹⁹³ Under the banner of #BlackLivesMatter, the demonstrations drew attention to the Department’s zero-tolerance approach to broken windows offenses.¹⁹⁴

¹⁸⁵ See Sam Levin, *Stop-and-Frisk Critics Unite Under One Police Reform Campaign*, VILLAGE VOICE (Feb. 24, 2012), <https://www.villagevoice.com/2012/02/24/stop-and-frisk-critics-unite-under-one-police-reform-campaign/> [https://perma.cc/2G8Z-35YK].

¹⁸⁶ *Our Campaign*, COMMUNITIES UNITED FOR POLICE REFORM, <https://www.changethenypd.org/campaign> [https://perma.cc/7XC3-W659].

¹⁸⁷ See *First Week of Floyd Stop-and-Frisk Trial Concludes*, COMMUNITIES UNITED FOR POLICE REFORM (Mar. 22, 2013), <https://www.changethenypd.org/news/first-week-floyd-stop-and-frisk-trial-concludes> [https://perma.cc/L2SK-4HZT].

¹⁸⁸ See *id.*

¹⁸⁹ See *id.*; N.Y. POLICE DEP’T, PATROL GUIDE NO. 212-11 (2018).

¹⁹⁰ See Jonathan Zhou, *Soul-Searching at the NYPD After Eric Garner Death*, COMMUNITIES UNITED FOR POLICE REFORM (Aug. 1, 2014), <https://www.changethenypd.org/media/soul-searching-nypd-after-eric-garner-death> [https://perma.cc/ZA2Y-KLJJ].

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.¹⁹⁵ The campaign harnesses mutual aid to protect New Yorkers from the risk of arrest and detention for fare evasion.¹⁹⁶ 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.¹⁹⁷ 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.¹⁹⁸ Its platform underscores the importance of decriminalization hand in hand with public investment in services that address community needs for safety and health.¹⁹⁹ 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.²⁰⁰ PROP publishes its findings²⁰¹ 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.²⁰² As a result of this multi-pronged approach in the streets and in

¹⁹⁵ See Nick Pinto, 'Swipe it Forward' Activists Protest NYPD Subway Arrests by Giving Out Free Rides, VILLAGE VOICE (Nov. 3, 2016), <https://www.villagevoice.com/2016/11/03/swipe-it-forward-activists-protest-nypd-subway-arrests-by-giving-out-free-rides/> [https://perma.cc/VJK7-KVQX].

¹⁹⁶ See Aaron Morrison, *With #SwipeItForward, NYC Activists Call Out Unnecessary Policing of Poor People of Color*, MIC (Nov. 2, 2016), <https://mic.com/articles/158296/with-swipeitforward-nyc-activists-call-out-unnecessary-policing-of-poor-people-of-color> [https://perma.cc/Y6EM-2JZG].

¹⁹⁷ See *id.*

¹⁹⁸ See *id.*; Kenrya Rankin, *Activists Ticket White Residents to Highlight How Police Target People of Color*, COLORLINES (Oct. 21, 2015, 3:14 PM), <https://www.colorlines.com/articles/activists-ticket-white-residents-highlight-how-police-target-people-color> [https://perma.cc/UZ5D-26G4].

¹⁹⁹ Coalition to End Broken Windows, *How to End 'Broken Windows' The People's Agenda* (on file with author).

²⁰⁰ See *The Mission*, POLICE REFORM ORGANIZING PROJECT, <http://www.policereformorganizingproject.org/mission> [https://perma.cc/2GGC-NAZ8].

²⁰¹ *Id.*

²⁰² See, e.g., Alafair S. Burke, *Unpacking New Policing: Confessions of a Former Neighborhood District Attorney*, 78 WASH. L. REV. 985, 993–94 (2003); Harcourt & Ludwig, *Broken Windows*, *supra* note 169, at 314–15; Harcourt & Ludwig, *Reefer Madness*, *supra* note 169, at 2.

academic and policy circles, the NYPD recalibrated its efforts and DA offices made minor changes to their charging policy.²⁰³ Misdemeanor arrests also continue to plunge. And, while public polls suggest many still support zero tolerance enforcement,²⁰⁴ 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.²⁰⁵

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.²⁰⁶ 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 Evely, *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/ZJ4B-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.

²⁰⁶ See Max Rivlin-Nadler, *Trump's Deportation Machine Is in High Gear, but Who in NYC Can Stop It?*, VILLAGE VOICE (Feb. 22, 2017), <https://www.villagevoice.com/2017/02/22/trumps-deportation-machine-is-in-high-gear-but-who-in-nyc-can-stop-it/> [<https://perma.cc/8RDP-MR5W>].

color, saddling them with debts they could not afford to repay.²⁰⁷ 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.²⁰⁸ 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.²⁰⁹ End Overdose NY declares unequivocally, “[i]t is inappropriate for courts to impose or interfere with medical decisions.”²¹⁰ 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.²¹¹ The No New Jails campaign formed in opposition, rejected the creation of any new jails.²¹² It proposes that funds allocated for construction pay for

²⁰⁷ See Josmar Trujillo, *Broken Windows Breaks the Bank*, HUFFINGTON POST (Jan. 30, 2017, 12:00 AM), https://www.huffpost.com/entry/broken-windows-breaks-the_b_14487326 [<https://perma.cc/V3KD-XB7D>]; Emma Whitford, *NYPD Claims New Yorkers Won’t Be Deported for Turnstile Jumping*, GOTHAMIST (Feb. 25, 2017, 12:10 PM), https://gothamist.com/2017/02/25/nypd_turnstile_jumping_deportation.php [<https://perma.cc/6XZ7-4T5Z>].

²⁰⁸ See Press Release, Brooklyn Dist. Attorney’s Office, Brooklyn District Attorney Announces Project Brooklyn CLEAR to Offer Treatment for Individuals Arrested with Small Amount of Narcotics (Mar. 6, 2018), <http://www.brooklynda.org/2018/03/06/brooklyn-district-attorney-announces-project-brooklyn-clear-to-offer-treatment-for-individuals-arrested-with-small-amount-of-narcotics/> [<https://perma.cc/4X46-CSQS>]; Press Release, Manhattan Dist. Attorney’s Office, *supra* note 34.

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/5b6de4731aef1de914f43628/t/5b96c6f81ae6cf5e9c5f186d/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-RDND>].

²¹² See Noah Goldberg, *Who is No New Jails NYC?*, BROOKLYN DAILY EAGLE (May 14, 2019), <https://brooklyneagle.com/articles/2019/05/14/no-new-jails-nyc/> [<https://perma.cc/9THQ-KWCE>].

“public housing, homeless shelters, public schools, and expanded mental health services for incarcerated people.”²¹³

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. Summonses, newer jails, and diversion are liberal reforms that view carceral institutions as legitimate but in need of improvement. 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.²¹⁴ While police officers were responsible for the arrests, prosecutors continued the process by pressing charges.²¹⁵ 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.²¹⁶ The campaign drew attention to the prosecutor’s role in the City’s broken windows strategy.²¹⁷

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 Boro Defs., *FAQ*, *supra* note 8.

²¹⁵ See *id.*

²¹⁶ See, e.g., JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 5–6 (2017) (offering a corrective to the standard narrative, which attributes mass incarceration to the longer prison sentences, the War on Drugs and private prisons, and instead demonstrating that prosecutor’s increased felony filings was the core driver); Leon Neyfakh, *Top Police and Prosecutors Condemn Mass Incarceration*, SLATE (Oct. 23, 2015, 10:25 AM), <https://slate.com/news-and-politics/2015/10/police-and-prosecutors-condemning-mass-incarceration-ignore-their-own-role-in-the-problem.html> [<https://perma.cc/P2S4-J9QU>]; Eli Hager & Bill Keller, *Everything You Think You Know About Mass Incarceration Is Wrong*, MARSHALL PROJECT (Feb. 9, 2017), <https://www.themarshallproject.org/2017/02/09/everything-you-think-you-know-about-mass-incarceration-is-wrong> [<https://perma.cc/B6LU-QFUR>].

²¹⁷ See 5 Boro Defs., *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.*

²²⁰ *See* BESIKI LUKA KUTATELADZE & NANCY R. ANDILORO, VERA INST. OF JUSTICE, PROSECUTION AND RACIAL JUSTICE IN NEW YORK COUNTY, at viii (2014), <https://www.ncjrs.gov/pdffiles1/nij/grants/247227.pdf> [<https://perma.cc/8TAK-7DZA>].

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.”); KOHLER-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.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.²²⁹ All five borough DAs still prosecuted low-level charges, and aggressively so until recently.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

²²⁸ See Stephanie Clifford & Joseph Goldstein, *Prosecutor Limits When He'll Target Marijuana*, N.Y. TIMES, July 8, 2014, at A17; Beth Fertig, *District Attorneys Take Steps to Relax Marijuana Enforcement*, WNYC NEWS (May 15, 2018), <https://www.wnyc.org/story/district-attorneys-take-steps-soften-marijuana-enforcement/> [<https://perma.cc/FEQ6-4AK8>]; Beth Fertig & Jenny Ye, *Brooklyn's DA's Pledge to Reduce Marijuana Prosecutions Makes Little Difference*, WNYC NEWS (Sept. 7, 2017), <https://www.wnyc.org/story/despite-das-change-marijuana-policy-brooklyn-defendants-still-come-court/> [<https://perma.cc/6PTX-BX5A>].

²²⁹ See *Testimony Before City Council Public Safety and Finance Committees: FY18 Preliminary Budget*, MANHATTAN DISTRICT ATT'Y'S OFF. (Mar. 30, 2017), <https://www.manhattanda.org/testimony-before-city-council-public-safety-and-finance-committees-fy18-preliminary-budget/> [<https://perma.cc/JC3Z-PBNA>].

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.

Id.; see also Clifford & Goldstein, *supra* note 228; Fertig & Ye, *supra* note 228.

²³⁰ See MODELS FOR INNOVATION, *supra* note 135, at 4–5; DARCEL D. CLARK, OFFICE OF THE BRONX CTY. DIST. ATTORNEY, 2017 ANNUAL REPORT 6 (2017), https://www.bronxda.nyc.gov/downloads/pdf/annual-reports/annual_report_2017.pdf; Press Release, Brooklyn Dist. Attorney's Office, Low-Level Marijuana Prosecutions in Brooklyn Plunged by over 91% This Year as District Attorney's Office Expanded Declination Policy (July 27, 2018), <http://www.brooklynda.org/2018/07/27/low-level-marijuana-prosecutions-in-brooklyn-plunged-by-over-91-this-year-as-district-attorneys-office-expanded-declination-policy/> [<https://perma.cc/HJW8-VCKB>]; Ross Barkan, *Advocates Say Queens Needs a Progressive DA to Root Out 'Deeply-Rooted Moral Corruption'*, GOTHAMIST (Jan. 22, 2019, 11:20 AM), http://gothamist.com/2019/01/22/queens_da_race_protest.php [<https://perma.cc/PM9T-QH9N>]; Erin Durkin, *Staten Island DA Won't Be Joining in on Push to Stop Prosecuting Marijuana Charges*, N.Y. DAILY NEWS (May 16, 2018, 6:16 PM), <https://www.nydailynews.com/new-york/staten-island-da-won-stop-prosecuting-marijuana-charges-article-1.3993096> [<https://perma.cc/76KD-SLDH>].

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.

²³³ See Joseph Goldstein, 'Testilying' by Police Persists as Cameras Capture Truth, N.Y. TIMES, Mar. 19, 2018, at A1.

²³⁴ See KOHLER-HAUSMANN, *supra* note 141, at 165, 168, 169.

²³⁵ See *id.* at 143, 165, 170 ("[T]he 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 ("[T]he 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.

New York Penal Law section 240.20.²⁴⁰ 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.²⁴¹

An ACD entails having the case adjourned for a period of time, most often a year or six months.²⁴² 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.²⁴³ If there were no conditions attached to the ACD, the accused person need not appear in court for the dismissal.²⁴⁴ During that time, the case appears as an open case.²⁴⁵ For noncitizens, an ACD makes the person visible to federal immigration authorities until the case is dismissed and sealed.²⁴⁶ ACDs “represent[] roughly 23 to 30 percent of all misdemeanor arrest dispositions in recent years.”²⁴⁷

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.²⁴⁸ There is also a mandatory court surcharge of \$120.²⁴⁹ After a year, the underlying arrest record is sealed, and only the mark of a disorderly conduct violation is apparent.²⁵⁰

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.²⁵¹ With the fifteen-day-maximum jail time, under DACA guidelines, disorderly conduct can count as a misdemeanor under federal law.²⁵²

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)(iii).

²⁵⁰ See KOHLER-HAUSMANN, *supra* note 141, at 158.

²⁵¹ See Transcript of the Minutes of the Committee on Immigration Jointly with the Committee on Education and Committee on Public Safety, at 206–07 (Apr. 26, 2017) (statement of Hasan Shafaquallah, Deputy Attorney, Immigration Law Unit, Legal Aid Society), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3028942&GUID=1058179C-1264-44A8-A9D0-D3B4A3C66B59> [<https://perma.cc/8W7V-XANE>].

²⁵² See PENAL § 70.15; 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; see also *Frequently Asked Questions*, U.S. CUSTOMS & IMMIGR. SERVS., <https://www.uscis.gov/archive/frequently-asked-questions> [<https://perma.cc/X2HC-HK8N>] (last updated Mar. 8, 2018).

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 Miriam 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.

²⁵⁴ *A Love Letter to the #NoCopAcademy Organizers from Those of Us on the Freedom Side . . .*, PRISON CULTURE (Mar. 13, 2019), <http://www.usprisonculture.com/blog/2019/03/13/a-love-letter-to-the-nocopacademy-organizers-from-those-of-us-on-the-freedom-side/> [https://perma.cc/XCT5-9MQE] [hereinafter *Prison Culture*].

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.²⁶⁰ These promises have not been uniformly kept.²⁶¹

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.²⁶² DA Gonzalez inherited an office policy not to prosecute marijuana charges from his late predecessor—a policy, however, that was not consistently applied.²⁶³ Acting DA Gonzalez also vowed to expand pre-charge diversion programs.²⁶⁴

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.”²⁶⁵ 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

²⁶⁰ See MODELS FOR INNOVATION, *supra* note 135, at 8, 9, 11.

²⁶¹ See Jake Offenhartz, *Vance's DAs Won't Stop Throwing the Book at Petty Crime*, VILLAGE VOICE (Feb. 8, 2018), <https://www.villagevoice.com/2018/02/08/vances-das-wont-stop-throwing-the-book-at-petty-crime/> [<https://perma.cc/MG45-MGTZ>].

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.

²⁶⁴ See Rob Abruzzese, *Acting DA Eric Gonzalez Receives Endorsement of Local Activists*, BROOKLYN DAILY EAGLE (July 25, 2017), <https://brooklyneagle.com/articles/2017/07/25/acting-da-eric-gonzalez-receives-endorsement-of-local-activists/> [<https://perma.cc/72AZ-K4XU>].

²⁶⁵ Press Release, Brooklyn Dist. Attorney’s Office, Acting Brooklyn District Attorney Eric Gonzalez Announces New Policy Regarding Handling of Cases Against Non-Citizen Defendants (Apr. 24, 2017), <http://www.brooklynda.org/2017/04/24/acting-brooklyn-district-attorney-eric-gonzalez-announces-new-policy-regarding-handling-of-cases-against-non-citizen-defendants/> [<https://perma.cc/7M3H-9F2U>] [hereinafter Press Release, Brooklyn Dist. Attorney, Non-Citizen Defendants].

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.

²⁶⁸ See Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,800 (Jan. 25, 2017).

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.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.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 “dismantl[ing] the current policing apparatus that acts as a funnel to mass incarceration and the deportation machine.”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

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).

²⁷² See Lasch et al., *supra* note 1, at 1708–10.

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.

²⁷⁶ See ROSE CAHN, IMMIGRANT LEGAL RES. CTR., MODEL PROSECUTOR POLICIES & PRACTICES ON IMMIGRATION ISSUES (2018), https://www.ilrc.org/sites/default/files/resources/model_prosec_pol_prac_immig_issues-20181121.pdf [<https://perma.cc/U57U-HEMG>]; FAIR PUNISHMENT PROJECT ET AL., THE PROMISE OF SANCTUARY CITIES AND THE NEED FOR CRIMINAL JUSTICE REFORMS IN AN ERA OF MASS DEPORTATION 3 (2017), <http://fairpunishment.org/wp-content/uploads/2017/04/FPP-Sanctuary-Cities-Report-Final.pdf> [<https://perma.cc/S9TG-ZVM8>]; LENA GRABER ET AL., IMMIGRANT LEGAL RES. CTR., LOCAL OPTIONS FOR PROTECTING IMMIGRANTS: A COLLECTION OF CITY & COUNTY POLICIES TO PROTECT IMMIGRANTS FROM DISCRIMINATION AND DEPORTATION (2016), https://www.ilrc.org/sites/default/files/resources/local_options_final.pdf [<https://perma.cc/UAB9-6Z8J>]; GRABER & MARQUEZ, SEARCHING FOR SANCTUARY, *supra* note 59, at 24; Shakeer Rahman & Robin Steinberg, *Sanctuary Cities in Name Only*, N.Y. TIMES, Feb. 15, 2017, at A27.

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).

²⁸³ *See* Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1156 (2008).

4 percent of the total number of people removed that year.²⁸⁴ Two years later, that percentage increased to 23.1%.²⁸⁵ By 1996, criminal convictions triggered more than half of all removals.²⁸⁶ 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.²⁸⁷

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.²⁸⁸ In New York City from 1988 to 1994, felony arrests exceeded misdemeanor arrests by a small margin.²⁸⁹ After 1994, misdemeanor arrests increased relative to felony arrests by at least a factor of two.²⁹⁰ This trend persisted in New York City and was replicated throughout the country.²⁹¹ 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.²⁹² To this day, misdemeanors, and broken windows offenses specifically, remain the most frequent reason for contact with criminal court.²⁹³ Federal immigration authorities relied on and encouraged aggressive state and local policing to locate suspected undocumented immigrants, while avoiding Tenth Amendment prohibitions against commandeering.²⁹⁴

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.

²⁸⁸ See Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 301–02, 339–40 (1998).

²⁸⁹ KOHLER-HAUSMANN, *supra* note 141, at 25.

²⁹⁰ *Id.* at 41 fig.1.3.

²⁹¹ See *id.* at 2.

²⁹² Jessica A. Roth, *The Culture of Misdemeanor Courts*, 46 HOFSTRA L. REV. 215, 215 n.4 (2017).

²⁹³ See, e.g., LISA LINDSAY, OFFICE OF THE CHIEF CLERK OF N.Y.C. CRIMINAL COURT, CRIMINAL COURT OF THE CITY OF NEW YORK: 2017 ANNUAL REPORT 9, 25–26 (Justin Barry ed., 2018), <https://www.nycourts.gov/COURTS/nyc/criminal/2017-Annual-Report.pdf> [<https://perma.cc/LQ9B-TT6M>].

²⁹⁴ See, e.g., Joan Friedland, *How ICE Uses Databases and Information-Sharing to Deport Immigrants*, NAT'L IMMIGR. L. CTR. (Jan. 25, 2018), <https://www.nilc.org/2018/01/25/how-ice-uses-databases-and-information-sharing-to-deport-immigrants/> [<https://perma.cc/5JYN-RJMA>].

same demographics.²⁹⁵ Black and Latinx individuals are the most frequent targets of broken windows policing in New York City.²⁹⁶ “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.”²⁹⁷ 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.”²⁹⁸ “Black immigrants are more likely to be detained for criminal convictions than the immigrant population overall.”²⁹⁹ Latinx are more likely than their White counterparts to be targets for low-level policing, and they make up over 90 percent of those deported.³⁰⁰ “[W]hile individuals from . . . four Latin American countries make up 72.6 percent of the US unauthorized (im)migrant population in 2012, they constituted more than 95 percent of removals in 2013.”³⁰¹

Alina Das argues this demographic overlap is not a coincidence, but consistent with a century long history of racially motivated immigration enforcement.³⁰² 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.

²⁹⁹ *Id.* pt. II, at 5.

³⁰⁰ See MEXICAN AM. LEGAL DEF. & EDUC. FUND ET AL., DETENTION, DEPORTATION, AND DEVASTATION: THE DISPROPORTIONATE EFFECT OF DEPORTATIONS ON THE LATINO COMMUNITY 2 (2014), https://www.maldef.org/wp-content/uploads/2019/01/Deportation_Brief_MALDEF-NHLA-NDLON.pdf [<https://perma.cc/WC7P-PVNY>].

³⁰¹ See MARTHA ESCOBAR, CAPTIVITY BEYOND PRISONS: CRIMINALIZATION OF LATINA (IM)MIGRANTS 52 (2016).

³⁰² See Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171, 173–74 (2018).

review of the historical record suggests the use of criminal convictions has disguised an immigration policy inflected with racial bias.³⁰³

Demographic overlap aside, recent data from ICE confirm that both criminal convictions and pending criminal charges account for at least half of deportations.³⁰⁴ These criminal contacts include low-level offenses, including drug possession and traffic violations.³⁰⁵ ICE apprehended over 138,000 people in 2018 because of criminal conviction or pending charges.³⁰⁶ Almost 33,000 were apprehended because of pending criminal charges.³⁰⁷ In 2017, over 144,000 individuals were deported because of a criminal conviction or pending charge.³⁰⁸ Selling marijuana and larceny were amongst the top ten offenses that triggered removal.³⁰⁹ The 1700% increase in courthouse arrests since 2016 underscores the risk of detection posed by a mere accusation.³¹⁰ 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.³¹¹

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

³⁰³ *See id.*

³⁰⁴ *See* U.S. IMMIGRATION & CUSTOMS ENFT, FISCAL YEAR 2018 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 3 fig.2, 6 fig.4 (2018), <https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf> [<https://perma.cc/5CQ2-G4D3>].

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/8969468fb8b2485a87ff1ff448397ba0> [<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.").

³¹¹ *See* Press Release, Immigrant Def. Project, IDP Unveils New Statistics & Trends Detailing Statewide ICE Courthouse Arrests in 2017 (Dec. 31, 2017), <https://www.immigrantdefenseproject.org/wp-content/uploads/ICE-Courthouse-Arrests-Stats-Trends-2017-Press-Release-FINAL.pdf> [<https://perma.cc/S3KV-REQC>].

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

³¹² IMMIGRANT DEF. PROJECT, “ONE DAY TO PROTECT NEW YORKERS” LEGISLATION PRACTICE ADVISORY (Apr. 29, 2019) [hereinafter IMMIGRANT DEF. PROJECT, “ONE DAY TO PROTECT NEW YORKERS”] (citations omitted), <https://www.immigrantdefenseproject.org/wp-content/uploads/One-Day-to-Protect-New-Yorkers-364.pdf> [<https://perma.cc/QU4K-P3JG>]; see also 8 U.S.C. §§ 1226(c)(1)(C), 1227(a)(2)(A)(i), (iii), 1229(b)(1)(C) (2012); N.Y. PENAL LAW § 70.15 (McKinney 2019).

³¹³ See 8 U.S.C. § 1227(a)(2)(A)(i); IMMIGRANT LEGAL RESOURCE CENTER, § N.11 BURGLARY, THEFT, AND FRAUD 227 (Jan. 2019) https://www.ilrc.org/sites/default/files/resources/n.11-burglary_theft_fraud.pdf [<https://perma.cc/7SXX-SY3J>]; IMMIGRANT LEGAL RESOURCE CENTER, § N.8 CONTROLLED SUBSTANCES 2, 3 (2013), https://www.ilrc.org/sites/default/files/resources/chart-note_08-controlled_substances.pdf [<https://perma.cc/DF6Y-RL83>].

³¹⁴ See Cade, *supra* note 8, at 1754.

³¹⁵ See N.Y.C. BAR ASS’N, REPORT ON LEGISLATION BY THE CRIMINAL COURTS COMMITTEE THE CRIMINAL COURT OPERATIONS COMMITTEE AND THE IMMIGRATION AND NATIONALITY LAW COMMITTEE 2 (2019), <https://s3.amazonaws.com/documents.nycbar.org/files/2019490-OneDayProtectNYersBudget.pdf> [<https://perma.cc/L6CE-B2MV>]; Cade, *supra* note 8, at 1798–99; Lasch et al., *supra* note 1, at 1745–46.

or gang affiliations.³¹⁶ One worthwhile reform may include closing those gaps in coverage, particularly those relating to DA conduct.³¹⁷ 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.³¹⁸ 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.³¹⁹

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."³²⁰ 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.³²¹

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.³²² 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

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.

³¹⁹ See Jordan Cunnings, Comment, *Nonserious Marijuana Offenses and Noncitizens: Uncounseled Pleas and Disproportionate Consequences*, 62 UCLA L. REV. 510, 525–26 (2015).

³²⁰ GRABER ET AL., *supra* note 276.

³²¹ See MODELS FOR INNOVATION, *supra* note 135, at 17; Press Release, Brooklyn Dist. Attorney, Non-Citizen Defendants, *supra* note 265.

³²² See *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010).

the conduct at issue.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 *Padilla* obligations, time pressure, unequal leverage, and impediments to getting discovery “frustrate the ability to bargain for immigration-safe dispositions.”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.³²⁵

The prosecutors staffing arraignments, in particular, are the least experienced and newest hires in a DA’s office,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

³²³ See Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953, 954 n.1 (2018); Davorin J. Odrčić, *Plea Bargaining for Noncitizen Clients: What Defense Attorneys Should Know*, ST. B. WIS. (Oct. 21, 2015), <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=7&Issue=20&ArticleID=24398> [https://perma.cc/W5TU-JDQQ].

³²⁴ See Cade, *supra* note 8, at 1776.

³²⁵ See LINDSAY, *supra* note 293, at 28.

³²⁶ See, e.g., *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).

poverty.³²⁷ 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.³²⁸

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.”³²⁹

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.³³⁰ 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.³³¹ “Previously, the one-year potential sentence associated with some misdemeanors in New York meant that convictions would frequently trigger certain removal

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.

³³⁰ See Howell, *supra* note 139, at 291–92.

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-6NZZ>].

[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

³³² IMMIGRANT DEF. PROJECT, “ONE DAY TO PROTECT NEW YORKERS”, *supra* note 312, at 1 (citations omitted); see 8 U.S.C. §§ 1226(c)(1)(C), 1227(a)(2)(A)(i), (iii), 1229(b)(1)(C) (2012) (2012).

³³³ See IMMIGRANT DEF. PROJECT, LEGAL ALERT: ONE DAY TO PROTECT NEW YORKERS ACT PASSES IN NY STATE (2019), <https://fortunesociety.org/wp-content/uploads/2019/04/One-Day-bill-bullets-4.2.19.pdf> [<https://perma.cc/UZX2-VGF3>].

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.³³⁶ Decriminalization through nullification also accelerates the process of dismissal for the many cases that prosecutors dismiss when they offer ACDs.³³⁷

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.³³⁸ 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.³³⁹ 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

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.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.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."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.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

³⁴⁰ See, e.g., LAURIE BERG, *MIGRANT RIGHTS AT WORK: LAW'S PRECARIOUSNESS AT THE INTERSECTION OF IMMIGRATION AND LABOUR*, at xiv, xvi (2016).

³⁴¹ See K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1917 (2019).

³⁴² UNZUETA, *supra* note 17, at 1; RITCHIE & MORRIS, *supra* note 17, at 3.

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.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.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.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

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.

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.")

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.”³⁴⁷ 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.”³⁴⁸ 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.”³⁴⁹ 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.³⁵⁰ These tools negate the reality of rehabilitation and erase the hope for redemption.³⁵¹ Instead of deportations and prison sentences,

³⁴⁷ Natapoff, *supra* note 22, at 88.

³⁴⁸ *Id.* at 89.

³⁴⁹ *Id.* at 82.

³⁵⁰ See Liz Samuels & David Stein, *Perspectives on Critical Resistance*, in ABOLITION NOW! TEN YEARS OF STRUGGLE AGAINST THE PRISON INDUSTRIAL COMPLEX 1, 7 (2008), <http://criticalresistance.org/wp-content/uploads/2012/06/Critical-Resistance-Abolition-Now-Ten-Years-of-Strategy-and-Struggle-against-the-Prison-Industrial-Complex.pdf> [https://perma.cc/QKT4-XGBF].

³⁵¹ See RaeDeen Keahiolalo-Karasuda, *Carceral Landscape in Hawai‘i: The Politics of Empire, the Commodification of Bodies, and a Way Home*, in ABOLITION NOW! TEN YEARS OF STRUGGLE AGAINST THE PRISON INDUSTRIAL COMPLEX 121, 128, 129, 130 (2008), <http://criticalresistance.org/wp-content/uploads/2012/06/Critical-Resistance-Abolition-Now-Ten->

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.³⁵²

Just as community organizing in New York City helped to debunk the morality and empirical postulates behind broken windows policing, we now 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.

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.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 federal³⁵⁴ and New York

Years-of-Strategy-and-Struggle-against-the-Prison-Industrial-Complex.pdf [https://perma.cc/QKT4-XGBF].

³⁵² See Beth E. Richie, *Foreword*, 37 SOC. JUST., no. 4, 2011/2012, at 12, 12–13, https://communityaccountability.files.wordpress.com/2012/06/foreword-bethrichie.pdf [https://perma.cc/H3GL-3NF7].

³⁵³ See Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 297 (2019).

³⁵⁴ Although *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. *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886). In *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. *Id.* at 374. The case established the rule that the decision to prosecute cannot be based on arbitrary classification, such as race. *See id.* In the years since *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. *See United States v. Armstrong*, 517 U.S. 456, 465 (1996) (citing *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. *Armstrong*, 517 U.S. at 464

State law, a prosecutor's discretion is not subject to judicial review.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.³⁵⁶ These core values of liberal government are often in tension with one another.³⁵⁷ Scholars have also proposed various mechanisms for arriving at the right balance between these values: self-regulation,³⁵⁸ judicial commissions,³⁵⁹ legislative guidelines,³⁶⁰ and repealing immunity.³⁶¹ One point of pressure for regulating

(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 insulated state prosecutors from civil liability and declared a broad doctrine of prosecutorial immunity. *Imbler v. Pachtman*, 424 U.S. 409, 427, 430–31 (1976).

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 found 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].").

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 CIR. REV. 1, 3 (2009).

³⁵⁷ See TESLIK, *supra* note 356, at 5; Green & Zacharias, *supra* note 356, at 893.

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 (2008).

³⁵⁹ See Bennett L. Gershman, *New Commission to Regulate Prosecutorial Misconduct*, HUFFINGTON POST (May 20, 2014, 12:09 PM), https://www.huffingtonpost.com/bennett-l-gershman/new-commission-to-prosecutorial-misconduct_b_5353570.html [https://perma.cc/MP7A-Z8BG].

³⁶⁰ See PFAFF, *supra* note 216, at 206–07.

³⁶¹ See Bennett L. Gershman, *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.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.³⁶³ Low-level offenses lack "normative guilt"; thus, prosecutors enjoy greater public legitimacy when exercising their discretion.³⁶⁴ For serious offenses, prosecutors are traditionally more constrained by public outcry.³⁶⁵ Public pressure can limit their discretion at the higher end.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.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."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.³⁶⁹ Considerations against pressing charges could include protecting witnesses or delaying prosecution until after the completion of a long-term investigation.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."³⁷¹ Such decisions about the desirability of a law are

(Aug. 12, 2015, 5:47 PM) https://www.huffingtonpost.com/evan-bernick/its-time-to-end-prosecuto_b_7979276.html [<https://perma.cc/2UCV-X6SD>].

³⁶² See, e.g., 5 Boro Defs., *Call for Moratorium*, *supra* note 5.

³⁶³ See Vorenberg, *supra* note 6, at 1531.

³⁶⁴ See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1657–58 (2010); Vorenberg, *supra* note 6, at 1531.

³⁶⁵ See Vorenberg, *supra* note 6, at 1526.

³⁶⁶ See *id.* at 1526–27.

³⁶⁷ See Green & Zacharias, *supra* note 356, at 874–75.

³⁶⁸ Sarat & Clarke, *supra* note 7, at 401–02.

³⁶⁹ See *Preliminary Proceedings*, 47 GEO. L.J. ANN. REV. CRIM. PROC. 273, 273–76 (2018).

³⁷⁰ See *United States v. Lovasco*, 431 U.S. 783, 794–95 (1977); Sarat & Clarke, *supra* note 7, at 391.

³⁷¹ Fairfax, *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.³⁷² 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.³⁷³ The statutes enforced by the DAs’ offices existed long before 1994 when the NYPD initiated its new policing strategy.³⁷⁴ 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.³⁷⁵ 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.³⁷⁶ Executive officers, such as prosecutors, are nimble and flexible in their ability to make significant policy changes.³⁷⁷ 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.³⁷⁸ Its impermanence from administration to

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).

³⁷⁶ See, e.g., Deanna Paul, *Legalizing Marijuana Is Now One of Cuomo’s Priorities. He’s Been Resisting It for Years*, WASH. POST (Dec. 18, 2018), <https://www.washingtonpost.com/nation/2018/12/17/legalizing-marijuana-is-now-one-cuomos-priorities-hes-been-resisting-it-years/> [<https://perma.cc/AKR6-NCC4>].

³⁷⁷ See Fairfax, *supra* note 21, at 1274.

³⁷⁸ See Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1057 (2015); cf. David Thatcher, *Don’t End Broken Windows Policing, Fix It: Quality of Life is Not Just for Wealthy Suburbanites*, MARSHALL PROJECT (Sept. 9, 2015), <https://www.themarshallproject.org/2015/09/09/don-t-end-broken-windows-policing-fix-it> [<https://perma.cc/4SFH-JQ4W>] (arguing that modern policing should focus on the proper implementation of public order rules instead of abandoning them altogether).

administration, or from political moment to moment, permits experimentation. City policies have often been the laboratory for statewide policies in New York.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.³⁸⁰

Nullification also expresses a different separation of powers—the local versus state government divide.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.’”³⁸² Nullification gives expression to local concerns about the application of statewide criminal statutes.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.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.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.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.³⁸⁷ #NYCdontprosecute relied on and built on these lasting to changes city government.

³⁷⁹ See Paul, *supra* note 376.

³⁸⁰ See *id.*

³⁸¹ See Robert Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 718–19, 731 (1996).

³⁸² *Id.* at 731.

³⁸³ See Fairfax, *supra* note 21, at 1268; Misner, *supra* note 381, at 718–19, 731.

³⁸⁴ See Jojo Annobil, *The Immigration Representation Project: Meeting the Critical Needs of Low-Wage and Indigent New Yorkers Facing Removal*, 78 FORDHAM L. REV. 517, 520–21 (2009).

³⁸⁵ See Green & Zacharias, *supra* note 356, at 869–70.

³⁸⁶ See Kaplan-Lyman, *supra* note 374, at 206.

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.³⁸⁸ 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.³⁸⁹ Awarding preferential treatment to defendants because of their access to the prosecutor creates inconsistent outcomes that cannot be justified.³⁹⁰ 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.³⁹¹

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.³⁹² Prosecutorial discretion is also unreviewable in court.³⁹³ Most elections are uncontested, heavily favor incumbents, and are rarely the site for substantive discussion about law, policy, or justice.³⁹⁴ Although, in the last year, some prosecutors across the country have opened their doors to community input,³⁹⁵ 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

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).

³⁹⁰ See, e.g., Al Baker, *Arrest of a Bronx Prosecutor Is Said to Uncover Possible Favored Treatment in Past*, N.Y. TIMES, Apr. 29, 2011, at A23.

³⁹¹ 5 Boro Defs., *Call for a Moratorium*, *supra* note 5.

³⁹² See, e.g., Randall Grometstein & Jennifer M. Balboni, *Backing Out of a Constitutional Ditch: Constitutional Remedies for Gross Prosecutorial Misconduct Post Thompson*, 75 ALB. L. REV. 1243, 1268, 1270–71 (2011).

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).

³⁹⁵ See, e.g., Brandon Bossert, *Attorney General Takes in Public Input During Criminal Justice Town Hall*, WMDT (Feb. 27, 2019), <https://www.wmdt.com/2019/02/attorney-general-takes-in-public-input-during-criminal-justice-town-hall/> [<https://perma.cc/8WV8-C64J>].

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 inexperienced

³⁹⁶ See Carl Campanile, *Lawyers Sue Cuomo over Law That Probes Prosecutor Misconduct*, N.Y. POST (Oct. 17, 2018, 8:57 PM), <https://nypost.com/2018/10/17/lawyers-sue-cuomo-over-law-that-probes-prosecutor-misconduct/> [<https://perma.cc/W3WK-CRY>].

³⁹⁷ See Simonson, *supra* note 353, at 270–71.

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.

⁴⁰¹ See *id.* at 285; Robin Steinberg & Skylar Albertson, *Broken Windows Policing and Community Courts: An Unholy Alliance*, 37 CARDOZO L. REV. 995, 998–99 (2016).

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 Defs., *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.⁴⁰⁵ Second, professional prosecutors rarely deploy their legal expertise to prosecute these cases.⁴⁰⁶ Broken windows charges are reflexively leveled because prosecutors need only to rely on police observations to bring charges.⁴⁰⁷ These cases are “advantageous, quick-and-dirty pleas with minimal resource outlay.”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.”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.⁴¹⁰ Many of these cases are resolved at the accused’s first appearance.⁴¹¹ The absence of public scrutiny has been essential in sustaining the status quo.⁴¹² Community court watch programs have grown in part to force transparency on criminal courts.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.⁴¹⁴ A broad coalition of civil society organizations supported the action.⁴¹⁵ Finally, the campaign built on an emerging understanding about the harms of the broken windows policing.⁴¹⁶ The campaign models a mechanism for regulating prosecutorial discretion that is substantially different from other proposals: disruptive public

⁴⁰⁵ See *id.* at 269.

⁴⁰⁶ See Bowers, *supra* note 364, at 1703–04.

⁴⁰⁷ See *id.* at 1716, 1718.

⁴⁰⁸ *Id.* at 1716.

⁴⁰⁹ *Id.*

⁴¹⁰ See *id.* at 1705–06.

⁴¹¹ See *id.* at 1705.

⁴¹² See *id.* at 1705–06, 1713–14.

⁴¹³ See Steinberg & Albertson, *supra* note 401, at 996–97; Beth Schwartzapfel, *The Prosecutors*, THE MARSHALL PROJECT (Feb. 26, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/02/26/the-prosecutors> [https://perma.cc/42YJ-QNZX].

⁴¹⁴ See 5 Boro Defs., *Call for a Moratorium*, *supra* note 5.

⁴¹⁵ See *id.*

⁴¹⁶ See *id.*; *Immigrant Rights Day of Action*, MORE (Feb. 14, 2017), <https://morecaucusnyc.org/2017/02/14/immigrant-rights-day-of-action/> [https://perma.cc/AC4P-844S]; *The Issue*, *supra* note 172.

participation.⁴¹⁷ 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.

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).