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## **New pathways to sanctuary in New York City**

**Hilary Sanders**

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### **Abstract:**

This chapter focuses on the protection of undocumented migrants in New York City during the Trump presidency, a period of heightened immigration enforcement that explicitly targeted cities with policies of withholding information about immigration status from the federal government. The increased threat of unpredictable raids by federal immigration officers, particularly outside courthouses, led municipal authorities to increase funding for services intended to protect immigrants with precarious legal status, including information sessions about individual rights and free legal services to regularize status and contest deportation orders. However, given that contact with the criminal justice system remains the primary means by which federal authorities locate deportable migrants, a recent policy shift outside the field of immigrant rights, involving the decriminalization of low-level offenses, has also indirectly offered a significant measure of protection. This analysis attempts to quantify the impact of migrant-specific policies versus criminal justice reform and explores the merits of various strategies available to cities attempting to shield residents lacking legal status from the effects of national immigration enforcement, beyond traditional methods of limiting cooperation with the federal government.

**Keywords : New York City, Sanctuary policy, Undocumented immigrants, Deportation, Criminal justice reform**

### **Introduction**

Since their emergence in the 1980s, policies of sanctuary in the United States have proved themselves resilient to changing national contexts. They adapted to the wave of conservatism and concern over illegal border crossings of the 1990s, as well as the expansion of the surveillance state and “crimmigration” enforcement in the wake of 9/11 (Stumpf 2006). They have also developed in conjunction with policy experiments in the opposite direction, as measures designed to restrict the social rights of the undocumented and facilitate their identification and deportation have multiplied, particularly in rural areas, cities, and states in the Southeast and Southwest (Rodriguez 2008; Varsanyi 2010). As such, they have been an integral part of the fragmentation of immigration policy on the local level (Varsanyi et al. 2011; Walker and Leitner 2011).

However, local jurisdictions attempting to protect undocumented immigrants have been confronted with an unprecedented cascade of restrictive immigration policies adopted at the

federal level since February 2017. The current administration's determination to curb legal entry has led to travel bans in various iterations, a dramatic reduction in refugee admissions, and a tightening of criteria to qualify for asylum. Although the number of undocumented residents present in the United States has been decreasing since the Great Recession, the President has vowed to sharply increase immigration enforcement within the nation's interior (Executive Order 13768). In this context, the contradiction between federal priorities and those of sanctuary jurisdictions, already salient, has become an ever-widening gulf. Cities that refuse to comply with deportation efforts have been stigmatized by the Executive branch for harboring criminals and risking public safety, whereas stakeholders in these districts criticize federal policies and the tactics of immigration agents as xenophobic and inhumane (Cunningham Warren 2017). Given the polarized, partisan nature of this conflict, it is not surprising that the national context has only strengthened the resolve of stakeholders in sanctuary jurisdictions, leading to the formation of an arsenal of techniques of non-cooperation (Lasch et al. 2018). However, if we consider sanctuary more broadly, we can observe that local governments have continued to innovate in their approach to migrant protection, and that public policies outside the narrow field of immigration management also have a significant impact on the unauthorized population's likelihood of detection by federal authorities.

This chapter will explore the modalities of this struggle and the levers of action available to city governments attempting to protect deportable migrants, beyond the "traditional" methods of limiting cooperation with the federal government, and the political and institutional boundaries within which such actions can take place. Focusing on New York City, home to roughly 477,000 unauthorized residents and tens of thousands more with precarious legal status, it will analyze the means by which municipal government has achieved some measure of success in countering the Trump administration's repression of sanctuary jurisdictions (MOIA 2019: 11). How can direct intervention among immigrant communities shield this population from arrest by federal immigration agents? To what extent does the larger framework of the criminal justice system affect immigrants' risk of deportation? To answer these questions, the chapter will first describe the evolution of New York's local immigration policies, designed to improve access to services and reduce communication with federal immigration agents, towards a more confrontational position through the conflict around detainer requests. Using data from the New York Police Department (NYPD), the Mayor's Office for Immigrant Affairs (MOIA), and the Office of Civil Justice (OCJ), the following section will attempt to quantify the impact of migrant-specific policies within the context of the aggressive enforcement efforts that have marked the first three years of the Trump presidency. A third section will examine the continuing vulnerability of deportable immigrants within the criminal justice system, and conduct an analysis of the criminal justice reforms enacted in New York City in 2016 and 2017 in regards to this population. A concluding section will discuss the implications and possible consequences of these trends.

Shifting policies of migrant protection

A political consensus around the recognition and inclusion of recent immigrants became entrenched in New York City in the 1980s, as the demographic realities embodied by the city's increasingly diverse population diverged from the increasingly exclusionary and security-oriented policies enacted on the federal level. Thanks to immigration from the Caribbean, Latin America, and Asia, New York avoided the population loss plaguing metropolitan areas in the Northeast and in the Rust Belt, and continued to grow during the following decades (Department of City Planning 2013). As a primary immigration gateway and an emblematic "global city", it attracted both unskilled labor in the service sector and highly skilled workers in the growing "knowledge economy" (Hall et al. 2011; Sasken 2001). The entrepreneurial tendency of immigrants compared to the native-born population, a phenomenon observed across national contexts, further strengthened the formation of a "migration-development nexus" among city leaders in New York and elsewhere (Desidero and Mestres-Domenech 2011; Filomeno 2017; Sanders 2018).

Since this period, New York City has consistently been a leader in the crafting of progressive policies designed to protect migrants from the repressive effects of federal immigration law. In 1986, Democratic Mayor Edward Koch (1978-1989) created a municipal office dedicated to assisting New York's growing immigrant communities, the first of its kind nationwide. Voted by referendum in 2001 into the city's charter and made into a permanent part of city government, the Mayor's Office of Immigrant Affairs is now the largest and most generously funded of such offices, with over 50 full-time staff members (de Graauw 2015). Furthermore, as a result of the 1980s Sanctuary movement in regards to Central American migrants, Mayor Koch issued an executive order in 1989 prohibiting municipal employees from transmitting information about immigration status to the federal government (EO 124). After the original non-cooperation policy was invalidated by the 1996 immigration law IIRIRA<sup>1</sup>, and amid concerns that immigrant communities were reluctant to report anti-Muslim hate crimes in the wake of the 9/11 terrorist attacks, a re-vamped executive order forbidding municipal employees from *collecting* sensitive information about immigration status or sexual orientation was enacted in 2003 (EO 41). This measure was intended to protect victims and witnesses during their interactions with local law enforcement, but allowed the police to determine legal status when individuals were the object of a criminal investigation. In this way, once unauthorized migrants faced criminal charges, however minor and whether or not the charges were ultimately dropped or disproved, they lost the promise of confidentiality offered by city government.

New York's progressive position towards immigrants was strengthened during the post-9/11 era, buttressed by concrete measures that improved this population's access to city services, which include public schools, the police department, a network of public hospitals and clinics, and parks and libraries, among others. Since 2003, the city government has adopted and extended comprehensive language access legislation, mandating that all city agencies translate its written documentation in the six languages most represented among the populations they serve, and inform users with Limited English Proficiency of the availability

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<sup>1</sup> Illegal Immigration Reform and Immigration Responsibility Act.

of free interpretation services in nearly all languages (Local Law 73, EO 120, Local Law 30)<sup>2</sup>. After the election of Mayor de Blasio in 2013, the city also created a free municipal identification card that all New York residents, including undocumented immigrants, could use during interactions with police and other city agencies<sup>3</sup>. These initiatives were adopted under pressure from vocal and well-funded immigrant rights associations such as the New York Immigration Coalition, the Immigrant Defense Project, and Make The Road. They have also been influential in inspiring a number of other large U.S. cities to adopt similar policies, notably municipal ID cards in Detroit in 2016, Chicago in 2018, and Philadelphia in 2019, part of a larger trend on the local level towards acceptance of unauthorized immigrants' long-term residence in the United States in the foreseeable future. As highlighted by Gulasekaram and Ramakrishnan (2015), despite the attention given to the exceptional case of Arizona, a progressive turn unfolded in states and cities in the wake of Obama's executive action in 2012, Deferred Action for Childhood Arrivals (DACA). Significantly, these initiatives in local governance have occurred in cities in which the undocumented population is primarily composed of one national-origin group, such as Chicago with its large Mexican community, as well as those with more diverse populations, like New York City. In the latter, the two largest foreign-born populations, from the Dominican Republic and China, only account for 25% of the total immigrant population (MOIA 2019: 12).

The issue that has come to define "sanctuary" cities in the United States context is not, however, the expansion of access of services, but rather the treatment of non-citizens who have come into contact with the criminal justice system. The establishment of the Secure Communities program between 2008 and 2012 allowed the automatic transmission of fingerprint data taken during all police bookings to the federal immigration agency Immigration and Customs Enforcement (ICE). Thereafter, the identification of immigrants whose presence is suspected to be unauthorized was greatly facilitated for federal agents, who previously relied on the deliberate cooperation of local law enforcement and corrections officers. With the help of more extensive and interconnected databases, ICE agents now receive immediate notification of a possible match between individuals present in local jails and existing records (e.g. previous border apprehension or expired visa). In such cases, federal agents can request that local law enforcement authorities detain the suspect for an additional 48 hours; this extension allows ICE to take the individual into custody for further investigation of legal status, possibly leading to transfer to a detention center and eventual deportation proceedings. These new tools created an immediate and substantial increase in immigrant removals resulting from arrests by local law enforcement, even when charges are dropped or never formulated. The subsequent backlash from immigrant rights' organizations and local jurisdictions made countering Secure Communities and questioning the legitimacy

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<sup>2</sup> 23% of residents were estimated to be Limited English Proficient in 2018 (MOIA 2019: 13).

<sup>3</sup> To avoid making the card a marker for undocumented status, city government broadened its appeal by allowing transgender residents to choose the gender indicated on the card, by offering discounts to the city's network of museums, and by extending eligibility to residents as young as 10. Similar in many respects to the card launched in San Francisco in 2009, the New York program, launched in 2015, has succeeded in reaching a particularly large audience, having issued over 1 million cards by 2017.

of ICE requests for immigrant detention to local jails and prisons the linchpin of debates about sanctuary<sup>4</sup>.

While law enforcement in the vast majority of jurisdictions has tolerated this increased collaboration with federal government, and some have welcomed it enthusiastically, the response of cities and counties opposed to federal deportation efforts has been to restrict the cases in which detainer requests are respected (23 % of counties in 2018), to decline requests by ICE to interview suspected individuals in person or over the phone (2 %), and to refuse to notify the agency of individuals' release date from local jail (6 %) (Avila et al. 2018). Since 2014, the laws passed by New York City Council have made the city's detainer policy one of the nation's strictest: the police department and department of corrections only comply with detainers of 48 hours relating to individuals who have committed a "violent or serious crime" and have been deported and illegally reentered the country, or who are suspected terrorists. The City also mandated the closure of the ICE field offices at the prison complex on Riker's Island, and in proximity to all city jails. Whereas hundreds of individuals were detained each year at ICE request in years prior, from July 2015 to June 2019, only two were detained beyond their scheduled date of release and transferred to federal custody (NYPD 2016; 2017; 2018; 2019)<sup>5</sup>. City legislation effectively ended the local prison to ICE pipeline that the federal government had briefly established, primarily through Secure Communities.

Federal courts have generally defended the position of cities that limit cooperation with immigration detainers, condemning these periods of detention as an unconstitutional violation of the right to due process of law promised by the 4<sup>th</sup> amendment<sup>6</sup>. As a result, a growing number of counties have decreased, rather than increased, cooperation with ICE since 2016, despite the executive branch's concerted efforts to undermine sanctuary legislation (Avila et al. 2018). After Attorney General Jeff Session's attempt to nullify California's Trust policy (less protective than New York's but state-wide) was struck down by a district court in 2017 (*United States v. State of California*), the Department of Justice also failed to coerce sanctuary cities into sharing more information with ICE by threatening to withhold federal grants to police departments (*City of Philadelphia v. Sessions*). Given these judicial victories, the resistance of New York City government to cooperating with the federal government's deportation strategies has only become more determined, in line with national trends. However, the core repertoire of policies enacted by sanctuary jurisdictions is limited to the extent that these attempts to disentangle immigration and law enforcement are operative only *after* undocumented individuals come into contact with the criminal justice system. The next section will examine situations that occur outside this dynamic, and strategies that attempt to prevent such encounters.

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<sup>4</sup> ICE names these detainer requests Detention and removal order (DRO) holds.

<sup>5</sup> However, these measures apply to undocumented residents who live in one of the five NYC burroughs, but not to undocumented workers who live in neighboring counties in New Jersey, where close collaboration with ICE was common during this period.

<sup>6</sup> Although in March 2017 federal agents began to accompany detainers with "ICE warrants", signed by an ICE officer, the intentional confusion around nomenclature did not have an effect on their legal argument. Neither based on criminal charges nor reviewed by a judge to determine the existence of probable cause, "ICE warrants" continue to be deemed insufficient to justify extending a period of detention. See for example *Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014) ou *Morales v. Chadbourne*, 996 F.Supp.2d 19.

## Migrant-specific policies in the age of Trump

The necessity of further strengthening protections for vulnerable immigrants, already a priority from the start of Bill de Blasio's first term as mayor, quickly became apparent after the presidential elections of 2016<sup>7</sup>. Indeed, as cooperation from local law enforcement had declined nationwide, the new administration developed strategies to pursue the goal of dramatically increasing deportations, championed during the presidential campaign. Executive Order 13768, published January 30<sup>th</sup>, 2017, untied ICE agents' hands by dismantling the *Priority Enforcement Program*<sup>8</sup>, which had attempted to narrowly target unauthorized immigrants with criminal records, while encouraging the release of individuals who were not considered threats to public safety. The new federal guidelines instructed ICE field offices to abandon these enforcement priorities, allowing agents to make apprehensions outside the criminal justice system. As a result, in addition to greatly increasing detention requests, the agency began making at-large arrests of individuals who have been released from local jails without charges, or of individuals who had received removal orders after the rejection of an asylum application. Agents could also freely conduct raids in public areas, during which any unauthorized immigrant encountered could be taken into custody and deported. According to ICE's internal guidelines, arrests were not to take place in "sensitive areas", enumerated as schools, hospitals, places of worship, or public demonstrations, though exceptions were permitted. Workplaces, public areas in residential neighborhoods, and courthouses, in particular, were not considered sensitive areas (Directive N. 11072.1).

Given the Trump administration's insistence that the aim of increased immigration enforcement was to protect the general public from criminal activity, this increase in non-criminal arrests hardly seems justified, but ICE officials repeatedly claimed that the agency had no choice given the refusal of local police departments to fully cooperate with federal immigration agents. As attempts to directly nullify or defund non-cooperation policies were being struck down by federal courts, the Trump administration specifically targeted sanctuary cities in retaliation. Through Operation 'Safe City', announced September 2017, it authorized increased and more indiscriminate enforcement in jurisdictions that refused to comply with federal requests for detention<sup>9</sup>. Consequently, although arrests of unauthorized immigrants by ICE increased nationwide by 44% from 2016 to 2017, and non-criminal arrests increased by 248%, these trends were more pronounced in New York City (MOIA 2018).

In NYC, total arrests increased by 88% (twice as much as nationally), and the number of non-criminal arrests increased 414% from 2016, the last full year of the Obama administration, to 2017<sup>10</sup>. As for deportations, total nationwide interior removals increased by

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<sup>7</sup> Bill de Blasio was elected mayor in 2013 and reelected to a second term in 2017.

<sup>8</sup> This program replaced Secure Communities, which the Obama administration terminated in 2014.

<sup>9</sup> Enforcement operations took place in Baltimore; Cook County, Illinois; Denver; Los Angeles; New York City; Philadelphia; Seattle; Santa Clara County, CA; Washington, D.C.; and the state of Massachusetts, leading to 498 arrests over four days (ICE News Release 2017).

<sup>10</sup> More precisely, total arrests in the New York area reached 2576 throughout 2017, of which 674 non-criminal (<https://www.ice.gov/sites/default/files/documents/Document/2017/localStats2017b.pdf>).

46% in the same period, whereas in New York City, ICE removals increased by 150%, with a 266% increase in non-criminal removals (MOIA 2018)<sup>11</sup>. As expressed by the Acting Director of ICE at the time, “sanctuary jurisdictions that do not honor detainers or allow [ICE] access to jails and prisons are shielding criminal aliens from immigration enforcement and creating a magnet for illegal immigration. As a result, ICE is forced to dedicate more resources to conduct at-large arrests in these communities” (ICE 2017). The decision made by city government to protect undocumented immigrants held for misdemeanors thus led to a backlash from ICE, leading to increased arrest and deportation of individuals with no serious criminal convictions<sup>12</sup>.

NYC government reacted on a number of fronts to counter ICE’s enhanced enforcement efforts, in particular by reinforcing access to legal defense and to accurate information about immigration law and constitutional rights. These migrant-specific policies, implemented in conjunction with local civil society actors, have seen their budgets increase substantially in recent years. One strategy particularly championed by the MOIA has been the organization of Know Your Rights information sessions, tailored to specific immigrant communities. Conducted in 10 different languages, with events in Spanish outnumbering those in English, these KYR sessions provide a forum to advise immigrant communities in regards to interactions with police and ICE officers, and to inform them of the limits to the authority of these agents (MOIA 2019: 35). Although “strategic assimilation” or “camouflaging” are common strategies on the part of undocumented immigrants to avoid drawing the attention of law enforcement (Chauvin and Garcés-Masareña 2014; Garcia 2019), these tactics are of little use in the case of federal agents seeking to apprehend particular individuals. For example, immigrants and New Yorkers more broadly are often unaware that they have no obligation to open the door of their home to ICE officers.

The City funded 681 such events in 2018, roughly half conducted by MOIA staff and half by community-based organizations that partner with the city. In comparison, a total of 658 events were organized throughout 2016 and 2017<sup>13</sup>. This sudden increase in the funding of Know Your Rights (KYR) sessions was a direct response to the surge of at-large arrests conducted by ICE agents in New York City. In 2018, KYR events in all five boroughs reached a total of 18,000 New York residents<sup>14</sup>. Given that participants share information within their own networks and social media, including applications that facilitate communication about sightings of ICE officers, the impact is clearly much greater.

Another strategy pursued by New York City authorities has been to improve access to legal counsel and representation for immigrant residents, both undocumented individuals seeking to obtain authorized status and legal residents seeking to obtain citizenship. According to the Office of Civil Justice, city government has increased funding sevenfold

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<sup>11</sup> In 2017, 2006 individuals were deported in the New York area, of which 791 non-criminal (<https://www.ice.gov/sites/default/files/documents/Document/2017/localStats2017b.pdf>).

<sup>12</sup> However, these numbers are still down compared to 2013-2014, when Secure Communities was fully effective nationally, using broad criteria for the detention and deportation of unauthorized immigrants who were identified through local jails.

<sup>13</sup> Data provided upon request by the MOIA.

<sup>14</sup> Data provided upon request by the MOIA.



since 2013 for free legal services for this population, attaining an allocation of \$48 million in 2019 (OCJ 2019: 33). In order to reach the individuals and families most in need of legal assistance, city-funded non-profit organizations have set up screening sessions in schools, hospitals, and community centers. In particular, these initiatives have helped long-term residents, including immigrants facing expiration of DACA or Temporary Protected Status, to renew their status or apply for permanent residency or other visas. Overall, these programs reached nearly 18,000 individuals in 2018, offering full legal representation in 79.7% of these cases (OCJ 2019: 46). When cases entailed an application for legal status with the United States Citizenship and Immigration Services (USCIS), the success rate has been close to 100% of the 2,482 applications sent through legal programs funded by NYC's Office of Civil Justice and decided by the federal agency in 2018, 96.5% were granted (OCJ 2019: 42). This support in obtaining legal status could be seen as a way of ending the prolonged "state of waiting" that arguably characterizes the existence of all unauthorized immigrants, and that sanctuary jurisdictions have traditionally done little to correct (Bagelman 2016).

City-funded legal defense services have also provided representation to defend individuals in deportation proceedings. The City offered legal representation in over 3,400 cases in 2018, out of a total of 31,000 removal cases initiated at the federal immigration court located in New York City (OCJ 2019: 37-39). 3000 of these cases were funded through programs targeting low-income immigrants with children, or unaccompanied children themselves<sup>15</sup>. However, as the number of deportation proceedings filed in New York immigration court has risen dramatically, by nearly 50% from 2017 to 2019, immigration attorneys have been unable to respond to the increase in demand, leaving increasing numbers of immigrants facing deportation without representation in court: 36.9% in 2019, compared to 12% in 2017 (TRAC 2020). The City's investment in legal services is thus particularly relevant in this context of penury.

The funding of Know Your Rights sessions and legal services clearly protects immigrants by helping them to maintain or secure legal status to reside on U.S. territory, or to minimize their risk of deportation by ICE. These efforts represent a laudable effort by city authorities to maintain the legitimacy of its status as a sanctuary city through direct and transparent means, via generously funded programs targeted exclusively for immigrant populations. Using the tools of law, local government actors attempt to prevent the situations of vulnerability created by precarious legal status and unnecessary interaction with federal immigration agents. If we tally the total number of New Yorkers who benefitted from KYR sessions (~18,000), mayoral legal defense services (17,967), and removal defense services funded by City Council (3000), we can estimate that city authorities assisted 39,000 immigrants in 2018 alone.

Clearly, when individuals are armed with the knowledge of the limited power of immigration authorities, the confines of their own homes can constitute a temporary haven.

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<sup>15</sup> Unlike the majority of immigrant legal services, funded through mayoral programs, these 3000 cases were funded through City Council programs, the New York Immigrant Family Unity Project (NYIFUP) and Immigrant Child Advocates' Relief Effort (ICARE). NYIFUP represented approximately 1,300 immigrants facing removal in FY2018, while ICARE represented 1,700 unaccompanied immigrant children facing removal.

However, it is the assistance provided by the city in obtaining legal immigration status that is of particular significance here: legal status represents the most reliable form of protection from deportation, although only citizenship can entirely eliminate this threat. As a pre-emptive measure, it precludes the power struggles that occur when undocumented immigrants become involved with law enforcement. Furthermore, instead of acting only within the bounds of municipal authority, this strategy intervenes at the federal level, through a separate component of the Department of Homeland Security, USCIS. Generally, the city's migrant-specific policies of protection draw on the expertise of the city's legal community and leverage constitutional and immigration law to their favor.

### Structural change in the criminal justice system

Despite the recent increases in at-large arrests of immigrants, many of whom have no criminal record, it is important to underline that interaction with the criminal justice system remains the primary means by which ICE identifies "removable aliens", even in cities with sanctuary policies. The NYPD no longer communicates to ICE information about the release dates of individuals in custody, or complies with detainer requests, in accordance with this policy. Nonetheless, the federal agency is still notified of the presence in local jails of individuals suspected to be removable, through the booking process which comprises obligatory background checks with records from the Federal Bureau of Investigation (FBI), linked to DHS databases<sup>16</sup>. Local jail bookings can thus help ICE agents locate such individuals within a given geographical area, as can scheduled appearances in court, which is public information<sup>17</sup>.

Indeed, in a cruel subversion of city authorities' efforts to protect immigrant residents through the legal system and the diffusion of knowledge about rights, it is precisely those individuals who choose to comply with judicial orders to appear in court that have recently become particularly vulnerable to arrest. As noted earlier, courthouses are part of the public spaces considered "non-sensitive" that have seen dramatic increases in ICE enforcement operations (Cunningham Warren 2017: 204). In New York state, whereas only 11 arrests occurred within and around state courthouses in 2016, 195 occurred in 2018, with 75% of arrests occurring in New York City (IDP 2019: 6). ICE has maintained that this trend is a necessary consequence of certain cities' refusal to allow full collaboration between local police and the federal agency.

ICE is not formally barred from the interior of courthouses, and in the past the agency occasionally made arrests *after* conviction of individuals for felonies, or with prior deportation orders. But it was exceedingly rare for individuals with no prior criminal record to

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<sup>16</sup> The program linked the FBI database of nation-wide criminal records and search warrants to that of ICE, both agencies being part of the Department of Homeland Security since 2004. As a result, fingerprint and other personal data that is transmitted during routine FBI background searches are now automatically shared with ICE agents.

<sup>17</sup> Information about court appearances is available online through the website of the New York State Unified Court System, of which New York City Criminal Court is a part.

be apprehended by federal agents at mere hearings and arraignments, in full view of plaintiffs, witnesses, jury members, and the general public. In response to these unprecedented arrests, many of them disruptive and violent, and under pressure from immigrant rights organizations, as well as the NYC Bar Association, the NY State Office of Court Administration passed a rule in April 2019 forbidding ICE agents from making arrests within state courthouses, which are property of the state of New York, not the federal government (Directive 1-2019). However, this rule has led to a displacement of enforcement activity to the immediate surroundings of courthouses (IDP 2020). It is noteworthy that the current escalation of immigration enforcement in the court system undermines immigrant populations' trust in the legal process, leaving them less likely to seek recourse when victimized, or to defend themselves when accused.

In this context, a previous policy shift outside the field of immigrant rights, involving the enforcement of low-level misdemeanors, has indirectly offered a significant measure of protection for immigrants at risk of deportation. The Criminal Justice Reform Act (CJRA), passed by New York City Council in June 2016 with support from the chamber's progressive wing as well the Mayor, was intended to protect low-income New Yorkers of color, who are disproportionately targeted by the police, from the immediate and long-term consequences of criminal arrest and eventual conviction for non-violent offenses. It created a civil procedure to handle five "quality of life" violations covered by the city's administrative code: drinking alcohol in public, littering, public urination, unreasonable noise, and all NYC Parks Rules violations. The NYPD supported the measure, as it encourages officers to conserve human and financial resources, while allowing them to continue issuing criminal summonses for these offenses to appear in New York City Criminal Court, when deemed necessary. A collaborative of legal experts at John Jay College estimate that the CJRA led to approximately 123,000 fewer criminal summonses being issued in the 18 months after the reform was implemented; this radical shift is primarily attributable to the 94% drop in criminal summonses for the five offenses covered by the reform (Tomascak, Grimsely et al. 2020: 2). Police officers in most cases (87%) now issue civil summonses for these offenses, which correspond to a standardized fine structure, or an option to perform community service. Offenders can pay fines online or by phone to the NYC Office of Trials and Hearings without making a scheduled appearance at a public trial. In this civil procedure, there are no criminal convictions on offenders' record, with their associated consequences on employment opportunities and immigration status. This process also eliminates the risk of having an outstanding warrant issued when an offender fails to appear in court, which can lead to arrest if an individual is stopped for any reason. The reform thus reduces contact between all New York residents and the criminal justice system, a clear benefit for undocumented immigrants.

A logical extension of the city's decriminalization of low-level offenses was the decision by the District Attorneys of Manhattan, Brooklyn, Queens, and the Bronx, in August 2017, to dismiss all outstanding warrants for these offenses, in cases that dated back at least 10 years, and in which the offender had not committed another offense subsequently (Manhattan District Attorney's Office 2017). This amounted to 644,000 warrants being dismissed in the four boroughs (Staten Island declined to participate). With these outstanding

warrants wiped from their record, individuals who had missed a court hearing or trial for an offense now covered by the new administrative procedure no longer risked criminal prosecution in the event of a police apprehension. For unauthorized immigrants, this represents a significant protection from arrest and possible criminal court proceedings that could lead to identification and deportation by ICE.

This criminal justice reform represents a sea change compared to the Broken Windows policing strategy put in place under Mayor Giuliani in the 1990s, which assumed that strict repression of minor offenses would lead to reductions in violent crime. It is also part of the dismantling of the Stop-and-Frisk policy adopted by Mayor Bloomberg in 2003, intended to prevent crime by instructing officers to use their discretion to pre-emptively question and search individuals observed displaying suspicious behavior. The policy was ended by court order in 2013 after a federal judge deemed that it created a pattern of racial profiling targeting primarily African-American and Latino men (*Floyd v. City of New York*). From the perspective of immigrant rights organizations, these strategies facilitated the NYPD bringing deportable immigrants into the criminal justice system, where they could come to the attention of ICE (IRD, ILRC & Fair Punishment Project 2017). During the years when they were operational, the assertion that the city's policy of limited cooperation was successfully maintaining "community trust" among immigrant populations was doubtful at best, despite the intentions of many police chiefs (Ferrel et al. 2006).

Although the Criminal Justice Reform Act was not specifically designed to prevent the interaction of the unauthorized immigrant population with the police, its impact in this regard is substantial, as it is for all New Yorkers. After the law went into effect on June 13<sup>th</sup> 2017, only 214,258 criminal summonses were issued for all offenses during the following two and half years, whereas 757,669 had been issued during the previous two and a half year period, constituting a 71% drop (Tomascak, Chauhan et al. 2020:2). Although the issuance of criminal summonses had already been declining in the past two decades, we can estimate that at least 500,000 citations to appear in criminal court were avoided through 2019, or about 200,000 per year. Given that NYC's roughly 477,000 undocumented residents constitute roughly 5.3% of the population of the city's five boroughs, and assuming that violation rates are identical among the undocumented population and the rest of the city's residents, approximately 10,600 criminal summonses for infractions committed by unauthorized immigrants were avoided each year after implementation of CJRA (MOIA 2019: 10)<sup>18</sup>. The population of undocumented individuals has clearly received a form of indirect protection, allowing them to forego the risk of publicly appearing in court, of having a warrant for their arrest issued in the case of non-appearance, and of having a possible criminal conviction on their record. If the same logic is applied to the dismissal of outstanding warrants (644,000 dismissed in 2017), we can estimate that 34,132 warrants pertaining to undocumented

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<sup>18</sup> Given that one individual can commit multiple offenses (and receive multiple summonses), the number of civil summonses issued does not correspond to the number of individuals involved, which is most likely lower. Furthermore, based on widely corroborated data indicating that *incarceration* rates for the foreign-born are significantly lower than among the general population, it is highly possible that violation rates among undocumented immigrants are also lower (Rumbaut et al 2006).

immigrants were erased<sup>19</sup>. The dismissal of outstanding warrants represents the elimination of a lesser risk, in the event of a future stop by police, but is nonetheless significant.

Without enacting legislation specifically targeted to the protection of undocumented immigrants, New York City Council and the city's largest District Attorney's Offices have thus reformed the criminal justice system in a way that reduces the risks associated with "quality of life" offenses for this population. This "universal" policy, applicable to all New York City residents, is an effective complement to the targeted policies of offering legal defense and informing immigrants of their rights and of the functioning of governmental institutions. However, these are not parallel and independent processes that result by differing means in protecting deportable individuals from interaction with federal immigration agents. Indeed, both developments are part of a broader reconfiguration within sanctuary jurisdictions of the role of the criminal justice system in the struggle to defend immigrant claims to residency.

## Conclusion

Throughout the periods of emergence and institutionalization of sanctuary policies in the United States, interactions with law enforcement have been the key point of contact between unauthorized immigrants and federal immigration authorities. Although one of the primary goals of sanctuary policies is to reassure immigrants that they can access *all* municipal services, communication between city employees in hospitals or social services departments and the federal government has never been a significant danger, in comparison. After the full rollout of Secure Communities in 2012, laying bare the consequences of automatic communication between police and immigration authorities, sanctuary cities have intensified their focus on protecting unauthorized immigrants who become involved with law enforcement, whether as defendants, witnesses, or temporary detainees whose charges are dropped. The refusal to honor detainer requests from ICE was an obvious step in the process of strictly circumscribing cooperation with federal immigration authorities to cases in which defendants face a true public safety risk.

By partly closing this jail-to-deportation pipeline, sanctuary jurisdictions have made fewer undocumented immigrants involved in the criminal justice system easily available to federal immigration agents, and are largely responsible for the inability of the Trump administration to increase the number of deportations per year beyond the levels observed in 2012-2014, when Secure Communities was fully operational. The Criminal Justice Reform Act of 2016, though adopted without explicit reference to New York's status as a sanctuary city, further reduced the number of deportable individuals that could be identified and located by ICE. However, in order to continue pursuing unrealistic deportation targets, and to punish sanctuary cities for their refusal to fully cooperate with the federal government, the agency has re-directed enforcement efforts to a larger community of immigrants. As a result, a rising share of immigrants deported has no past criminal convictions, increasing from 32% in 2016

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<sup>19</sup> Similarly, one individual can possess multiple outstanding warrants.

to 43% in 2018<sup>20</sup>. In sanctuary cities such as New York, where there is a diminishing pool of deportable immigrants who have been identified by the police and court systems, with public records attached to their name, it is likely that this proportion will continue to increase. New York City government has thus adapted by offering services to a larger community of immigrants, in order to reach those who are not involved and have little chance of becoming involved in the criminal justice system. The shift in strategy to pre-emptive measures is, in part, the result of the on-going process of disentanglement of immigration enforcement and criminal justice that is occurring in sanctuary jurisdictions. As minor, non-violent offenses are progressively decriminalized in New York City and other large cities, public authorities will be forced to be increasingly imaginative in their efforts to extend protections to a wider swath of the deportable immigrant population.

What are the long-term consequences of this shift in tactics on the part of sanctuary jurisdictions, by which fewer immigrants are brought to the attention of ICE through local criminal justice systems, and fewer immigrants are unaware of their rights or lacking legal counsel to regularize their status? One notable trend that we can expect to continue is the reliance of federal immigration agents on “Big Data” to find deportable individuals. Already, accounts are emerging on the use of surveillance technology, such as databases of license plates photographed by public and private security cameras across the country to locate targets, and of social media to trace them in real-time (Funk 2019). Although local jurisdictions can do little to protect their residents from these strategies, sanctuary policy in the future will probably involve restricting access to civil databases run by local and state authorities. Provisions to destroy personal data used to issue municipal identity cards in San Francisco and New York are a case in point. More recently, New York state legislation expanding access to drivers’ licenses to undocumented immigrants included a measure blocking federal immigration agencies from the Drivers’ and Motor Vehicles (DMV) database. As the post-Covid-19 world unfolds, these conflicts over access to data in the name of public health and safety seem increasingly likely.

Another consequence of the federal government’s thwarted efforts to increase deportations is that the backlash against sanctuary jurisdictions is becoming a more generalized attack on city governments and the larger public. Although threats to withhold federal funding from sanctuary cities have been discussed by conservative members of Congress in the past, the Trump administration was the first to attempt a coercive strategy by making a federal grant to police departments contingent upon full cooperation with immigration enforcement<sup>21</sup>. In a more creative act of retaliation, the Department of Homeland Security excluded all New York state residents from enrolling in airport security pre-clearance programs that shorten wait times, as a result of the state’s legislation regarding driver’s licenses for undocumented residents and the confidentiality of the corresponding

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<sup>20</sup> Numbers of individuals deported with or without criminal convictions, or with pending criminal charge are available at <https://www.ice.gov/removal-statistics/2016> and <https://www.ice.gov/removal-statistics/2018>.

<sup>21</sup> The City of Los Angeles protested the conditions imposed by the Attorney General for access to Community Oriented Policing Services in *City of Los Angeles v. William Barr* (2019), and the Ninth Circuit has temporarily blocked the provisions.

data<sup>22</sup>. It is unclear whether these attacks are simply meant to pressure local governments to comply with the federal government, or also to create resentment among the general population, but they raise the question of the future popularity of an issue that has not yet generated significant opposition in the university towns, large cities and progressive states where sanctuary policy has been adopted.

Finally, the increase in at-large arrests that has accompanied the decreasing availability of deportable immigrants through local criminal justice systems seems to be part of a larger strategy to emphasize the fundamental vulnerability of this population, perhaps in order to highlight the relative security procured by United States citizenship among conservative voters. The objective of periodic tactics such as the Safe Cities campaign targeting sanctuary cities, or the deployment of elite BORTAC agents from the Border Patrol to accompany ICE officers in these cities, is not necessarily to dramatically increase the number of individuals deported, as these operations are expensive and resource intensive. These episodic and highly mediatised operations primarily increase uncertainty among immigrant communities, similar to the manner in which the creation of a Denaturalization taskforce casts doubt on the permanence of United States citizenship through naturalization. Furthermore, the repeated announcements by the current administration of imminent large-scale raids, which lead to few arrests, begs the question of their veritable intent. As media space is saturated with images and messages reinforcing migrant insecurity, public space is emptied of immigrants at risk of deportation, who remain behind locked doors to avoid arrest. In this light, the federal government and local authorities in sanctuary jurisdictions are engaged in a struggle focused not only on deportation *per se*, but also more generally on access to a “common good” whose extension to racialized minorities has historically been problematic in the United States: the right to visibly and legitimately occupy public space.

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<sup>22</sup> Customs and Border Protection announced February 6<sup>th</sup>, 2020 that New York residents would no longer be eligible to apply for or renew “Trusted Traveler Programs”.

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