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The #Buffalo25 and the New Era of Immigration Enforcement

Nicole Hallett

University at Buffalo School of Law

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THE #BUFFALO25 AND THE NEW ERA OF IMMIGRATION ENFORCEMENT

Nicole Hallett[†]

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INTRODUCTION

The United States has entered a new era of immigration enforcement, including a return to the mass immigration raids last

[†] Assistant Clinical Professor of Law, University at Buffalo School of Law, Director of the Community Justice Clinic, J.D., Yale Law School, 2008. All legal work described herein was done with and by students of the Community Justice Clinic. Thanks to Meghan Zaldivar of the New York Immigration Coalition, Kirk Laubenstein of the Coalition for Economic Justice, Pastor Justo Gonzalez formerly of Pilgrim St. Luke’s Church, Jennifer Connor, Emily Terrana, Carra Stratton, Jeremy Spindler, and other members of Justice for Migrant Families, Movimiento Cosecha, Julie Mao of the National Lawyers Guild – National Immigration Project, and Emi MacClean of the National Day Laborer Network for their advocacy on behalf of the #Buffalo25.

Unless otherwise cited, the author obtained information regarding the events of October 18, 2016 through interviews conducted with eyewitnesses and affected parties, and shares that information here with permission from those interview subjects. Some names have been changed to protect the identity and privacy of those affected.

seen during the final years of the Bush Administration.¹ Because immigration raids impose enormous human costs on immigrant communities, they require an aggressive response by the immigrants' rights movement.

The clinic that I direct, the Community Justice Clinic at the University at Buffalo School of Law, was involved in responding to a series of workplace raids that occurred at four Mexican restaurants in Buffalo, New York in the waning days of the Obama Administration.² In addition to the owner of the restaurants and two managers, twenty-five workers were arrested.³ Nearly half of these workers were placed into removal proceedings or charged with illegal reentry.⁴ These workers, who became known as the "#Buffalo25," were at the center of a campaign that included legal advocates, organizers, faith leaders, and the community at large.⁵

The #Buffalo25 campaign's primary aim was to prevent the prosecution and deportation of the workers.⁶ However, the lessons drawn from the campaign also provide a blueprint for how to respond effectively to future raids in the Trump era. Above all, the #Buffalo25 shows how a "law and organizing" approach provides the best chance to protect individual raids victims as well as to transform the larger debate on immigration policy. Workplace raids, while devastating to individual victims, provide an opportunity to highlight the inhumane and cruel effects of the U.S. immigration system, which may bring the immigrants' rights movement closer to its ultimate goal of systemic reform.

In this Article, I will identify certain characteristics of effective raid responses, including creative lawyering, the integration of organizing and legal advocacy, and the use of social media and other new online organizing tools. I will also discuss some persistent challenges facing legal advocates doing raids defense, including the criminalization of immigration enforcement and the failure of prosecutorial discretion as a substitute for meaningful reform. Though these lessons are relevant to all types of immigration raids,

¹ See Stewart M. Powell, *Bush Administration Steps Up Immigration Raids*, HOUS. CHRON. (June 1, 2008, 5:30 AM), <https://perma.cc/6DJW-ELHP>.

² Phil Fairbanks, *25 Arrested – Including Owner – in Raids on Four Mexican Restaurants*, BUFFALO NEWS (Oct. 18, 2016), <https://perma.cc/P54A-PYHK>.

³ See *id.*; see also footnote text, *infra* note 57.

⁴ See Liz Robbins, *Owner Was Target, but Restaurant Workers Are Swept Up in Immigration Raids*, N.Y. TIMES (Nov. 11, 2016), <https://perma.cc/QEF2-88CS>.

⁵ See *The #Buffalo25 Need Our Help!*, N.Y. IMMIGR. COALITION (Oct. 28, 2016), <https://perma.cc/CML7-7N8E>.

⁶ See *id.*

I focus primarily on one type – raids that occur at workplaces, or “workplace raids.”

I. WORKPLACE RAIDS: A BRIEF HISTORY

At the time the #Buffalo25 raids occurred in October 2016, they seemed like an anomaly in immigration enforcement.⁷ Though the Obama Administration deported over 3.1 million people between 2008 and 2016,⁸ it had largely ceased the mass arrests of undocumented workers common during the Bush Administration.⁹ Under a policy promulgated by then-U.S. Department of Homeland Security (“DHS”) Secretary Janet Napolitano, U.S. Immigration and Customs Enforcement (“ICE”) was directed to focus workplace enforcement efforts on employers, not workers.¹⁰ ICE adopted an enforcement strategy that relied heavily on so-called “silent” raids, which involve an audit of the paperwork a business must maintain to show compliance with immigration laws.¹¹ As a result of this policy shift, during the first years of the Obama Administration the number of workers arrested in workplace raids plummeted while employer audits and fines rose.¹²

This was a marked shift from the Bush Administration, which had engaged in many large-scale and high profile raids of workplaces employing undocumented workers.¹³ Workplace arrests,

⁷ See John Burnett & Marisa Peñaloza, *How Kitchen Raids in Buffalo Sent Shock Waves Through Immigrant Rights Community*, NPR (Jan. 8, 2017, 8:35 AM), <https://perma.cc/KR5H-QPW3>.

⁸ See U.S. IMMIGRATION & CUSTOMS ENF’T, FISCAL YEAR 2016 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 2 (2016), <https://perma.cc/P7UY-5EBD>.

⁹ See Julia Preston, *A Crackdown on Employing Illegal Workers*, N.Y. TIMES (May 29, 2011), <https://perma.cc/D4DB-9MXQ>. Though the Obama administration moved away from mass workplace raids, it did not move away from raids entirely, as evidenced by the 2016 home raids on Central American asylum-seekers. See Julianne Hing, *The Obama Administration Is Restarting Immigration Raids, but to What End?*, NATION (May 13, 2016), <https://perma.cc/TQ4U-XLED>.

¹⁰ Memorandum from Marcy M. Forman, Dir., Office of Investigations, U.S. Immigration & Customs Enf’t, U.S. Dep’t of Homeland Sec., to Assistant Dir., Deputy Assistant Dirs. et al., Worksite Enforcement Strategy (Apr. 30, 2009), <https://perma.cc/J5NS-M8BB> (“ICE must prioritize the criminal prosecution of the actual employers who knowingly hire illegal workers because such employers are not sufficiently punished or deterred by the arrest of their illegal work force.”).

¹¹ See Preston, *supra* note 9.

¹² See ANDORRA BRUNO, CONG. RESEARCH SERV., R40002, IMMIGRATION-RELATED WORKSITE ENFORCEMENT: PERFORMANCE MEASURES 4-10 (2015), <https://perma.cc/G6GC-3WNY>.

¹³ See, e.g., Yvonne Abraham & Brian R. Ballou, *350 Are Held in Immigration Raid*, BOS. GLOBE (Mar. 7, 2007), <https://perma.cc/3G5C-8VZC>; Steven Greenhouse, *Crackdown Upends Slaughterhouse’s Work Force*, N.Y. TIMES (Oct. 12, 2007), <https://perma.cc/J4EA-267R>; Adam Nossiter, *Hundreds of Workers Held in Immigration Raid*, N.Y.

which remained low throughout the 1990's,¹⁴ increased twelve-fold from 2002 to 2008.¹⁵ Most of those arrested were workers; less than 2.25% of workplace arrests in 2008 were of employers.¹⁶ One of the largest of these raids occurred in May 2008 at an Agriprocessors, Inc. plant in Postville, Iowa, where almost 400 undocumented immigrants were arrested and 262 were ultimately convicted of fraudulent use of identity documents.¹⁷ The government's utilization of fast-track trials to convict the workers was widely condemned by immigration and criminal defense experts.¹⁸ Another high profile politically divisive raid followed later that summer.¹⁹

These workplace raids led to an anti-enforcement backlash that changed the immigration debate at the time.²⁰ Critics of the Bush Administration's workplace enforcement policy pointed to the humanitarian costs of the raids, including their effect on minor

TIMES (Aug. 25, 2008), <https://perma.cc/WPD3-H4WW>. See Shoba Sivaprasad Wadhia, *Under Arrest: Immigrants' Rights and the Rule of Law*, 38 U. MEM. L. REV. 853, 862-73 (2008), for a discussion of other large-scale workplace raids during the Bush administration.

¹⁴ See Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 209-11 (2007).

¹⁵ See DORIS MEISSNER & DONALD KERWIN, MIGRATION POLICY INST., DHS AND IMMIGRATION: TAKING STOCK AND CORRECTING COURSE 32 (2009), <https://perma.cc/VA7C-5DKG>.

¹⁶ See U.S. DEP'T OF HOMELAND SEC., WORKSITE ENFORCEMENT STRATEGY (2009), <https://perma.cc/C736-VJAX>.

¹⁷ See Julia Preston, *270 Illegal Immigrants Sent to Prison in Federal Push*, N.Y. TIMES (May 24, 2008), <https://perma.cc/UY5S-8HAJ>; see also Spencer S. Hsu, *Immigration Raid Jars Small Town*, WASH. POST (May 18, 2008), <https://perma.cc/B7QV-N59B>. See Cassie L. Peterson, Note, *An Iowa Immigration Raid Leads to Unprecedented Criminal Consequences: Why ICE Should Rethink the Postville Model*, 95 IOWA L. REV. 323, 332-34 (2009), for a detailed account of the Postville raid and its aftermath.

¹⁸ See, e.g., Peter R. Moyers, *Butchering Statutes: The Postville Raid and the Misinterpretation of Federal Criminal Law*, 32 SEATTLE U. L. REV. 651 (2009); see also Spencer S. Hsu, *Expedited Trials of Illegal Immigrants Are Questioned*, WASH. POST (July 25, 2008), <https://perma.cc/K3HG-TD7E>. The legal theory used to convict the Postville workers of identity fraud was eventually struck down by the U.S. Supreme Court in *Flores-Figueroa v. United States*, 556 U.S. 646 (2009). The court held that to be convicted of aggravated identity theft, an individual must know that a false social security number belongs to a real person. *Id.* at 657. The government had argued that there was no mens rea requirement and that merely using a social security number that was not one's own was sufficient. See Adam Liptak & Julia Preston, *Justices Limit Use of Identity Theft Law in Immigration Cases*, N.Y. TIMES (May 4, 2009), <https://perma.cc/2JWA-YCWK>.

¹⁹ See Spencer S. Hsu, *Raid's Outcome May Signal a Retreat in Immigration Strategy, Critics Say*, WASH. POST (Sept. 2, 2008), <https://perma.cc/LM5T-QNND>.

²⁰ Benjamin Crouse, Comment, *Worksite Raids and Immigration Norms: A "Sticky" Problem*, 92 MARQ. L. REV. 591, 611-12 (2009); Jens Manuel Krogstad, *Iowa Raid Helps Shape Immigration Debate*, USA TODAY (May 9, 2013, 9:16 PM), <https://perma.cc/C3PM-ZSCD>.

children,²¹ and on the economies of the small towns where the raids took place.²² Scholars noted that an increase in immigration raids had led to widespread Fourth and Fifth Amendment violations.²³ More fundamentally, the raids did not deter illegal immigration or unauthorized work,²⁴ but did put undocumented workers at an increased risk of labor exploitation.²⁵ Obama came in to office promising to move away from workplace raids for these reasons.²⁶

Republicans were unhappy with the decrease in workplace raids.²⁷ Nevertheless, the issue largely faded from public view, with focus turning instead to the possibility of comprehensive immigration reform and, after reform efforts failed in 2013,²⁸ to President Obama's immigration executive actions protecting "dreamers" and parents of U.S. citizens from deportation in 2012 and 2014.²⁹ Don-

²¹ See RANDY CAPPS ET AL., *THE URBAN INST. & NAT'L COUNCIL OF LA RAZA, PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN* (2007), <https://perma.cc/B6T2-YABN>; Sherryl Zounes, *Children Without Parents: An Unintended Consequence of ICE's Worksite Enforcement Operations*, 21 GEO. IMMIGR. L.J. 511 (2007).

²² See, e.g., Steven Greenhouse, *Shuttered Meat Plant Edges Back into Business, but Its Town Is Still Struggling*, N.Y. TIMES (Dec. 4, 2008), <https://perma.cc/79EK-YYSW>.

²³ Stella Burch Elias, "Good Reason to Believe": *Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza*, 2008 WIS. L. REV. 1109, 1135 (2008); Raquel Aldana, *Of Katz and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081 (2008).

²⁴ The number of undocumented immigrants is tied to economic needs, not enforcement efforts. See JEFFREY S. PASSEL & D'VERA COHN, PEW RESEARCH CTR., *SIZE OF U.S. UNAUTHORIZED IMMIGRANT WORKFORCE STABLE AFTER THE GREAT RECESSION* (2016), <https://perma.cc/YCR3-NFEX>.

²⁵ See Kati L. Griffith, *Laborers or Criminals? The Impact of Crimmigration on Labor Standards Enforcement*, in *THE CRIMINALIZATION OF IMMIGRATION: CONTEXTS AND CONSEQUENCES* 89, 95-96 (2014); Leticia M. Saucedo, *Immigration Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Immigrant Workplace*, 38 FORDHAM URB. L.J. 303, 308 (2010).

²⁶ See Jennifer Ludden, *Immigration Experts Predict Fewer Workplace Raids*, NPR (Dec. 2, 2008, 1:27 PM) (quoting candidate Obama as being opposed to workplace raids), <https://perma.cc/Q2RC-Z4W6>.

²⁷ Brian Bennett, *Republicans Want a Return to Workplace Immigration Raids*, L.A. TIMES (Jan. 27, 2011), <https://perma.cc/3VXH-VJZB>.

²⁸ The Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013), otherwise known as "comprehensive immigration reform," passed the Senate on a 68-32 vote on June 27, 2013. *S.744 - Border Security, Economic Opportunity, and Immigration Modernization Act*, CONGRESS.GOV <https://perma.cc/CGQ5-CKVR>. It was never taken up in the House of Representatives and declared dead in 2014. Steven T. Dennis, *Immigration Bill Officially Dead: Boehner Tells Obama No Vote This Year, President Says*, ROLL CALL (June 30, 2014, 2:24 PM), <https://perma.cc/264X-K253>.

²⁹ Memorandum from Janet Napolitano, Sec'y of Homeland Sec., U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot. et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), <https://perma.cc/3YNE-B98F>; Memorandum

ald Trump revived the debate about workplace raids during the 2016 presidential primaries when immigration enforcement emerged as a key focus of his campaign.³⁰ After his surprise election, Trump's transition team made clear that workplace raids would be a highly visible element of the new Administration's restrictionist immigration policy.³¹ Indeed, in the first year of Trump's presidency, several large-scale workplace raids took place.³² For instance, in January 2018, ICE conducted raids on ninety-eight 7-Eleven stores in seventeen states, arresting workers who could not prove they were legally in the United States.³³ Though the raids were portrayed as a crackdown on employers who employ undocumented workers, it appears that no employers were arrested.³⁴

Recent policy changes suggest that workplace raids may become even more common. Though DHS always retained the ability to make so-called "collateral arrests" when conducting enforcement actions against employers, the practice was discouraged during the Obama Administration.³⁵ Now, such collateral arrests are on the rise.³⁶

dum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs. et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014), <https://perma.cc/V9PZ-W28H>.

³⁰ Nick Corasaniti, *Donald Trump Releases Plan to Combat Illegal Immigration*, N.Y. TIMES (Aug. 16, 2015), <https://perma.cc/JQ39-FZLV>.

³¹ Brian Bennett, *As Soon as He Is Inaugurated, Trump Will Move to Clamp Down on Immigration*, L.A. TIMES (Jan. 19, 2017, 3:00 AM), <https://perma.cc/DV5C-XQBU>; see also Ruben Vives, *'I Left My Tacos on the Table and Took Off Running.'* *Immigrants Remember the Workplace Raids of the 1980s*, L.A. TIMES (Jan. 14, 2017, 5:00 AM), <https://perma.cc/2DQT-PN3T>.

³² See, e.g., Sarah Fowler, *55 Detained in Mississippi Restaurant Immigration Raids*, USA TODAY (Feb. 23, 2017, 11:38 AM), <https://perma.cc/28AH-FL7R>.

³³ Patricia Mazzei, *Immigration Agents Target 7-Eleven Stores in Push to Punish Employers*, N.Y. TIMES (Jan. 10, 2018) <https://perma.cc/9VEA-BUL4>.

³⁴ *Id.*

³⁵ See Nicholas Kulish et al., *Immigration Agents Discover New Freedom to Deport Under Trump*, N.Y. TIMES (Feb. 25, 2017), <https://perma.cc/UV95-9PL9>.

³⁶ See, e.g., Jennifer Medina & Miriam Jordan, *A Broader Sweep*, N.Y. TIMES (July 21, 2017), <https://perma.cc/35YC-4TAM>. Conservative groups such as the Center for Immigration Studies have expressed dissatisfaction with the lack of high profile workplace raids. See Brenden Kirby, *The Soft Spot in Trump's Immigration Shift: Workplace*, LIFEZETTE (June 26, 2017, 6:21 AM) (quoting Mark Krikorian, executive director of the Center for Immigration Studies), <https://perma.cc/ACB5-R27M>. This dissatisfaction suggests that Trump may be compelled to increase workplace raids in response to calls from his base.

II. THE STORY OF AN IMMIGRATION RAID

The #Buffalo25 raids occurred three weeks before the 2016 presidential election at a moment of transition in U.S. politics. At the time, it was widely assumed that Hillary Clinton would prevail in the election and that she would in large part continue the immigration policies of her predecessor.³⁷ In this context, the raids seemed like the result of an overzealous local ICE office or lax oversight from higher level officials in DHS. With the election of Donald Trump, the raids began to look more like a harbinger of things to come.³⁸ The #Buffalo25 raids and their aftermath provide a case study for those thinking about how to effectively respond to workplace raids in the Trump era. Workplace raids – indeed large-scale immigration raids of all kinds – present major advocacy challenges, but they also provide opportunities to push for systemic reform.

A. *The #Buffalo25 Restaurant Raids*

On the morning of October 18, 2016, Jose was cutting vegetables in the kitchen of La Divina, a Mexican restaurant and grocery store in the Kenmore neighborhood of Buffalo, New York.³⁹ Jose had worked as a cook at La Divina for four months, though he had been living in the U.S. for longer. The day started like any other, with Jose and several other employees arriving at the restaurant to do food preparation before the restaurant opened.⁴⁰

Without warning, half a dozen armed officers entered the restaurant, pointed guns at the workers, and ordered them onto the floor.⁴¹ Jose and his colleagues spent the next hour handcuffed while ICE agents executed a search warrant at the restaurant. Eventually, the workers were interrogated, fingerprinted, arrested, and taken to the local ICE office for processing. The agents were rude and abusive, swearing at Jose when he couldn't remember the exact address where he was living. When he asked what was happening, he was told to shut up. It was, as Jose recounted sometime afterward, one of the most terrifying experiences of his life.

³⁷ In fact, Clinton came out against the immigration raids targeting Central American asylum-seekers in January 2016. See Peter Nicholas, *Hillary Clinton Opposes Immigration Raids; Backs 'Due Process' for Undocumented Children*, WALL STREET J.: WASHINGTON WIRE (Jan. 12, 2016, 7:04 AM), <https://perma.cc/L4FJ-WBJ6>.

³⁸ Robbins, *supra* note 4.

³⁹ *La Divina Restaurant Back Open after Raid*, WRGZ (Oct. 21, 2016, 6:46 PM), <https://perma.cc/KS4S-QK99>.

⁴⁰ Burnett & Peñaloza, *supra* note 7.

⁴¹ *See id.*

While the La Divina raid was taking place, ICE agents were also conducting raids at three other Mexican restaurants and several private apartments all owned by restaurateur Sergio Mucino.⁴² The simultaneous raids proceeded along similar lines to the raid at La Divina. Bystanders described the scene as “bees around a honey nest” as agents carried papers, computers, and a safe out of the restaurants.⁴³ Individuals inside described the terror they felt as agents entered with guns drawn, before handcuffing and arresting them. At one private apartment, a mother was arrested in front of her two young children, ages four and two. The children were subsequently placed with Child Protective Services.⁴⁴ At another residence, a married couple was arrested and their life savings were confiscated, including thousands of dollars they had saved for their seventeen-year-old daughter’s college education.⁴⁵

According to the criminal complaint filed against Mucino, the restaurateur, the raids were the result of a two-and-a-half year investigation by Homeland Security Investigations,⁴⁶ the investigatory arm of ICE.⁴⁷ The complaint charged Mucino and two managers with conspiracy to harbor “unauthorized aliens.”⁴⁸ It alleged that Mucino paid his largely undocumented workforce off the books, recruiting them from Mexico to take jobs and providing them with lodging and transportation to and from the restaurants.⁴⁹ The workers, the complaint alleged, were being paid under the minimum wage while Mucino netted \$50,000 a week in cash that he had failed to report to tax authorities.⁵⁰ In addition to a safe, agents also confiscated three vehicles, including a Porsche that Mucino bought with some of the ill-gotten gains from the criminal scheme.⁵¹

⁴² See Fairbanks, *supra* note 2.

⁴³ Callan Gray, *Witnesses Describe the Raids on Four Local Mexican Restaurants*, WIVB (Oct. 18, 2016, 7:34 PM), <https://perma.cc/WQ3S-S9AR>.

⁴⁴ Phil Fairbanks, *Protest Targets Detention of Undocumented Workers*, BUFF. NEWS (Oct. 25, 2016), <https://perma.cc/J4DP-6U7F>.

⁴⁵ Robbins, *supra* note 4.

⁴⁶ See Criminal Complaint, *United States v. Mucino*, No. 1:16-mj-00147 (W.D.N.Y. Oct. 17, 2016) (Bloomberg Law, Court Dockets).

⁴⁷ *Homeland Security Investigations*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://perma.cc/D9Y3-Z7CF>.

⁴⁸ Criminal Complaint, *supra* note 45, at ¶ 1.

⁴⁹ *Id.* at ¶¶ 12, 17.

⁵⁰ *Id.* at ¶ 12.

⁵¹ Press Release, U.S. Attorney’s Office, W. Dist. of N.Y., *Owner of Four Local Restaurants And Two Others Charged In Conspiracy To Harbor Illegal Aliens* (Oct. 18, 2016), <https://perma.cc/G9TY-6GVX>; Gray, *supra* note 43.

The investigation began with a tip from a former employee,⁵² who allegedly had been fired after he was caught stealing. An important breakthrough in the investigation occurred in August 2016, when police responded to a complaint that a group of Latino men were playing basketball at a school after dark in the suburban community of Orchard Park.⁵³ When the men could not produce U.S. identification, border patrol was called, and the men were arrested.⁵⁴ Many of those arrested turned out to work at the restaurants under investigation.⁵⁵ One of the restaurant's managers contacted ICE to try to return money owed to the arrested workers and ended up providing investigators with information needed to move the investigation forward.⁵⁶ The #Buffalo25 raids happened two months later, in October 2016.

Though Mucino, as the employer, was ostensibly the target of the investigation, dozens of workers were also arrested. Early reports put the number of arrests at twenty-five,⁵⁷ though it later turned out to be more.⁵⁸ Some of these individuals were ultimately released by ICE under the Obama Administration's prosecutorial discretion guidelines.⁵⁹ Some were placed in removal proceedings.⁶⁰ Finally, nine individuals were charged with illegal reentry into the country after a previous deportation, a felony under federal law.⁶¹ Some of the workers were released on ankle monitors but others were denied bond and remained in detention.⁶²

⁵² Criminal Complaint, *supra* note 45, at ¶ 12; Fairbanks, *supra* note 2.

⁵³ See Evan Anstey, *10 Illegal Immigrants Found on Orchard Park School Grounds*, WIVB (Aug. 12, 2016, 5:50 PM), <https://perma.cc/T23Q-WRSU>; Robbins, *supra* note 4.

⁵⁴ Robbins, *supra* note 4.

⁵⁵ Criminal Complaint, *supra* note 45, at ¶ 30.

⁵⁶ Robbins, *supra* note 4.

⁵⁷ Fairbanks, *supra* note 2.

⁵⁸ Accurate numbers of individuals arrested were obtained through legal intakes after the raids and differ from early numbers provided by ICE and the U.S. Attorney's Office. For instance, early reports noted that seven individuals had been charged with illegal reentry, whereas the legal team was able to identify nine individuals who were so charged. See *Owner of WNY Restaurants Charged*, WGRZ (Oct. 18, 2016, 11:39 PM ET), <http://perma.cc/V45X-ETQF>.

⁵⁹ See Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't et al., *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014), <https://perma.cc/ZHE4-FPG7>.

⁶⁰ The information regarding individuals granted prosecutorial discretion and placed into removal proceedings has been gathered by legal and organizing teams.

⁶¹ See 8 U.S.C. § 1326(a)-(b) (2017) (prescribing criminal penalties for illegal reentry into the country).

⁶² Phil Fairbanks, *Two Workers Detained, Two Released After Raids at Mexican Restaurants*, BUFF. NEWS (Oct. 19, 2016), <https://perma.cc/JY8Q-A6B7>.

B. Community Response

The raids sparked outrage in Buffalo, both within and outside the city's large, immigrant community. News of the raids broke early in the morning, and the media arrived at the restaurants before the raids concluded.⁶³ Religious organizations, community groups, legal services providers, and community members quickly started a campaign called #Buffalo25 to stop the prosecution and deportation of workers arrested in the raids.⁶⁴ Within days of the raids, three different public actions took place – a press conference with faith leaders calling for the release of the workers,⁶⁵ a rally outside one of the restaurants,⁶⁶ and a march to the immigration court in downtown Buffalo.⁶⁷

Beyond these initial displays of public support for the workers, however, the community faced an immediate hurdle to organizing a response: no community group in Buffalo was actively engaged in immigrants' rights advocacy or organizing. This gap was quickly filled by Movimiento Cosecha (hereinafter referred to as "Cosecha"),⁶⁸ a relatively new national organizing group based in Boston. A team of Cosecha organizers arrived in Buffalo to support the arrested workers during one of their hearings.⁶⁹ The campaign received further support from several local organizers, labor unions, and faith leaders,⁷⁰ among other stakeholders.

The campaign's first goal was to identify the workers arrested in the raids. Inquiries made to ICE were met with hostility or silence. ICE's only response was that all of the workers had been screened for human trafficking and none were found to fit the criteria. However, by the end of the first week, the organizing team made contact with one of the workers, which led to more contacts. Within two weeks of the raids, the campaign had identified almost all of the workers arrested in the raids. Only then did it become

⁶³ Several media outlets recorded video of ICE agents conducting the raid and search of Don Tequila, one of the four restaurants. See *Owner of WNY Restaurants Charged*, *supra* note 58; Gray, *supra* note 43.

⁶⁴ *The #Buffalo25 Need Our Help!*, *supra* note 5.

⁶⁵ See *Press Conference Responds to Recent Raid at Local Mexican Restaurants*, WKBW (Oct. 20, 2016, 10:06 AM), <https://perma.cc/C3VR-BTF3>.

⁶⁶ Mike Arena, *Rally at Don Tequila Two Days After Raids*, SPECTRUM NEWS BUFF. (Oct. 20, 2016, 9:50 PM), <https://perma.cc/B6TZ-NCNN>.

⁶⁷ Fairbanks, *supra* note 44.

⁶⁸ MOVIMIENTO COSECHA, <https://perma.cc/8BMA-5JVE>.

⁶⁹ See Ellie Dorritie, *#Buffalo25 Defy ICE*, WORKERS WORLD (Nov. 3, 2016), <https://perma.cc/KN3J-GLYL>.

⁷⁰ See, e.g., Rev. Justo González II, *Viewpoints: Stand in Solidarity with #Buffalo25*, BUFF. NEWS (Nov. 17, 2017), <https://perma.cc/Y922-S9Y4>.

clear that many of the workers had been released without being placed in removal proceedings. The campaign quickly focused on the four workers who were facing removal, as well as the nine individuals charged with illegal reentry.

Though the local press had reported the Orchard Park raid when it occurred,⁷¹ it did not percolate into the public consciousness like the restaurant raids did two months later. Once its connection to the later raids became clear, the campaign expanded to include individuals arrested in that raid as well, many of whom were also facing deportation and/or criminal charges.

The campaign developed both public and private strategies to help the workers arrested in #Buffalo25 raids. Many of the workers were not facing legal action and so getting involved in the public campaign only put them at risk of landing on ICE's radar once again. Indeed, after making initial contact with organizers, some of those not facing legal action disappeared into the wind.

For those workers facing legal action, the organizing team developed a multi-pronged strategy to pressure ICE and the U.S. Attorney's Office to drop the charges and removal proceedings against the workers:

(1) Social Media and Press Coverage: From the very beginning, the organizing team recognized the importance of harnessing social media and press coverage. The team used the hashtag, #Buffalo25, to raise awareness of the campaign on Facebook and Twitter.⁷² They circulated several petitions on social media that people could sign and share as a way of increasing community involvement. In addition to inviting local press to campaign events, the team attracted the interest of national media, such as *The New York Times* and *National Public Radio*.⁷³

(2) Direct Actions: The organizing team used early court dates and ICE check-ins of some of the arrested workers as opportunities for direct actions outside of ICE offices.⁷⁴ At one of these actions, eight people were arrested for blocking the door of a federal build-

⁷¹ Anstey, *supra* note 53.

⁷² See Feed of #Buffalo25, TWITTER, <https://perma.cc/A2EF-84B9>.

⁷³ See, e.g., Burnett & Peñaloza, *supra* note 7; Robbins, *supra* note 4.

⁷⁴ See, e.g., Mike Arena, *Restaurant Workers Arrested in Immigration Raids Rally With Supporters*, SPECTRUM NEWS BUFFALO (Oct. 25, 2016, 8:40 PM), <https://perma.cc/U89V-KUAV>; Stephanie Barnes, *Rally in Support of Undocumented Workers*, WGRZ (Oct. 25, 2016, 11:54 AM), <https://perma.cc/23BN-GDK4>; Patrick Koster, *Advocates for Rounded-up Workers Show Support for the 'Buffalo 25'*, WBFO 88.7 (Oct. 25, 2016), <https://perma.cc/M25R-443G>.

ing.⁷⁵ These actions further increased press coverage and public support of the campaign.

(3) Pressure on Elected Officials: After the raids but before the 2016 presidential election, the organizing team decided to target Hillary Clinton in the hopes that her campaign would put pressure on local ICE officials to exercise discretion on the workers' cases. Within two weeks of the raids, Cosecha organized a week-long caravan to Clinton campaign headquarters across three states (New York and the swing states of Pennsylvania and Ohio).⁷⁶ The organizers ultimately occupied a Clinton campaign office in Pittsburgh.⁷⁷ The goal of the caravan was two-fold: to support the arrested workers and to connect the raids to a broader immigrants' rights agenda in protest of the Obama Administration's record number of deportations. After the 2016 election, the focus shifted to U.S. Senators Chuck Schumer and Kirsten Gillibrand as potential political allies. A Cosecha protest targeted Senator Schumer's Buffalo office and labor allies made calls to local Schumer staff members. As a result, both U.S. Senators agreed to attempt to intervene with ICE on the workers' behalf.⁷⁸

(4) Family Support: All of the arrested workers lost their jobs after the raids and many of the workers were unable to procure other jobs because the local restaurant industry became skittish about employing undocumented workers. Many of the families affected could not afford to pay November's rent as a result of the loss of income. The community came together to provide financial support for the workers and their families by hosting a series of Community Taco fundraisers at a local church⁷⁹ and by organizing an online fundraising drive.⁸⁰ The campaign ended up supporting a handful of the families for many months while they fought their deportation and criminal charges. This aspect of the campaign was critical because it allowed the workers to fight their cases when

⁷⁵ Mike Arena, *Protesters Charge Doors of Buffalo's Immigration Office, 8 Arrested*, SPECTRUM NEWS BUFF. (Oct. 27, 2016, 10:20 PM), <https://perma.cc/R9LF-FH6R>.

⁷⁶ Brett Wilkins, *'Buffalo 25' Undocumented Immigrants Begin Week-Long Protest March Against Deportations*, DAILY KOS (Nov. 2, 2016, 11:51 AM PDT), <https://perma.cc/8TTG-BDTD>.

⁷⁷ Ben Norton, *Migrant Justice Activists Occupy Hillary Clinton Campaign Office, Demand End to Raids and Deportations*, SALON (Nov. 4, 2016, 9:50 AM), <https://perma.cc/2S86-ML8C>.

⁷⁸ Calls for Rep. Brian Higgins to do the same were unsuccessful.

⁷⁹ Paola Suro, *Buffalo 25 Members Hold Fundraiser by Selling Tacos*, WKBW (Jan. 23, 2017, 12:42 AM), <https://perma.cc/WZ3B-AFAW>.

⁸⁰ *Support the Families of the #Buffalo25*, GENEROSITY, <https://perma.cc/R6U3-R5KX>.

they would have otherwise had to accept plea deals and deportation.

This four-prong strategy not only kept attention on the raids for months when they otherwise would have faded from the public's attention, but also allowed pressure to build on the key decision-makers, most importantly, ICE and the U.S. Attorney's Office.

C. Legal Response

Immediately, it became clear that the detained workers would need legal advice and representation. While Buffalo has a large refugee and asylee population,⁸¹ and there are multiple legal services organizations that serve the refugee community,⁸² none of these organizations had done raids response nor had the capacity to do so. Another organization, the Volunteer Lawyers Project of the Erie County Bar Association,⁸³ represents immigrants seeking many different types of relief, but the organization's intake criteria foreclose representation for all but the strongest cases. The lawyers that ended up heeding the call for legal representation were a combination of local labor lawyers, the Community Justice Clinic at the University at Buffalo School of Law,⁸⁴ and lawyers from national immigrants' rights organizations such as the National Immigration Project of the National Lawyer's Guild and the National Day Laborer Organizing Network.⁸⁵

This group of lawyers fanned out across the state to interview workers detained in local jails across upstate New York, as well as workers that had been released, to screen for possible legal relief. As is often the case for undocumented immigrants, most of the workers had no obvious strong legal claim to stay in the United States – at least upon first impression. However, the legal team quickly identified two possible avenues for relief. The first depended on possible constitutional violations that had occurred

⁸¹ See Joel Rose, *Resettled Refugees Help to 'Bring Buffalo Back'*, NPR (Dec. 2, 2015, 4:28 AM ET), <https://perma.cc/9RJ9-QDTP>; Jerry Zremski, *Immigrants End the Decline in Erie County Population*, BUFFALO NEWS (Mar. 25, 2015), <https://perma.cc/ZEK3-GMZ8>.

⁸² See, e.g., JOURNEY'S END REFUGEE SERVS., <https://perma.cc/U8NG-7R27>; CATH. CHARITIES BUFF., <https://perma.cc/9K47-BXVD>; INT'L INST. BUFF., <https://perma.cc/M6W9-JQH5>.

⁸³ *The Immigration Program at VLP*, VOLUNTEER LAW. PROJECT, <https://perma.cc/59NR-HETE>.

⁸⁴ *Community Justice Clinic*, U. BUFF. SCH. L., <https://perma.cc/F373-ZKB3>.

⁸⁵ NAT'L IMMIGR. PROJECT NAT'L LAW. GUILD, <https://perma.cc/R2EA-TPGM>; NAT'L DAY LABORER ORGANIZING NETWORK, <https://perma.cc/68NJ-2S2Q>.

during the raids. Many of the workers had been handcuffed for hours before they were even questioned about their immigration status. For the workers in removal proceedings, the circumstances of their detention and arrest gave rise to a possible claim under the Fourth and Fifth Amendments of the U.S. Constitution because ICE lacked probable cause for the arrests and had targeted them solely based on their Latino appearance. These workers would be able to file a motion to suppress the information obtained about their immigration status during and after the arrests.⁸⁶ If the motion to suppress were granted, and the government's evidence of their immigration status were thrown out, they could move to have their removal proceedings terminated.⁸⁷ This claim was even stronger for those workers arrested in the Orchard Park raid in what seemed like a clear example of racial profiling. However, this wasn't going to be able to help the workers who had previous removal orders and who were facing reentry charges because ICE could simply choose to reinstate their removal orders without a court hearing.⁸⁸ It also did not address their criminal charges.⁸⁹

The second strategy depended on the fact that the workers had been the victims of labor exploitation at the hands of their employer. The criminal complaint against the owner alleged that workers made as little as \$500 for up to eighty-four hours of work done in a single week, which amounted to less than \$6.00 per hour and no overtime.⁹⁰ The truth was more varied, but just as egregious. Some of the wait staff made no salary at all and worked solely for tips, and some of the kitchen staff made even less than \$500 per week.⁹¹ This exploitation did not give rise to an immediate claim

⁸⁶ See AM. IMMIGRATION COUNCIL, PRACTICE ADVISORY: MOTIONS TO SUPPRESS IN REMOVAL PROCEEDINGS: A GENERAL OVERVIEW (2017), <https://perma.cc/4DKN-Y7R8>, for an overview of motions to suppress in the immigration context.

⁸⁷ Termination of removal proceedings does not give rise to legal status in the U.S. but does prevent a removal order from being entered. See 3A C.J.S. *Aliens* § 1821 (2017).

⁸⁸ 8 C.F.R. § 1241.8(a) (2017) ("An alien who illegally reenters the United States after having been removed, or having departed voluntarily, while under an order of exclusion, deportation, or removal shall be removed from the United States by reinstating the prior order.")

⁸⁹ It is well established that a defendant cannot seek to suppress his or her identity, even when a constitutional violation has occurred. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039-40 (1984) (citations omitted); *United States v. Del Toro Gudino*, 376 F.3d 997, 1001-02 (9th Cir. 2004). In the case of those individuals with prior removal orders, the government already had evidence establishing the elements of the crime and only needed to know their identity to connect them to that independently obtained evidence.

⁹⁰ See Criminal Complaint, *supra* note 45, at ¶ 17.

⁹¹ See Robbins, *supra* note 4.

for relief from removal, but it did raise the specter of getting additional government stakeholders involved. Though ICE had used the labor exploitation as one of its public justifications for the raids,⁹² it had not brought in the U.S. Department of Labor (“DOL”) or any other labor agency either before or after the raids.

After making contact with the workers, members of the legal team reached out to the DOL and the New York State Attorney General’s Office – Labor Bureau to report the labor violations. Both agencies were interested in investigating, but were initially hesitant to get involved with a federal criminal investigation. However, after *The New York Times* ran its story on the raids in November,⁹³ both agencies took steps to open investigations. The legal team worked to make sure that the agencies could interview all of the workers, including the workers who were still detained on criminal charges. Unfortunately, some of those arrested in the raids could not participate in the labor investigations because they had not worked at the restaurants; they had been arrested at the apartments owned by the owner and were in many cases related to workers at the restaurant. These individuals needed to rely on other legal strategies not related to the labor investigations.

More extensive interviewing uncovered other avenues of relief for some of the workers. At least one worker had been a victim of domestic violence and was therefore potentially eligible for a U visa, a special visa available to victims of certain crimes.⁹⁴ In addition, some of the workers had been victims of prior labor trafficking in the state of Georgia.⁹⁵ For these workers, the legal team filed complaints with the U.S. DOL in Atlanta and made requests that the agency certify the workers for U and T visas, the latter for victims of human trafficking that cooperate with law enforcement.⁹⁶ Finally, for some of those individuals with criminal charges, the legal team investigated ways of challenging the underlying removal orders that were the basis of the illegal reentry charges on due pro-

⁹² See Press Release, *supra* note 51.

⁹³ Robbins, *supra* note 4.

⁹⁴ 8 U.S.C. § 1101(a)(15)(U) (2017) (providing criteria for an alien who has suffered substantial abuse as a victim of criminal activity, possesses information about it, is helpful in investigation or prosecution of the crime, and the criminal activity violated the laws of the United States).

⁹⁵ Though there was no connection between the traffickers and the owner of the restaurants in Buffalo, there had been an informal pipeline of individuals escaping in Georgia and traveling to Buffalo.

⁹⁶ 8 U.S.C. § 1101(a)(15)(T) (2017).

cess grounds.⁹⁷

The team also worked to secure legal counsel for all of the individuals arrested in the raids. The Community Justice Clinic represented four individuals in removal proceedings. Those criminally charged had access to criminal defense attorneys, but not attorneys with labor or immigration expertise. The legal team provided advice to the public defenders assigned to represent them. In one case, a law firm from New York City took over the defense of one individual in criminal proceedings. Finding representation for other workers was a challenge because of local capacity issues. However, eventually the team was able to secure legal representation for every worker facing legal action.

D. Outcome of the #Buffalo25 Campaign

In many ways, this Article is premature because the fates of some of the individuals arrested in the raids are still up in the air. However, it is safe to say that the outcome of the campaign is mixed. The workers facing removal proceedings have fared better than those facing criminal charges. Of the six workers faced with deportation, four have been granted deferred action because of their participation in the labor investigations and three of those four also were certified for U or T visas. Two additional workers intend to fight their deportation by filing a motion to suppress in immigration court and have found pro bono counsel to assist them. While none of these workers face imminent deportation, their ultimate fates may not be decided for several years.

By contrast, those facing criminal charges have had little success. The sustained public pressure on the acting U.S. Attorney, James P. Kennedy, Jr., to drop the charges or offer plea deals did not result in leniency for the workers. Many of those who were denied bond and remained in detention decided to give up on fighting their cases and agree to be deported immediately in exchange for pleading guilty to illegal reentry.⁹⁸ Only one person decided to fight her criminal case: a mother with two U.S. citizen children. The legal team found her pro bono counsel who filed a motion to dismiss the criminal charges by collaterally attacking her prior removal order. In December 2017, she accepted a plea to a misde-

⁹⁷ See *United States v. Raya-Vaca*, 771 F.3d 1195, 1198 (9th Cir. 2014), for an example of this type of due process claim.

⁹⁸ See Harold McNeil, *Six Restaurant Workers Plead Guilty to Illegal Re-Entering*, BUFF. NEWS (Feb. 1, 2017), <https://perma.cc/K3HF-8QWY> (reporting that six people pled guilty to illegal re-entry charges).

meanor illegal entry charge and sentenced to time served.⁹⁹ She voluntarily agreed to depart so that she could return to Mexico to join her husband, who had already been convicted of illegal reentry and deported after the raid.¹⁰⁰

The campaign's long-term effects on the City of Buffalo also remain unclear, though some conclusions can be drawn. The campaign marked the first time that the progressive advocacy community in Buffalo had come together to organize around an immigration enforcement action, and this organizing has had the effect of increasing capacity that will be essential if and when future raids occur.

The #Buffalo25 organizing team renamed itself "Justice for Migrant Families of WNY" and has grown into a grassroots organization that aims to "support, advocate, and organize to protect the human and civil rights of undocumented families who have been affected by ICE and Customs and Border Authorities."¹⁰¹ The New York Immigration Coalition hired a full-time immigrants' rights organizer from among the #Buffalo25 organizing team.¹⁰² The legal community also responded, creating a freestanding raids response team that are available to provide legal representation to individuals arrested in future raids. Finally, the faith community, which was an integral part of the campaign since the beginning, created a support infrastructure for the undocumented immigrant community in Buffalo. Most importantly, two churches, Pilgrim-St. Luke's United Church of Christ and Trinity Episcopal Church, declared themselves sanctuary churches and now welcome undocumented immigrants to take refuge there to avoid deportation.¹⁰³

The raids also led to a reevaluation of local policy. Prior to the raids, local cooperation with law enforcement was common and not controversial in Buffalo. In the aftermath of the raids, there were calls for Buffalo to become a sanctuary city by adopting poli-

⁹⁹ See *USA v. Ramirez-Arrelano*, No. 17-cr-00080-FPG-HKS (W.D.N.Y. Apr. 19, 2017).

¹⁰⁰ President Trump's recent executive orders prioritize for deportation anyone convicted of a criminal offense and prioritize criminal prosecution and deportation of "immigration violators." See Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

¹⁰¹ JUST. FOR MIGRANT FAMS. WNY, <https://perma.cc/46NG-H8JZ>; see also Justice for Migrant Families, FACEBOOK, <https://perma.cc/Q8ST-MC56>.

¹⁰² See *Staff Series: Meghan Maloney de Zaldivar*, N.Y. IMMIGR. COALITION (Mar. 24, 2017, 12:57 PM), <https://perma.cc/4DVU-EBV8>.

¹⁰³ Veronika Bondarenko, *This Buffalo Church is Shielding Undocumented Immigrants from Trump's Crackdown, and Helping Them Escape to Canada*, BUSINESS INSIDER (May 14, 2017, 9:00 AM), <https://perma.cc/E5V3-RRHW>; Dan Herbeck & Robert J. McCarthy, *2 Buffalo Churches Pledge 'Sanctuary' for Immigrants*, BUFF. NEWS (Feb. 17, 2017), <https://perma.cc/K882-6E67>.

cies to prohibit cooperation with ICE.¹⁰⁴ Mayor Byron Brown rejected those calls.¹⁰⁵ The Common Council,¹⁰⁶ the city's legislative body, instructed the city's Corporation Counsel to explore what policies could be enacted without running afoul of federal law,¹⁰⁷ but it failed to act on those recommendations. Still, the fact that the Common Council even considered enacting sanctuary policies is in no small part because of the #Buffalo25 raids.

The final verdict on the success or failure of the campaign may not be known for several years as the workers' legal cases wind through the court system. However, it is clear that the raids have left an indelible mark both on the individual victims of the raids and on the City of Buffalo as a whole.

III. LESSONS IN EFFECTIVE RAIDS RESPONSE FROM THE #BUFFALO25 CAMPAIGN

Are there lessons to be drawn from the successes and failures of the #Buffalo25 campaign? Like any case study, there are elements of the #Buffalo25 raids that resist attempts to draw conclusions from them. For one thing, they occurred at a unique political moment that is unlikely to be replicated any time soon. There was extreme policy uncertainty in the interstitial period between the election and the Trump inauguration. Local decision-makers, facing a power vacuum from within the agency, were perhaps more likely to continue on the course set by the raids rather than change course in response to public and political pressure.

Second, Buffalo is not necessarily representative of places where raids might occur in the future. Buffalo is a border city, which affects how the public and local government view immigration enforcement. Border patrol has a robust presence in the area and there is a higher level of background immigration enforce-

¹⁰⁴ See Carl Edholm, *Make Buffalo, NY a "Sanctuary City" – A Safe Haven for Immigrants*, CHANGE.ORG, <https://perma.cc/V3MS-RVAC>; Nicole Hallett, *Another Voice: Buffalo Must Protect Its Immigrant Residents*, THE BUFF. NEWS (Feb. 9, 2017), <https://perma.cc/K548-SGN2>.

¹⁰⁵ Susan Schulman, *Mayor Says Buffalo Is Not 'Sanctuary City' for Refugees*, BUFF. NEWS (Jan. 29, 2017), <https://perma.cc/8Z9P-BW8B> ("We are not trying to facilitate illegal immigration. We are trying to support people who have come here legally, make sure they are successfully transitioned, and can be productive members of society.").

¹⁰⁶ The Common Council is the municipal legislative body for the city of Buffalo. See *Legislative Branch – The Common Council*, CITY BUFF., <https://perma.cc/RRG2-JEHY>.

¹⁰⁷ COMMON COUNCIL, *Agenda Item 17-383, Buffalo Immigrant & Refugee Leadership Team – Make Buffalo a Sanctuary City*, CITY BUFF. (May 30, 2017, 2:00 PM), <https://perma.cc/Y2YP-ZY6Y>.

ment even in the absence of high profile raids.¹⁰⁸ The city’s politics, while largely run by the Democratic party, are relatively conservative even by upstate New York standards.¹⁰⁹ All of these factors make effective raids response more difficult in Buffalo than in some other places.

Conversely, as a major metropolitan area, Buffalo has resources that rural areas – where many raids are likely to occur – do not have.¹¹⁰ Though Buffalo did not have an organization devoted to immigrants’ rights, it has a rich tradition of grassroots advocacy that was essential when the #Buffalo25 raids occurred. In terms of legal resources, though no organization had experience doing raids response, there were multiple organizations providing legal services to immigrants – something that is not true of many parts of the U.S.

Nevertheless, certain lessons from the #Buffalo25 campaign will be useful to advocates responding to future workplace raids.

A. *Characteristics of Effective Raids Response*

The #Buffalo25 campaign was not an unqualified success. Most obviously, some of the workers were deported and the outcome for other workers is still up in the air. However, the ways in which it did succeed can teach us something about how to replicate an effective response for future raids.

1. Integration of Organizing and Legal Advocacy

The #Buffalo25 campaign was, in many respects, a model organizing campaign. It garnered widespread community support, effectively harnessed social media and press coverage, and raised thousands of dollars to support the workers while they fought their deportation cases. This organizing effort was sustained despite the

¹⁰⁸ This “routine” immigration enforcement has been criticized by organizations from outside the city but has garnered very little attention within the city itself. See Jerry Zremski, *Immigrant Arrests Bring Incentives*, BUFF. NEWS (Feb. 6, 2013), <https://perma.cc/XCX4-S77J> (citing study by Families for Freedom, a NYC-based advocacy group, that alleges widespread illegal arrests by upstate border patrol).

¹⁰⁹ For instance, Buffalo was alone among major upstate cities in not declaring or reaffirming itself a sanctuary city after the 2016 election. See Ryan Whalen, *Across Upstate New York, Cities Affirm Sanctuary Status – but Not Buffalo*, SPECTRUM NEWS BUFF. (Jan. 27, 2017, 12:59 AM), <https://perma.cc/JGV8-JDZK>. Congressman Brian Higgins was one of twenty-four Democrats to vote for “Kate’s Law,” which increased criminal penalties for illegal immigration, in the House of Representatives. See *H.R. 3004: Kate’s Law*, GOVTRACK, <https://perma.cc/CKK8-RDTU>.

¹¹⁰ See Robin Runge, *Addressing the Access to Justice Crisis in Rural America*, A.B.A., <https://perma.cc/DY5W-SG84>.

fact that there was initially no local organization spearheading the campaign. The campaign benefited from having a national organization – Cosecha – devote considerable resources to the campaign in the first few weeks. By the time Cosecha stepped back, a local organizing team was in place. This seamless hand-off allowed the campaign to gain, rather than lose, momentum in the months after the raid.

Nevertheless, the successes that were directly attributable to the campaign were mostly legal in nature. The workers who successfully avoided deportation did so by exercising their legal rights and by accessing legal claims for relief. Likewise, the workers still fighting deportation are doing so through legal channels. Though the campaign was successful in convincing Senators Schumer and Gillibrand to intervene on the workers' behalf, that intervention did not directly lead to ICE agreeing to terminate removal proceedings.

However, organizing played a key role in opening up legal avenues of relief for the workers. The workers who were able to avoid deportation ultimately did so because of their cooperation with investigations into the labor practices at the restaurants. Though the exact motivations of the investigating agencies are unknown, the timeline of events suggests that the agencies began their investigations in response to the public media campaign. Those investigations ultimately led to the workers receiving U and T visa certifications, deferred action, and work authorization. The agencies were not required to certify the workers for visas,¹¹¹ nor was ICE required to grant the agencies' request for deferred action.¹¹² These were discretionary decisions made by individuals influenced by the organizing campaign. For the workers still fighting their removal by challenging the legality of their arrests, the success of the organizing campaign allowed for the recruitment of pro bono counsel who might not have otherwise been willing to step in.

In this way, the #Buffalo25 campaign is the perfect example of what legal scholars have identified as “law and organizing,” which is typically defined as legal advocacy that “is intimately joined with,

¹¹¹ U.S. DEP'T OF HOMELAND SEC., U VISA ENFORCEMENT CERTIFICATION RESOURCE GUIDE 3 (2017), <https://perma.cc/7T28-43XY> (“[L]aw enforcement officers cannot be compelled to complete a certification.”).

¹¹² *Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://perma.cc/2TME-2335> (“Deferred action is a *discretionary* determination to defer a removal action of an individual as an act of prosecutorial discretion.” (emphasis added)).

and ultimately subordinate to, grassroots organizing campaigns.”¹¹³ Without legal advocacy, the campaign would have been unlikely to prevent the deportation of a single worker. However, legal advocacy alone would have been unlikely to succeed either. Another recent example of the interplay between organizing and legal advocacy is the case of Daniela Vargas, a DACA recipient who was arrested shortly after speaking at a pro-immigration rally in Mississippi in what many called an act of retaliation.¹¹⁴ Though her attorneys filed a federal petition for habeas corpus on her behalf, she was eventually released from detention “based largely on community pressure and media attention.”¹¹⁵

The integration between legal advocacy and organizing is likely to be an important characteristic of effective raids response in future cases as well. The vast majority of workers arrested in a raid are unlikely to have asylum claims or other avenues for remaining in the U.S. In most cases, a worker’s best chance to avoid deportation is to convince relevant decision-makers to exercise prosecutorial discretion.¹¹⁶ Such discretion is much more likely to be granted when an active organizing campaign is present. At the same time, given the complexities of the immigration legal system, it is important to secure legal representation for every individual affected by a raid. An arrested worker without legal representation, even when supported by an active organizing campaign, is unlikely to be able to navigate the byzantine immigration system to their benefit.

Organizing can also help prevent workplace raids from occurring in the first place. Since January, advocacy organizations have begun to educate employers who are interested in protecting their undocumented workforces.¹¹⁷ In California, labor unions pressed

¹¹³ Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 447 (2001).

¹¹⁴ See Christine Hauser, *A Young Immigrant Spoke Out About Her Deportation Fears. Then She Was Detained*, N.Y. TIMES (Mar. 2, 2017), <https://perma.cc/8YDR-Z3P8>; Ray Sanchez, *DREAMer Daniela Vargas Released, Immigration Group Says*, CNN (Mar. 10, 2017, 7:15 PM ET), <https://perma.cc/K2W6-YMPF>.

¹¹⁵ Jenny Jarvie, *Mississippi ‘Dreamer’ Daniela Vargas Released from Detention but Deportation Order Stands*, L.A. TIMES (Mar. 10, 2017, 2:55 PM), <https://perma.cc/4EVS-E6XU> (noting statements from the DACA recipient’s attorney).

¹¹⁶ Prosecutorial discretion in the enforcement of law is granted because, due to limited resources, Department of Homeland Security “cannot respond to all immigration violations or remove all persons illegally in the United States.” Memorandum from Jeh Charles Johnson, *supra* note 59.

¹¹⁷ See NAT’L EMP. L. PROJECT & NAT’L IMMIGR. CTR., WHAT TO DO IF IMMIGRATION COMES TO YOUR WORKPLACE, <https://perma.cc/7RVH-HTGU>, for one such attempt to educate employers.

the State Assembly to pass a bill that would prohibit ICE from entering workplaces unless they had a judicial warrant.¹¹⁸ As employers begin to resist ICE efforts to conduct raids on their worksites, these and other organizing campaigns are beginning to have an effect.¹¹⁹

There is some question about whether this strategy continues to be effective in the new era of immigration enforcement. It has occasionally appeared that ICE has targeted individuals for deportation based upon their participation in public organizing campaigns around immigration issues,¹²⁰ such as in the case of Daniela Vargas.¹²¹ Many immigrants hope to keep their heads down and avoid any contact with immigration, believing any public attention at all is bad attention. Once a raid has occurred, however, there is little evidence that organizing a public campaign to press ICE to exercise discretion is counter-productive, though it is clearly less successful than it previously was.¹²² Still, given the current political climate, advocates should evaluate whether to engage in public strategies on a case-by-case basis.

2. Intersectional, Complex, and Multi-Geographic Advocacy

The #Buffalo25 legal team needed to engage in creative lawyering in order to secure relief for the arrested workers. Shortly after the workers were arrested, ICE brought in a local legal services organization to screen the workers for trafficking claims and other claims for relief. ICE did this in response to the #Buffalo25 campaign's call for the workers to have access to legal counsel in the early days before the organizing team had made contact with the workers. Although well-respected, the organization limited their intake process to identifying a small handful of claims commonly brought in immigration court – namely, asylum and cancellation of removal. The organization screened the workers, found no obvious

¹¹⁸ See David Bacon, *Fire and ICE: The Return of Workplace Immigration Raids*, AM. PROSPECT (Apr. 27, 2017), <https://perma.cc/D994-HPKJ>; Sophia Bollag, *California Assembly OKs Protection Against Workplace Raids*, U.S. NEWS AND WORLD REP. (June 1, 2017, 12:46 AM), <https://perma.cc/AWG3-Z2QJ>.

¹¹⁹ See, e.g., Jessica Haynes, *Ann Arbor Restaurant Refused Kitchen Entry to ICE Agents, Owner Says*, MLIVE (Aug. 9, 2017), <https://perma.cc/3QYV-MK4D>.

¹²⁰ See *Is ICE Targeting Undocumented Activists for Arrest? Organizers Speak Out After 11 Days in Jail*, DEMOCRACY NOW! (Mar. 31, 2017), <https://perma.cc/GAY6-8HYS>.

¹²¹ See Sanchez, *supra* note 114.

¹²² For example, in May 2017, a mother and child were deported to Honduras despite the vigorous intervention of Senator Bob Casey, who publically chastised ICE for the decision. Ted Hesson & Seung Min Kim, *Casey Blasts Trump Administration Over Child Deportation*, POLITICO (May 3, 2017, 03:10 PM EDT), <https://perma.cc/S245-BEAG>.

claims for relief, and told the workers that their only option was to accept deportation. This, unfortunately, is how many immigration practitioners view immigration law – as a limited set of options unavailable to most people.

The #Buffalo25 legal team realized that this approach was not going to be effective. Instead, they engaged in intersectional, complex, and multi-geographic advocacy on behalf of the arrested workers:

Intersectional Advocacy. Effective raids defense will often require legal advocacy in practice areas other than immigration in order to unlock relief within the immigration system, which is what I call “intersectional” lawyering. Undocumented immigrants are vulnerable to all kinds of rights violations, such as labor exploitation, domestic violence, housing discrimination, and abuse by law enforcement. Perversely, vindicating these rights can, in certain circumstances, lead to immigration relief. The Obama Administration promulgated a policy that victims of serious crimes, including domestic violence, and “individuals involved in non-frivolous efforts related to the protection of their civil rights and liberties” were eligible for prosecutorial discretion,¹²³ although the policy was applied unevenly. The justification behind this policy was a pragmatic one – if undocumented immigrants are not afraid they will be reported to ICE and deported if they stand up for their rights, they are much more likely to do so. The status of this policy after the Trump Administration’s recent executive orders and DHS implementation memorandums is unclear,¹²⁴ though prosecutorial discretion is clearly still available on a case-by-case basis.¹²⁵

¹²³ Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf’t, to All Field Office Dirs. et al., Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011) [hereinafter “Certain Victims” Memo], <https://perma.cc/P2T7-P9L6>.

¹²⁴ The DHS Implementation Memo on “Enforcement of the Immigration Laws to Serve the National Interest” rescinds “all existing conflicting directives, memoranda, or field guidance,” specifically mentioning the Nov. 20, 2014 Jeh Johnson’s memo regarding enforcement priorities. See Memorandum from John Kelly, Sec’y, U.S. Dep’t of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Prot. et al. Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017), <https://perma.cc/FY9L-W89R>. The “Certain Victims” Memo is not explicitly named, and a DHS spokesperson recently stated that it remains in effect. See Nora Caplan-Bricker, “I Wish I’d Never Called the Police”, SLATE (Mar. 19, 2017, 8:12 PM), <https://perma.cc/W6SW-658Q>.

¹²⁵ Q&A: *DHS Implementation of the Executive Order on Enhancing Public Safety in the Interior of the United States*, U.S. DEP’T HOMELAND SECURITY (Feb. 21, 2017), <https://perma.cc/54S7-G688> (“Q3: Does this new memoranda substantively change the authority of immigration enforcement officers throughout DHS to exercise traditional law enforcement discretion? A3: DHS officers and agents maintain discretion to determine

Even in a world in which prosecutorial discretion is less available, pursuing civil rights and labor claims may lead to certifications for U or T visas. While labor and civil rights violations do not themselves qualify an individual for one of these visas, investigations into them may lead to certifications for other qualifying crimes.¹²⁶ In addition, individuals who are victims of constitutional violations by ICE or other law enforcement personnel may be able to make a claim for a motion to suppress in immigration court, leading to the termination of removal proceedings. Therefore, it is essential that lawyers engaged in workplace raids defense screen for labor and civil rights violations and other qualifying criminal activity in addition to the traditional immigration claims for relief. This requires that the lawyers be knowledgeable and competent to identify issues in many different areas of law.

The #Buffalo25 raids are a perfect illustration of the importance of this type of intersectional lawyering. As will likely be the case in many workplace raids, the workers' rights to traditional relief in immigration court was limited. However, it became immediately clear that the workers had suffered labor exploitation at the hands of their employer. In addition, the raids themselves gave rise to claims for relief, particularly for the workers arrested in the Orchard Park raids who eventually challenged the legality of their arrests in immigration court.

Complex Advocacy. Raids defense will often require litigating claims in many different forums, not solely in immigration court. This "complex" advocacy is necessary, again, because of the often limited forms of relief available through the immigration system. In particular, it may be necessary to bring claims in federal court, either by filing a direct challenge to the government's action as occurred in the recent case of the DACA recipient arrested in Washington State,¹²⁷ or by filing a damages action and then trying to negotiate for termination of removal proceedings as part of an out-of-court settlement, as occurred in some raids cases during the

which action(s) to take against removable aliens, but they have been provided with additional guidance by the president and secretary.").

¹²⁶ U visa qualifying crimes include extortion, blackmail, perjury, obstruction of justice, and witness tampering, among others. 8 U.S.C. § 1101(a)(15)(U)(iii) (2017). See also EUNICE HYUNHYE CHO, NAT'L EMP'T LAW PROJECT, U VISAS FOR VICTIMS OF CRIME IN THE WORKPLACE: A PRACTICE MANUAL (May 2014), <https://perma.cc/R769-2AG5>.

¹²⁷ See Jennifer Medina, *Immigrant Protected Under Obama Program Now Fights His Arrest*, N.Y. TIMES (Feb. 14, 2017), <https://perma.cc/SU7Z-J6D8>.

Bush Administration.¹²⁸ It may also require filing claims with multiple criminal or civil enforcement agencies.

In the case of the #Buffalo25 raids, the workers filed complaints with two different DOL offices in addition to participating in the New York State Attorney General's investigation. In other cases, it may be necessary or prudent to get local police involved in investigating criminal activity. Rarely will raids defense be at its most effective if the battle is fought solely in immigration court. Accordingly, it is important to put together a legal team that has expertise litigating in many different forums, not just in immigration court.

Multi-Geographic Advocacy. Though the #Buffalo25 legal team included lawyers from national advocacy organizations, it was essential, especially in the early days and weeks of the campaign, to have lawyers on the ground to conduct intakes, develop legal strategies, and communicate with local decision-makers. However, an effective raids defense must consider pursuing legal claims with a much broader geographic scope. For example, the intakes of the #Buffalo25 workers revealed that many of them had been trafficked into the country by an unscrupulous H-2A labor contractor in Georgia.¹²⁹ That required filing complaints with the U.S. Department of Labor in Atlanta and participating in an investigation remotely. It was this long-distance investigation that ultimately allowed three of the workers to obtain U and T visa certifications.

Legal advocacy that takes place in multiple geographic locations is common when representing undocumented immigrants. Because of their tenuous legal situation, undocumented immigrants are often itinerant, traveling from state to state in search of work and security. Even immigrants who enter the country and settle in one place may have been victims of crimes during the journey to their final destination.¹³⁰ These circumstances can require investigating legal claims in locations other than where the immi-

¹²⁸ See, e.g., *US to Pay \$350K, Halt Deportations in New Haven Immigration Raid Settlement*, FOX NEWS (Feb. 15, 2012), <https://perma.cc/72LY-PAT3>.

¹²⁹ Robbins, *supra* note 4. The H-2A guest worker program allows employers to obtain short-term seasonal labor in the agricultural industry. See *H-2A Temporary Agricultural Program*, U.S. DEP'T LAB. EMP. & TRAINING ADMIN., <https://perma.cc/RG4D-TN5W> (last visited Dec. 12, 2017). There is widespread agreement that the program is rife with abuse. See FARMWORKER JUSTICE, *NO WAY TO TREAT A GUEST: WHY THE H-2A AGRICULTURAL VISA PROGRAM FAILS U.S. AND FOREIGN WORKERS* (2011), <https://perma.cc/4C5U-R8D6>.

¹³⁰ See, e.g., Sarah Stillman, *Where Are the Children?*, NEW YORKER (Apr. 27, 2015), <https://perma.cc/BK64-RJ26> (detailing the extortion and kidnapping schemes that many undocumented immigrants fall victim to on their journey to the United States).

grant is ultimately arrested in a raid. Lawyers engaged in raid defense must be willing to pursue these distant claims, or have good connections to lawyers across the country who can assist the local team.

3. Raids Response Infrastructure

An effective response to workplace raids must happen quickly. Arrested workers may be pressured by ICE officers into signing documents that concede removability or, at the very least, will be interviewed without having counsel present, which may complicate future claims to relief. With the expansion of expedited removal,¹³¹ workers unable to prove they have been present in the country for more than two years may be removed without ever having seen a judge in as little as a day.¹³² Likewise, the expanded use of detention for non-citizens in removal proceedings could increase the time it takes to identify workers picked up in raids.¹³³ It is often difficult or impossible for detained individuals to seek out legal representation. Moreover, ICE only permits lawyers to visit particular detainees if the lawyers have the detainees' names and alien numbers, but it is often impossible to get this information without first speaking to the detainees. Unless there is a pre-existing team of organizers and lawyers ready to spring into action when a raid occurs, workers may be deported before they are even identified.

At the time of the #Buffalo25 raids, there was no pre-existing raids response infrastructure in Buffalo. The campaign was lucky in several ways, including that many of the workers were released from detention on ankle monitors and were able to make contact with the organizing team within a few days. One of the most important outcomes of the #Buffalo25 campaign may be the infrastructure for responding to future raids. Indeed, in the months since Trump's inauguration, there have been several smaller-scale raids

¹³¹ Memorandum from John Kelly, *supra* note 124 (expanding expedited removal to apply to aliens who have been present in the country less than two years).

¹³² See 8 C.F.R. § 235.3(b) (2017); see also Laura Smith, *Donald Trump Can Deport People Without Even Giving Them a Hearing*, MOTHER JONES (Feb. 27, 2017, 11:00 AM), <https://perma.cc/U98B-F9PH> ("Under the new plan, apprehended immigrants will be asked for proof (such as receipts, phone records, or identification) that they have been in the country over the past two years. If they can't produce the necessary documentation, they will be deported in as little as 24 hours.").

¹³³ See Chris Hayes & Brian Montopoli, *Trump Administration Plans Expanded Immigrant Detention, Documents Say*, NBC NEWS (Mar. 3, 2017, 9:43 PM), <https://perma.cc/2U97-CSPH>, (citing the Trump Administration's plans to increase immigration detention by 500%).

in Buffalo,¹³⁴ and the existence of a raids response team has been critical in responding quickly to those raids.

4. Use of Social Media and Other New Forms of Advocacy

The last time that ICE conducted large-scale workplace raids in the late Bush Administration, social media was in its infancy. In the months since Trump's inauguration, social media has emerged as one of the more effective tools for advocates fighting against immigration raids.¹³⁵ Today, social media can inform communities about raids as they are happening.¹³⁶ It can also be used to garner community support for individuals arrested in raids, as was done in the #Buffalo25 campaign. During the #Buffalo25 campaign, the hashtag was used thousands of times on Twitter, Facebook, and Instagram.¹³⁷ Continued use of the hashtag has allowed supporters to get updates about the campaign and to find out about fundraisers being held.

Social media is not the only new tool available to advocacy campaigns. New online petition tools can also be an effective mechanism for measuring public support for a campaign in a way that was difficult just a few years ago. The #Buffalo25 used several online petitions to garner support for the campaign.¹³⁸ Other high profile campaigns to prevent both individual deportations,¹³⁹ and

¹³⁴ See, e.g., Hannah Buehler, *Border Patrol Rounds Up Illegal Immigrants on Grand Island*, WKBW (Feb. 15, 2017, 2:47 PM), <https://perma.cc/7TQ6-TQWQ>.

¹³⁵ See Delphine Schrank, *Trump's Season of Fear: Inside the Devastation Left by Immigration Raids*, GUARDIAN (Mar. 13, 2017, 06:00 AM), <https://perma.cc/2NR4-SLT7>, (citing importance of social media in spreading news of immigration raids).

¹³⁶ The use of social media during raids can backfire as unsubstantiated rumors cause mass panic. See Luis Gomez, *Immigration Raids Spark Fears, Rumors in California, Social Media*, SAN DIEGO UNION-TRIB. (Feb. 10, 2017, 11:00 AM), <https://perma.cc/9A5D-A8DC>; Jesse J. Smith, *Rumor of Local Immigration Raids Not True, but Fear is Real*, hv1 (Mar. 3, 2017), <https://perma.cc/UZ8L-QB4M>. Recent cases of fake reports of raids being circulated on social media has led some organizations to release guidelines for when information about raids should be shared. See, e.g., DESIS RISING UP & MOVING, A BRIEF GUIDE FOR SHARING REPORTS OF RAIDS ON SOCIAL MEDIA (2017), <https://perma.cc/E4XH-XTRM>.

¹³⁷ As analyzed by online hashtag trackers.

¹³⁸ See, e.g., Marshall Bertram, *Stop the Deportation of the Workers in the Buffalo Restaurant Raids*, CHANGE.ORG, <https://perma.cc/UR55-APP5>; *The #Buffalo25 Need Our Help!*, *supra* note 5.

¹³⁹ See, e.g., AFSC NEWARK IMMIGRANT RIGHTS PROGRAM, *Stop the Deportation of a Loving, Hardworking Father*, CHANGE.ORG, <https://perma.cc/M62M-U8B3>; Laton Davis, *Keep Silver's Family Together: Stop Disabled Father's Imminent Deportation*, CHANGE.ORG, <https://perma.cc/WRY4-J2Z3>; Karen Lucas, *Stop Kimberly's Deportation and Stop the Raids!*, MOVEON.ORG, <https://perma.cc/HLP8-LBVR>.

raids in general,¹⁴⁰ have used the same tactic to even greater effect.

Both social media and online petitions allow for more effective organizing that increases pressure on decision-makers to exercise discretion in raids cases. Though it is hard to quantify how much the #Buffalo25's social media campaign mattered at the end of the day, off-the-record conversations with ICE officials suggest it played some role in the agency's ultimate decision to grant deferred action to some of the workers.

B. Challenges to Effective Raids Response

As explained above, the #Buffalo25 campaign was successful in preventing the deportation of some of the arrested workers and in building an immigrant rights movement in Buffalo, but it did not succeed in all of its goals. Most obviously, it did not prevent the prosecution and deportation of some of the arrested workers for illegal reentry. In order to draw lessons for future raids, the ways in which the campaign failed are just as important to explore as the ways in which it succeeded.

1. Criminalization of Immigration Law

The workers facing criminal prosecution fared much worse than the workers who were placed in removal proceedings. In many cases, the only difference between these workers was whether they had successfully crossed the Southern border on their first try. For example, Rosa, one of the individuals arrested in the raids, had crossed the border several years earlier, had been caught within an hour of crossing, and was deported. The same day she was deported, she re-crossed the border and had been living in the U.S. ever since. Rosa had many equities – she had U.S. citizen children, no criminal record, and had been living in the United States for most of her adult life. Nevertheless, not only could she not take advantage of the enforcement priorities put into place by President Obama, she faces criminal prosecution for illegal reentry. And despite her multiple positive equities, the #Buffalo25 campaign was unable to convince ICE and the U.S. Attorney's Office to exercise discretion in her case.

Illegal reentry is a felony punishable by up to two years' imprisonment, up to twenty years if the individual has previous criminal history.¹⁴¹ This statute has been on the books for decades, but pros-

¹⁴⁰ See Esther Yu Hsi Lee, *Obama Received 136,000 Petitions to Stop Deportation Raids This Week*, THINKPROGRESS (Feb. 3, 2016, 3:55 PM), <https://perma.cc/BS78-6KJB>.

¹⁴¹ See 8 U.S.C. § 1326(a)-(b) (2017).

ecutions have exploded in recent years, rising from less than 5,000 per year in the latter years of the Clinton Administration to close to 40,000 a year in the final years of the Obama Administration.¹⁴² If prosecutions for illegal entry, a misdemeanor punishable by up to six months' imprisonment,¹⁴³ are included, the total number of immigration-related criminal prosecutions rises to 80,000 per year.¹⁴⁴ A significant portion of crimes prosecuted under federal law each year are illegal entry and reentry prosecutions.¹⁴⁵

Rosa and many of the other individuals arrested in the #Buffalo25 raids and charged with illegal reentry look very little like the typical illegal reentry defendant. 92% of individuals convicted of illegal reentry have previous criminal history.¹⁴⁶ Only 4.7% of prosecutions involved individuals, such as Rosa, with no criminal history and only one prior deportation.¹⁴⁷ The majority are apprehended at the border and have no established residence in the United States.¹⁴⁸

In previous raids, individuals like Rosa would have been subject to reinstatement of their prior removal order,¹⁴⁹ but would not be criminally prosecuted. The decision by the U.S. Attorney's Office to charge a large percentage of those arrested in the raids with illegal reentry changed the trajectory of the #Buffalo25 campaign because, by doing so, the prosecution labeled these individuals as "criminals" rather than "immigrants" or "workers."¹⁵⁰

This designation had consequences well beyond the convictions themselves. Though the offices of Senators Schumer and Gillibrand eventually agreed to intercede on behalf of the workers in removal proceedings, they refused to do so for the workers facing criminal charges. Likewise, the U.S. Department of Labor decided

¹⁴² See *Criminal Prosecutions for Illegal Entry Up, Re-Entry Down*, TRACIMMIGRATION (July 21, 2016), <https://perma.cc/L4CH-BK4V>. See Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 635-40 (2012) for a history of prosecutions for immigration-related crimes.

¹⁴³ See 8 U.S.C. § 1325(a) (2017).

¹⁴⁴ See U.S. SENTENCING COMM'N, *ILLEGAL REENTRY OFFENSES* 8 (2015) (reporting for Fiscal Year 2013), <https://perma.cc/9PSD-8ZWP>.

¹⁴⁵ For instance, in 2013, 26% of federal criminal prosecutions were for illegal reentry. *Id.* at 1.

¹⁴⁶ *Id.* at 16.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 24 (reporting for illegal reentries).

¹⁴⁹ 8 U.S.C. § 1231(a)(5) (2017) (providing that removal orders of aliens illegally reentering the country are reinstated).

¹⁵⁰ See Michael Mroziak, *Three Accused of Harboring Illegal Immigrants in Local Restaurant Raids*, WBFO 88.7 (Oct. 18, 2016), <https://perma.cc/V2NN-BJSA>.

not to seek deferred action from removal for Rosa and the others in criminal proceedings with prior deportation orders.

Several people within these offices admitted privately that the line separating “criminal” and “non-criminal” aliens did not make sense in this case given that none of the workers had previous criminal records and were only being prosecuted for immigration-related crimes. Nevertheless, the optics of assisting so-called “criminal aliens” were too difficult. The result is that the campaign’s attempts to pressure the U.S. Attorney into dropping criminal charges against the #Buffalo25 workers have largely failed.

Scholars have long noted the effect that criminalizing immigrants has on the public discourse. In many cases, it is immigrants’ rights advocates themselves making this distinction. As Angélica Cházaro points out, advocates have gone to great lengths “to enhance the reputation of the undocumented and distance them from the ‘criminals’ through constant appeals to immigrants’ purportedly hard-working, law-abiding nature.”¹⁵¹ As a consequence, “the ‘criminal alien’ continues to be one of the most reviled characters of all of U.S. law, with many enemies and extremely few political friends”¹⁵²

The campaign to separate undocumented immigrants into “deserving” and “undeserving” categories has largely succeeded. A recent CNN poll found that only 27% of Americans want the government to deport all undocumented immigrants while 78% of Americans want the government to deport undocumented immigrants convicted of a crime.¹⁵³ However, this strategy can backfire because, as Cházaro predicts, it “merely invites immigration authorities to expand the category of the criminal alien, to justify the current record levels of deportations.”¹⁵⁴

Indeed, that is precisely what has happened. The Obama Administration centered its immigration policy on removing “[f]elons, not families,”¹⁵⁵ a distinction that was always problematic since most people convicted of crimes also have families. The Trump Administration has gone even further, prioritizing the re-

¹⁵¹ Angélica Cházaro, *Beyond Respectability: Dismantling the Harms of “Illegality”*, 52 HARV. J. ON LEGIS. 355, 374 (2015).

¹⁵² Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599, 1607 (2009).

¹⁵³ CNN & ORC INTERNATIONAL, POLL 2 (2017), <https://perma.cc/5UZV-D8CL>.

¹⁵⁴ Angélica Cházaro, *Challenging the “Criminal Alien” Paradigm*, 63 UCLA L. REV. 594, 659 (2016); see generally Alan A. Aja & Alejandra Marchevsky, *How Immigrants Became Criminals*, BOS. REV. (Mar. 17, 2017), <https://perma.cc/ZUP2-DAY>.

¹⁵⁵ President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), <https://perma.cc/39R5-2EFU>.

removal of individuals who “have committed acts which constitute a chargeable criminal offense,”¹⁵⁶ a category that includes the author and most everyone else in the United States, whether an immigrant or not. By defining “criminal alien” to include individuals who have never been arrested, let alone convicted, of a crime, the Trump Administration has essentially collapsed the distinction between felons and families.

Increasing illegal reentry prosecutions accomplishes the same goal. Because the nature of illegal immigration often involves committing immigration-related crimes, the Trump Administration’s call for the Department of Justice to substantially increase prosecutions for these crimes has the potential to transform many undocumented immigrants into “criminal aliens.”¹⁵⁷ A bill introduced in the House of Representatives took this strategy one step further.¹⁵⁸ By criminalizing illegal presence in the United States – currently only a civil infraction – the law aims to transform every undocumented immigrant into a criminal subject to deportation under the Trump Administration’s enforcement priorities.

When these individuals, newly classified as “criminal aliens,” are picked up in workplace raids, their options for avoiding further prosecution and deportation will be limited. The #Buffalo25 campaign ran into this problem repeatedly while advocating on behalf of those charged with illegal reentry. This reclassification is one of the most persistent obstacles to effective raids defense.

2. Overreliance on Prosecutorial Discretion

The #Buffalo25 were lucky in one way – they were arrested while the Obama’s Administration’s enforcement priorities were still in effect,¹⁵⁹ which allowed twelve of the workers – almost half of those arrested – to be released and not placed in removal proceedings at all. That outcome would be inconceivable today as the Trump Administration has moved to increase enforcement and has eschewed the Obama Administration’s commitment to deport only those convicted of serious crimes.¹⁶⁰

Prosecutorial discretion plays such an important role in our

¹⁵⁶ Memorandum from John Kelly, *supra* note 124.

¹⁵⁷ See Exec. Order, *supra* note 100; see also Jennifer Medina, *Trump’s Immigration Order Expands the Definition of ‘Criminal’*, N.Y. TIMES (Jan. 26, 2017), <https://perma.cc/BL7M-C9RE>.

¹⁵⁸ See H.R. 2431, 115th Cong. (2017) (authorizing states and localities to enact and enforce criminal penalties for immigration violations).

¹⁵⁹ See Memorandum from Jeh Charles Johnson, *supra* note 59.

¹⁶⁰ See Kulish et al., *supra* note 35.

immigration system because successive Acts of Congress, most notably the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,¹⁶¹ have expanded the categories of removable aliens and severely limited relief to such an extent that discretion has become one of the only glimmers of humanity in an otherwise draconian system. Discretion has become particularly important in the wake of the failure of recent comprehensive immigration reform efforts. However, the reliance on discretion as a substitute for legislative reform has many shortcomings. Most obviously, prosecutorial discretion is an insecure form of relief. Not only can discretion policies change over time, but they are unevenly and arbitrarily applied by local decision-makers.¹⁶² It is widely believed that one reason President Obama adopted the Deferred Action for Childhood Arrivals (“DACA”) program was because lower-level ICE officials had refused to apply more flexible prosecutorial discretion policies.¹⁶³

Immigration advocates cheered DACA and the Obama Administration’s decision in 2014 to expand DACA to include millions of parents of U.S. citizens and lawful permanent residents in its Deferred Action for Parents of Americans (“DAPA”) program.¹⁶⁴ DAPA was enjoined by a U.S. District Court in Texas shortly after it was announced,¹⁶⁵ and never went into effect after the injunction was affirmed by an equally divided U.S. Supreme Court.¹⁶⁶ The memos underlying both DAPA and DACA have now been rescinded by the Trump Administration,¹⁶⁷ and DACA recipients will begin to lose their work authorization and protection from deportation on March 6, 2018 unless Congress agrees to a legislative

¹⁶¹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009–546 (1996).

¹⁶² See Erin B. Corcoran, *Seek Justice, Not Just Deportation: How to Improve Prosecutorial Discretion in Immigration Law*, 48 LOY. L.A. L. REV. 119, 144–47 (2014).

¹⁶³ Michael Kagan, *Binding the Enforcers: The Administrative Law Struggle Behind President Obama’s Immigration Actions*, 50 U. RICH. L. REV. 665, 671 (2016).

¹⁶⁴ See 2014 *Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://perma.cc/LJ8R-VQ3F>.

¹⁶⁵ *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015), *aff’d*, 809 F.3d 134 (5th Cir. 2015), *aff’d per curiam*, 136 S.Ct. 2271 (2016) (mem.).

¹⁶⁶ *United States v. Texas*, 136 S. Ct. 2271 (2016), *reh’g denied*, 137 S. Ct. 285 (2016).

¹⁶⁷ See Memorandum from John F. Kelly, Sec’y, U.S. Dep’t of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Protection et al., Rescission of November 20, 2014 Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”) (June 15, 2017), <https://perma.cc/6V7D-DXCN>; Memorandum from Elaine C. Duke, Acting Sec’y, U.S. Dep’t of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigration Servs. et al., Rescission of Deferred Action for Childhood Arrivals (DACA) (Sept. 5, 2017), <https://perma.cc/Z9L8-JFK4>.

fix.¹⁶⁸ As the almost 700,000 DACA recipients await their fate, the immigrants' rights movement's focus on prosecutorial discretion as an alternative to immigration reform has begun to look short-sighted. Though DHS continues to claim that individual officers have authority to exercise discretion on a case-by-case basis,¹⁶⁹ recent reports suggest that prosecutorial discretion is all but dead until at least 2020.¹⁷⁰

Some scholars have attempted to address the shortcomings of prosecutorial discretion given its importance in the current system. For instance, Shoba Wadhia has argued that prosecutorial discretion should be codified in regulations and subjected to judicial review.¹⁷¹ Michael Wishnie takes another tack by reading into the Immigration and Nationality Act, by way of the due process clause, a requirement that a sanction (deportation) should be proportional to the offense.¹⁷² This "proportionality" claim would allow immigration judges and federal courts to weigh the equities in the cases of individual immigrants.¹⁷³ What is really needed, however, is comprehensive immigration reform that remediates the cruelest aspects of the current immigration system.

Without such reform, individuals arrested as a result of a raid tomorrow or the day after will likely face very different odds than the #Buffalo25. The fact that most individuals arrested in raids will have to rely on prosecutorial discretion in order to have the chance of avoiding deportation will be one of the most enduring challenges to effective raids response in the coming years.

CONCLUSION

It remains to be seen whether workplace raids will become a prominent part of the Trump Administration's immigration enforcement policy. If so, the Administration will likely discover what

¹⁶⁸ See Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), <https://perma.cc/2VK5-WTF3>.

¹⁶⁹ Q&A: *DHS Implementation of the Executive Order on Enhancing Public Safety in the Interior of the United States*, *supra* note 125.

¹⁷⁰ See Muzaffar Chishti & Jessica Bolter, *The Trump Administration at Six Months: A Sea Change in Immigration Enforcement*, MIGRATION POL'Y INST. (JULY 19, 2017), <https://perma.cc/E4AE-TF8G>; see also *Trump Administration Ends Prosecutorial Discretion? All Undocumented Immigrants Threatened with Removal?*, IMMIGRATIONPROF BLOG (July 8, 2017), <https://perma.cc/8B4M-L4P5>.

¹⁷¹ See Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 279-82, 294-295 (2010).

¹⁷² Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 416-17 (2012).

¹⁷³ Courts thus far have rejected this claim. See, e.g., *Marin-Marín v. Sessions*, 852 F.3d 192 (2d Cir. 2017); *Hinds v. Lynch*, 790 F.3d 259 (1st Cir. 2015).

previous administrations have learned – these types of raids are unpopular with the American public and ineffectual at curbing illegal immigration. Workplace raids reveal the U.S. immigration system for what it is – inhumane, unjust, and cruel. Widespread raids are likely to increase calls for immigration reform. Eventually, the policy will probably be abandoned. In the meantime, advocates must learn how to engage in effective raids response to minimize the deleterious impact on workers, their families, and their communities. The #Buffalo25 campaign, with its successes and failures, provides a roadmap for the raids that will happen in the years to come.