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## The Domestic Violence Survivors Justice Act and Criminalized Immigrant Survivors

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# THE DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT AND CRIMINALIZED IMMIGRANT SURVIVORS

*Assia Serrano and Nathan Yaffe<sup>†</sup>*

The complexity of the contemporary correctional juggernaut illustrates the challenges and limits of meaningful reform . . . .  
[J]ust targeting singular policy shifts is not enough.<sup>1</sup>

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<sup>†</sup> Assia Serrano is a mother, an immigrant, and a criminalized survivor. She was criminalized for actions she was coerced into taking by her abusive ex—who was 20 years older than her—when she was a teenager. After serving 17 years of an 18-to-life sentence, the court resentenced Assia to time-served and released her under the Domestic Violence Survivors’ Justice Act (the first immigrant to get relief under the law). She was then transferred to ICE custody, and shortly thereafter deported. She has been a member of Survived & Punished NY since 2018. Nathan Yaffe is a member of Survived & Punished NY, an immigration lawyer, and one of the people on Assia’s defense team.

<sup>1</sup> KAY WHITLOCK & NANCY A. HEITZEG, *CARCERAL CON: THE DECEPTIVE TERRAIN OF CRIMINAL JUSTICE REFORM* 46 (2021).

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## INTRODUCTION

This piece explores how New York’s Domestic Violence Survivors Justice Act (“DVSJA”)—a law meant to grant freedom to criminalized survivors—plays out in practice for criminalized immigrant survivors. New York enacted the DVSJA to address the unjust, but common, harsh punishment of survivors for conduct that an abuser compels, coerces, or otherwise causes. When the court grants a survivor DVSJA relief, the material benefit is shortening that survivor’s sentence of incarceration.

However, for criminalized immigrant survivors, the DVSJA’s promise of freedom may amount to little more than a mirage because DVSJA relief does not expunge, vacate, or alter underlying convictions. We situate the DVSJA in its institutional, legal, and policy context: a criminalized survivor’s sentence does not exist in a vacuum. Their sentence is just one part of a broader process of criminalization. For immigrant survivors, the most threatening aspect of such criminalization is an extensive institutional partnership between the police and the New York State Department of Corrections and Community Supervision (“DOCCS”) on the one hand, and U.S. Immigration and Customs Enforcement (“ICE”) and the deportation courts on the other. New York participates in this partnership to help ICE deport New Yorkers *en masse* from state prisons, ensuring they have minimal protection or chances to resist deportation.

All this was well-documented when New York passed the DVSJA in 2019. Likewise, it was evident that in virtually every case, relief under the DVSJA would do nothing to slow the punishment bureaucracy through which ICE and New York collaborate to deport criminalized immigrant survivors. In every way, it was utterly foreseeable that criminalized immigrant survivors would be just as vulnerable to further

punishment via deportation as they were before the DVSJA's passage. Author Assia Serrano experienced the consequences of the DVSJA's shortcomings firsthand: in 2021, after 17 years in prison, a court granted her relief under the DVSJA and ordered her immediate release. Yet she did not enjoy even a single day of freedom because shortly after her release (in the form of a transfer to a New York-based ICE jail), she was deported to Panama, where she still fights to return to the U.S.

Given the predictability of these problems—and their tragic human toll—it is surprising that there has been so little public commentary about the fact that, for criminalized immigrant survivors, sentencing relief under the DVSJA is overwhelmingly likely to be the precursor to deportation. This piece fills the gap in the policy discussion, based on the experiences of the first immigrant survivor to be resentenced and released under the DVSJA. In addition to calls for changes in policy and practice, this piece urges New York Governor Kathy Hochul, who has expressed concern for the plight of domestic violence survivors—but has refused to use her clemency power to free criminalized survivors (whether facing deportation or not)—to live up to her stated values through widespread use of the clemency power.

I: THE DVSJA, INSTITUTIONAL HEARING PROGRAM, AND DOCCS  
COORDINATION WITH ICE—AS SEEN FROM A PERSONAL, LEGAL, AND  
POLICY PERSPECTIVE

The authors believe that understanding a law or policy is not best achieved through mere textual analysis, but instead through the experiences of people subjected to, and forced to struggle with or against, that law or policy. Thus, this section begins with an in-depth discussion of the experience of one of the authors, Assia Serrano.

In Section I(A), we explain how, at the very start of her time in prison, ICE hustled her through immigration court to secure a deportation order<sup>2</sup> before she had a chance to fully understand her options or even what was happening in proceedings. While she fought for her release through the DVSJA, she was unaware that she had a deportation order, and thus was unaware that shortening her sentence was likely to only hasten her deportation. Finally, at the end of her sentence, New York's punishment bureaucracy collaborated with ICE to ensure she would be deported, down to coordinating to help ICE kidnap her—thereby stealing her chance for a long-awaited free-world reunion with her children—before she set foot outside the prison grounds.

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<sup>2</sup> In this piece, the term “deportation order,” is used rather than the euphemistic term “removal order.”

After grounding our analysis in Assia’s experiences as the first criminalized immigrant survivor to be released under the DVSJA in Section I(A), Section I(B) provides the legal and policy backdrop to those experiences. There, the authors provide an overview of the Institutional Hearing Program (IHP), which allowed ICE to secure a deportation order early in Assia’s prison term; of the DVSJA, which technically created a pathway to “release” from prison, but substantively excluded Assia from its vision of freedom precisely because she was an immigrant; and of the policies of collaboration between New York state prisons and ICE.

*A. Assia’s Story*

[Authors’ Note: this section shares some of Assia’s experiences of abuse, incarceration, parenting, deportation proceedings from prison, fight for release under the DVSJA, and subsequent re-arrest and deportation. Because the experiences are Assia’s alone, this section is written in the first person from her perspective.]

i. Being Jailed as a New Mom, Giving Birth to a Second Child in Jail, and Being Sent to Prison

When I arrived at Bedford Hills Correctional Facility (“BHCF”), in early April of 2006, I was struggling to adjust to a life without my children. My daughter was six months old at the time of my arrest, and I was three months pregnant with my son, whom I gave birth to while incarcerated on Rikers Island. Numb is the best word I can use to describe my state of being. After giving birth, I was only allowed to spend two days with my son at Elmhurst hospital—only two days in which I could nurse, love, care for him, and hope he remembered me. I understood that being denied acceptance into the nursery program meant I would have to send my baby home upon being discharged from the hospital. I had been stripped of my identity—I was a mother first—everything else came secondary to that role, but without my children I felt lost, empty, and useless. I thought my life was over, not simply because I was deprived of my freedom—I was stripped of what I believe to be my purpose, raising my children.

During that time, I also began grappling with the trauma I experienced at the hands of my abuser, my children’s father. Knowing my children were in his care not only made me sad, it terrorized me mentally and emotionally. I moved about BHCF and performed my daily tasks, attended mandatory programs, and fulfilled requirements as expected, not consciously, but in a robotic state. I aimed to stifle all that connected me to or reminded me of the pain, as well as psychological and verbal abuse

I endured while in a relationship with a man 20 years my senior, which had lasted until the moment I was arrested.

ii. Getting Funneled Through Deportation Proceedings While in Prison

Almost immediately after I was convicted and transferred to BHCF, my deportation proceedings started. It felt like one blow after another. Not only did I have to figure out how to survive alone, I was also expected to fight another battle: to muster the courage and strength to stand before another judge and explain when, how, and why I entered the United States. I did not know what was involved in my deportation proceedings. The notice I received from the prison did not specify the time and date that the proceedings would be held, so they came as a surprise. I did not know how to hire my own lawyer from prison, nor the deadline for doing so.

Instead of choosing my own representation, I was in a group of nearly a dozen women who were awaiting proceedings. A man approached and introduced himself, and said that he would be representing us. We did not discuss the scope of our relationship, rather, I understood that I simply would be represented by this lawyer, and that I did not have a choice.

He proceeded to speak to each of us for approximately two minutes, with no privacy, asking a few extremely basic questions about how we got to the United States. He did not ask any of us if we had any fears related to the possibility of being deported, or if we faced any threats to our life in the countries we would be deported to.

When proceedings started, the ICE prosecutor said that I came into the country with no papers. When I finally understood what ICE was saying—I still was not comfortable in English at the time, and there was no interpreter—I said that no, I had a visa. ICE, my attorney, and the judge spoke about this for a minute, and my case was adjourned. I did not understand what had happened in court that day.

I did not know when my next hearing was, or what would be involved. I had no way to contact my attorney, and did not hear from him before the next hearing. I went to the hearing again not knowing what to expect. When I arrived, the lawyer said I was right—I had in fact come in on a visa. For that reason, ICE was amending its previous statement. During the hearing, I didn't really understand what was happening. The hearing lasted only a few minutes. I now know that at the end of the hearing I was issued a deportation order.

After the hearing, I asked my attorney what happened and what the next steps were. He told me not to worry, and that after my time in prison, I would get to go before an immigration judge again. Because I didn't

understand at the time that my immigration court process had ended already, I believed him. At that moment, I felt relieved, thinking I had time to focus on dealing with everyday life in prison—learning to navigate, stay afloat, and most importantly, time to focus on healing and dealing with the consequences of my actions. Based on the assurance from my lawyer that I would go before an immigration judge again, I did not take further action on my case. I understood from the lawyer that I did not have to take any further action until I was released from prison.

I did not have any further interaction with immigration authorities, such as ICE or the immigration court, during my time in prison. I didn't really talk about my immigration status, and it didn't really come up. The fact that I had no further interaction with immigration while I was in prison reinforced my belief that my attorney's advice was correct: I had no reason to doubt that the first hearings were just preliminary, and that everything with the immigration court would continue after I was released. Based on my understanding from my attorney, I took no further action until around the time of my release. It was not until I spoke with immigration attorneys around the time that I was released from prison that I realized that my attorney's advice was false, and that I had already been ordered to be deported and didn't have any further hearings before a judge.

### iii. Getting Resentenced Under the DVSJA

Seventeen years after my initial immigration proceedings at BHCF, I got a different lawyer from the Center for Appellate Litigation who helped me get relief under the DVSJA. When I found out I qualified to be re-sentenced under this law, as a criminalized survivor of domestic violence, I let my children know right away. Despite the many years of state-imposed separation, we had built a wonderful relationship based on love, trust, and honesty. My children were ecstatic and began making plans to spend time with me and go everywhere together. For the first time in their lives, things began to seem normal: they would finally have Mommy home. It never crossed my mind that gaining relief through the DVSJA would expedite my deportation, as I assumed I would have a chance to appear before another immigration judge.

Neither myself nor my DVSJA attorney understood how a successful outcome could end up hurting me in the end. We believed tending to the matter at hand—my prison sentence—was the priority. My DVSJA attorney told me that he could not advise me about my immigration case, and he was not able to get support from the immigration division of his non-profit. He didn't review paperwork from my immigration case. At the time, I did not know—and thus, I believe he did not know—that I had

been ordered deported already. So, we filed my DVSJA motion in February 2021, and then we had three painful and re-traumatizing meetings with the District Attorney (DA)'s office that prosecuted my case throughout March.

On April 23, with the support of the New York County DA who prosecuted my case, along with an assigned DA from the Bureau of Domestic Violence, I was resentenced and ordered to be released immediately. I remembered at the hearing that the DA and the judge expressed hope for me having a good future with my family after I was released.

iv. Seeing My Dreams of Freedom Snatched Away because New York Collaborated with ICE to Ensure My Quick Deportation

Instead of releasing me, however, officials at Taconic Correctional Facility ("TCF")—where I served the last few years of my sentence—held me for two weeks, notified ICE officers of my new release date, and coordinated a date for them to hand me over to ICE. They made arrangements for my deportation despite a New York State Supreme Court judge's order that was supposed to grant my freedom under the DVSJA, a law meant to protect criminalized survivors of domestic violence and give us a new start.

Based on my understanding from my attorney that immigration proceedings would resume after prison, after I was resentenced, I quickly reached out to members of Survived & Punished New York ("S&P NY"), a volunteer collective supporting criminalized survivors, to see if they could connect me with legal support to fight my immigration case. My DVSJA attorney had told me to expect the resentencing to take longer, but because it moved so quickly, I basically only had two weeks (between my resentencing and my new release date) to make a plan for immigration court.

S&P NY found a lawyer at Bronx Defenders who could not take my case but did a legal intake with me. She discovered and informed me that I had a deportation order. She was the first person to tell me about this deportation order, so I was shocked and felt desperate. She explained how extremely limited my legal options were at that point, and promised to try to find a lawyer to take on my case because she couldn't. Despite my and others' efforts, I still didn't have a lawyer by the time I was released from TCF.

Walking out of TCF on May 4th, 2021 after a 17-year sentence felt bittersweet. I was handcuffed, shackled, and transported to Albany County to be processed and booked by immigration officers at Rensselaer County Jail. I didn't get a chance to inform my family members or to explain to my children what the next phase of our lives would be like—because I myself did not understand it. I spent a very long time waiting to



hold my own children, one of whom was a baby when I was first locked up, and the other whom I gave birth to in jail.

I spent 43 days in ICE custody at Rensselaer County Jail in Troy, NY. Very shortly after I arrived in Rensselaer, lawyers from Prisoners' Legal Services ("PLS") (whom the Bronx Defenders attorney who did my intake had contacted) reached out and offered to represent me in trying to get my immigration court case reopened. Meanwhile, supporters in S&P NY, including my co-author on this piece, fought for me to get a pardon—which I understood was the most likely path for me to reopen my case.

My PLS attorneys seemed resigned to me being deported. I actually felt that they were encouraging me to accept deportation because they kept saying I would have to stay locked up the whole time I fought, and would probably lose anyway. If I had more time or options, I would have stopped right then to find new lawyers, because I didn't think they were really fighting hard for me. But with how fast everything moved, I had to move ahead with them. Eventually, I learned that the motion to reopen they filed for me had no hope of being granted—it was only six pages, including both the motion itself and the supporting documents, and was denied within three days. Thankfully, around that time I was able to get new lawyers working on my case, including my co-author. After the PLS motion to reopen was quickly denied, my new legal team helped file a second motion to reopen, which is still being litigated today.

In the meantime, even though my lawyers explained to the Governor's office how urgent the situation was, Governor Hochul never gave me an answer on my pardon application. Because the pardon didn't work out and because what my PLS attorneys filed was inadequate and had been quickly denied, all our efforts did not stop my deportation. Despite the fact that I still have a motion to reopen being litigated, I was deported 43 days after I got to Rensselaer.

I won't ever forget when the deportation officer knocked on my cell door at 2:30 A.M. and handed me two plastic bags. "*One for your personal property; put the state property in the other,*" he said. I did not ask, nor did he tell me, but I knew on the morning of June 17, 2021, that I was secretly being deported to my country of origin, Panama, and at that moment, my hopes and dreams of remaining in the US with my children and family vanished.

On the day I was deported, I was not allowed to speak to my attorneys. I was given one phone call which I used to let my mom know I was at Atlanta International Airport ready to board my connecting flight to Panama. I was scared, nervous, and incredibly confused. I was forcibly being sent to a place I no longer knew, where my only close relative was my 84-year-old father. With \$300 in my pocket, no clothes, ID, or even

the means to leave the airport, I was dropped off, told “good luck,” and forgotten.

Although I’ve been in Panama for a little over a year, I’m still in a state of shock. It’s indescribably hard to reinvent my life, to adjust, and even to feel free because I am still in bondage—trapped away from my children, away from my loved ones, alone, afraid, forced to figure out my life on my own. Honestly speaking, I’m far from doing that, and to make matters worse, my absence continues to hurt my children, the two individuals whose unconditional love have carried me throughout the years.

**B. *Legal and Policy Backdrop: New York’s Deportation Pipeline for Criminalized Immigrant Survivors***

**i. The IHP Facilitates ICE Securing Deportation Orders Against Incarcerated New Yorkers; DOCCS Ensures ICE’s Deportation Dragnet Stays as Wide as Possible**

One of the tools ICE used to streamline Assia’s deportation was the Institutional Hearing Program (“IHP”), in which prisons partner with ICE and immigration judges to run deportation courts from within prisons. The poisoned roots of the IHP extend all the way back to the Reagan Era Immigrant Reform and Control Act (“IRCA”), which brought about a massive expansion of border policing<sup>3</sup> and led to building more immigration jails.<sup>4</sup> Against the backdrop of the War on Drugs, a raft of policies accompanied IRCA and tightened the link between the policing of immigrants and the formal criminal punishment process.<sup>5</sup> Indeed, IRCA funded the creation of the so-called “Alien Criminal Apprehension Program” (“ACAP”), under which ICE devoted more ICE<sup>6</sup> resources to tracking and deporting immigrants after they finished their prison sentences.<sup>7</sup> ACAP was an early version of what is now known as the “Criminal Alien

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<sup>3</sup> See KELLY LYTTLE HERNÁNDEZ, *MIGRA!: A HISTORY OF THE U.S. BORDER PATROL* 231 (2010) (“The IRCA . . . dramatically expanded the U.S. Border Patrol.”).

<sup>4</sup> See DEBORAH WALLER MEYERS, *US BORDER ENFORCEMENT: FROM HORSEBACK TO HIGH-TECH*, *MIGRATION POL’Y INST.* 3 (No. 7, Nov. 2005).

<sup>5</sup> See *id.* at 4.

<sup>6</sup> Then known as the Immigration and Naturalization Service.

<sup>7</sup> See Patrisia Macías-Rojas, *Immigration and the War on Crime: Law and Order Politics and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 6 *J. ON MIGRATION & HUM. SEC.*, 1, 5 (2018); see also S. Rep. No. 104-48, at 33 (1995).

Program” (“CAP”),<sup>8</sup> the “heart of the deportation machine,”<sup>9</sup> which has accounted for a majority of deportations during recent presidential administrations.<sup>10</sup>

IRCA codified a commitment to re-criminalizing immigrants who have already been punished once through the criminal punishment system by starting the deportation process as quickly as possible after they receive a criminal conviction.<sup>11</sup> Along with ACAP, the other program IRCA established to ensure speedy deportation of immigrants with criminal convictions was the IHP.<sup>12</sup> Under IHP, prison officials collaborate with ICE to help ICE find people to put through deportation proceedings in hopes of facilitating immediate post-release re-incarceration and deportation.<sup>13</sup> The premise of IHP is that if all opportunities to appear before a judge to challenge deportation are “complete[d] . . . prior to completion of aliens’ sentences,” release from prison can be converted into “release into [ICE] custody for immediate removal.”<sup>14</sup>

It is crystal clear that the singular purpose behind the IHP has always been to prime the deportation machine by letting ICE secure a deportation order as early during a criminal sentence as possible. Government

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<sup>8</sup> See WALTER EWING ET AL., AM. IMMIGR. COUNCIL, THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES 13 (July 2015) (“IRCA also spurred the creation of new immigration-enforcement programs . . . that eventually became ICE’s Criminal Alien Program (CAP) . . .”).

<sup>9</sup> Dara Lind, *Inside the Government’s Most Powerful Weapon for Deporting Unauthorized Immigrants*, VOX (Nov. 2, 2015, 11:20AM), <https://perma.cc/PJ8H-JDGM>.

<sup>10</sup> See OFFICE OF THE INSPECTOR GEN., U.S. DEP’T HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT’S CRIMINAL ALIEN PROGRAM FACES CHALLENGES 7-8 (2020) (“[M]any local jails cooperate with ICE, which arrested 321,400 aliens from local jails [from October 1, 2013 to September 30, 2019]. According to ICE data for the same period, 516,900, or 79 percent of its 651,000 total arrests were based on in-custody transfers from the criminal-justice system.”); see generally GUILLERMO CANTOR ET AL., AM. IMMIGR. COUNCIL, ENFORCEMENT OVERDRIVE: A COMPREHENSIVE ASSESSMENT OF ICE’S CRIMINAL ALIEN PROGRAM (Nov. 2015). (explaining that under President Obama’s administration, most deportations from within the United States were via CAP).

<sup>11</sup> See Immigration Reform and Control Act of 1986, 8 U.S.C. § 3445 (1986) (“In the case of an alien who is convicted of an offense which makes the alien subject to deportation, [ICE] shall begin any deportation proceeding as expeditiously as possible after the date of the conviction.”).

<sup>12</sup> See AM. IMMIGR. COUNCIL, THE INSTITUTIONAL HEARING PROGRAM: AN OVERVIEW 1 (Nov. 2021); see also AUDIT DIV., U.S. DEP’T JUST., AUDIT REPORT: IMMIGRATION AND NATURALIZATION SERVICE INSTITUTIONAL REMOVAL PROGRAM 1-3 (Sept. 2002).

<sup>13</sup> See AM. IMMIGR. COUNCIL, THE INSTITUTIONAL HEARING PROGRAM: AN OVERVIEW 1-3 (Nov. 2021); see also Jonathan Xavier Inda, *Subject to Deportation: IRCA, ‘Criminal Aliens’, and the Policing of Immigration*, 1 MIGRATION STUDIES 292, 298 (2013) (describing the program as “concentrat[ing] specifically on forging ties with a core group of federal and state prisons.”).

<sup>14</sup> AUDIT DIV., U.S. DEP’T JUST., AUDIT REPORT: IMMIGRATION AND NATURALIZATION SERVICE INSTITUTIONAL REMOVAL PROGRAM 1-2 (Sept. 2002).

officials have hardly been shy about proclaiming this purpose.<sup>15</sup> State officials who oversaw the implementation of IHP in New York were equally open that this was the purpose, with New York’s Department of Corrections describing IHP’s goals “to generate deportation orders for all deportable criminal aliens,” to “improve the efficiency of ICE . . . in obtaining final orders of deportation against criminal aliens,” and “expedite the actual deportation of criminal aliens when they are released [from prison].”<sup>16</sup>

New York has been an enthusiastic partner in implementing IHP from the start. The first-ever pilot of the IHP program ran at Sing Sing prison in 1986, before moving to Downstate Correctional Facility Fishkill so that immigration judges based in New York City and Newark could moonlight there more easily.<sup>17</sup> The IHP program in New York currently operates in several prisons, including Bedford Hills Correctional,<sup>18</sup> where Assia was incarcerated from 2006–2021. At the outset of incarceration, DOCCS ensures the pipeline into IHP is as wide as possible by notifying

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<sup>15</sup> See *Oversight of the Immigration and Naturalization Service: Hearing Before the Subcomm. on Immigr. of the Comm. on the Judiciary*, 104th Cong. 10, 47 (1995) (Many politicians, including liberals, wanted to deprive at least some noncitizens of all protections against deportation. Senator Edward Kennedy, suggested, “[O]nce a person is found guilty . . . why not just deport them right away.” INS Commissioner Doris Meissner, stated, “[a]t the heart of the plan to expedite the removal of criminal aliens is the Institutional Hearing Program.”); BUREAU IMMIGR. CUSTOMS ENF’T, U.S. DEP’T OF HOMELAND SEC., ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003-2012 4-4 (2003) (“The purpose of the IRP is to ensure that aliens convicted of crimes in the U.S. are deported directly from correctional institutions, precluding their release into the community.”); Patrisia Macías-Rojas, *Immigration and the War on Crime: Law and Order Politics and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 6 J. ON MIGRATION & HUM. SEC. 1, 9-10 (2018) (As a Congressional Representative, Charles Schumer’s Omnibus Counterterrorism Act of 1995 (H.R. 896) emphasized targeting “alien terrorists” and laid the foundation for the 1996 Anti-terrorism and Effective Death Penalty Act (AEDPA), which “fused ‘counterterrorism’ measures with ‘criminal alien deportation’ [and] . . . limit[ed] access to due process rights in the criminal justice and immigration systems.”).

<sup>16</sup> STATE OF N.Y. DEP’T CORR. SERVS., VIDEO TELECONFERENCING FOR DEPORTATION HEARINGS 1-2 (Apr. 2008) (“The IHP was enhanced in 1994 in order to *generate deportation orders for all deportable criminal aliens* prior to their earliest release date. This . . . was designed to increase public safety by reducing the number of criminal aliens that could be released to the community.”) (emphasis added); see also Helen Morris, *Zero Tolerance: The Increasing Criminalization of Immigration Law*, INTERPRETER. RELEASES (1997 Federal Publications Inc.) Aug. 29, 1997, at 1317, 1324 (discussing “the goal of quickly removing people under the IHP.”).

<sup>17</sup> THOMAS J. BONITA III, U.S. DEP’T JUST., EXEC. OFF. FOR IMMIGR. REV., THE NEW YORK STATE VIDEO INSTITUTIONAL HEARING PROGRAM PILOT PROJECT 4 (May 1999).

<sup>18</sup> N.Y. DEP’T CORR. SERVS., VIDEO TELECONFERENCING FOR DEPORTATION HEARINGS 2 (Apr. 2008).

ICE whenever a noncitizen is newly incarcerated.<sup>19</sup> At the backend—and despite not being required by law—DOCCS regulations require notifying ICE before the release of any noncitizen so ICE, at its discretion, can immediately arrest that person before release.<sup>20</sup>

IHP remains in effect today in many places, including in New York. Furthermore, as discussed more below, some non-profits that represent immigrants in removal proceedings appear to support keeping IHP in place.

## ii. The DVSJA Utterly Disregards the Unique Needs of Criminalized Immigrant Survivors

In 2019, New York passed the DVSJA after more than a decade of advocacy.<sup>21</sup> The intent for the DVSJA was to respond to the injustice of many survivors of domestic violence being criminalized for their acts of survival.<sup>22</sup> The law was labeled a “key initiative” in then-Governor Andrew Cuomo’s Women’s Justice Agenda, and was intended to recognize that the “vast majority of incarcerated women have experienced physical or sexual violence in their lifetime, and too often these women wind up in prison in the first place because they’re protecting themselves from an

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<sup>19</sup> N.Y. CORRECT LAW § 147 (McKinney 2021); *see generally* N.Y. STATE DEP’T CORR. SERVS., RESEARCH IN BRIEF: DEPARTMENT PROCEDURES FOR PROCESSING CRIMINAL ALIENS (2009) (New York’s Department of Correctional Services schedules times for ICE agents to interview noncitizens within 3-4 days of custody before possibly initiating deportation proceedings); *see also* Felipe De La Hoz, *New York, a Sanctuary State, Provides Criminal Justice Data to ICE*, DOCUMENTED (May 8, 2019), <https://perma.cc/7BLM-WHJJ>; MIZUE AIZEKI ET AL., IMMIGRANT DEF. PROJECT, ICE KNOWS THAT YOU’RE IN DOCCS. WHAT HAPPENS NEXT? 8 (2021).

<sup>20</sup> MIZUE AIZEKI ET AL., *supra* note 19 at 8 n.2; *see also* N.Y. DEP’T CORR. & CMTY. SUPERVISION, MERIT TERMINATION OF SENTENCE AND DISCHARGE FROM PRESUMPTIVE RELEASE, PAROLE, CONDITIONAL RELEASE, AND POST-RELEASE SUPERVISION (PRS) 5, 10, 13 (2018).

<sup>21</sup> SURVIVORS JUSTICE PROJECT, DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT: RESOURCE GUIDE 1 (2021) [hereinafter DVSJA RESOURCE GUIDE], <https://perma.cc/XGD4-DVUS>.

<sup>22</sup> Domestic Violence Survivors Justice Act (DVSJA) codified as amended at N.Y. CRIM. PROC. LAW § 440.47 (McKinney 2019) and N.Y. PENAL LAW §§ 60.12 and 70.45 (McKinney 2021) (explaining that pursuant to N.Y. Penal Law §§ 60.12 acts of survival can include self-defense against an abuser, but also any other actions where, under the law, the abuse was a “significant contributing factor.” The abuse itself must be “substantial,” and can include “physical, sexual, or psychological abuse” by a family or household member. For discussion of “significant contributing factor[s],” *see* DVSJA RESOURCE GUIDE, *supra* note 21, at 28. For discussion of what constitutes a victim of domestic violence according to the law, *see* N.Y. PENAL LAW § 60.12(1) (defining a victim of domestic violence as a person subjected to “substantial physical, sexual or psychological abuse” by a family- or household-member).

abuser.”<sup>23</sup> Governor Cuomo’s press release further indicated that the goal of the law was to “help ensure the criminal justice system takes into account that reality and empowers vulnerable New Yorkers rather than just putting them behind bars.”<sup>24</sup>

State Assemblymember Aubry, a sponsor of the DVSJA, celebrated that it would “change th[e] unconscionable dynamic” where a survivor “receives punishment and prison instead of compassion and assistance,” and thus “restore dignity and justice to criminalized [domestic violence] survivors in our state.”<sup>25</sup> State Senator Roxanne Persaud decried survivors’ “unjustified prison sentences,” saying the DVSJA “will finally right th[e] wrong” of survivors “being unfairly incarcerated,” and would instead give them “deserve[d] support and the ability to rebuild their lives.”<sup>26</sup>

To do this, the DVSJA targets criminalized survivors’ sentences, rather than their convictions. For survivors who, like Assia, were already incarcerated when the DVSJA passed, it allows for reductions in sentence, including immediate release.<sup>27</sup> However, the DVSJA’s resentencing has major limitations: first, it is only available to people sentenced to at least eight years in prison.<sup>28</sup> There also are evidentiary and procedural obstacles,<sup>29</sup> and even if someone can prove their actions were the direct result of abuse, some convictions are ineligible for resentencing.<sup>30</sup>

Survivors can also benefit from the DVSJA at the initial sentencing phase.<sup>31</sup> The same evidentiary requirements apply and the same

<sup>23</sup> Press Release, Andrew M. Cuomo, Governor, N.Y., Governor Cuomo Signs Domestic Violence Survivors Justice Act (May 14, 2019), <https://perma.cc/W5DX-ZRWB>.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*; see also Christopher L. Hamilton, “*Alive but Still Not Free*”: Nikki Addimando and Judicial Failure to Apply the Domestic Violence Survivors Justice Act, 100 B.U. L. REV. ONLINE 174, 178 (2020) (“It is indisputable . . . that the main legislative priority of the DVSJA is to fix the injustice of domestic abuse survivors being incarcerated for defending themselves by prioritizing support and rehabilitation over lengthy prison sentences.”).

<sup>27</sup> N.Y. CRIM. PROC. LAW § 440.47 (McKinney 2019) citing N.Y. PENAL LAW § 60.12 (McKinney 2019). Author Assia Serrano was resentenced to “time served” and thus given immediate release under the DVSJA.

<sup>28</sup> *Id.*

<sup>29</sup> See *id.*; see also N.Y. PENAL LAW § 60.12 (McKinney 2019) (stating that there must be two pieces of corroborating evidence for the abuse; if a survivor does not have any evidence and can rely only on their testimony, they cannot establish eligibility for resentencing).

<sup>30</sup> See N.Y. PENAL LAW § 60.12 citing N.Y. PENAL LAW § 70.00 (excluding convictions for resentencing including Aggravated Murder, Murder 1, and any offense with a sex offender registry requirement.).

<sup>31</sup> DVSJA RESOURCE GUIDE, *supra* note 21, at 10 (stating that if a survivor’s criminalized conduct took place after August 12, 2019, they can *only* get the benefit of the DVSJA at the sentencing phase, because the law forbids resentencing for people who could have asked for DVSJA consideration at their initial sentencing).

convictions are ineligible for resentencing, but there is no minimum-sentence rule like the eight-year minimum applicable in resentencing.<sup>32</sup> There is a complicated scheme for the possible DVSJA sentences depending on the crime of conviction.<sup>33</sup> For purposes of considering immigration consequences, the key details are: (i) the maximum possible sentence is more than one year for every conviction eligible for DVSJA sentencing, and (ii) for most, the minimum DVSJA sentence is one year or longer.<sup>34</sup>

Because of this, in the vast majority of situations, changing the sentence imposed while leaving the conviction intact will do nothing to protect immigrant survivors from re-criminalization at the hands of ICE. To begin with, often all that ICE needs to deport someone is the conviction; thus, a conviction alone makes re-incarceration and deportation far more likely.<sup>35</sup> Further, in any conceivable circumstance, immigrants who are resentenced—all of whom were originally sentenced to eight years or more—are still vulnerable to deportation, even if courts grant them immediate release under the DVSJA to reunite with their families, as in *Assia*'s case.<sup>36</sup> Thus, the resentencing provision is categorically unhelpful when it comes to protecting immigrants from deportation.

As for initial sentencing, because a maximum possible sentence of more than one year (regardless of the actual sentence imposed) opens up new grounds for deportation and blocks pathways to relief,<sup>37</sup> the DVSJA's design exacerbates immigration consequences for DVSJA convictions. Indeed, the significance of the maximum sentence being over one year should have been especially clear to New York criminal justice reformers. Just prior to passing DVSJA, a massive campaign under the banner "One Day to Protect New Yorkers" undertook widespread political education and organizing to pass a law reducing the maximum possible sentence for New York A Misdemeanors by one day to 364 days—precisely to make such convictions more "immigration safe."<sup>38</sup> And, of particular relevance

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<sup>32</sup> N.Y. PENAL LAW § 60.12 (McKinney 2019).

<sup>33</sup> *Id.*

<sup>34</sup> DVSJA RESOURCE GUIDE, *supra* note 21 at 32–33.

<sup>35</sup> Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 555–56 (2013) (discussing how state and local prosecutors negotiate immigration consequences through plea bargaining).

<sup>36</sup> See generally HILLEL R. SMITH, CONG. RESEARCH. SERV., R45151, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY 5–8 (2021) (discussing immigration consequences of criminal convictions).

<sup>37</sup> See NORTON TOOBY, POST-CONVICTION RELIEF FOR IMMIGRANTS § 7.48 (2022).

<sup>38</sup> See PETER MARKOWITZ, ET AL., IMMIGRANT DEF. PROJECT & CARDOZO L. IMMIGR. JUST. CLINIC, "One Day To Protect New Yorkers": Legislation Practice Advisory 1-3 (2019) (describing convictions' mitigated immigration consequences under the One Day to Protect New Yorkers Act, enacted just prior to the DVSJA); *supra* note 23.

for criminalized survivors, a maximum possible sentence of more than one year blocks the possibility of the Violence Against Women Act's cancellation of removal, which creates a path to a green card for certain abuse survivors.<sup>39</sup> Finally, an actual sentence of over a year is likely in the vast majority of DVSJA cases and can trigger numerous additional consequences—including mandatory detention and deportability in some cases.<sup>40</sup>

In addition to the DVSJA's other, plentiful problems,<sup>41</sup> the fact that it always leaves a criminalized survivor with a conviction—usually one that will trigger numerous immigration consequences—means that the legislation falls short of its promise. Instead, the DVSJA denies immigrant survivors the “compassion and assistance,” “empower[ment],” “ability to rebuild,” “support,” and the “restor[ation] of dignity and justice” that the DVSJA promised.<sup>42</sup> The DVSJA's vision of freedom is limited, practically speaking, only to U.S. citizens.<sup>43</sup> Especially when applied in the context of New York's direct and extensive collaboration with ICE, it is clear that the DVSJA condemns criminalized immigrant survivors to the threat of ICE re-criminalization and deportation after release.

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<sup>39</sup> See PETER MARKOWITZ ET AL., *supra* note 38 at 2; CAROLE ANGEL ET. AL., NAT'L IMMIGRANT WOMEN'S ADVOCACY PROJECT (NIWAP) AT AM. U. WASH. COLL. L. & LEGAL MOMENTUM, *BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS* § 1.1 N.4, § 3.4 (Kathleen Sullivan & Leslye Orloff eds., 2013).

<sup>40</sup> See NORTON TOOBY, *POST-CONVICTION RELIEF FOR IMMIGRANTS* § 8.7 (2022); *see also* TOOBY, *supra* note 37.

<sup>41</sup> See SURVIVED & PUNISHED N.Y., *Preserving Punishment Power: A Grassroots Abolitionist Assessment of New York Reforms* 11–15 (2020), (stating some of the issues include judges' discretion about DVSJA resentencing, interpreting the statute, and deciding the burden of proof required, the DVSJA's narrow applicability, and its foundational reinforcement of the carceral system, law enforcement, and non-profit industrial complex.); *see also* Jean Lee, *Domestic Violence Survivors Aren't Getting the Reduced Sentences They Qualify for*, PBS NEWSHOUR: THE 19TH (July 14, 2021, 1:54 PM), <https://perma.cc/ZVV4-WG4P> (discussing the lack of tracking how many domestic survivors have applied for resentencing versus its denials and the few people who have been resentenced); *see generally* Alaina Richert, *Failed Interventions: Domestic Violence, Human Trafficking, and the Criminalization of Survival*, 120 MICH. L. REV. 315 (2021) (discussing reduced sentencing statutes' shortcomings and restrictions on domestic violence survivor-defendants), *see supra* note 34.

<sup>42</sup> *See supra* text accompanying notes 23–26.

<sup>43</sup> *See supra* text accompanying notes 34–40.



II: CRITICAL REFLECTIONS: WHAT DOES THE DVSJA DO FOR  
IMMIGRANTS IN THE CONTEXT OF DOCCS–ICE COLLABORATION TO  
ENSURE DEPORTATION OF CRIMINALIZED IMMIGRANTS?

A. *Inherent Limits of Sentencing Reforms*

Our epigraph bears repeating: the “complexity of the contemporary correctional juggernaut” means that “just targeting singular policy shifts is not enough.”<sup>44</sup> As illustrated in Section I, the DVSJA did little for Assia except speed her toward deportation. The details of the DVSJA’s sentencing scheme show the legislation’s disregard for the unique needs of criminalized immigrant survivors.<sup>45</sup> However, the more fundamental problem has to do with the legislation’s starting point of sentencing reform.

The limits of sentencing reform include a history of rarely making a significant and durable impact on the overall incarceration rate, and providing relief for a few.<sup>46</sup> The DVSJA bears that out: based on the most comprehensive tracking effort, only 27 survivors have been resentenced and released under the DVSJA,<sup>47</sup> despite the fact that an estimated 94% of people incarcerated at BHCF—and at least 79% in all prisons nationwide<sup>48</sup>—have experienced physical abuse and over 60% have experienced past sexual abuse prior to incarceration.

For criminalized immigrant survivors, the DVSJA is little more than a precursor to deportation: collaboration between DOCCS and ICE ensures that ICE fast-tracks survivors once they are prosecuted by the criminal punishment system and subjects them to re-criminalization based on place of birth. This reflects the fact that the DVSJA is a species of “managerial decriminalization” that “may reduce . . . sentences, but [] shifts rather than concedes correctional control, and does not shrink the carceral state.”<sup>49</sup> Criminalized immigrant survivors are attuned to the reality that DVSJA relief is likely a precursor to deportation: another criminalized immigrant survivor beginning the process of seeking relief under the DVSJA reported that reading about Assia’s situation led her to conclude,

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<sup>44</sup> WHITLOCK & HEITZEG, *supra* note 1, at 46.

<sup>45</sup> See *supra* Section I(B)(ii).

<sup>46</sup> See WHITLOCK & HEITZEG, *supra* note 1, at 125-26, 145.

<sup>47</sup> See Video Interview with Kate Mogulescu, Dir., Survivors’ Just. Project (July 5, 2022) (amounting to roughly eight survivors being resentenced and released under the DVSJA per year) (on file with author).

<sup>48</sup> See *Women in Prison: An Overview*, AM. CIV. LIBERTIES UNION, <https://perma.cc/X6TK-J6MY> (last visited Nov. 6, 2022).

<sup>49</sup> WHITLOCK & HEITZEG, *supra* note 1, at 94.

“I’m definitely not [seeking resentencing].”<sup>50</sup> A third criminalized immigrant survivor reported making the same decision for the same reason.<sup>51</sup>

On the other hand, there has been only one other known immigrant survivor resentenced and released under the DVSJA who was *not* immediately arrested and deported. Her situation underscores how the IHP and other forms of ICE-DOCCS collaboration condemn immigrants to precisely the fate she narrowly avoided, by chance. For unknown reasons, after her initial hearing before an immigration judge under the IHP, the court never called her back for a second hearing.<sup>52</sup> Despite her release, she reported that knowing ICE has already started the process of deporting her and may resume the process at any time means she “feels like [she’s] still incarcerated,” and is “constantly looking behind [her] back—even walking out the gate [of the prison] —[she] kept looking behind [her].”<sup>53</sup> As her story illustrates, she avoided a deportation order, and the certain re-incarceration and deportation to follow, not due to New York protecting her from ICE, but for arbitrary reasons such as oversight or perhaps ICE discretion.

Although it was foreseeable that, for criminalized immigrant survivors, the DVSJA would be a prelude to (or accelerant of) further criminalization, activists who advocated for the DVSJA confirmed that they never considered a broader form of legislation that might have benefitted immigrants as described above.<sup>54</sup> Furthermore, lawmakers did not return requests for comment about the issue. Indeed, some advocates naturalized the law’s inability to help immigrants by responding that the limitations we pointed to are *inherent* to sentencing reform, such that it is not fair to lay the consequences that flow from such reforms at advocates’ feet.<sup>55</sup> Yet the coalitions that formed to pass the DVSJA were the ones who chose sentencing reform as a vehicle to help survivors.<sup>56</sup> Some advocates also

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<sup>50</sup> Telephone Interview with criminalized survivor (Aug. 1, 2022) (on file with authors) (name omitted for safety).

<sup>51</sup> Interview with criminalized survivor in N.Y.C., N.Y. (Aug. 3, 2022) (on file with authors) (name omitted for safety).

<sup>52</sup> Telephone Interview with criminalized survivor (Aug. 1, 2022) (on file with authors) (name omitted for safety).

<sup>53</sup> *Id.*

<sup>54</sup> See E-mail from Jaya Vasandani, Co-Founder & Co-Dir., Women & Just. Project, to Authors (Aug. 18, 2022) (on file with authors).

<sup>55</sup> Video Conference Interview with Kate Mogulescu, Dir., Survivors Just. Project (July 7, 2022) (on file with authors).

<sup>56</sup> See generally *DVSJA History*, SURVIVORS JUSTICE PROJECT, <https://perma.cc/N4XX-FSXZ> (last visited Nov. 6, 2022) (citing TAMAR KRAFT-SOLAR, ET AL., AVON GLOB. CTR. FOR WOMEN & JUSTICE & WOMEN IN PRISON PROJECT AT THE CORR. ASS’N, FROM PROTECTION TO PUNISHMENT: POST-CONVICTION BARRIERS TO JUSTICE FOR DOMESTIC VIOLENCE SURVIVOR DEFENDANTS IN NEW YORK STATE 2, 10 (2011) (recommending legislation reform of sentencing laws for domestic violence survivors).

deflected blame to federal immigration policy, but this was part of the context in which they acted. It is true that no single policy change can fix everything, but it is important for a policy's proponents to avoid hiding or minimizing the trade-offs and consequences of advocacy choices (especially where, as here, they are entirely foreseeable), such as illustrated by Assia's case.

*B. The Role of Lawyers on Both Sides of the DVSJA*

It is noteworthy that, despite the fact that Assia had access to high-quality representation for her DVSJA application, she did not learn that she had a deportation order until after her DVSJA application was approved, on the eve of her release from prison into the hands of ICE. Insofar as the DVSJA provides for counsel in the context of resentencing, it nevertheless failed to connect Assia with the immigration support she needed, and as a result she did not know what awaited her. Whether she would have chosen to pursue resentencing or not had she known is beside the point: among other things, she could have had time to prepare a robust challenge to her underlying order, and should would not have been forced to do so in the destabilizing context of being abruptly transferred to a county jail contracted by ICE. Nor would she have been stuck—because of lack of time and the rush to move on ICE's timetable—with less-than-zealous representation from lawyers who assumed her case was a lost cause.<sup>57</sup> With more forewarning, she would have been in a better position to resist her deportation.

On the state's side, one of the authors, Nathan Yaffe, spoke with the DA's office that consented to Assia's resentencing and asked for its support for Assia's pardon application. Not only did the office refuse, but we learned that the DA who evaluated Assia's DVSJA application knew about Assia's deportation order all along.<sup>58</sup> Disturbingly, the office later reported that it supported Assia's DVSJA application in part because the DA was certain Assia would be promptly deported after the grant. The DOCCS-ICE collaboration allowed the DA to essentially transform the DVSJA into a version of Early Conditional Parole for Deportation Only ("ECPDO"),<sup>59</sup> unbeknownst to Assia or her DVSJA attorney. Indeed, the

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<sup>57</sup> Assia subsequently submitted a grievance with the New York State Bar disciplinary committee against the immigration attorneys in question, and simultaneously made a motion in immigration court based in part on ineffective assistance of counsel.

<sup>58</sup> Telephone Conversation with Manhattan Dist. Att'ys Off. (May 20, 2021) (on file with authors).

<sup>59</sup> See generally PETER MARKOWITZ, BRONX DEFS. STEP BY STEP GUIDE TO ECPDO & CPDO (Immigrant Defense Project 2011) (2004) (describing that ECPDO is a process through which DOCCS transfers people to ICE for deportation before they serve their minimum sentence).

DA's changing position—support for Assia's DVSJA application when so many DAs stonewalled, delayed, and refused to join, and opposition to a pardon shortly thereafter<sup>60</sup>—and stated reasons could be read to suggest the DA weaponized the DVSJA process by strategically speeding Assia towards deportation via early release before she could connect with immigration counsel who could assist her in reopening her deportation case.

Whether or not the DA was strategically deploying the institutional framework described above to bring about deportation in this case, the control the DA exercises over the DVSJA process generally allows for this possibility. Both the asymmetric information available to the DA (as an actor in the criminalization infrastructure) compared to the criminalized survivor, and the DA's conversion of DVSJA resentencing into something akin to ECPDO are troubling and profoundly inappropriate.

### C. *The IHP and Other Forms of DOCCS - ICE Collaboration*

As discussed in Section I(B), IHP and related forms of DOCCS–ICE Collaboration were never intended to serve any purpose other than manufacturing deportation orders.<sup>61</sup> Indeed, the entire infrastructure was built with that singular goal in mind: deport more people more quickly.<sup>62</sup> New York's policy choice to collaborate with ICE from the moment of criminalization—which includes ensuring that as many people as possible receive deportation orders in prison and that anyone ICE wants to arrest is “released” into ICE custody—exposes New York as an institutionally anti-immigrant jurisdiction.<sup>63</sup>

In response to this harmful collaboration, New York State Senator Julia Salazar and Assemblymember Karines Reyes have led legislative

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<sup>60</sup> See Tamar Sarai, *New York State Law Helps Bring an Incarcerated Survivor Home*, PRISM (June 7, 2021), <https://perma.cc/DE8P-LAXB> (noting that prosecutors “commonly” argue that there is “insufficient evidence of past abuse” or that the claims of abuse were unrelated to the offense . . . sentenced [for]” to oppose the DVSJA).

<sup>61</sup> See generally *supra* Section I(B).

<sup>62</sup> See generally *supra* Section I(B).

<sup>63</sup> See, e.g., Assia Serrano, *Opinion, Close ICE Jails, Restore All Dignity*, Albany Times Union (Dec. 18, 2021), <https://perma.cc/MBL7-GHNM> (statement by Senator Salazar: Assia's “experience is ‘the everyday reality for many undocumented New Yorkers who find themselves trapped in our criminal legal system.’ . . . Both the Dignity Not Detention Act and New York for All would have helped Assia by ensuring that New York's local law enforcement and correctional facilities stop collaborating with ICE. Passing both of these bills would mean that others would not have to endure the inhumane experience that Assia and her family did.”); see N.Y. CORRECT. LAW § 147 (McKinney 2021); see also Felipe de la Hoz, *New York, a Sanctuary State, Provides Criminal Justice Data to ICE*, DOCUMENTED (May 8, 2019), <https://perma.cc/7BLM-WHJJ>; DEP'T OF CORR. & CMTY. SUPERVISION, Directive No. 9221, Merit Termination of Sentence and Discharge from Presumptive Release, Parole, Conditional Release, and Post-Release Supervision § (IV)(a)(3) 5,10, 13 (2018); N.Y. DEP'T OF CORR. SERVS., *supra* text accompanying note 19.

efforts to forbid collaboration between DOCCS and ICE.<sup>64</sup> Surprisingly, some legal service providers in New York have seemed curiously reticent to support such efforts. For example, some immigrants' rights and public defender organizations have refused to publicly support this legislation. Prisoners' Legal ("PLS") is among such public defender organizations and holds a state contract to represent hundreds of people in deportation proceedings in New York prisons annually.<sup>65</sup> Meanwhile, PLS continues to boast to lawmakers about its comparatively high "success rate" (38 percent) for people facing deportation in prison compared to those without representation (two percent in 2015).<sup>66</sup>

Respectfully, we think refusal to publicly back legislation to end IHP (and all other forms of DOCCS–ICE collaboration) elevates lawyers' interests over those of their clients. Assia has served time with numerous people who were represented by PLS, only for PLS to cajole them into accepting ECPDO. Consequently, they gave up their fight to remain in the US, ability to seek a pardon, and any realistic legal pathway back to this country because they accepted ECPDO. In some instances, people have reported feeling like they had no choice but to go along with their lawyer's recommendation, especially given the circumstances of their incarceration, which limited their options for counsel.<sup>67</sup> Notably, PLS does not disclose what portion of its "success rate" is made up of clients whose effective legal relief is actually faster deportation.<sup>68</sup> Based on Assia's experience and anecdotal accounts she heard from others inside, however, we would not be surprised if the percentage of those who end up getting deported is unfortunately high. None of this amounts to "due process," which should come as no surprise given the history and origins of IHP.

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<sup>64</sup> See S.B. 03076B (N.Y. 2021); Assemb. B. 02328B (N.Y. 2021) (New York State Senator Julia Salazar and Assemblymember Karines Reyes introduced a draft bill, the New York for All Act, that would forbid any coordination between DOCCS and ICE).

<sup>65</sup> See *Testimony on the New York State Public Protection Budget for FY 2022-2023 Before the J. Legis. Hearings Conducted by Assemb. Ways & Means & S. Fin. Comm 3-4* (2022) (statement of Prisoners' Legal Servs.) [hereinafter *Testimony of Prisoners' Legal Servs. 2022*]; *Testimony on the New York State Public Protection Budget for FY 2021-2022 Before the J. Legis. Hearings Conducted by Assemb. Ways & Means & S. Fin. Comm 3-4* (2021) (statement of Prisoners' Legal Servs.) [hereinafter *Testimony of Prisoners' Legal Servs. 2021*]; *Testimony on the New York State Public Protection Budget for FY 2020-2021 Before the J. Legis. Hearings Conducted by Assemb. Ways & Means & S. Fin. Comm. 3-4* (2020) (statement of Prisoners' Legal Servs.) [hereinafter *Testimony of Prisoners' Legal Servs. 2020*].

<sup>66</sup> See *Testimony of Prisoners' Legal Servs. 2022*, *supra* note 65 at 8; see *Testimony of Prisoners' Legal Services 2021* *supra* note at 13-14; see *Testimony of Prisoners' Legal Servs. 2020*, *supra* note 65 at 6 (linking this success to funding PLS's work under IHP).

<sup>67</sup> This is based on Assia's recollection of past conversations with people incarcerated with her at Bedford Hills and Taconic Correctional Facilities.

<sup>68</sup> See *supra text accompanying* note 65.

Even insofar as ECPDO may be important to someone who wishes to shorten the sentence they serve prior to a seemingly unavoidable deportation, the harm of expanding deportation courts under IHP by allowing them to operate in state prisons far outweighs the aggregate benefit of shortened sentences. Based on FOIA results, from 2014 to 2022, there were 191 people granted ECPDO in New York.<sup>69</sup> Granting ECPDO results in shortening the prison sentence (below the minimum time required) in exchange for being transferred to ICE for deportation. By contrast, over the same period (2014 to 2022), there were 2,548 deportation orders issued from New York State-run carceral facilities.<sup>70</sup> The benefit of ending DOCCS–ICE collaboration—thereby ending ICE’s ability to secure deportation orders against people in New York state prisons—thus far outweighs any purported harm that flows from the resulting unavailability of ECPDO.

*D. Reliving Trauma with the DA and the Judge*

Finally, it bears mention that seeking resentencing under the DVSJA requires going back to the same DA and the same judge who inflicted unspeakable violence and trauma by sending a domestic violence survivor to prison for acts of survival in the first place. While this issue is not unique to criminalized immigrant survivors, it is so central to the experience of seeking resentencing that it calls for brief comment. For Assia, this process was not only re-traumatizing, but also entailed an interrogation about a charge that the DA was not able to sustain at trial due to a complete lack of evidence. That survivors seeking resentencing effectively have to try to prove to the DA that they were abused—before having to prove it to the judge who already condemned them to prison once—are additional layers of cruelty.

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<sup>69</sup> See FOIL Log No. DOCCS-22-03-379, “Early Conditional Parole for Deportation Only per year since 2014 by place of incarceration when the application was made.” (On file with authors) (In all likelihood, the overwhelming majority—if not nearly all—of these 191 individuals were ordered deported in IHP proceedings, rather than in proceedings that predated their incarceration on the sentence shortened via ECPDO. However, data is not available to confirm this analysis.)

<sup>70</sup> See *Outcomes of Deportation Proceedings in Immigration Court by Nationality, State, Court, Hearing Location, and Type of Charge*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC), SYRACUSE UNIV. (Sept. 2022), <https://perma.cc/B5C4-FEVX> (The figure 2,548 includes data for Downstate Correctional also known as Fishkill, Bedford Hills Correctional, Ulster Correctional, Orange County Correctional, and Buffalo Juvenile).

### III: THE GOVERNOR'S FAILURE TO MITIGATE THESE HARMS USING CLEMENCY AS A STOPGAP

For some of the issues outlined above, there are easy and immediate solutions. For example, DOCCS could adopt a new regulation to end its pre-”release” coordination with ICE that ensures ICE can arrest and deport people quickly.<sup>71</sup> New York could shut down the deportation-court-in-prison program.<sup>72</sup> ICE could use its prosecutorial discretion to allow DVSJA survivors to remain in the US and heal from the violence of the abuse they survived and the re-traumatizing experience of imprisonment.<sup>73</sup> None of these solutions require new laws.

But other problems, like the limitations of the DVSJA and the inherent vulnerability to ICE that comes with leaving convictions intact, would require lawmaking and longer processes of reform. The same goes for the notification system for alerting ICE when a non-citizen is first taken into DOCCS custody.<sup>74</sup>

Even before these broader problems are addressed, however, there is always an overriding executive safety valve in place: the governor’s unfettered pardon power. Governor Hochul promised, like her predecessor before her, to exercise her clemency powers more frequently than once per year.<sup>75</sup> Despite repeatedly proclaiming that her family’s experience and mother’s work with domestic violence survivors instilled social justice values in her and inspired her to use her power to help survivors,<sup>76</sup> Governor Hochul has pardoned only one criminalized survivor and has given no indication that she will give favorable consideration to criminalized survivors with serious convictions,<sup>77</sup> which most have.<sup>78</sup>

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<sup>71</sup> See *supra* note 63; see also *supra* note 19.

<sup>72</sup> See *supra* note 63 (Article 15-AA, Section 319-a would prohibit the operation of deportation courts in prison).

<sup>73</sup> See NAT’L IMMIGR. PROJECT OF THE NAT’L LAWYERS GUILD, Opinion Letter on DHS and ICE’s Enforcement Priorities to Department of Homeland Security Secretary Alejandro Mayorkas (June 28, 2021).

<sup>74</sup> See *supra* notes 19-20.

<sup>75</sup> See Press Release, Kathy Hochul, Governor, N.Y. Governor Hochul Grants Clemency to 10 Individuals and Announces Formation of New Clemency Advisory Panel (Dec. 24, 2021), <https://perma.cc/3T5S-83KA> [hereinafter Governor Hochul’s New Clemency Advisory Panel Press Release]; see also Jacob Kaye, *Governor Hochul yet to Enact Major Clemency Reforms*, QUEENS DAILY EAGLE (July 6, 2022), <https://perma.cc/3M2R-6QBG>.

<sup>76</sup> See Ethan Geringer-Sameth, *Hochul Signs Two Bills to Protect Domestic Violence Survivors*, GOTHAM GAZETTE (Oct. 28, 2021), <https://perma.cc/95NL-8374>.

<sup>77</sup> See Governor Hochul’s New Clemency Advisory Panel Press Release, *supra* note 75.

<sup>78</sup> See N.Y. CRIM. PROC. LAW § 440.47 (McKinney 2019) citing N.Y. PENAL LAW § 60.12 (McKinney 2019); see, eg., *Governor Hochul’s New Clemency Advisory Panel Press Release*, *supra* note 75 (pardoning Edilberta Reyes Canales, a domestic violence survivor convicted of Criminal Contempt in the Second Degree, Resisting Arrest, Assault in the Third Degree,

At the time of publication, Assia's pardon application is sitting on Governor Hochul's desk. It has been there for 18 months, and the governor's staff has reached out to ask for more information or updates about Assia's life post-deportation.<sup>79</sup> The Governor has yet to announce a decision about whether to grant Assia's application, and has given no indication of when she might do so. For Assia and others,<sup>80</sup> her promises to grant clemency more often and to more people feel like yet another betrayal of criminalized immigrant survivors by the State of New York. Today and any day, Governor Hochul could grant clemency to criminalized immigrant survivors (and to all survivors, if she saw fit). Pending broader changes to ensure that New York does not continue speeding criminalized immigrant survivors towards deportation, it is incumbent on the Governor to take unilateral action to begin repairing the harms New York has caused criminalized immigrant survivors.

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Endangering the Welfare of a Child, Falsely Reporting an Incident to Law Enforcement in the Third Degree, Petit Larceny, and Attempted Petit Larceny).

<sup>79</sup> Emails from Charlene Cordero, Assistant Sec'y for Pub. Safety, N.Y., to Nathan Yaffe, (2021–22), (on file with authors).

<sup>80</sup> See *Survivor Stories SURVIVED & PUNISHED* N.Y., <https://perma.cc/RRX3-KXGR> (last visited Nov. 11, 2022).