Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students

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Michael A. Olivas,


Imagine there's no heaven
It's easy if you try
No hell below us
Above us only sky
Imagine all the people living for today

Imagine there's no countries
It isn't hard to do
Nothing to kill or die for
And no religion too
Imagine all the people living life in peace

You, you may say
I'm a dreamer, but I'm not the only one
I hope some day you'll join us
And the world will be as one. . . .

John Lennon, “Imagine,” Apple, @1971
I. Introduction: The Aftermath of the DREAM Act Defeats

In Fall, 2010, at the urging of Latino groups, Sen. Harry Reid (D-NV) brought forward a bill, the Development, Relief, and Education for Alien Minors (DREAM) Act, as the first building block toward future comprehensive immigration reform. As had been the case in 2007, when an earlier attempt had died in the Senate, the DREAM Act was tantalizingly close, and followed many public stories about undocumented college students in the media; these continued through the 2010 lame-duck session, where once again the votes were not there. The “third time” may be the mythical “charm,” but not in this subject matter: Democratic backers of the legislation again fell short of the 60 Senate votes required to move the DREAM Act legislation forward in December, 2010.1

While the federal legislation option was the best known and most politicized, the action at the state level has increased substantially, and a number of developments have occurred since the December 2010 Congressional failure. Subsequent activities at the state level have included Wisconsin (repealed resident tuition statute),2 Maryland (passed resident tuition statute; “frozen” while certified for state ballot measure);3 Rhode Island (state board responsible for residency tuition policy enacted rule allowing residency tuition in 2012);4 Illinois (passed state statute


allowing schools to award non-state-funded scholarships to the undocumented);\textsuperscript{5} California (passed three state statutes: allowing schools to award non-state-funded scholarships, providing state financial assistance, and making special provisions for undocumented student leaders);\textsuperscript{6} Connecticut (passed resident tuition statute).\textsuperscript{7} While Maryland placed the issue on the 2012 statewide ballot, there was an effort in California to do the same before the provisions of the new laws were to take effect in 2013; when the signatures were counted in early January, 2012, there were not enough legitimate signatures to certify the measure to the November, 2012 ballot.\textsuperscript{8} In 2012, immigrant groups in Maryland were litigating the ballot measure issue, arguing that the statute had not even been put into effect.\textsuperscript{9} Rhode Island was the first state to enact residency


\textsuperscript{7} H.B. 6390, 2011 Leg., Reg. Sess. (Conn. 2011); CONN. GEN. STAT. § 10a-29.


tuition for undocumented college students by administrative action rather than by a statute, as tuition policy is set administratively in the state.\textsuperscript{10}

From 2010 through 2012, litigation occurred in California,\textsuperscript{11} Nebraska,\textsuperscript{12} and Texas—upholding state statutes against restrictionist efforts to eliminate the recent tuition provisions. In New Jersey\textsuperscript{14} and Florida,\textsuperscript{15} the states were sued due to policies that restricted even citizen


\textsuperscript{12} Mannschreck v Clare (challenge to Nebraska residency statute, dismissed in 2010 on standing). See Kevin Abourezk, Judge tosses suit on tuition to illegal immigrants; Plaintiffs likely to refile suit, Lincoln Journal Star, Dec. 18, 2010, at A1.

\textsuperscript{13} IRCOT v Texas, 706 F. Supp. 2d 760 (S.D. Tex. 2010) (dissmissing federal jurisdiction). See Susan Carroll, In-state rates for illegal immigrants attacked, Houston Chron., Dec. 16, 2009, at B1. This case is languishing in Texas state court in Houston, as of Summer, 2012, and now is only a challenge to the aid provision, not to residency. In addition, litigation was filed in Illinois, but it is in the early stages, to quash it or move it to state court. Marderosian v. Barr Topinka and Rutherford, (XX F. Supp. xxx N.D. Ill. 2012) Case # 12-cv-2262.


Residents from receiving residency or financial aid if their parents were out of status. Litigation also was filed in New Jersey, Maryland, and New York on associated residency tuition issues. In addition to these expansive accommodationist initiatives, designed to incorporate undocumented college students into their communities, there have been states that have done the opposite: enacting statutes or policies to prevent the undocumented from receiving resident tuition (redundant, as Sections 1621 and 1623 require affirmative passage of state laws to accord the status), (see Table One) and a small number of states ban them outright, including Alabama, Indiana, and Ohio, which did so in 2011. (For these, see Table Two.) The 2011


18 Lisa W. Foderaro, 3 SUNY Graduates File Suit to Get a Tuition Break, NY Times, Feb. 6, 2011, at CT1 (suit for NY resident tuition by NJ residents attending NY boarding school).


Alabama bill would have restricted even refugees from enrolling, and was enjoined by the federal district judge.\textsuperscript{23} Additional Alabama provisions affecting K-12 students and requiring the state to “inventory” such children were not enjoined by the trial court, but by the Eleventh Circuit.\textsuperscript{24} Existing New Jersey policy denied state financial aid to a student who is a U.S. citizen, but whose mother was undocumented. Suit was filed on this issue in 2011.\textsuperscript{25} On October 20, 2011, the Southern Poverty Law Center filed \textit{Ruiz v. Robinson}, which would require Florida to extend its in-state tuition rates to citizen residents who qualify, even if their parents were undocumented.\textsuperscript{26} In a major development, in late 2010, the California Supreme Court


\textsuperscript{22} In 2011, the Ohio Legislature changed the policy concerning undocumented college students in the state, who already had not previously been eligible for resident tuition. O.R.C. 3333.31 (D), (E) (2011) “(D)(1) The rules of the chancellor for determining student residency shall grant residency status to a person who, while a resident of this state for state subsidy and tuition surcharge purposes, graduated from a high school in this state, if the person enrolls in an institution of higher education and establishes domicile in this state, regardless of the student’s residence prior to that enrollment. (2) The rules of the chancellor for determining student residency shall not grant residency status to an alien if the alien is not also an immigrant or a nonimmigrant.” [ statute at http://codes.ohio.gov/orc/3333.31 ] See Aaron Marshall and Reginald Fields, Budget Bill Passed by Senate Does More Than Spend Money Changes Are Coming to Communities, Consumers, Students, PLAIN DEALER, June 13, 2011, at A1; Aaron Marshall, Senate OKs Compromises in $112 Billion State Budget House to Vote Today on Range of Cuts, Tax, Breaks, PLAIN DEALER, June 29, 2011, at A1.

\textsuperscript{23} Haile v. xxx, F Supp (2011) (enjoining Sec. 8 college provisions to Alabama Taxpayer and Citizen Protection Act, “H.B. 56” (September 28, 2011, Judge Sharon Lovelace Blackburn).


overturned the state appellate court, which had the effect of upholding the state’s residency statute, in place since 2001. There have been other stutters and half steps in states on the topic of such residency statutes, both accommodationist and restrictionist.27

[Insert Tables One and Two approximately here]

During the pendency of these various state actions, the 2012 GOP presidential primary race heated up, providing an unexpected national debate on the issue of undocumented college students. In the early stages of the 2011 campaign period, Texas Governor Rick Perry’s having signed the original state law in his state in 2001 drew the attention of his opponents, all of whom aligned themselves against his record.28 When he withdrew from the race in early 2012, virtually all observers noted that not only his poor performance in the debates but his earlier actions concerning the tuition matter (and his spirited defense of those actions) had hurt him with voters and the public. Buoyed by his leaving the race, the remaining candidates piled on against his views, and indicated their opposition to the DREAM Act. During the course of the campaign, among ethnic and immigration politics, the DREAM Act was excoriated, and only when a military-limited-path to legal status surfaced, stripping out the original beneficiary noncitizen


college students, did the Republican frontrunners Newt Gingrich and Mitt Romney endorse the revised policy.29

In April 2011, Senator Harry Reid (D-NV) and twenty one other Democrat senators published a letter they sent to President Barack Obama urging him to use executive discretion and authority to stop deportations and removals of undocumented young people—who grew up in the United States or have been residing in the US for many years—who would have benefited from the DREAM Act. The co-signers said in the letter that they would bring the DREAM Act back for a vote to the Senate, but the Republican-led House was likely this time to block the bill, a reversal of the previous December 2010, when the House passed the bill but the Senate had failed to gain the 60 Senators it needed. Sen. Chuck Schumer (D-NY), who was leading the Senate effort to enact the bill as Chair of the Senate Judiciary Subcommittee on Immigration, Refugees and Border Security, sent his own letter to DHS Secretary Janet Napolitano, calling upon her to not target DREAM Act-eligible young people for deportation.30 While she said that the students were "not the [Department's] priority," she insisted that no category of Prosecutorial Discretion would be employed for groups of individuals: "I am not going to stand here and say that there are whole categories that we will, by executive fiat, exempt from the current immigration system -- as sympathetic as we feel towards them."31


In June 2011, with the release of what came to be known as the “Morton Memo” and in August and November, 2011, there were developments in the issue of Deferred Action (DA) and the extent to which the Obama Administration would extend a form of prosecutorial discretion to DREAM Act students and others in the country without legal status. The Obama administration undertook a test-case review of immigration cases in Baltimore and Denver with an eye toward freezing deportations of unauthorized residents who had no criminal records and then expanding the program of Prosecutorial Discretion nationwide; the plans were to favor the elderly, children who have been in the country more than five years, students who came to the U.S. under the age of 16 and were enrolled in a college degree program, and victims of domestic violence: their pending deportations could be put on hold under the test program, as low priority populations. In the predictable thermodynamics of immigration politics, however, there was an equal and opposite reaction against employing such discretion, particularly for the population of potential DREAM Act enrollees. In addition, DA, however advantageous in stopping the clock or in throwing sand into the deportation and removal gears, is not a true or final resolution of undocumented immigration status, and will likely leave many DREAMers unassisted and ineligible for any ultimate change in their legal status. The uncertainty and complexity have made the status quo very frustrating for many observers, particularly the affected students.

Moreover, there were many potentially-eligible students who had grown frustrated at the slow pace and their lack of options during college and after graduation, and with a series of large public marches in 2006, they began a systematic practice of outing and revealing themselves to


authorities in public fashion. This landscape brought attention to the students—negative and positive—but even over time, has not created any valence for revisiting the failed 2010 federal legislation. That avenue was closed due to the GOP intransigence on enacting legislation for which the President could claim credit and the symmetrical decision by the Obama Administration to run for another term, with his campaign theme the inability or unwillingness of Congress to do its legislative and governance work, especially the Republican House and, to a lesser degree, the Democratic Senate. This article addresses the contours of Prosecutorial Discretion (PD) and Deferred Action policy (DA), including their unusual provenance and history, widespread use in a variety of Department of Homeland Security (DHS) and other settings, and efficacy—the plusses and minuses of such a discretionary policy. In the final section, the early returns on the revised policy will be reviewed, including two test case trial runs by the Administration—in Baltimore and in Denver—and the mismatch between DA/PD and the DREAM Act student expectations in the absence of comprehensive immigration reform will be evaluated.


35 “But part of political leadership is being able to project a positive idealism that you know is at odds with the real world. I am ready to believe that Obama adopted this faux-harmonious tone, apart from its being his natural register, as a way to win the election, and as a marker for what he hoped America could become, and—crucially—that once in office, he maintained it as a sound position for himself as he moved toward reelection. Late last year, he also applied it with chess-master skill against the congressional Republicans, in daring them to let the widely popular payroll-tax cut expire at the start of an election year. They backed off, and when the dust settled, the Republicans found themselves at an unaccustomed political disadvantage. Having secured an agreement on government funding for the rest of the year, Obama had taken one of their favorite tools, the threat of a government shutdown, out of their hands through the campaign season. And after three years of seeming to shy from ‘partisan’ rhetoric, he began linking the slate of GOP presidential contenders to the Tea Party–dominated Republican Congress, whose approval ratings were far worse than his own.” James Fallows, Obama, Explained, Atlantic Monthly (March 2012), http://www.theatlantic.com/magazine/archive/2012/03/obama-explained/8874/
II. The Unusual History and Roots of Deferred Action

In furtherance of a lifelong indulgence with rock and roll music, I have developed a playful series of research and policy analyses on the topic of the law and business of rock and roll, one I conduct for various audiences and with CLE credit for entertainment lawyers. Among the many fascinating topics are the adhesion contracts that many young artists sign in their early ambition and naivete, a number of riveting cases that have arisen over the years with dead and living artists, the growing number of technological advances that affect the ownership and distribution of musical resources to the large number of user destinations, public policy and regulation concerning music, musical references hidden in judicial opinions, and the very large intersection of rock and roll and immigration law, or the flow of international artists into and from the United States in the globalized world that is today’s genre. Among this treasure trove of materials, I discuss the relationship between rock and roll and Deferred Action, in the person of one of my most beloved musical influences, the late former Beatle John Lennon, whose legal troubles in the 1970s gave rise to the doctrine of Deferred Action (at the time, also called “prosecutorial discretion” and “non-priority status”), as he and his wife Yoko Ono attempted to remain in the United States, in the face of Lennon’s earlier drug conviction in the U.K.37


37 The litigation in the John Lennon immigration matter included three interrelated lawsuits and a BIA petition for review. The cases included: Lennon v. Marks, Civil No. 72-1784 (S.D.N.Y., filed May 1, 1972) (seeking injunction compelling the INS to act upon Lennon's third preference petition); it became moot when the petition was reviewed. The second case was Lennon v. Richardson, 378 F. Supp. 39 (S.D.N.Y. 1974), was an action brought under the Administrative Procedure Act, 5 U.S.C. § 522 (1966), (APA action to obtain Immigration Service records concerning nonpriority status). The third was Lennon v. United States, 387 F. Supp. 561 (S.D.N.Y. 1975) (seeking to enjoin deportation on grounds of political beliefs). The final matter was Lennon v. INS, 527 F.2d 187 (2d Cir. 1975) (reversing BIA decision that had upheld his deportation). After the remand, IJ Fieldsteel granted relief to Lennon, allowing him to remain in the country. See generally, Leon Wildes, The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act, 14 San Diego L. Rev. 42, 43-44, fn. 4 (1976); see also Leon Wildes, The Nonpriority Program of the Immigration and Naturalization Service A measure of the Attorney General’s Concern for Aliens (Pt. I), 53 Interpreter Releases 25 (January 26, 1976); (Pt. II), 33 (January 30, 1976). The court had held that Lennon’s earlier 1968 guilty plea in London for cannabis possession had violated British drug laws and rendered him
Their lawyer Leon Wildes has recounted the extensive and complicated history of the case, which became a struggle to determine the existence of applicable agency discretion and the extent to which it could be employed in his attempt to remain in the United States, where they were searching for Yoko Ono’s daughter, who had been snatched by Ono’s former husband and could not be found:

Lennon came to the United States as a visitor in August 1971, and was permitted to remain until late February 1972. At that time the INS instituted deportation proceedings against him as an alleged overstay. Lennon claimed that the proceedings were instituted for political reasons. Among other things, he requested a grant of nonpriority status.

Nonpriority status is a euphemism for an administrative stay of deportation which effectively places an otherwise deportable alien in a position where he is not removed simply because his case has the lowest possible priority for INS action. Traditionally, the status was accorded to aliens whose departure from the United States would result in extreme hardship. Lennon and artist Yoko Ono, his wife, had come to this country to fight contested custody proceedings concerning Kyoko, Ono’s daughter by a prior marriage. Lennon and Ono were completely successful on the law, with courts in several jurisdictions awarding them custody of Kyoko. However the father absconded with the child and could not be found. In the midst of the frantic search for the child, Lennon and Ono were subjected to expulsion proceedings. They felt, accordingly, that the equities involved in their continued search for the child justified the application for nonpriority status. Hardship notwithstanding, nonpriority status was never even given consideration, and the deportation proceedings relentlessly advanced.

Commencing on May 1, 1972, through extensive correspondence with the INS, Lennon made every conceivable effort to obtain the records relevant to nonpriority procedures before instituting suit in federal court. However, after more than a year's correspondence, the records were not forthcoming. In fact, the Service stated that the data about nonpriority cases were "not compiled" although at no time did it deny the existence of either a nonpriority program or relevant records. Lennon's demands, made pursuant to the FOIA, continued until August 1973, with no response from the Service.38

When this legal action was undertaken, the salient rules on the various INS nonpriority classifications were in a hidden format, unknown and inaccessible to immigration attorneys: “The entire program was so shrouded in secrecy that a former District Director of the Immigration and Naturalization Service (INS) actually denied the existence of the program. . . The situation was a classic example of secret law.”39 As Lennon’s attorney Leon Wildes noted, after the case, “this [Operations] Instruction was transferred from the unpublished Blue Sheets to the published White Sheets,”40 which not only made the OI and its implementing details known to the practitioner community, but the resultant regularization of the practice resulted in more transparency in the process. In their earlier existence, the INS internal regulations were never made available and had carried little weight.41 This more open provision continued over two decades, with modifications and significant litigation, until 1997, when they were rolled into a


39 Id.

40 Id.

41 A number of courts downplayed or minimized the role of OI, as mere intra-agency guidance or informal procedural guidelines with no substantive weight or binding precedent. As one example, see Velasco-Gutierrez v. Crossland, 732 F.2d 792, 798 (10th Cir. 1984).
revised and reformatted “Standard Operating Procedures” (SOP) manual, one whose contents were public and available to the immigration bar.\textsuperscript{42}

As another Beatles song had foretold, the Lennon matter was a “Long and Winding Road,” one which, after the five-year struggle, permitted the musician to remain in the US, and which shined FOIA light on the internal practice of allowing then-INS officials to short-circuit a proceeding and assign low priority status to it, essentially letting it remain in a state of limbo without further action to remove the noncitizen.\textsuperscript{43} In the 1970s, when this status came to be known, remaining in the United States was an unalloyed positive feature, before the 1996 appearance of prohibitive and punitive three-year and ten-year bars on relief. Therefore, the discovery of this discretionary status was a substantial practice tool for the immigration bar, one that has shrunk over the years, as Congress has, in a series of actions, squeezed much of the previously-available discretion from the system and made relief unavailable except in substantially-narrowed and limited circumstances.\textsuperscript{44} This shrinking of discretionary jurisdiction is essentially the case in the year 2012, forty years after \textit{U.S. v. Lennon} and fifteen years after the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),\textsuperscript{45} the Antiterrorism and Effective Death Penalty Act (AEDPA),\textsuperscript{46} and the Personal Responsibility and Work Opportunity

\textsuperscript{42} Shoba Sivaprasad Wadhia, The Role of Prosecutorial Discretion in Immigration Law 9 CONN. PUBL. INT. L. J. 243, 251 (2010).

\textsuperscript{43} Of course, this happened most famously in Lennon v. INS, 527 F.2d 187 (2d Cir. 1975), where, after the Second Circuit reversed the BIA decision that had upheld Lennon’s deportation and remanded to the Immigration Court, Immigration Judge Fieldsteel granted relief to Lennon, allowing him to remain in the country. See generally, Wildes, The Nonpriority Program, 14 San Diego L. Rev. 42, 43-44, fn. 4 (1976).

\textsuperscript{44} This complex trend has been well-documented and summarized by Professor Wahdia, in Shoba Sivaprasad Wadhia, The Role of Prosecutorial Discretion in Immigration Law 9 CONN. PUBL. INT. L. J. 243, 246-265 (2010).


Reconciliation Act (PRWORA)—all enacted by Congress in 1996. By every indication, there is much less play in the statutory joints than had been the case before these statutes.

With these more detailed and punitive 1996 legislative provisions, not only was there less discretion available to intending immigrants and noncitizens, but this reduction in the statutory authority to resolve cases led, perhaps inevitably, to heightened administrative and agency authority to exercise residual prosecutorial flexibility. Because no legislation as comprehensive as that affecting immigration and naturalization can pin down every detail or anticipate every development, a certain (and very large) amount of administrative discretion will always be available, but the balance of this determination has shifted dramatically and paradoxically to the agency, as noted by legal scholars Adam Cox and Cristina Rodriguez, who have written: “the Executive still has de facto delegated authority to grant relief from removal on a case-by-case basis. The Executive simply exercises this authority through its prosecutorial discretion, rather than by evaluating eligibility pursuant to a statutory framework at the end of removal proceedings. In fact, because these decisions are no longer guided by the INA’s statutory framework for discretionary relief, the changes may actually have increased the Executive’s authority.”

And the sea-changes occurred in immigration enforcement after the depredations of September 11, 2001, when national security and terrorism of necessity became an even larger part of the equation than had previously been the case. These acts of terrorism on the United States within its own borders immeasurably strengthened the Executive’s hand. Even with the


rise of the multitude of post-9/11 immigration reform legislation and the rise of executive action, such as the growth and reorganization of the immigration function within the larger omnibus Department of Homeland Security (DHS), the die had been cast and additional centralization of the discretion function became evident. Although the emergent Executive Office for Immigration Review (EOIR) immigrant courts function remained in DOJ, with accompanying substantive and administrative/jurisdictional responsibilities, observers have noted: choosing to “insulate decisions regarding relief from the prosecutorial arm of the immigration agencies has been undermined by the recent changes to the relief provisions. These changes have had the effect of shifting more aspects of the deportation decision back to Immigration and Customs Enforcement (ICE). Far from eliminating discretion, then, the statutory restrictions on discretionary relief have simply consolidated this [remaining] discretion in the agency officials responsible for charging decisions. Prosecutorial discretion has thus overtaken the exercise of discretion by immigration judges when it comes to questions of relief.”

Inasmuch as the legislative record of 2010-2012 reveals deep and growing enmity between the two major parties, the Obama Administration has apparently determined that any forms of immigration reform will have to be modest, and in the nature of non-legislative, adjudicatory, administrative review and discretionary deferred action. This is not minor tinkering or a forlorn concession, but rather an important political insight, that grasping the real levers of immigration reform in fundamental fashion is a powerful tool, especially if Congressional commitment to immigration reform is not evident, or, in an election year, not possible. The truth is that every Administration—and for that matter, every administrative agency—no matter the interaction with the legislative process and Congress, seeks to maximize the discretionary space available to it. Seen in this light, this administrative law and legislative case study are the story of almost any complex administrative regime, with thick descriptive narrative to detail the case of DREAM Act-eligible undocumented college students.

III. Prosecutorial Discretion and Deferred Action in the Course of Immigration Policy

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A final appeal option for a failed immigration matter is a private relief bill, legislation so daunting at the present that Congress has only passed two such extraordinary measures since 2005. The other remaining final avenue is discretion available to the immigration authorities, traditionally exercised as a form of relief from enforcement, allowing a favorable judgment within the zones of prosecutorial priorities. One avenue of prosecutorial discretion and relief is Deferred Action, such as that sussed out by the matter of John Lennon.

While the odds of getting a private relief bill enacted are very small, attempting to do so remains a legitimate part of an advanced cause of action for a client, especially one who has appealing characteristics and a compelling narrative arc to his or her story. Recent examples of successful private relief legislation include two stunning cases of hardship, one that involved a VAWA would-be beneficiary whose mother had fled spousal abuse in Japan and who died in a car crash before his mother remarried, to a U.S. Citizen who was not yet in a statutory position to confer any derivative status upon the boy; another was a widow of a U.S. soldier who had married her telephonically—and not in person—and who was killed in action before they could technically consummate the long-distance virtual marriage. (Ironically, at the time they married, she was pregnant with his child, who was then born a U.S. Citizen after his father’s death in

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52 Margaret Mikyung Lee, Private Immigration Legislation (CRS Report RL33024, 2007). There is a useful and comprehensive site where all such private immigration legislation is tracked: http://www.loc.gov/search/?q=private+immigration+legislation&fa=digitized%3Atrue%7CSubject%3Apr ivate+legislation

combat.)\(^{54}\) These extraordinary provisions are rare in part because they require unanimity and because the Congressional committee rules for enacting them have become very strict and unavailing. In addition, while they often can eventually lead to Legal Permanent Resident status, the mere introduction of a private relief bill no longer guarantees that the case will be permanently deferred or stayed.\(^{55}\)

Deferred Action is another Hail Mary pass form of immigration relief, but is fundamentally a form of administrative function—a Hail Mary pass to the immigration authorities rather than to Congress, and it or a form of it are widely available within DHS. As one example of a recent successful DA, a young out-of-status child who had been brought by her parents to the United States from Brazil died in a terrible multi-car crash caused by foggy weather; her parents, her older sister, an uncle, and her uncle’s girlfriend died in the accident, and she was hospitalized with serious injuries. Being orphaned in such a horrific way enabled her to obtain DA status and avoid removal in 2012,\(^{56}\) although it is not clear what her eventual relief may be: she would appear to qualify for special immigrant juvenile status, another form of extraordinary relief, available only for dire straits of children.\(^{57}\)


\(^{57}\) The various and complicated provisions for “special immigrant juveniles” (SIJ) are found in Section 203(b)(4) of the Immigration and Nationality Act (INA), which sets aside immigrant visas for children considered “special immigrants” under section 101(a)(27). Section 113, Publ. L. No. 105-119, 11 Stat. 2440 (November 26, 1997), amended the class to noncitizen juveniles deemed eligible for long-term foster care based on abuse, neglect, or abandonment, and added other stringent requirements. The CIS website sets out SIJ criteria and policies: http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=3d8008d1c67e0310VgnVCM100000082ca60aRCRD&vgnextchannel=3d8008d1c67e0310VgnVCM100000082ca60aRCRD and the intra-agency policy memo on SIJ is at: http://www.uscis.gov/files/pressrelease/SIJ_Memo_052704.pdf.
Deferred Action is available only at the discretion of the agency, and while the status can be requested by counsel, there is no formal application and it is not a widely-sought or widely available form of relief. Immigration authorities treat DA as “an act of administrative choice [by ICE, CBP, and CIS] to give some cases lower priority in appropriate circumstances and [is] in no way an entitlement.” Even if it is extended, it serves merely to “freeze” the case, and does not remove or reconstitute the underlying adjudication of the alien’s deportability. It grants no other benefit, although it can include work authorization, and does not always extend to family beneficiaries or even immediate relatives. In essence, each case and its constituent parts have to be made on their own facts and circumstances.


59 Id. at 248-252 (detailing discretionary features). See also generally, Shoba Sivaprasad Wadhia, The Policy and Politics of Immigrant Rights, 16 TEMP. POL. & CIV. RTS. L. REV. 387 (2007). Professor Stephen Lee, in a detailed article, Monitoring Immigration Enforcement, 53 Ariz. L. Rev. 1089, 1109 (2011), noted that the grant of prosecutorial discretion was itself “a response to Congress’ failure to pass the DREAM Act” (at fn. 72) but also, “Importantly, those noncitizens who receive the benefit of this exercise of discretion become eligible for work authorization.” (at 1109) However, his footnoting to this assertion cites the second sentence of ICE FAQ memorandum: “Q: Will beneficiaries of an exercise of prosecutorial discretion automatically receive work authorization? A: No. Nothing about this process is automatic and nobody who goes through this process is automatically entitled to work authorization. Per longstanding federal law, individuals affected by an exercise of prosecutorial discretion will be able to request work authorization, including paying associated fees, and their requests will be separately considered by USCIS on a case-by-case basis.” (at fn 71, emphasis added). Some of the DREAM Act students and others with similar low-priority status are receiving some kind of response, and their removals have been stayed. See, e.g., Michael A. Olivas, Some DREAM students face nightmare scenarios, Obama administration must honor commitment, DREAM Act, Houston Chronicle, April 6, 2011, http://www.chron.com/disp/story.mpl/editorial/outlook/7508464.html (college student given series of one year stays); Mark Curnutte, Pastor's Stay of Deportation Extended, NKY.COM, Dec. 19, 2011, http://nky.cincinnati.com/article/AB/20111219/NEWS01/312190139 (status extended to church pastor). See Roberto G. Gonzales, Learning to Be Illegal: Undocumented Youth and Shifting Legal Contexts in the Transition to Adulthood, 76 Amer. Sociol. Rev. 602 (2011) (following up DREAM Act-eligible students after college graduation).

At best, the hypothetical ICE Answer to the FAQ is inconsistent and contradictory—it assumes NO but says the noncitizen can apply. Importantly, emphasizing the second part of the FAQ Answer, rather than the first part, leads to different conclusions, and even the grant of prosecutorial discretion has not always resolved or even frozen the case. Some noncitizens who would appear from the record to be eligible have found themselves deported or given brief reprieves, but no reconstitution of their status. See, e.g., Susan Carroll, New Immigration Policy Too Late for Sick Teacher: Man Deported to Spain Despite Clean Record, Job, Hous. Chron. Aug. 27, 2011, at A1 (k-12 teacher with illness removed); Daniel González, Deportee Struggles to Readjust, Ariz. Repub., Jan. 23, 2012, at A1 (former Phoenix high-school cross-country coach's failure to gain discretionary relief); Ruben Navarrette, Quit playing favorites, politics
In a technical sense, it has no formal group-eligibility, such as its close non-statutory cousin, Deferred Enforced Departure, formerly known as Extended Voluntary Departure\(^6^0\) or its statutory cousin Temporary Protected Status,\(^6^1\) which may be extended to groups for long periods of time and in similarly-compelling circumstances. It is predominantly a case-by-individual case determination. DED and TPS however, do accord work authorization and other privileges, and arise from the same humanitarian motivation. DA can occasionally morph into a group concept, as when Hurricane Katrina closed New Orleans colleges and made it impossible for international students to remain “continuously enrolled” in coursework, disrupted their studies, and in a number of cases, displaced them to other cities.\(^6^2\) CIS issued “Interim Relief” Guidelines in the circumstances, and was flexible in allowing the affected colleges and students

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\(^6^0\) “Deferred Enforced Departure (DED) grants certain qualified citizens and nationals of designated countries a temporary, discretionary, administrative protection from removal from the United States and eligibility for employment authorization for the period of time in which DED is authorized. The President determines which countries will be designated based upon issues that may include, but are not limited to, ongoing civil strife, environmental disaster, or other extraordinary or temporary conditions. The decision to grant DED is issued as an Executive Order or Presidential Memorandum.” U.S. CITIZENSHIP & IMMIGRATION SERVICES, AFFIRMATIVE ASYLUM PROCEDURES MANUAL 57 (Nov. 2007), http://www.uscis.gov/files/nativedocuments/AffrmAsyManFNL.pdf. DED, which was designated Extended Voluntary Departure until 1990, is conferred upon nationals of a particular country by means of either an Executive Order or a Presidential Memorandum.

\(^6^1\) INA § 244(a), 8 U.S.C. § 1254(a) (2006).

\(^6^2\) “USCIS ANNOUNCES INTERIM RELIEF FOR FOREIGN STUDENTS ADVERSELY IMPACTED BY HURRICANE KATRINA” (USCIS Press release, November 25, 2005), available at: http://www.uscis.gov/files/pressrelease/F1Student_11_25_05_PR.pdf (DA action available to F-1 students impacted by Hurricane Katrina college closures). DA relief was not made available to M-1 or J-1 visa holders, even those whose situations in the Hurricane were just as dire.
to waive certain requirements and procedures. Statutory provisions as well as CIS guidelines for a form of DA have been enacted for “U visas,” those available to certain individuals without status who have experienced violence or who have been victims of crime. The use of Parole, which does not count as a formal means of “entry” into the United States, also functionally resembles DA status, and may be granted on a case by case basis, often for emergency medical treatment or other humanitarian purposes.


64 In an April 6, 2007 “Recommendation from the CIS Ombudsman [Prakash Khatri] to the Director, USCIS [Emilio T. Gonzalez],” there was acknowledgement that U visa holders [8 U.S.C. §1101(a)(15)(U)] could receive Deferred Action, including work authorization and family beneficiary-eligibility. 6 8 U.S.C. §1184(o)(3)(A). The intra-agency memo is available at: http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_32_O_Deferred_Action_04-06-07.pdf (last visited February 28, 2012). Gonzalez published his response to the Ombudsman on August 7, 2007, agreeing for the need for data but stressing the infeasibility of doing so: http://www.dhs.gov/xlibrary/assets/cisombudsman_rr_32_o_deferred_action_uscis_response_08-07-07.pdf (last visited February 28, 2012). There are not many U visa holders, and the data have not yet been fully analyzed, but early reports include some problems with the use of the U, both because they were not made available for almost seven years and can require several abuse and violence to be visited upon the victims, but also because the normal rough and tumble of court cases involving victims can often re-victimize the witnesses. See, e.g., Jessica Farb, The U Visa Unveiled: Immigrant Crime Victims Freed from Limbo, 15 Hum. R’ts Brief 6 (2007); Micaela Schuneman, Seven Years of Bad Luck: How the Government's Delay in Issuing U-Visa Regulations Further Victimized Immigrant Crime Victims, 12 J. Gender Race & Just. 465 (2009) (delays and problems involved with using U visas).

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Eligibility for DA had originally appeared at 242.1(a)(22)(A)-(D) of the Operating Instructions, but the OI were administratively withdrawn in 1997, removed from the Inspector’s Field Manual, and several were replaced by 8 C.F.R. §274a.12(c)(14): DA is “an act of administrative convenience to the government which gives some cases lower priority…..” 66 A decade later, the agency Ombudsman recommended to CIS that it publish the criteria and application guidelines for DA, that the data be gathered in a systematic fashion, and that there made publicly available establish a regular review of the decisions (to “ensure that like cases are decided in like manner”), but these have not occurred.67 The previous Operating Instruction OI 242.1(a) (22) had required data be gathered and kept, in large part so that the cases could not languish and be kept open for long periods of time: “The district director will sign the form personally and set forth the basis for making the recommendation. . . . Interim or biennial reviews will be conducted to evaluate whether approved cases should be continued or removed from the deferred-action category. Each regional commissioner must maintain current statistics on deferred-action cases, with the data readily available upon request. Statistics must be kept on the numbers of: (i) cases in the deferred-action category at the beginning of the fiscal year; (ii) recommendations received in the fiscal year to date; (iii) recommendations approved; (iv) recommendations denied; (v) cases removed from the deferred-action category; and (vi) deferred-action cases pending at the end of the fiscal year.”68

As an example of how DA operated under this OI regime, consider Bull v INS, a 1986 11th Circuit case,69 which construed the OI as requiring more process than would otherwise be due to the petitioners, even unsympathetic intending immigrants. In this interesting and complex case, both the Immigration Judge and the Board of Immigration Appeals refused Bull’s application for adjustment of status due to several strikes against him, including the predicate criteria not having been determined eligible, an immigrant visa not being immediately available, and, most important, his having pled guilty in Florida to a charge of passing a bad check, a crime

67 Recommendations, supra, at note 64.
68 Hopper and Osuna, supra note 51, at 10-11.
69 Bull v INS, 790 F.2d 869 (11th Cir. 1986).
involving moral turpitude (CIMT). But the Circuit carefully read and applied the forms of discretionary relief available to him at the time (which would not be available to him today, or since 1996, when the game-changing IIRIRA, AEDPA, and PWROA became determinative), and held:

At first glance, the conclusion of the immigration judge and Board of Immigration Appeals that, even if Bull had been granted the continuance and subsequently filed his adjustment application, he would nevertheless not have qualified for adjustment because an immigrant visa was not immediately available to him seems quite sound. Although Bull's wife had filed the requisite petition to obtain a visa for him, it had not been approved as of the time of the request for a continuance, and, based upon the time normally required to process such a petition, it was likely that any approval of it would not be forthcoming for some time.

However, a reading of the Immigration and Naturalization Service's own Operations Instructions and a prior opinion from the Board of Immigration Appeals belies that conclusion. In Operations Instruction 242.1(a) (23), the I.N.S. adopted a policy of refraining from either deporting or instituting proceedings against the beneficiary of a prima facie approvable visa petition if approval of the petition would make the beneficiary immediately eligible for adjustment of status. Pending final adjudication of a petition which has been filed, the district director will not deport, or institute proceedings against, the beneficiary of the petition if approval of the petition would make the beneficiary immediately eligible for adjustment of status under section 245 of the Act or for voluntary departure under the Service policy set forth in Operations Instruction 242.10(a)(6)(i). . .

[As to the CIMT], at first glance, the decisions of the immigration judge and the Board to deny the continuance because ‘the respondent has a criminal conviction on his record and is not fully and clearly eligible for the relief of adjustment of status,’ seem proper because, under 8 U.S.C. § 1182(a)(9), aliens who have been convicted of, or who admit having committed, a crime involving moral turpitude are ineligible to receive visas and are excludable from admission into the United
States. Thus, based upon this statute, the requirement for adjustment of status in 8 U.S.C. § 1255(a)(2) that ‘the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence,’ and Bull's guilty plea in Florida to the charge of passing a bad check, ‘the immigration judge ... summarily den[ied] a request for a continuance ... upon his determination ... that the adjustment application would be denied on statutory grounds ... notwithstanding the approval of the petition.’ . . .

[T]his denial of the request for a continuance based upon the conclusion that Bull's guilty plea makes him statutorily ineligible for adjustment of status would not be an abuse of discretion were that conclusion correct. What makes for an abuse of discretion in this instance is that the legal conclusion upon which the denial was based is incorrect. While 8 U.S.C. § 1182(a)(9) would seem to make Bull statutorily ineligible as a result of his Florida guilty plea, § 1182(h) provides an exception to § 1182(a)(9) for the spouse of a United States citizen, allowing him to be issued a visa and admitted to the United States for permanent residence if he can establish (A) that his exclusion will result in extreme hardship to his United States citizen wife and (B) that his admission into this country ‘would not be contrary to the national welfare, safety, or security of the United States.’

Thus, even in a situation such as Bull, when there were several reasons to disqualify the noncitizen plaintiff from adjusting status or even remaining in the country, the court determined that it is not the actual facts that rendered his claims for relief plausible, but the failure of the IJ or the BIA to articulate the actual reasons that DA was not considered or applied in his review: “this denial of the request for a continuance based upon the conclusion that Bull's guilty plea makes him statutorily ineligible for adjustment of status would not be an abuse of discretion were that conclusion correct. What makes for an abuse of discretion in this instance is that the legal conclusion upon which the denial was based is incorrect.”

70 Id., 790 F.2d 869, 871-873. (citations omitted) The Deferred Action OI at the time were 242.1(a)(22), but the point of Bull is how the OI work, and how some courts have deferred considerably to the weight of the OI.

71 Id., at 872. (citations omitted).
Remarkably, even then the denial would have been upheld, except neither the IJ nor the BIA articulated their reasoning. Interpreting the OI, the court held: “In light of § 1182(h), Bull's request for a continuance could still have been denied if it had been determined that his deportation would not result in hardship to his wife or in the even more unlikely event that it was decided that his continued presence in this country constituted a threat to national security. However, since there is no mention in either the opinion of the immigration judge or that of the Board of Immigration Appeals of any such finding or even of the consideration of § 1182(h), we must assume that they failed to consider Bull's request for a continuance in light of the statutory eligibility for adjustment of status available to him under § 1182(h).”

In subsequent law review articles, Lennon attorney Leon Wildes provided an invaluable scholarly service by publishing previously-unavailable data on the use of DA in the files made available to him. Writing in 2004, he found: “Aside from the records of cases recently approved, removed, and denied deferred action status, sixty-three cases that were approved between 1959 and 1991 were included in the files. These old cases contained forms indicating that a biennial review had taken place and that the statuses of the cases remained the same; thus, it was determined that the cases should be maintained in deferred action classification. A major shortcoming of the current data is that it contains fewer cases, only 332 from the eastern region and 167 cases from the central region, as opposed to the 1843 cases nationwide analyzed in the original 1976 [Wildes] article. Of the 332 eastern cases, 8 were denied deferred action status and 28 were removed from the category entirely, meaning that approximately 89% of the cases were granted. None of the cases from the central region were removed. However, 19 were denied. Thus, approximately 89% of those cases were granted.”

In a 1997 study of DA and private relief bills, Robert Hopper & Juan P. Osuna noted how rare prosecutorial discretion was: “In the Western Region of the INS, there were 131 deferred-action cases pending at the beginning of fiscal year (FY) 1995. Favorable recommendations for deferred action were sent to the regional commissioner in only 22 of those cases. In the Central

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72 Id., at 872-3. (citations omitted).

Region, only 49 deferred-action cases were pending at the beginning of FY 1995. Finally, in the Eastern Region, there were 106 deferred-action cases still pending as of December 1995. Only five cases had been approved.\textsuperscript{74} The record keeping has gotten no better or more transparent, and the agency has found itself being able to please no one: restrictionists do not want DA expanded, while accommodationists want DA widened and deepened. Because the data are so spotty and irregular, neither side can say with certainty which form of perdition has occurred.

Professor Shoba Sivaprasad Wadhia, heir to the Wildes DA scholarship throne, has conscientiously attempted to gather more recent DA data, and has persisted through several years of the immigration authorities doing a poor job of making data available and busily throwing down radar chaff to hide the complete data and decisions. For example, in one remarkable stretch of persistence, FOIA requests, phone calls, and dogged determination, she emerged with partial and incomplete DA records from FY 2003 through FY 2010, having requested them from each USCIS regional service center and field office:

The remaining qualitative data within the 270-page PDF document included 118 identifiable deferred action cases. It was difficult to label a case as tender or elder age because much of the data lacked identifiers. However, when a field included the word “minor,” “infant,” or a specific age (e.g., eighty-nine-year-old), the case was calculated as involving tender or elder age for purposes of this analysis. It should also be mentioned that some of the cases approved, pending, or unknown contained little to no factual information and, as a consequence, were not identified as bearing any of the “positive” factors listed above. The outcomes for many of these cases were unknown because the field was blank or there simply was not a field in the log maintained by a particular office. Many of the cases also had outcomes that were marked as “pending.” Of the 118 cases, fifty-nine (59/118 or fifty percent) were pending or unknown; forty-eight (48/118 or 40.7%) were granted; and eleven (11/118 or 9.3%) were denied.

\textsuperscript{74} Hopper and Osuna, supra note 51, at 11.
Among the 107 cases approved, pending, or unknown, fifty (50/107 or 46.7%) involved a serious medical condition, nineteen (19/107 or 17.8%) involved cases in which the applicant had USC family members, twenty-two (22/107 or 21.5%) involved persons who had resided in the United States for more than five years, and thirty-two (32/107 or 29.9%) cases involved persons with a tender or elder age. Many of these cases (29/107 or 27.1%) involved more than one “positive” factor. For example, many of the cases (10/107 or 9.3%) involved both a serious medical condition and USC family members. Likewise, many of the cases (21/107 or 19.6%) involved both tender or elder age and a serious medical condition.

Among the forty-eight granted cases, twenty-four (24/48 or 50%) involved a serious medical condition; ten (10/48 or 20.8%) involved cases in which the applicant had USC family members; four (4/48 or 8.3%) involved persons who had resided in the United States for more than five years; and thirteen (13/48 or 27.1%) cases involved persons with a tender or elder age. Many of these cases (12/48 or 25%) involved more than one “positive” factor. For example, four (4/48 or 8.3%) of the cases involved both a serious medical condition and USC family members. Likewise, ten (10/48 or 20.8%) of the cases involved both tender or elder age and a serious medical condition. 75

In a surprising turn of events, the Bush Administration employed DA an average 771 times in the years 2005-2008, while the pace dropped to 661 per year on average during the first years of the Obama Administration. In response to the GOP insistence that the border be “tightened” before discussion of comprehensive immigration reform would take place, ICE in a Democrat administration seriously advanced enforcement measures and by 2010, the most recent

75 Shoba Sivaprasad Wadhia, Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law, 10 U. of New Hamp. L. Rev. 1, 41-42 (2011) (citations omitted). Remarkably, these data included more than one hundred emergency Haitian cases, following the 2010 earthquake in that country. Professor Wadhia indicated that the data were in very poor shape, and drolly noted: “It is neither possible to conclude that the records I received were complete, nor is it possible to analyze the entirety of what I received, because there is great disparity between how the data on deferred action is collected and recorded by each office, if at all.” (at 39) Her impressive forensic skills in gathering and analyzing the data were at the level of television’s CSI quality.
year for which such figures were available, was deporting almost 400,00—an historic high record. Yet, disagreement over what the enforcement metrics would include, divisive 2012 election year politics, and the unwillingness of any Southwestern border Republican U.S. Senator to take the lead on such policies brought the DREAM Act to a stall, and resulted in no bipartisan traction on the larger issue. Senator John McCain (R-AZ), historically a moderate and conciliator on the subject, took a sharp turn to the right when he unsuccessfully ran for the U.S. Presidency in 2008, and never again spent his political capital on this issue.

IV. The Good, the Bad, the Ugly, and the Impossible of Prosecutorial Discretion

By 2011, and with the inability of the Obama Administration to get the DREAM Act through Congress, it had become clear that the only pathway for any movement on resolving the inchoate and liminal status of the large number of non-criminal undocumented persons was that of internal administration, including the tools available for prosecutorial discretion, or the small number of non-statutory and other non-regulatory mechanisms. At the time, reports began to indicate that the combination of a slowed economy, increased border security, and restrictionist state statutes had reduced the number of undocumented immigrants in the country, and even

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citizen children were being removed with their parents who were in unauthorized status.\textsuperscript{79} The DHS began telegraphing small signals regarding Administration intent to reduce the many low priority cases from the civil and immigration court case dockets and instead to focus upon bigger game, including criminal aliens, terrorism and national security matters, and the larger border-securing devices that the Republicans had laid out as conditions precedent for agreeing to any legalization initiatives or other cooperative efforts. By this time, a curious phenomenon had occurred: The Administration had developed an impressive and successful enforcement regime, but one that employed forms of prosecutorial discretion (such as Deferred Action) less often than had the predecessor Bush administration, resulting in a historic high number of deportations and removals, and receiving no credit for its successes from its conservative critics.\textsuperscript{80}

Secretary Napolitano accurately noted in March, 2011 that the use of DA had fallen to lower levels than those of the Bush DA figures, and that more unauthorized persons had been

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removed. The numbers also reveal how immigration cases overall have clogged the system and ground it almost to a halt. National data gathered by the Transactional Records Access Clearinghouse (TRAC) reported in August 2010 that the number of unresolved Executive Office for Immigration Review (EOIR) immigration cases before immigration judges were at their all-time high of approximately 250,000, averaging 459 days from notices-to-appear (NTA) through resolution.

Democrat members of the House and Senate began in the Spring of 2011 to press for expanded use of Deferred Action, Prosecutorial Discretion, and other administrative means to allow DREAM Act students some form of relief from deportation, especially as hundreds had outing themselves and made their undocumented status known to the larger public during the DREAM Act deliberations. Additional news stories had begun to appear regularly about


students without status being discovered in traffic court, random police encounters, and travel security.  

Most of these stories cast the students in a favorable light, and a number of private and public resources were being made available, such as resident tuition for certain postsecondary Plyler enrollees, financial aid for some, litigation that upheld the state resources, and public sympathy and solidarity with others, turning their status into a larger traditional civil rights identity and movement.

Then, in June 2011, ICE Director John Morton released directives announcing the expanded use of prosecutorial discretion (PD) in enforcement and began a pilot project process in two offices, where additional legal review and discretion would be undertaken. In August 2011, DHS established a joint DHS-Department of Justice (DOJ) working group to review and


resolve the hundreds of thousands cases then in the process of Executive Office for Immigration Review (EOIR) review. In November 2011, DHS revealed additional details on how the review was to proceed and how the large number of case would be whittled down to the most urgent and serious. Six months after the several “Morton” Memoranda were issued, in January 2012, ICE had completed the PD pilot project reviews in Denver and Baltimore, and had determined that many low priority cases could be identified and more attention paid as a result to criminal and serious alien offenders.

Working with various immigration organizations and advocates, the Administration began to lay out its plans, and announced how PD would be administered, how pending cases at various stages would be reviewed, and how lawyers and representatives could seek PD for clients in the system. The political thermodynamics of this complex initiative were quick to emerge and complicate the overall project. Of course, there were many observers who were against any easing of the process or any review, labeling such a system a “back door amnesty,” a view that ranged from political moderates who did not want to give federal agencies more authority to Congressional actors who saw this increase in prosecutorial discretion as an end run around legitimate legislative options and the more limited regulatory procedures, one that they felt enabled the Administration to act unilaterally. And some political opportunists saw this as


90 See, e.g., House Judiciary Immigration Subcommittee Holds Hearing on OIG Adjudications Report On February 15, 2012, the House Judiciary's Subcommittee on Immigration Policy and Enforcement held a
a chance to excoriate President Obama and to accuse him of pandering to Latino and other
Democrat constituencies; nativists at the far right saw this as an act of perdition and political
cowardice.91 And those who wanted to extend the discretion further were unhappy and
disappointed at what they considered a tepid and half-loaf response, combined with unpopular
security measures.92

91 This genre has wide and deep roots. See, e.g., Hans von Spakovsky, Backdoor Amnesty – Abusing the Constitution and Presidential Authority, Heritage.org, August 19, 2011,

A20; Gary Endelman and Cyrus D. Mehta, KEEPING HOPE ALIVE: PRESIDENT OBAMA CAN USE HIS EXECUTIVE POWER UNTIL CONGRESS PASSES THE DREAM ACT, blogspot.com, December 18, 2010, http://cyrusmehta.blogspot.com/2010/12/keeping-hope-alive-president-obama-can.html (last visited January 13, 2012); Julia Preston, U.S. Pledges to Raise Deportation Threshold, NY Times, June 18, 2011, A14 ("groundswell of local resistance" to Secure Communities programs). As the war on terrorism has escalated, a number of initiatives have arisen. For a critical and comprehensive
In real life, the “Morton Memorandum” was not just one memorandum, but collectively a series of memos, promulgated before and after the June 17, 2011 Ur-memo. Moreover, the Morton Memorandum is an administrative Rosetta Stone of policy and procedure, one that contains many interrelated sections and complex characteristics. Even though this is obviously a mixed metaphor, it should be noted that the Morton Memorandum has many moving parts: definitional, including the basic concordance setting out priorities, the multiple and freighted meanings of the applicable terminology, the organizational ethos and structural capability of ICE to administer and adjudicate the many cases that are likely to be processed, and the many administrative and procedural transparency features that will be needed for all the parties involved—the aliens and their families, their counsel and other advocates, the agency personnel, the political actors across all spectrums from the Obama Administration through the broad middle of the polity to the restrictionist and nativist politicians. A large-scale national discourse is beginning to be underway, but in a presidential election year where anti-immigrant sentiment has already been openly on display, this has been and is likely to continue as an ugly act in self-constituting the sovereign self.

In chronological order, the collective “Morton Memorandum” have thus far included:

- Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions, 20 August 2010;\(^\text{93}\)

- Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens, 2 March 2011;\(^\text{94}\)


Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, 17 June 2011 [Morton Memo];95

Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, 17 June 2011 [Prosecutorial Discretion Memo];96

Case-by-Case Review of Incoming and Certain Pending Cases (17 November 2011) and other CIS and EOIR memos.97

These policy documents set out the broad outlines of the comprehensive and overarching Prosecutorial Discretion (PD) ICE program, including the actual priority enforcement decision structure, the affected agency (and related agencies) personnel, the relevant factors to consider for exercising PD, positive factors for exercising “particular care and consideration,” those negative factors to be used in determining enforcement policies, and the timing or preferable points at which PD might be best applied.98 In addition, Morton indicated which of the many


memoranda had been issued by previous immigration officials would be incorporated into the new mix of priorities, and which were to be rescinded or discarded.

First, the broad outlines of what constitute proper PD were set out, and included:

- deciding to issue or cancel a notice of detainer;
- deciding to issue, reissue, serve, file, or cancel a Notice to Appear (NTA);
- focusing enforcement resources on particular administrative violations or conduct;
- deciding whom to stop, question, or arrest for an administrative violation;
- deciding whom to detain or to release on bond, supervision, personal recognizance, or other condition;
- seeking expedited removal or other forms of removal by means other than a formal removal proceeding in immigration court;
- settling or dismissing a proceeding;
- granting deferred action, granting parole, or staying a final order of removal;
- agreeing to voluntary departure, the withdrawal of an application for admission, or other action in lieu of obtaining a formal order of removal;
- pursuing an appeal;
- executing a removal order; and
- responding to or joining in a motion to reopen removal proceedings and to consider joining in a motion to grant relief or a benefit.99


In addition, the Memorandum set out the enforcement standard as “principally one of pursuing those cases that meet the agency's priorities for federal immigration enforcement generally,” a different standard than that which had been employed since the Clinton Administration, “whether a substantial federal interest was present.” While these differential standards are difficult to discern, and the degrees of separation are nuanced, it was widely accepted that the newer standards were intended to be less-stringent under the revised criteria, and more pro-immigrant.

The various ICE actors and authorized agents and employees are numerous and spread horizontally across many agencies and departments, and vertically from the chief Secretary of DHS to the many subordinates who undertake the comprehensive work of immigration, naturalization, and the multiple diplomatic, programmatic, and enforcement tasks. As in any complex organization, there is a substantial chain of command with many lower level policy players and officials. The Memorandum spells these out in some detail for the various administrative units within ICE: Enforcement and Removal Operations (ERO), Homeland Security Investigations (HSI), and Office of the Principal Legal Advisor (OPLA), and those who practice or have executive responsibilities before the Executive Office for Immigration

100 Ibid. at 2-3.

101 Whether there is “a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction” is also one of the requirements for certification in a number of settings, such in determining whether a minor can be prosecuted under the Juvenile Justice and Delinquency Act of 1974, as amended, 18 U.S.C.A. Secs. 5031-5042 (West 1985 & Supp. 1995). United States v. W.P., Jr., a minor, 898 F.Supp. 845 (M.D. Ala. 1995).


105 Office of the Principal Legal Advisor (OPLA). http://www.ice.gov/about/offices/leadership/opla/.
Review (EOIR),¹⁰⁶ the DHS/DOL/DOJ/State Department counterparts,¹⁰⁷ or the other immigration enforcement authorities, writ large, such as Customs and Border Patrol (CBP),¹⁰⁸ or other Citizenship and Immigration Services proceedings.¹⁰⁹ Many of the interrelationships are set out in long-established administrative and adjudicatory structures, have Memoranda of Understanding to apportion responsibilities, or are set out in statutes and regulations.¹¹⁰

The heart of the Morton Memorandum is the listing of “relevant factors” for exercising PD, including, but not limited to:

• the agency's civil immigration enforcement priorities;

• the person's length of presence in the United States, with particular consideration given to presence while in lawful status;

• the circumstances of the person's arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child;

• the person's pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States;

• whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat;


¹⁰⁷ For example, the Department of Labor has jurisdiction over many of the employment-based immigrant enforcement provisions. See http://www.dol.gov/compliance/laws/comp-ina.htm .


¹⁰⁹ http://www.uscis.gov/portal/site/uscis.

•the person's criminal history, including arrests, prior convictions, or outstanding arrest warrants;

•the person's immigration history, including any prior removal, outstanding order of removal, prior denial of status, or evidence of fraud;

•whether the person poses a national security or public safety concern;

•the person's ties and contributions to the community, including family relationships;

•the person's ties to the home country and conditions in the [home] country;

•the person's age, with particular consideration given to minors and the elderly;

•whether the person has a U.S. citizen or permanent resident spouse, child, or parent;

•whether the person is the primary caretaker of a person with a mental or physical disability, minor, or seriously ill relative;

•whether the person or the person's spouse is pregnant or nursing;

•whether the person or the person's spouse suffers from severe mental or physical illness;

•whether the person's nationality renders removal unlikely;

•Whether the person is likely to be granted temporary or permanent status or other relief from removal, including as a relative of a U.S. citizen or permanent resident;

•whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime; and

•whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities, such as ICE, the U.S Attorneys or
Department of Justice, the Department of Labor, or National Labor Relations Board, among others.\textsuperscript{111}

The Memorandum urges that the long “list is not exhaustive and no one factor is determinative. ICE officers, agents, and attorneys should always consider prosecutorial discretion on a case-by-case basis. The decisions should be based on the totality of the circumstances, with the goal of conforming to ICE’s enforcement priorities.”\textsuperscript{112}

In addition, the Memorandum itemizes several “positive factors [that] should prompt particular care and consideration,” including, but not limited to:

- veterans and members of the U.S. armed forces;
- long-time lawful permanent residents;
- minors and elderly individuals;
- individuals present in the United States since childhood;
- pregnant or nursing women;
- victims of domestic violence; trafficking, or other serious crimes;
- individuals who suffer from a serious mental or physical disability; and
- individuals with serious health conditions.\textsuperscript{113}

The positive factors noted above also have their counterpart mirror opposites, to exercise and prioritize the negative criteria that should be used to decline prosecutorial discretion:


\textsuperscript{112} When I refer to all the various Memoranda, I use the collective term “Morton Memoranda” to signal they were from several sources and covered different issues.

• individuals who pose a clear risk to national security;

• serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind;

• known gang members or other individuals who pose a clear danger to public safety; and

• individuals with an egregious record of immigration violations, including those with a record of illegal re-entry and those who have engaged in immigration fraud.\textsuperscript{114}

These detailed criteria, even sketched in the necessarily broad (and sometimes confusing and duplicative) strokes, show the folk wisdom of both God and the Devil residing in the details of any complex scheme. The broad outlines, carried across several administrations and incorporating many plusses and minuses from earlier organizational experiences and political priorities, are so generic as to be un-newsworthy and quotidian. Of course, the mere announcement of such initiatives, which emphasize ongoing and previously-established priorities, but also new emphases and policies, had the inevitable Heisenberg effect—the uncertainty principle where the very act of announcing an initiative draws attention to the topic and alters the position of the issue being observed.

Leon Wildes and law scholar Shoba Sivaprasad Wadhia, for example, have noted:

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The Morton Memo also empowers Immigration and Customs Enforcement employees to consider cases for prosecutorial discretion early in the enforcement process and without relying on an affirmative request by an attorney. This clause is important because prosecutorial discretion has largely operated as a program reserved for seasoned private immigration attorneys with special relationships within the agency. . .

\textsuperscript{114} \textit{Ibid.}, at 5.
Nevertheless, critics believe the Morton Memo serves as a new backdoor “amnesty” or circumvention of Congress in the wake of failed congressional action on immigration. Select members of Congress have gone so far as to announce legislation to prevent the administration from exercising prosecutorial discretion. But that is politics. The importance of prosecutorial discretion was revealed long ago with the case of John Lennon. More than thirty-five years later, prosecutorial discretion continues to serve as a smart enforcement policy that allows the immigration agency to prioritize its limited resources and place sympathetic cases on the backburner. Ultimately, the impact of the Morton Memo is important and can be measured only with diligent oversight by the private bar, Congress and the agency’s own watchdogs.115

Nativist columnist Michelle Malkin railed indelibly against the initiatives as examples of the “deadly ’13 strikes you’re out’ policies of border-state prosecutors.”116 She saw the Memorandum as a political ploy and power-play designed to accomplish administratively what the Obama Administration could not do—or has not been able to do—that is, enact any form of immigration reform that would provide some pathway for some unauthorized aliens to earn or become eligible for a more regularized status.

And ICE is a large player in the scheme of immigration enforcement, but it is by no means the only participant. In January 2012, the U.S. Border Patrol announced a new plan to repatriate unauthorized Mexicans back to Mexico and “to begin imposing more serious consequences on almost everyone it catches from Texas to San Diego.”117 Labeled the


“Consequence Delivery System,” the proposed Border Patrol initiative will prioritize its apprehended immigrants to priority categories, from first-timers to criminal aliens with violent records. Associated Press reports indicated that additional penalties were to be meted out, and that these will “be severe for detained migrants and expensive to American taxpayers, including felony prosecution or being taken to an unfamiliar border city hundreds of miles away to be sent back to Mexico.” This new strategy was piloted in 2009 in Arizona, home of statewide restrictionist policies designed to discourage undocumented workers from establishing residence or working. The program, if it were to be expanded, would prove to be expensive and would likely overpopulate local and state prison facilities, as well as tax the enforcement efforts that have already been overwhelmed by the new metrics of increased border security. Even with moderate enforcement, immigration cases have completely saturated Southwestern court dockets. “Among individual Immigration Courts, and considering only those with at least 1,000 pending cases, the court with the fastest buildup during FY 2011 was the Immigration Court in Oakdale, Louisiana, where pending cases jumped by 45 percent. The San Antonio, Texas court ranked second, with a growth spurt of 40 percent during this year. New Orleans, Louisiana (up 33 percent), Houston, Texas (up 31 percent), and Phoenix, Arizona (up 28 percent) made up the remaining top five locations experiencing the highest growth rates in case backlogs. Las Vegas, Nevada just missed out being included in these ranks with a growth rate of 27 percent.” And when examining the actual “wait times” (from start to final resolution of cases already docketed), the TRAC data showed: “Wait times continue to be longest in California with 666 days, up from 660 days three months ago. Massachusetts average wait times declined to 603 days from 617 days over the same time period. Utah stayed in third place, with an average time of 563 days pending cases have been waiting in the Salt Lake City Immigration Court — up from 537 days three months ago.”


118 Id. at ImmigrationImpact.com.

119 The Syracuse University Transactional Records Access Clearinghouse (TRAC) reported that immigration-related prosecutions referred by the DHS immigration enforcement agencies totaled 59 percent of all federal prosecutions in federal courts, both Article III district courts (predominantly illegal re-entry and drug-related offenses) and those of magistrate judges (mostly illegal re-entry and illegal entry offenses). Reporting October 2011 data, the study also found that the number of immigration-related
Meanwhile, other comprehensive enforcement initiatives such as the ICE "Secure Communities Program," designed to coordinate multi-agency cooperation and resource-sharing, have been operational since March, 2008, but a number of state officials have withdrawn or attempted to limit their participation in the multilateral consortia, as they have from §287(g) cooperative arrangements. In other words, these relationships are complex, fluid, and highly politicized.

Moreover, no war can be waged without support of its infantry, and the ICE foot soldier employees have not supported initiatives that would lead to more targeted enforcement and more PD resources. In voting an overwhelming “Vote of No Confidence” in ICE Director John Morton and other top ICE executives, the AFL-CIO National Immigration and Customs Enforcement Council, representing approximately 7,000 ICE officers and other employees from the ICE Office of Enforcement and Removal Operations (ERO), showed their displeasure with the direction of ICE’s efforts in June 2010—well before the increased accomodationist initiatives that became evident in the Administration support of the DREAM Act and the Summer 2011

prosecutions filed in that period were 119.5 percent greater than were such prosecutions filed in 2006. The data are also reported by federal judicial districts, by the largest number of prosecutions per capita for immigration matters during this period. Table 3 revealed that the highest concentration was the same five districts as five years before, although the order of the top five had shifted: California Southern District; Arizona; Texas Western District; New Mexico; Texas Southern District. Transactional Records Access Clearinghouse, DHS Referred Most Federal Criminal Prosecutions in October 2011, February, 2012, http://trac.syr.edu/immigration/reports/271/ (last visited March 3, 2012).


“Morton Memoranda.” They considered the proposed resource allocation to be undermining their enforcement authority and rewarding illegal behavior. While labor disagreement with management has a long and complicated history in the United States, such enmity and animosity not over working conditions or conservative efforts to undermine labor unions but over basic organizational goals and legal strategy for executing the fundamental mission direction is unusual, and certainly not likely to be efficacious for smooth implementation of the ICE discretionary policies and programs.

While the staff reaction to a different mix of enforcement and adjudications or processing persons for permanent residence in the country has clearly embraced the enforcement function of the house, this emphasis is a relatively recent development within the agency, one that is likely increased due to the DHS relocation and the increased general emphasis upon immigration control as national security border security in the war on terrorism. As one internal measure of this mixed-function issue, ICE has deployed “Fugitive Operations Teams,” responsible for locating and apprehending persons whose presence in the United States is considered to be unauthorized, either through legal entry and subsequent violations (such as overstaying a visa’s terms) or though their having crossed a border without inspection.

In addition, worksite enforcement has become a higher priority for ICE, and thousands of arrests are made each year as a measure of this mission—over and above the policing efforts by the agency charged with actually securing the border, U.S. Customs and Border Protection (CBP), which grew from approximately 4,000 agents each year in the early 1990s to more than 21,000 in FY 2011; these figures do not include the extensive support and administrative CBP

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One scholar who has carefully examined this shifting mission has remarked upon the rise in residential and workplace enforcement in ICE: “Together, the surge in residential and workplace enforcement actions has been breathtaking and inconsistent with the agency’s historical focus on serious offenders and genuine threats to national security.”

This “mission creep” is a problematic evaluation issue across all agencies and complex administrative structures, and the extensive scholarship in these areas points to issues of professional competence and institutional capacity. Taking on new jurisdictions or having complex adjudicatory powers reveal serious fault lines in many governmental organizations.

For example, should comprehensive immigration reform be enacted, it would require a substantial increase in the naturalization and evaluation side of the house, even while the enforcement functions need to be enhanced in the post 9/11 world. If the sign of a mature intellect is the ability to hold incongruous and nuanced positions or ideologies, so it is with

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124 “DHS Budget: 287(g) Down, ‘Secure Communities’ & E-Verify Up: ‘A fiscal year 2013 budget brief released by Homeland Security today has some details on the Obama administration’s immigration enforcement priorities, and one of the losers is the federal-local partnership known as 287(g). The administration is proposing a budget reduction of $17 million up front, and the document suggests a gradual phase-out in favor of Secure Communities, which is described as “more consistent, efficient and cost effective.’” Leslie Berestein Rojas, DHS budget proposes discontinuing 287(g) in some jurisdictions, Multi-American, SCPR.org, Feb. 13, 2012, http://multiamerican.scpr.org/2012/02/dhs-to-begin-discontinuing-287g-in-some-jurisdictions/ (last visited, March 3, 2012). See also Shoba Sivaprasad Wadhia, The Role of Prosecutorial Discretion in Immigration Law, 9 Conn. Publ. Int. L. J., 243, 293 (2010).

125 Wadhia, id, at 293. See also Helen B. Marrow, Immigrant Bureaucratic Incorporation: The Dual Roles of Professional Missions and Government Policies, 74 American Sociological Review 756 (2009).

administrative agencies. The ICE functions in the relatively-new Department of Homeland Security umbrella, and has taken on enhanced apprehension and policing and enforcement functions, which pose internal dissension and persistent tensions with the more ameliorative incorporation and constitutive obligations. PD and DA perform a fluid, lubricating role in mediating among these conflicting strains within the organization and across agencies, such as coordination with DOL’s employment expertise.127

Perhaps as evidence of this mediating dimension, there is evidence that ICE is using DA as a means of negotiating and settling litigation that involves excessive force or embarrassing public mistakes by immigration authorities. For example, in Connecticut in 2007, soon after the city of New Haven had announced a voluntary municipal registration card to be available to all residents irrespective of immigration status, ICE agents and police arrested without warrants almost a dozen Latino men who were not authorized to be in the country. After the men obtained pro bono legal counsel, and following several years of processing the matter, in 2012, ICE offered all the plaintiffs either immigration relief or termination of their pending deportation proceedings; the settlement also paid compensation of $350,000. ICE conceded no admission of liability or fault, but settled the matter for discretionary purposes and because the men were not criminal aliens, thus fitting the DA-priority criteria.128 More widespread use of dormant discretionary latitude will undoubtedly lead to less litigation and fewer monetary settlements: the political economy of deferred action and other discretionary tools.129


V. The Trial Runs in Baltimore and Denver

ICE began an overall practice trial-run that ended January 13, 2012, designed to keep the “new low priority cases from clogging the immigration court dockets.” In this capacity, ICE attorneys were ordered to review all “incoming cases in immigration court” as well as other cases making their way through the ICE master calendar docket to employ the “more focused [Morton] criteria” to identify cases that were “most clearly eligible and ineligible for a favorable exercise of discretion.”

As test cases for the new approach, the Denver and Baltimore trial runs were informative and promising, but also illustrative of the many problems that the revised policies present to all involved. In what one observer called a “lightning review,” Denver prosecutors set aside much of their ongoing workloads, among the busiest in the nation, and worked around the clock over December, 2011 and January, 2012 to sift through the nearly 8,000 cases in one stage or another of deportation proceedings then pending before the local immigration courts and to apply the principles outlined in the Morton Memoranda. This review resulted in the identification of over 1,300 (16.4%) instances the lawyers considered “low priority,” constituting one-sixth of the pending cases, ranging from DREAM Act-type students outed in a routine traffic infraction to an unauthorized worker who had been married for nearly a dozen years to a U.S. citizen and who had been employed while using someone else’s Social Security information. The actual review, while overwhelming the 16 lawyers and staff who conducted it over the holidays, was undertaken on a short timetable due to the trial-run nature of the experiment and cleared out many cases and relieved the crush on the six immigration judges who averaged more than 1300


131 Preston, id., at A13.


133 DENVER SPECIFICS See also Nancy Lofholm, Prosecutorial review puts immigration cases in holding pattern, infuses a sense of hope, Denver Post, December 21, 2011, http://www.denverpost.com/search/ci_19589923#.TvOCsll0vhM.email.
cases each, with an average of 18 months in the queue per case.\textsuperscript{134} The review in Baltimore was on a smaller scale, but had somewhat similar results, with 366 cases of the total 3,759 (9.7\%) sorted for Deferred Action recommendations to close or terminate cases.\textsuperscript{135}

Picking this low-hanging fruit had consequences, however. To be sure, other court and agency business was put on hold during the review, but the concentration of professional effort was quite impressive and efficacious, especially in the initial test of the complex new policy. While the larger union problems that surfaced earlier are of obvious concern for carrying out any wholesale revision of policy and procedure, especially when the objections are about both the usual workload/employee matters but also about the overall direction and focus of agency enforcement initiatives, any changes in administrative organizational procedures will require commitment of the entire staff, from top to bottom and from lawyers and non-lawyer professionals. There were promising early reports that the immigration staff lawyers were pleased with their increased discretion and authority to “settle” cases that would have continued to pour in, discretion that their companion criminal prosecutors routinely employ to manage criminal pleadings and to reduce criminal dockets.\textsuperscript{136} The routine administration of justice in all areas requires focusing resources upon the most important and dangerous cases and offenders, and lawyers make dozens of decisions each week to pursue or not to pursue matters and to assign priority to enforcement efforts. Removing or accelerating such a large part of the docket are attractive incentives for the government lawyers to participate in these efforts.


\textsuperscript{135} John Fritze, Program May Close Cases of Deportation; Baltimore, Denver Pilot Cities for Expedited Review, BALT. SUN, Jan. 20, 2012, at 2A. In the technical argot of immigration, these were predominantly forms of Administrative Closure or Termination. Such distinctions do not make a difference in my overall narrative, but god is in the details. Shoba Sivaprasad Wadhia has examined these details in very comprehensive fashion, in her estimable The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions, XXX (2012).

\textsuperscript{136} Preston, supra note 130, at A13.
As essential as it is to get administrative buy-in and cooperation of agency staff for any major program initiative, perhaps equally important is the need to harness the energies of the large and varied immigration bar: the lawyers and other professionals who represent the immigrants in the process, and the array of NGOs and other actors in the large universe of immigration adjudication in the United States. While they surely share in the hope that these revised process and policies will result in better and expedited results for their undocumented and possibly-deportable clients, the metrics of success and efficacy are harder to measure.

Even successful instances of awards of Prosecutorial Discretion or other forms of relief, while welcome, still leave many of the noncitizens in an odd limbo—a situation surely better than the status quo ante, with its own unique and extraordinary hardships, but in some ways an equally frustrating and resolved place. Administrative closure, the primary form of PD available under these reviews, does not automatically award any status except a promise of delaying the case and not moving forward immediately with removal efforts. To be sure, this is better than not receiving the status; it is not nothing. However, the fortunate recipients still are likely ineligible for drivers licenses, other governmental identification, any governmental benefits, any waivers from other harsh penalties such as the bars to re-entry that likely affect most of them, any employment authorization, any adjustment of status opportunities, or, in truth, any movement forward to a more permanent status or permission to remain in the country. A number of noncitizens have received only temporary reprieves of one or two years, with no discernible end in sight for a change in their status. For example, DHS has played hardball with the important Employment Authorization Document (EAD) process, indicating that even successful cases being administratively closed will be ineligible for EAD unless they have a fresh and “independent basis” for such work authorization, such as would be imbedded within a pending adjustment of status (AOS) or application for asylum.  

Truth be told, if these noncitizens had

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137 See, e.g., Muzaffar Chishti and Claire Bergeron, Questions Arise with Implementation of Obama Administration's New Prosecutorial Discretion Policy (DC: Migration Policy Institute, February 2012), http://www.migrationinformation.org/USfocus/display.cfm?ID=883 (last visited March 4, 2012). And the policy’s reach is still not entirely clear. For example, on February 6, 2012, the US Court of Appeals for the Ninth Circuit demanded that DHS explain how it would use the new prosecutorial discretion policy to noncitizens already ordered to be removed and who were in the appeals process if they qualified for such discretion—whether detained or on bond. Alicia A. Caldwell, Court Ruling Could Prompt More Deportation Reviews, CBSNEWS.COM (Feb. 11, 2012), http://www.cbsnews.com/8301-501704_162-57375906/court-ruling-could-prompt-more-deportation-reviews/ (last visited March 4, 2012). In David Aranda Rodriguez v. Holder, the Circuit wrote: “ In light of ICE Director John Morton’s June 17, 2011
plausible cases for asylum or other forms of relief, they would have invoked them already, quite apart from the DHS initiative and the Morton Memoranda. Inasmuch as the discretion regime is designed over the long haul to integrate them into the society of eventual citizens, not providing work authorization seems ill-advised and shortsighted, particularly for DREAM Act-eligible students who are ready to begin their careers.

criticism that is occurring in any event. In the increasing number of states that have enacted restrictionist statutes, these “sleeping beauties”\textsuperscript{138} will not be able to attend public colleges, participate in adult education or GED classes, or take English language instruction offered or subsidized by public funds. Their ineligibility for these incorporating and mediating programs isolates them even further into their liminal status and makes it more difficult for them to become members of the society that they are on the verge of joining permanently.\textsuperscript{139}

In addition, the immigration bar has reason to believe that the DA initiative is not likely to be an improvement, for a truly ironic reason: if these clients are deemed to be eligible for any form of prosecutorial discretion, and others like them, why would they accept the half-loaf of DA when they might push for the real prize, permanent relief through one of the other means, such as Special Juvenile Immigrant status, or one of the other inchoate waiver forms available to immigration judges and immigration officials? As one AILA official in Denver was quoted as saying:

In many cases, lawyers for illegal immigrants are not accepting prosecutors’ offers because the immigrants have good chances of winning legal residency in court. Laura Lichter, the president-elect of the American Immigration Lawyers Association, who practices in Denver, said ICE could have done far more to reduce backlogs by rapidly completing those strong cases. ‘It is a major

\begin{itemize}
\item A Denver ICE prosecutor called the deferred cases “sleeping beauties,” presumably awaiting the prince’s kiss to dismiss them, while a Denver immigration lawyer characterized them as being consigned to “immigration purgatory.” Preston, supra note 130, at A13.
\end{itemize}
undertaking,’ she said of the docket review. ‘But it is also a major lost opportunity.’

It is not clear that they will be able to secure better results for their clients unless DA and prosecutorial discretion were to be broadened and more fully implemented, and worse, government decision-makers may then decide to play hardball with the cases that were not resolved and accorded such status. This blowback would likely harm other clients and it will be more difficult to advise clients to roll the dice with limited results and no eventual resolution. And if more lawyers calculate that they can do better for their clients and actually achieve a form of relief with traction, one that offers more hope and opportunities than will the vague status of DA and PD, they may be tempted to play a dangerous Game of Chicken with immigration judges and government lawyers. In other words, taking the easy cases off the table would, to ICE, signal that they have already given all the deals they are going to give, while to lawyers on the other side of the bar, taking these cases off the table but offering no final disposition could signal business as usual, on an expedited but insincere basis. In a contest where slowing the process down to gain some tactical advantages or to simply enable my client to remain in the country longer, such a result might prove less efficacious than the present situation, and further clog the court dockets.

In other words, the inevitable distrust and stalemates may return with a vengeance, with both sides more convinced than ever that cooperation and flexibility are in neither side’s interest. Simply parking these cases off the docket will not resolve them, absent additional discretion or finality. Most clients are not John Lennon, with widespread positive media and enormous financial and social resources. In the stark arithmetic of immigration enforcement, unless both sides trust each other and actually plea bargain with some authority, the entire enterprise will collapse. The inability to resolve the 16 percent satisfactorily might make the remaining 84 percent virtually impossible to adjudicate. Expanded to all the approximately 400,000 national

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cases pending would mean that between 40,000 and 64,000 cases could be affected by the enhanced review, if the 10 percent to 16 percent figures played out in the remaining districts.\(^{141}\) Without some form of final resolution, which is in the hands of a variety of review authorities, this population will be in limbo, at the least until additional security and criminal checks would be completed, and then again until an actual form of relief were available and were applied to the noncitizen. There is no further instruction available, and the limbo will likely be extended until the 2012 election resolves whether President Obama or his successor will have the opportunity and political valence to resolve these issues through whatever comprehensive immigration reform eventually evolves.

Of course, life also continues for ICE and the other players in this drama. Even if the cohort is removed through streamlined additional review, there will be the remaining individuals who will have their fates determined in the continuing process and under the traditional review procedures. And although Congress has not acted, and may not enact such legislation, additional special reviews may be required for either a military legalization procedure, such as surfaced in late 2011 and early 2012 to provide immigration status for military service, or another round for the DREAM Act—either with military beneficiaries or standalone. These will be even more complex cases, as the beneficiaries will be entitled to enhanced status with a likely detailed condition precedent determination process that will have to be layered on. In many respects, these would be a salutary development, even if targeted towards a subset of all the undocumented in the United States, but the small scale trial-runs in Denver and Baltimore have shown the many difficulties in planning, implementation, and operationalization of immigration legislation—and the symmetrical effects upon the immigration bar and private organizations and

NGO’s to gear up for the legal representation, advocacy, and litigation sure to result.
Nonetheless, a form of standoff has occurred, with unclear messages and results.

There are so many facets of review and so many moving parts that it requires a scorecard to tell the players, their positions, and the provenance of their complex orders. For example, the trial-run reviews included lawyers from the various immigration courts, as well as multiple agencies, including ICE, CIS, CBP, OPLA, EOIR, BIA, DHS, DOJ, and others in the traditional immigration-related jurisdictions. Their operating and reference documents included all the applicable memoranda, particularly those of August 20, 2010, March 2, 2011, June 17, 2011 and November 17, 2011—not all of which were in sync with each other and which were to be incorporated into standard operating procedures (SOPs) for each Office of the Chief Counsel (OCC). The SOPs were intended to lay out the various administrative, adjudicatory, and review procedures for each OCC unit, and were to serve as both systematic legal reviews but also blueprints with routine technical details, such as lockbox arrangements and notice provisions. And all these discrete pieces had to fit within a somewhat transparent national model, with algebraic variations on the “case-by-case basis” and applying a “totality of the circumstances” test. The mid-course change in Administration policy was so fluid and complex that the Ninth Circuit initiated action to ascertain if the Department of Justice lawyers would be using the new priority criteria in seven matters then-pending before the court, or if prosecutions would be pursued as had been ordered before the shift in policy. National data tracking ICE


prosecutorial discretion revealed that new filings involving deportation orders in immigration courts in the last three months of 2011 fell substantially, as the grants of relief increased accordingly, and economic circumstances in the United States proved not to provide as much incentive to emigrate for Mexicans in particularly.\footnote{\textbf{145} Julian Aguilar, Immigration Proposal Not Seen as Major Step, Texas Tribune, January 11, 2012, http://www.texastribune.org/immigration-in-texas/immigration/caution-patience-urged-after-tweak-proposed.}

And as additional trials were established by EOIR for Spring, 2012, in Seattle, Orlando, Detroit, New Orleans, and San Francisco, ICE released public data through April 19, 2012, indicating that the review had examined 219,554 pending cases, with 16,544, or (7.5 percent) having been identified to warrant prosecutorial discretion. ICE also reviewed 179,518 pending non-detained cases, with approximately 16,518 (9 percent), identified as amenable for prosecutorial discretion, and another 40,036 pending detained cases led to 26 (less than 1 percent) as amenable for prosecutorial discretion. In addition, it revealed that 2,722 (0.01 percent) of the cases of people in actual deportation proceedings were administratively closed.

Of these, only 182 individuals who came to the United States under the age of sixteen, have been in the United States for more than five years, have completed high school (or its equivalent), and are now pursuing or have successfully completed higher education in the United States. In other words, this entire winnowing process appears to have led to only 182 DREAM Act-eligible

students having their records administratively closed by ICE, and it is not clear how many of
them received employment authorization. 146

Although they are a slightly different timetable and so do not show which cases were
affecting which individuals, the TRAC data corroborate the disappointing overall results through
March 28, 2012; thus, they do not track exactly the ICE data above. The data did reveal that
approximately 650 cases had been terminated by an Immigration Judge (25 percent of all such
cases), with ICE concurrence through prosecutorial discretion. The other 1,959 cases (that is, 75
percent of all the resolved cases) were administratively closed by an IJ, “freezing” the
individuals’ status but not finally resolving their situation. These detailed TRAC data do not
reveal which of these cases were DREAM Act-eligible individuals.147 Further, it is impossible to

146 Case-by-Case Review and Administrative Closures, in ICE Case-by-Case Review Statistics, AILA
InfoNet Doc. No. 12042756 (Posted Apr. 27, 2012). These data have been extremely difficult to ferret
out and verify, and the traditional news media have not yet fully turned their otherwise-critical eye upon
this phenomenon. See APNewsBreak: Immigration Officials Offer to Shelve 7.5 Pct of Deportation Cases
immigration-officials-offer-to-shelve-7-5-pct-of-deportation-cases-under-review/2012/04/24/glQAQhHXfT_story.html ; Jill Replogle, Fewer Than 3,000 Immigration Cases
Closed Under New Obama Policy, Fronterasdesk.org, Apr. 24, 2012,
http://www.fronterasdesk.org/news/2012/apr/24/fewer-3000-immigration-cases-closed-under-new-
obam/#.T5fcw9XkqeM .

147 Concerning ICE’s review of pending cases in the Baltimore and Denver courts between December 4,
2011 and January 13, 2012, the March 2012 TRAC data were disappointing: “Only a small proportion of
pending caseloads in either court has been closed as a result of this initiative thus far. In the Baltimore
Immigration Court, a total 230 cases were closed. Compared to the 5,256 cases pending in that court at
the end of last September, these 230 closures only represented 4.4 percent of the court's backlog. . . There
have been even fewer closures in the Denver Immigration Court, where only 186 cases were closed
through this initiative as of the end of March, even though the backlog of cases there was larger than in
Baltimore. A total of 7,579 cases (excluding detained individuals) had been pending in the Denver court
at the end of last September. Thus, the 186 closures represented only 2.5 percent of that court's backlog. .
. A second surprising finding was that in Baltimore the majority of closures (57.4 percent) were
terminations — 132 out of 230. Quite the reverse was true in Denver, where almost every closure — 184
out of 186 — was administrative.” ICE Prosecutorial Discretion Initiative: Latest Figures (Syracuse:
TRAC, 2012), http://trac.syr.edu/immigration/reports/278/. Professor Wadhia has also investigated a
number of the overarching data issues, and has combined her critical work with FOIA requests and suits.
See Shoba Sivaprasad Wadhia, Sharing Secrets: Examining Deferred Action and Transparency in
verify or analyze with confidence even these small amounts of data trickling out, as there are substantial limitations (in the different time frames, USCIS and CBP also have the authority to grant deferred action and they have not made their data available, etc.). Also unknown is the method by which the prosecutorial discretion data are captured or the scope of the data. In addition, it is not always clear if the cases were provided administrative closure or deferred action, and whether that same individual received EAD; because the employment authorization applications are adjudicated by USCIS, ICE data (or CBP data) would not necessarily provide the full picture or exactly which benefit was granted. If ever there were a need for better data gathering and integrated reporting of all the moving parts, this would surely be Exhibit Number One, inasmuch as the trial runs received such publicity, consumed such resources (even leading to longer times in the queues for ineligible cases awaiting resolution), and raised hopes so high for the various stakeholders. At the end of the day, it is truly impossible to gauge the effectiveness or efficacy or even the scale of the trial runs, due to the lack of data transparency and poor public information provided by the multiple government players. In purely administrative law terms, one wonders how to judge the success of an experiment when the metrics and program measures are unclear and confusing. The one unmistakable conclusion is that the machinery labored mightily to produce very small and disheartening results.

VI. The Vexing Cases of the DREAMers

Remarkably, given how few undocumented college students there are (most estimates suggest approximately 50,000 to 60,000), there is a substantial media presence attesting to their existence and situations. There have been literally hundreds of newspaper and other media stories, as well as books and scholarly articles about the situation of potential DREAM Act students, ranging from those who were made known through a variety of life’s transactions, such
as minor traffic stops or other means, to many who undertook deliberate efforts to out
themselves and to draw attention to their status. Sometimes, the acts were done as immigration
authorities had already closed in on them or had apprehended them, and others were done either
defensively or even as acts of civil disobedience and invocations of civil rights.

148 A 2006 Migration Policy Institute (MPI) study estimated that approximately 50,000 undocumented
college students were enrolled, either full-time and part-time, and would be eligible for permanent status
under the DREAM Act. Jeanne Batalova & Michael Fix, New Estimates of Unauthorized Youth Eligible
(visited from homepage by selecting search and entering key words “backgrounder DREAM Act”) (last
visited Feb. 21, 2012). These data do not include persons who might be eligible for the Act’s military
options for legalization. For additional data, see also Elizabeth Redden, Data on the Undocumented,
INSIDE HIGHER ED., Mar. 17, 2009, available at
article title in search); Jeffrey S. Passel & D’Vera Cohn, PEW HISPANIC CENTER, A PORTRAIT OF
UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES iv (2009), available at
immigrants ages 18 to 24 who have graduated from high school, half (49%) are in college or have
attended college. The comparable figure for U.S.-born residents is 71%.”); Dueling Cost Estimates on
DREAM Act, InsideHigherEd.com, December 6, 2010,
http://www.insidehighered.com/news/2010/12/06/qt (last visited March 3, 2012); Dawn Konet,
Unauthorized Youths and Higher Education: The Ongoing Debate,
http://www.migrationinformation.org/Feature/display.cfm?id=642 (D.C. Migration Policy Institute,
after Gutierrez meeting with Napolitano, Huffington Post, Dec. 11, 2011, at;
visited March 6, 2012); Jeremy Redmon, Deportation Rules Free 2 Ga. Teens, Atlanta Journal-
College Students). See, also, Marcia Yablon-Zug & Danielle R. Holley-Walker, Not Every Collegial:
Exploring Bans on Undocumented Immigrant Admissions to State Colleges and Universities, 3
Charleston L. Rev. 421 (2009). For a sampler of individuals invoking civil rights traditions, see Elizabeth
Llorente, Two Undocumented Immigrants Who Sought Arrest are Released and Face Deportation,
Kelly, Successful Young Illegal Migrants Daring to Dream, ARIZONA REPUBLIC, June 29, 2011, at
A1; Jason Buch, Graduate’s Deportation Case Dropped, SAN ANTONIO EXPRESS-NEWS, Nov. 3,
2011, at A1; Kate Brumback, Rallying Cry: “Undocumented, Unafraid”, St. Louis Post-Dispatch, June
26, 2011, A16; E.J. Montini, Dream Act Kids Facing a Political Nightmare, Arizona Republic, November

149 As the many articles cited in the Appendix show, not a week goes by where no story—most of them
sympathetic—appears on hapless students in their difficult personal situations. See, e.g., Stephen
Magagnini, Dream Act students live in limbo, Sacramento Bee, Dec. 26, 2011, at A1A; P. Solomon Banda,
Courts Suspend Hearings to Deport; US Reviews Illegal Immigrant Status, BOSTON GLOBE, Jan. 17.
2012, at 6; Manny Fernandez, Vying for Campus President, Illegal Immigrant Gets a Gamut of
Responses, N.Y. TIMES, Mar. 10, 2012, at A11; Karoun Demirjian, Reid Hoping Renewed Interest in
Dream Act Will Give Party a Boost, LAS VEGAS SUN (Mar. 11, 2012),
As the failure of Congress and the Obama Administration to produce DREAM Act legislation in Fall, 2010 revealed, there were complex social and political dynamics at play, beyond the usual difficulties in enacting features of comprehensive immigration reform or its constituent parts. Immigration legislation is always a highly contested area, one where the overarching issues of the stagnant economy, nativism, and the breakdown of bipartisanship have combined to thwart agreements on how to resolve the impasse that has developed in postsecondary Plyler policies. Reviewing the number of states that have enacted positive accommodationist legislation and practices reveals a widespread acquiescence to the presence of these sojourner students, and any fair reading of the surprising amount of litigation that has been undertaken indicates legal resources and acceptance in the polity.

Appendix I is a partial list of news stories—print, blog, and video/video—that feature undocumented college students, either on a comprehensive basis or in individual portraits, since since 2009-2010, when it became evident that there was some Congressional traction for a DREAM Act vote. Indeed, the issues of these students had more fully entered the public


imagination during the immigrant rights marches of Spring, 2006, when tens of thousands of undocumented immigrants and their supporters took to the streets and statehouses to advocate for immigration reform;\textsuperscript{151} a steady trickle of stories emerged, with substantially more as the frustrations grew and the possibilities for them regularizing their status dimmed. Then, when the apparent possibility of enacting the DREAM Act emerged, their efforts intensified, and some of the students, including several in highly-public view and some in deportation proceedings, undertook much more public and successful publicity campaigns.\textsuperscript{152} For example, the student body president of CSU-Fresno had been in deportation proceedings, and another California student was also jailed by ICE when U.S. Senator Dianne Feinstein intervened to convince the agency not to remove him.\textsuperscript{153} In Georgia and Massachusetts, traffic infractions and driving with


\textsuperscript{153} Juliet Williams, Bill would let illegal immigrant students get aid, Sacramento Bee, August 31, 2011, available at: http://www.sacbee.com/2011/08/31/3875656/bill lets illegal students apply.html#storylink=scinlineshare (last visited March 6, 2012); Diana Marcum, Standing Up for a Dream, Los Angeles Times, November 28 2010, A1. In addition, legislation was enacted, which gave undocumented California college student leaders the right to be paid for their service. A.B. 844, October 8, 2011 (amending Section 72023.5 and adding Sections 66016.3 and 66016.4 to the Education Code, relating to state financial aid to certain student leadership positions). See also Jessica Kwong, Steve Li to be released today, following Feinstein's private bill, San Francisco Examiner, November 19 2010, http://www.sfgate.com/cgi-bin/blogs/cityinsider/detail?entry_id=77413 (last viewed March 6, 2012).

\textsuperscript{154} Due to the inability to receive drivers licenses, many undocumented would-be-licensed drivers operate vehicles without proper authority or insurance coverage. See, e.g., Damien Cave, Crossing Over, and Over, NY Times, October 3, 2011, at A1; Editorial: Two Deportation Cases, Two Disparate Outcomes, Denver Post, September 7, 2011, at B10; Iliana Perez, Life After College: A Guide for Undocumented Students (San Francisco: Educator for Fair Consideration [E4FC], 2012), http://www.e4fc.org/images/E4FC LifeAfterCollegeGuide.pdf; Elizabeth Stuart, Desperate, immigrants turn to the Internet to fight deportation, Deseret News, Mar. 4, 2012,
licenses—for which they were ineligible under state laws—revealed cases of undocumented students. Former Washington Post reporter Jose Antonio Vargas came out in venues available to Pulitzer Prize-winning authors: in an ABC News television interview he conducted and in a New York Times Magazine article he wrote, he announced he had never gained formal legal status in the United States. Five college students in Indiana were arrested for criminal trespass, after they entered Gov. Mitch Daniels' statehouse office; they did so to protest legislation being enacted that would require them to pay out-of-state tuition. However, citing the new priorities for immigration enforcement, ICE announced that it would not deport the students, four of whom were undocumented.

Even with the new form of low-priority status accorded to some undocumented, non-criminal college students, ICE officials continued to render decisions in each instance on a case by case basis, rather than extend Deferred Action to them as a discrete group. It is true that these students were clearly singled out as a low priority for enforcement and removal: the Morton Memorandum identifies them as “‘relevant factors’ for exercising PD” (setting out in particular “the circumstances of the person's arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child” and “the person's pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States”). But some


157 Ibid.

students have not been given DA, and others were not accorded DA until national attention was paid\textsuperscript{159}. And in some cases, no DA was available.\textsuperscript{160}

As a result of the unwillingness to assign prosecutorial discretion to currently enrolled k-12 students and to some college students, enforcement has not been uniform, and students who were inclined to reveal their status were required to make the calculated risk assessment that the self-reporting would be strategic and would lead to the inchoate form of relief. Inasmuch as there were a number of highly publicized cases where such relief was accorded for self-outing, the


\textsuperscript{160} This occurred at Del Norte High School in New Mexico, when undocumented students were removed to Mexico in 2004 even though they had been upon school grounds, and had transgressed no local or state laws. Albuquerque Police Will Not Turn in Illegal Immigrants, Albuq. J., August 14, 2007, http://www.abqjournal.com/news/appolicy08-14-07.htm (last visited March 7, 2012). However, in an Advisory FAQ published by the American Immigration Lawyers Association (AILA) regarding voluntary surrender, ICE officials warned: Q: "Should unlawfully present individuals who do not consider themselves high priority cases voluntarily surrender to ICE to avail themselves of this process?" A: "No. Any individual who self surrenders due to a belief that they will benefit from an exercise of discretion is very likely to be placed in removal proceedings and runs a serious risk that they will be removed from the United States. Nothing in this process creates a right or an entitlement to any person regardless of their individual circumstances." US ICE, Frequently Asked Questions on the Administration's Announcement Regarding a New Process to Further Focus Immigration Enforcement Resources on High Priority Cases (2011), http://www.aila.org/content/default.aspx?docid=36804 (last visited March 6, 2012). DREAM Act-eligible noncitizens have been removed even after the Administration review was undertaken and determined to apply to students and educators on a case-by-case basis. See, e.g., Elise Foley, DREAM Act-Eligible Man Faces Deportation, Despite Policy Change, HuffingtonPost.com, October 24, 2011, http://www.huffingtonpost.com/2011/10/24/dream-act-eligible-man-deportation_n_1029201.html ; Susan Carroll, Despite policy, Friendswood teacher deported, Houston Chronicle, August 27, 2011, available at: http://www.chron.com/news/houston-texas/article/Despite-policy-Friendswood-teacher-deported-2143472.php (last visited March 6, 2012).
risky behavior was rewarded, and proved to be efficacious as far as receiving DA went, which in turn emboldened additional students to come forward.\textsuperscript{161} The end game of the status has still not proven successful, and many of the DREAM Act-eligible students still have no enhanced opportunity for regularizing themselves, gaining work authorization, or becoming eligible for drivers licenses, resident tuition, or other program eligibility—all of which vary on a state by state basis. For example, in New Mexico, a border state with a plurality Latino population, undocumented students can receive in-state/resident tuition rates, state financial scholarships funded by the state lottery, and permission to qualify for a driver’s license, leading relatively – secure lives.\textsuperscript{162} If they had resided instead in neighboring Colorado, they would be ineligible for any of these benefits or status, as the state has not passed any legislation to render them eligible.\textsuperscript{163} Awarding them a form of prosecutorial discretion would not reconstitute their condition or alter this ineligibility, even if it postponed deportation or froze their immigration status without any ultimate form of relief or permission to work until their situation were resolved. This is a completely vexing and unsatisfying arrangement for all involved, especially for such a promising population, and one with no other likely avenues of relief available to them.

As the many references cited in this article indicate, there is an extremely large and growing research literature and scholarship emerging on this population of students. In many


\textsuperscript{162} Russell Contreras, Immigrant advocates, religious groups to continue pressure after NM driver’s license fight, The Republic, February 25, 2012, http://www.therepublic.com/view/story/78a023a1bdf041c0b6c9d004140ea208/NM--Immigrant-Licenses/. New Mexicans who are undocumented can qualify for resident tuition and lottery scholarships and financial aid.

respects, they are indistinguishable from other college students who are making their through to careers and young adulthood. However, with the impossibility of their practicing their trades, becoming licensed, and gaining employment, there is evidence of the stressful lives they lead and the abject prospects they face. Social scientists Roberto G. Gonzales and Leo R. Chavez have even conducted research into the hopelessness of DREAM Act-eligible students, employing a theoretical approach they label as “abjectivity,” a concept that “draws together abject status and subjectivity. We argue that the practices of the biopolitics of citizenship and governmentality—surveillance, immigration documents, employment forms, birth certificates, tax forms, drivers’ licenses, credit card applications, bank accounts, medical insurance, car insurance, random detentions, and deportations—enclose, penetrate, define, limit, and frustrate the lives of undocumented 1.5-generation Latino immigrants…The analysis shows how abjectivity and illegality constrain daily life, create internalized fears, in some ways immobilize their victims, and in other ways motivate them to engage politically to resist the dire conditions of their lives.”

If there is any single source of frustration, it is the remote likelihood that legislators will enact the required legislation, whether DREAM Act specific or the more elusive comprehensive immigration reform, that will allow them to regularize themselves and fulfill their promise. While the seeds of reform have been planted, and the media has continued to provide hopeful success stories and uplifting narratives, the restrictionist response has been sharp and focused. Gonzales and Chavez, summarize this “Nightmare”:

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The voices heard here indicate bitter lessons learned. With the awakening reality of their abject status as socially constituted noncitizens, these young people came to realize they were not like their peers. Even though they may have come to believe the civic lessons so essential to citizenship and to hold dear the values driving the American Dream, the illegality that defined their abject status left them with a clear sense of their difference. As noncitizens, they were full of discardable
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potential. No matter how hard they worked or how they self-disciplined, applied themselves, and self-engineered their very beings, they were to remain on the sidelines, waiting, leading abject lives on the margins of society, desiring government documentation of their presence.\textsuperscript{164}

VII. Conclusion: The Paradoxes of Prosecutorial Discretion

The Obama Administration found itself between a rock and a hard place in several respects in fashioning a reasonable response to the intolerable situation occasioned by the breakdown in immigration reform efforts in its first term, when it proposed and implemented new policies for streamlining its discretionary review procedures and using enhanced Deferred Action or discretionary mechanisms available to it under traditional administrative relief regimes. In the early stages of implementation, the professional legal staff have shown preliminary success in fashioning streamlined legal review mechanisms under enormous time pressures and in very complex enforcement regimes, but the rank and file employees have balked at these increased efforts—indeed, at times sounding as if insurrection and monkey wrenching would ensue. No matter how much discretion becomes inculcated into the immigration enforcement mechanisms, it will always appear to be too much and too generous for restrictionists, especially those in Congress, and those same policies will appear to be too little for accommodationists and immigrant advocates. Even with record deportations and removals of unauthorized migrants, especially those with criminal records, these efforts will fall short to the nativists expecting more aggressive policies and greater results; symmetrically, to those advocating for a more balanced combination of enforcement and relief from deportation, the measures will appear to be too inflexible and unyielding. If the proof is in the pudding, the newly-relaxed Deferred Action and prosecutorial discretion measures, following the reduced use of DA policy since the Bush Administration, will still be both too little and too late.

In addition, if DA were to be awarded to DREAM Act-eligible students as a class of beneficiaries, it would be decried by restrictionists as “back door” amnesty, thwarting the will of Congress, which has declined to enact remedial DREAM Act legislation. Even if it were to extend an inchoate forum of relief, ICE would not ultimately resolve the students’ liminal status, absent employment authorization and other final relief or more permanent measures. If other community-policing-cum-immigration interactions ebb and flow between success and disfavor, as have 287 (g) programs and “Secure Community”\textsuperscript{165} efforts, then the Administration will be distrusted by both proponents and opponents of each initiative. And without more accessible comprehensive immigration reform authority to resolve the many unresolvable cases, the Administration will only be able to whittle down a limited number of low priority cases, a number that will likely remain relatively small, even with enormous organizational resources devoted to the review effort. And, perhaps worse, there will be false hopes extended to DREAM Act students, who have languished for a long period with virtually no relief available to them. Their desperate pleas will have been for naught, and their purgatory will be extended in unproductive fashion. As a final consideration, any discretionary switch can be turned on by one Administration and can be turned off by its successor, as administrative and political priorities will inevitably differ, so there may be no continuity.

One additional feature came prominently to light during this period of DA practice: the increasing and complex role of Memoranda such as the “Morton Memorandum” and other sub-regulatory guidance and mediating structures and documents to facilitate the role of

administrative law functions in the agency and between the immigration bar. This full list would include several dozens of sources and products for explanation and implementation of the comprehensive regime. Even an incomplete list would include many practice guidance policy documents and manuals (such as the CIS Memorandum on the Role of Private Attorney and “Other Representatives”) or the OMB “Good Guidance Practices”), EOIR immigration court manual, CBP Inspector's Field Manual (Online), Warning letters, Agency memoranda,  

166 CIS and the other immigration authorities routinely issue Memoranda and Policy Memoranda on matters large (the “Morton Memorandum” and its successors) and small: see, e.g., U.S. CIS, Policy Memorandum: The Role of Private Attorneys and Other Representatives; Revisions to Adjudicator’s Field Manual (AFM) Chapters 12 and 15; AFM Update AD11-42 [December 21, 2011 PM-602-0055], http://www.uscis.gov/USCIS/Outreach/Feedback%20Opportunities/Interim%20Guidance%20for%20Comment/Role_of_Private_Attorneys_PM_Approved_122111.pdf (last visited March 6, 2012).


169 The Customs and Border Protection is available and searchable online, and is periodically updated in this e-format: https://help.cbp.gov/app/answers/list/kw/Inspectors%20field manual#s=eyJzIi8yZi0xMTAyMzU0Mi10cmFja291bGQgQ29udGVudCJ9fQ==. The complete CBP Inspector’s Field Manual is also available in print format from the American Immigration Lawyer Association: http://www.ailapubs.org/inspectors.html (last visited March 6, 2012).

170 For example, if a school certified to admit non-immigrants is determined by CIS not to be in full compliance, 814.4 requires a Warning Letter for Withdrawal of School Approval: “(c) Warning letter. When it appears that a school or school system has conducted itself in such a way that withdrawal of approval might be in order if the conduct were to be continued, an officer in the Examinations section shall send a letter of warning to the offending school or school system detailing the dereliction(s) and advising the school or school system that any repetition of the offense(s) may lead to proceedings to withdraw to approval. The letter must also ask the school to explain the cause(s) of the offense(s) and to indicate any corrective action the school has taken or will take with respect to the offense(s).” http://www.uscis.gov/ilink/docView/SLB/HTM/SLB/0-0-0-1/0-0-0-53690/0-0-0-562170/0-0-58247.html (last visited March 6, 2012). This issue was litigated in Blackwell College of Business v. U.S. Attorney General, 454 F.2nd. 928 (D.C. Cir. 1971).
Letters, formal and informal agency postings, various “Interpretations,” and other nonbinding means of regulation, each of which fits into the larger administrative law structure in immigration and naturalization. In addition, a substantial scholarship has grown, and the importance of immigration in the U.S. polity and world affairs has also resulted in the appearance of NGOs and private organizations that produce research and policy analysis in immigration and refugee law, including many reference and practice materials.

There is a temptation when looking at this extraordinary enterprise to have desiderata and critiques that reflect personal preferences or experiences, and that is all good and well, as far as it goes. I am a natural born U.S. Citizen, born abroad of USC parents, and I suspect my interests in immigration generally arise from my being Mexican-origin. I have lived in Texas since 1982, hence my interest in the 1982 Texas case, Plyler v. Doe, and I teach Higher Education Law as well as Immigration Law courses, no doubt leading to my continuing interest in DREAM Act scholarship and advocacy. I gravitated to the Mexican American Legal Defense and Educational

171 An online and searchable CIS website carries various memoranda, which can be searched, downloaded, and printed: http://www.uscis.gov/memoranda (last visited March 18, 2012).

172 As one example, the Answer to the burning and existential Question: Why is expedited processing available for SSI beneficiaries? is at the CIS website, searchable for technical questions: http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=8e0f54dbed15a110VgnVCM1000004718190aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD (last visited March 6, 2012).

173 Most longterm users of the various immigration-related websites would conceded that they have become more user-friendly and accessible, with many useful entries, downloadable forms, and extensive references. USCIS has even begun virtual contacts through the various social networks, although I have found these to be in the early stages of utility and efficacy. See the FAQ site at http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a75436d1a/?vgnextoid=6abe6d26d17df110VgnVCM1000004718190aRCRD&vgnextchannel=6abe6d26d17df110VgnVCM1000004718190aRCRD.


Fund Board when I was asked to join, for these reasons, and because doing so affords me almost daily involvement in crucial immigration issues at all levels: legislative, litigation, and advocacy.

But my interest in Deferred Action and prosecutorial discretionary priority-setting in immigration enforcement and administration arises because of deep concerns I have developed about the impasse that has developed in the long-overdue area of comprehensive immigration reform. There have been major changes and developments in the basic text of the INA, enormous cracks in the infrastructure of this critical task are evident, and the declining role of bipartisanship in the national political venues have all concerned me as a member of this community. Indeed, teaching it and knowing it as I do, and practicing it in the way I do, it is especially frightening to see the terrible inequities and inefficiencies, and the enormous promise unrealized by many current practices. No week passes where I do not hear from DREAM Act students, seeking representation, legal advice, or support. Ignorance may be bliss, but I am long past that point of comfort, especially when I see the daily discourse on immigration policy, which has coarsened and grown ugly, fuelled by opportunists at both extremes and, especially by what I believe to be anti-Mexican and anti-Latino prejudice. How else can one plausibly account for the virulence so evident in Alabama and other Southern states so far from Mexico that have enacted mean-spirited and likely-unconstitutional nativist statutes, just because they can? When white thugs on Long Island go “beaner-hopping” to wreak harm on Mexicans,

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177 On the slow but sure Latinization of the U. S. South, see generally GLOBAL CONNECTIONS AND LOCAL RECEPTIONS: NEW LATINO IMMIGRATION TO THE SOUTHEASTERN UNITED STATES (Fran Ansley & Jon Shefner eds.) (2009); Lisa R. Pruitt, Latina/os, Locality, and Law in the Rural South, 12 Harv. Latino L. Rev. 135 (2009). For early returns on the Alabama statute, the Alabama
whom they ascribe as low-caste, threatening, illegal lawbreakers, and instead beat Marcelo Lucero to death, mistaking this lawful permanent resident Ecuadorian,\textsuperscript{178} or when nationally prominent presidential candidates can urge electrification of border fences to turn back the undocumented,\textsuperscript{179} our discourse and actions have regressed to a vile and demonstrably-dangerous point.

My last point grows out of the search for fundamental fairness in this very important and complex series of exchanges, where my country invites some people in but not others, favors some over others on questionable bases, and constitutes itself through this essential immigration function. On a daily basis, I witness extraordinary acts of generosity and incorporation that reflect our better angels, and almost daily also experience a dreadful transaction or exquisite failure to realize our promise. I do not believe that either a dominant judiciary, Congress, or Administration is the single pathway out of the logjam we face. With the current and substantial undocumented population so evident in fact and in fiction, variegated across many degrees of guilt and innocence and millions of persons, no matter how much reform comes, it will likely be impossible to deal satisfactorily with them, whether one is an accommodationist or a restrictionist, and no matter what regime is adopted. I personally prefer a strong administration, one that is being thoughtful and resolute about applying the discretionary tools available to its


enforcement officers, especially as this discretion is likely to survive across political upheavals, administrations, administrative styles, changing populations and their personal circumstances, and varying financial and political resources. I would prefer that Article III judges not have biases and that they hold administrative and regulatory decisionmakers accountable in a fair fashion. And I would prefer a rollback of the various unsuccessful fixes we placed upon the system in the overreaction that was the 1996 immigration statutes. No matter how successful ICE is in awarding small number of DA determinations, the increased efficiency is welcome but illusory. That system has broken irretrievably, and we should say so. And we should fix it.

No amount of Deferred Action or prosecutorial discretion can place even the neediest or the lowest priority for removal enforcement on solid footing when the various tools have been taken out of the adjudicators’ toolkit: adjustment of the per country limitations that particularly harm legally-eligible Mexicans;180 availability of waivers for certain LPRs, and elimination of the bars to reentry;181 statutory waivers of relief from removal that have been rendered inoperable;182 reconstitution of the draconian criteria and features of “unlawful presence,” “entry,” “admission,” and “aggravated” felonies and “Crimes Involving Moral Turpitude;”183

181 INA Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) provide substantial penalties for long term unlawful presence: Section 212(a)(9)(B)(i)(I) of the Act (3-year bar) renders inadmissible for three (3) years those aliens who were unlawfully present for more than 180 days but less than one (1) year, and who departed from the United States voluntarily prior to the initiation of removal proceedings; while Section 212(a)(9)(B)(i)(II) of the Act (10-year bar) renders inadmissible an alien who was unlawfully present for one (1) year or more, and who seeks again admission within ten (10) years of the date of the alien’s departure or removal from the United States. Although the 3- and 10-year bars may be waived pursuant to Section 212(a)(9)(B)(v), this discretion is not often exercised.
reasonable bond, release, and detention practices;\textsuperscript{184} the essential provisions for a fair amount of judicial review;\textsuperscript{185} reconsideration of the various caps and quotas that have resulted in waiting queues of nearly twenty years in some instances.\textsuperscript{186} If I were immigration czar for a day, I would immediately adopt and extend the 2007 Ombudsman recommendations that additional DA criteria and data gathering be employed,\textsuperscript{187} and similar recommendations made by the 2011 Ombudsman.\textsuperscript{188} And I would make Prosecutorial Discretion policy into a firmer practice by submitting it to the Federal Register for notice and comments. These features have been in effect since the 1970’s, and should be memorialized and formalized. Until these tools are restored or employed, we are all simply playing around the edges of the problem.

However, even if all these were miraculously to appear tomorrow, I would still want a system that incorporated trial-run experiments and issued written documents to guide the various participants in the enterprise—that moved all Blue Pages to White Pages, as in the opening up of the original OI, following the John Lennon case and others that have thrown disinfectant upon the process. I prefer widespread discretion given to adjudicators and decisionmakers whose decisions were examined for horizontal fairness, and who had to meet at least the light touch of administrative law practices, and not the wrongful application of \textit{Chevron}.\textsuperscript{189} I realize that


\textsuperscript{186} Trujillo, Immigrant Visa Distribution, supra at note 180. For another approach and useful summary of the various arguments used to support various queuing policies and theories, see Peter H. Schuck, Morality of Immigration Policy, 45 San Diego L. Rev. 865, 878-883 (2008).


\textsuperscript{189} Here, I would adopt the administrative law suggestions about Chevron made by Kevin R. Johnson, Hurricane Katrina: Lessons about Immigrants in the Administrative State, 45 Hous. L. Rev. 11 (2008). See also John W. Guendelsberger, Judicial Deference to Agency Decisions in Removal
openness and transparency can cause administrators to be less-willing to set out criteria, and that this tradeoff needs to be guarded against, as I do not always trust judges any more than I trust federal agencies and worse, their agents. If every administration uses discretionary criteria to a greater or lesser extent, then they are appropriate tools, not politicized fits and starts.

My reading of the administrative law literature and the difficult political terrain for immigration reform leads me to believe the better path is to delegate to the Executive more and more-explicit discretionary authority to enact policies for the range of immigration programs, perhaps within overall congressional and statutory limits for the various categories, much as we do with the treatment of refugees and asylum seekers, but with Congressional control over numbers rather than the Presidential determination process we have now in deciding how many refugees we will admit every year. To maintain comity and a balance of powers, I would give virtually all the screening discretion to the President, within the constraints of periodic quota and entry-calibration by Congress. I would rely upon the federal courts to apply substantial due process review, more than exists at present under operating regimes of administrative deference and the *Chevron* doctrine. Here, I am mindful of the immigration and law scholar Kevin R. Johnson, who has written tellingly and sharply against *Chevron* deference and the legislative harms visited upon immigrants and intending immigrants in the current regime. He is largely correct in his careful parsing of the problems.\(^{190}\) I fear that in not heeding his strong warnings here, I will not learn the lessons he has prophetically taught over the years. And I may be letting my disdain for the recent and current congressional stalemates in immigration matters unduly influence me, and my deep admiration for President Obama seduce me, when I should be lashed to the mast. These issues vex me so, as I see all the imperfect options available, but I believe we

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\(^{190}\) See generally, Kevin R. Johnson, Hurricane Katrina: Lessons about Immigrants in the Administrative State, 45 Hous. L. Rev. 11 (2008); Michael A. Olivas, Immigrants in the Administrative State and the Polity Following Hurricane Katrina, 45 Hous. L. Rev. 1 (2008). And I acknowledge the many reservations that Professor Hiroshi Motomura has in noting how intertwined the federal and local jurisdictions are in immigration enforcement. See Hiroshi Motomura, The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line, 58 UCLA L. Rev. 1819 (2011) (reviewing proper role for federal enforcement in § 287(g) agreements and Secure Communities and deeming it to be “fundamentally reactive”).
have arrived at the worst of all worlds: poor Congressional prospects for reform, an all-too-light touch by the courts on the excesses and mistakes that are so evident in this area, and only modest discretionary use of deferred action and the levers of power—that is, not fully engaging or exercising what social observer James Fallows sagely calls the “decision-making muscle.”191 I have no occasion to proffer a grand synthetic model that will explain all previous administrative law disasters and guarantee no new ones will occur.192 My much-more-modest purpose is to begin an explanation, not to end one. But my real hope and prayer are that the adults in the room take charge so we can incorporate these precious students fully into the community by comprehensive immigration reform, as we need their striving, talents, and courage.

191 See James Fallows, Obama, Explained, Atl. M’thly (March 2012), supra at note 35. President Obama predicted he will accomplish significant immigration reform in his second term, should he be reelected: David Jackson, Obama: I've Got Five Years to Revamp Immigration, USA TODAY (Feb 23, 2012), http://content.usatoday.com/communities/theoval/post/2012/02/obama-ive-got-five-years-to-do-immigration-reform/1#. Vamos a ver (We shall see).

192 Moreover, this is a fast-moving area, where many of the proposals are like vaporware, fluid beyond recognition. This is made more difficult in an election year cycle. See, e.g., A Comparison of the DREAM Act and Other Proposals for Undocumented Youth [Fact Sheet] (DC: Immigration Policy Center, 2012), http://www.immigrationpolicy.org/sites/default/files/docs/dream_comparison_060112.pdf; Ben Winograd, STARS Act Highlights Potential Pitfalls of Rubio DREAM Proposal, Immigrationimpact.com, June 1, 2012, http://immigrationimpact.com/2012/06/01/stars-act-highlights-potential-pitfalls-of-rubio-dream-proposal/.
Appendix One: DREAM Act Newspaper, Magazine, and Website Stories, 2002-2012
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Lynn Brezosky, DREAM Act Not In Suicide Notes, SAN ANTONIO EXPRESS-NEWS, Dec. 3, 2011, at 1A.


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Jessica Kwong, *DREAM Act Stirs Emotions*, SAN ANTONIO EXPRESS-NEWS, Sept. 21, 2011, at 3B.


About the DREAM Act, OKLAHOMAN (Okla. City, Okla.), July 31, 2011, at 8A.


Kyra Kyles, In the Middle: They Didn’t Choose to Come Here—Now They Just Want to Belong, CHI. TRIB., July 26, at 6.


Guillermo X. Garcia, DREAM Act Backers March for Brothers Facing Deportation, SAN ANTONIO EXPRESS-NEWS, July 17, 2011, at 4B.

Albor Ruiz, Small Victories Being Won for Immigrants, DAILY NEWS (N.Y.), July 13, 2011, at 34.

Albor Ruiz, Their Passion and Drive Keeps Dream Act Alive, DAILY NEWS (N.Y), July 3, 2011k at 38.

Erin Kelly, Successful Young Illegal Migrants Daring to DREAM, ARIZ. REPUBLIC (Phx.), June 29, 2011, at A1.


Jeanna Smialek, Opposition Forms in First Hearing on DREAM Act: Senate Looks at Measure to Aid the Children of Illegal Immigrants, HOUS. CHRON., June 29, 2011, at A4.


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Fran Spielman, Rahm’s Lobbying Pays off on Casinos, DREAM Act, CHI. SUN-TIMES, June 1, 2011, at 12.


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Alan Gomez, Detours Ahead for Immigration, Both Sides Agree Legislation will Shift -- and Likely Stall -- Under New Congress, USA TODAY, Dec. 23, 2010, at 5A.

Peter Wallsten & Perry Bacon, Jr., Obama Exults as Congress Adjourns, WASH. POST., Dec. 23, 2010, at A01.


Veronica Flores-Paniagua, DREAM Act Deferred, but Spirits Undimmed, SAN ANTONIO EXPRESS-NEWS, Dec. 21, 2010, at 9A.


Ernest Hooper, *A Dream Unfulfilled for Millions of Worthy Students*, ST. PETERSBURG TIMES (Fla.), Dec. 20, 2010, at 1B.


“Seconds from Death; 'I saw the train & I thought I was a goner'; Senate OKs Gays, Dream Act Dies. Dogfight for First!” DAILY NEWS (N.Y.), Dec. 19, 2010, at 1.


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