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Wm M Bill of Rights J Postscript
(September 15, 2012)

IHELG Monograph

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Note:

President Barack Obama announced his new Deferred Action for Childhood Arrivals policy, on June 15, 2012, with the program being rolled out 60 days later, on August 15, 2012. I had just completed and submitted a long article on Deferred Action that I had delivered at a Spring, 2012 conference at William and Mary Law School, and which will be published in the William and Mary Bill of Rights Law Journal in early 2013.

A preliminary working paper is available at the IHELG website [www.law.uh.edu/ihelg], Michael A. Olivas, Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students, (Houston: IHELG Research Monograph No. 12-01), available at: <http://www.law.uh.edu/ihelg/monograph/12-01.pdf> . This POSTSCRIPT covers the events from May 15, 2012 until September 15, 2012. I make it available here in separate fashion, as the original has been posted and circulated.

Be certain to verify all the various citations, as both of these are working paper drafts, and will likely change in the editing and publishing process. No early deed goes unpunished.

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University of Houston Law Center/Institute for Higher Education Law and Governance (IHELG)

The University of Houston Institute for Higher Education Law and Governance (IHELG) provides a unique service to colleges and universities worldwide. It has as its primary aim providing information and publications to colleges and universities related to the field of higher education law, and also has a broader mission to be a focal point for discussion and thoughtful analysis of higher education legal issues. IHELG provides information, research, and analysis for those involved in managing the higher education enterprise internationally through publications, conferences, and the maintenance of a database of individuals and institutions. IHELG is especially concerned with creating dialogue and cooperation among academic institutions in the United States, and also has interests in higher education in industrialized nations and those in the developing countries of the Third World.

The UHLC/IHELG works in a series of concentric circles. At the core of the enterprise is the analytic study of postsecondary institutions--with special emphasis on the legal issues that affect colleges and universities. The next ring of the circle is made up of affiliated scholars whose research is in law and higher education as a field of study. Many scholars from all over the world have either spent time in residence, or have participated in Institute activities. Finally, many others from governmental agencies and legislative staff concerned with higher education participate in the activities of the Center. All IHELG monographs are available to a wide audience, at low cost.

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Postscript: Recent Developments (effective, September 10, 2012)

In an area as dynamic as immigration and higher education, I just knew that something big would occur after I submitted my earlier draft to the *Bill of Rights Journal* editors, which I did in early May, 2012. Of course, no early deed goes unpunished, and several tectonic shifts occurred within weeks, mostly welcome changes, but changes nonetheless. This Postscript updates the events already tracked in the article, and summarizes the recent developments, as of September 10, 2012. Like Caesar's Gaul, this is divided into three major parts: Issues concerning undocumented law students and undocumented lawyers that arose in California and Florida, and which are pending elsewhere; a decision in an important New Jersey case concerning financial aid eligibility of U.S. citizen children of undocumented parents, and a similar challenge to an unconstitutional Florida statute that also penalized citizen children eligible for resident tuition; and the major development at the federal level with President Barack Obama's decision to extend Deferred Action to DREAMers.

Undocumented Law Students and Undocumented Lawyers: In Spring, 2012, the state supreme courts in Florida and California considered two unprecedented requests from their bar licensing authorities: would federal and state law allow them to admit undocumented law students to the practice of law in their states? By July 15, 2012, both state bars had formal legal requests before their highest courts, asking for permission to admit the graduates, both of whom had passed the required bar exams and navigated the moral character and fitness provisions and other bar criteria. In both instances, the graduates had been brought to the United States by their

parents, and both had attended state k-12 schools, college, and law school.¹ Somewhat caught off guard by the questions of first impression, both courts requested amici to submit briefs on the issues that were raised. On May 16, 2012, for example, the California State Supreme Court issued the following order:

The California Supreme Court today unanimously issued an order directing the Committee of Bar Examiners of the State Bar of California to show cause before the Supreme Court why the court should grant the Committee's motion to admit Sergio C. Garcia to the State Bar of California as a licensed attorney. Garcia has graduated from law school in California and has passed the California bar examination, but is currently an undocumented immigrant.

After reviewing his application and performing a moral character review, the Committee of Bar Examiners certified his name to the Supreme Court for admission to the State Bar. The bar notified the court of Garcia's immigration status at the time the motion was filed.

The Supreme Court's order directs the Committee of Bar Examiners and Garcia to file opening briefs in support of the Committee's motion by June 18, 2012, and invites others to file amicus curiae briefs in the Supreme Court, either

¹ Don J. DeBenedictis, Hard Questions on Undocumented Bar Applicant, L.A. DAILY J., May 18, 2012, at 5; Don J. DeBenedictis, Undocumented Bar Hopeful has Many Friends, L.A. DAILY J., July 19, 2012, at 1; Young, Professional DREAMers Deserve Recognition, ImmigrationImpact.com, April 19, 2012, <http://immigrationimpact.com/2012/04/19/young-professional-dreamers-deserve-recognition/>; Ben Winograd, Courts Weigh Issuance of Law Licenses to Undocumented Attorneys, ImmigrationImpact.com, August 10, 2012, <http://immigrationimpact.com/2012/08/10/courts-weigh-issuance-of-law-licenses-to-undocumented-attorneys> .

in support of or in opposition to the motion. In particular, the order invites amicus participation by the Attorneys General of California and the United States.

The order also lists five specific questions as “among the issues that should be briefed.” The five questions are:

“1. Does 8 U.S.C. section 1621, subdivision (c) apply and preclude this court’s admission of an undocumented immigrant to the State Bar of California? Does any other statute, regulation, or authority preclude the admission?”

“2. Is there any state legislation that provides — as specifically authorized by 8 U.S.C. section 1621, subdivision (d) — that undocumented immigrants are eligible for professional licenses in fields such as law, medicine, or other professions, and, if not, what significance, if any, should be given to the absence of such legislation?”

“3. Does the issuance of a license to practice law impliedly represent that the licensee may be legally employed as an attorney?”

“4. If licensed, what are the legal and public policy limitations, if any, on an undocumented immigrant’s ability to practice law?”

“5. What, if any, other concerns arise with a grant of this application?”²

In addition, in a similar action in Florida, four former ABA presidents filed an action with the Florida Supreme Court, seeking to determine whether or not their undocumented client

² Maura Dolan, Court Takes up Bid of Illegal Immigrant to be Attorney, L.A. TIMES, May 17, 2012, at LATEXTRA 1 (correction appended substituting “moral examination” for erroneous “oral examination in For the Record, May 18, 2012 at A4). The California State Supreme Court request is reproduced at Bar Misc. 4186, S202512 (*In re SERGIO C. GARCIA on Admission*)

(who has passed the Florida bar examination) could be admitted to the State Bar. At first, the Florida Board of Bar Examiners had denied the applicant's application, but still sought clarification about its authority from the Court. Following President Barack Obama's announcement of a new policy on deferred action and the use of his prosecutorial discretion, it appeared that the candidate's unlawful status in the U.S. would be reconstituted so that he would no longer accrue unlawful presence.³ Therefore, the Florida Board ruled in August, 2012 that under the new guidelines, the candidate appeared to qualify for a law license, but it still wanted an advisory opinion from the state Supreme Court about his immigration status and its effect upon licensing before making a final decision.⁴ This brought the Florida matter to exactly the same posture as that pending in California—two state authorities seeking clarification of the legal authority to allow the graduates to be licensed, with positive recommendations from both bars. This issue is pending in September, 2012.

The new Deferred Action for Childhood Arrivals policy (DACA) by the President will also guarantee that more undocumented students will not only surface and work their way through the pipeline (another is awaiting developments in New York, and more are in the DACA application process), but the permission to gain employment authorization will affect their applications as well. The California law deans collectively prepared and submitted a brief in the California matter, as did immigration law professors, indicating that there is a substantial stake in

³ Julianne Hing, The Undocumented Attorney, an Oxymoron for Our DREAMless Days, Colorlines.com, June 7, 2012, http://colorlines.com/archives/2012/06/the_undocumented_attorney_an_oxymoron_for_our_dreamless_days.html.

⁴ Bar Says Illegal Immigrant Qualifies, SUN-SENTINEL (Ft. Lauderdale, Fla.), Aug. 13, 2012, at 4B

this issue for legal educators and the lawyer establishment.⁵ Virtually all the California regional and specialized bar associations, chief among them the State Bar, submitted careful briefs in favor of the petitioner, also revealing the deep and broad interest and support for his admission to their Bar.⁶ Finally, licensing in other professional fields will be affected, as there will now be undocumented graduates applying for teaching certificates, psychologist licenses, and licenses in medicine, engineering, architecture, pharmacy, and many other related fields. In this sense, the law license issue has been the lead runner in the marathon, but other fields will also be in this same situation.

Cases involving Citizens, Residency Requirements, and Tuition Benefits: A number of cases challenging the various state laws concerning have been filed by restrictionist advocates, and as of September, 2012, none had prevailed, falling short either on civil procedure grounds (that is, the plaintiffs had not been harmed by someone else receiving the lower, in-state tuition—so they could not be provided a remedy in law)⁷ or, as in the important 2010 *Martinez v. University of California Regents* case, the state statute was upheld as a legitimate state policy.⁸ In another higher education immigration/residency case that occurred in California during this time period, a number of immigrant organizations filed suit in November, 2006 to challenge California's postsecondary residency and financial aid provisions in *Student Advocates for*

⁵ Copies of all the briefs and other materials on this subject have been archived at www.law.uh.edu/ihelg. Gosia Wozniacka, *Illegal Immigrants Find Paths to Colleges, Careers*, ASSOCIATED PRESS, May 26, 2012, available at <http://www.seattlepi.com/news/article/Illegal-immigrants-find-paths-to-college-careers-3587545.php>. Full disclosure: I assisted in drafting the Immigration Law Professors brief, archived at www.law.uh.edu/ihelg (ReedSmith, LLP).

⁶ The Department of Justice filed a brief against admitting Garcia to the California bar.

⁷ See, e.g., *Day v. Sibelius*, 376 F. Supp. 2d. 1022 (D. Kan. 2005); affirmed as *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007).

⁸ 50 Cal. 4th 1277 (Cal. 2010).

*Higher Education et al v Trustees, California State University et al.*⁹ Citizen students with undocumented parents were being prevented from receiving the tuition and financial aid benefits due to them, at least in part because the California statute was not precisely drawn (or was being imperfectly administered). The challenge highlights several overlapping policies: immigration, financial aid independence/dependence upon parents, and the age of majority/domicile. The state agreed to discontinue the practice, and entered into a consent decree, resolving the matter in the plaintiffs' favor. The order overturned CSU's odd and likely-unconstitutional take on undocumented college student residency—that a citizen, majority-age college student with undocumented parents, was not able to take advantage of the California statute according the undocumented in-state residence, even if the student were otherwise eligible.

Rulings such as these have made a virtue of necessity, inasmuch as citizen children (whether birthright or naturalized) who reach the age of majority by operation of law establish their own domicile, so that their parents' undocumented status is irrelevant to the ability of the children to establish residency. In *A.Z. v. HESSA*, a 2012 New Jersey appeals court ruled that a similar program in the state (the Tuition Assistance Grant, TAG) could not withhold the grants from citizen children whose parent were undocumented: "Given our determination that A.Z. is the intended TAG recipient and that she meets the residency and domicile requirements independently of her mother, we need not determine B.Z.'s legal residence or domicile nor review HESAA's conclusion that B.Z. lacks the capacity to become a legal resident or domiciliary of New Jersey. We note, however, substantial authority supporting the proposition

⁹ Consent Decree, *Student Advocates for Higher Educ. v. Bd. of Trs. of Cal. State Univ.*, No. CPF-06-506755 (Cal. Super. Ct. Apr. 19, 2007), available at <http://webaccess.sftc.org/Scripts/Magic94/mgrqispi94.dll?APPNAME=IJS&PRGNAME=ROA22&ARGUMENTS=-ACPF06506755>. See, generally, Michael A. Olivas, *Undocumented College Students, Taxation, and Financial Aid: A Technical Note*, 32 *Rev. Higher Educ.* 407 (2009).

that a person's federal immigration status does not necessarily bar a person from becoming a domiciliary of a state. . . In sum, A.Z. is the intended recipient of a TAG. She is a citizen. The record also supports that she is a legal resident of, and domiciled in, New Jersey, based upon her lengthy and continuous residence here. To the extent the agency's 2005 regulation irrebuttably established that a dependent student's legal residence or domicile is that of his or her parents, it is void. Therefore, HESAA erred in denying A.Z. a TAG.”¹⁰ The latest instance of such a restriction upon birthright citizens was discovered in Florida, when the *Ruiz v. Robinson* case, filed in 2011, challenged a similar practice in the state. The state regulation denied resident tuition to U.S. citizen children whose parents were undocumented, as the New Jersey and California practices had done for state financial aid. On August 31, 2012, the federal court in Florida struck down this statute.¹¹

Prosecutorial Discretion and Deferred Action, 2012: One might usefully ask: Can the DREAM Act pass as a standalone bill, if at all, or must it be a part of a larger legislative strategy? President Barack Obama determined that he would find executive authority to address the inchoate and marginal status where these students found themselves, and in Summer of 2011, within six months of the failure of the DREAM Act to attract the required sixty votes, his Administration indicated it would simply assign low enforcement priority to DREAMers, and would not remove or deport them if they were caught in the immigration enforcement

¹⁰ The case, as yet unpublished, is at: <http://www.aclu-nj.org/news/2012/08/08/court-rules-that-state-agency> . Carlos Avila, American-Born Student Wrongfully Denied State Tuition Assistance, TRENTONIAN (Trenton, N.J.), Aug. 9, 2012, at A4

¹¹ Michael R. Vasquez, Suit: Some Born Here Denied In-State Tuition, Miami Herald, Oct. 20, 2011, at 6B; Jay Weaver, Judge: Fla. Rule on Tuition Flouts Constitution, Miami Herald, Sept. 5, 2012, at 1A. The case, as yet unpublished, is at: <http://www.splcenter.org/get-informed/case-docket/wendy-ruiz-et-al-v-gerard-robinson-et-al>

mechanism, unless they had criminal records or other disqualifying characteristics. In June, 2011, in a series of detailed “Morton” memoranda, the Administration rolled out a series of reviews of all the 400,000 persons then in immigration proceedings, and would close the removal cases and grant two year stays and possible employment authorization (permission for the DREAMERS so certified to work without violating federal law).¹²

The review, which had seemed so promising, was underwhelming by any measure. The Obama Administration had begun the most aggressive enforcement in US history, militarizing the border, building the futile fence that is supposed to deter unauthorized entry, and removing over 400,000 persons in 2011, more than any recent presidency. In addition, the re-set of Deferred Action was used more sparingly than had been the case in President George Bush’s presidency.¹³ Yet even with these demonstrable enforcement priorities and results, congressional restrictionists were not satisfied and would not acknowledge the metrics of immigration enforcement, as the stated predicate for what everyone knew was needed, comprehensive immigration reform of one sort or another, to regularize the flow, to reorganize the complicated and unsuccessful employment provisions, especially those designed for short-term high skilled work, and to provide some tradeoff for increased legal immigration: a pathway to eventual legalization or “amnesty,” perhaps along the lines of the last such program, that of the 1986 IRCA legalization provisions. The data have not been transparent or easily available, but the preliminary figures revealed fewer than 2% of the test-case reviews for Deferred Action led to

¹² *See generally*, Shoba Sivaprasad Wadhia, Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law, 10 U. N. H. L. Rev. __ (2012); Shoba Sivaprasad Wadhia, The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions, Harv. Latino L. Rev., (forthcoming 2013).

¹³ Dara Lind, La Opinion: Obama Has Granted a Record Low Number of Deferred Actions to Immigrants, AMERICA’S VOICE (Apr. 28, 2011), http://americasvoiceonline.org/blog/entry/la_opinion_obama_has_granted_a_record_low_number_of_deferred_actions .

closed-cases, and only 54% of those fortunate few were given permission to work—and these were considered the easy, most deserving, “low-hanging fruit”—and while their removals were temporarily stayed, they received no benefits, remained ineligible for most forms of relief, and were, in many respects, no better off than before. Fewer than 300 of these closed cases were DREAM Act eligible students.¹⁴ They were now known to the government, yet had no hope of any reconstitution of their unlawful status.

Worse, a number of DREAMers had become frustrated by the legislative failures, and with no futures, they began to “out” themselves in a longstanding United States protest tradition and civil rights argot. While their status may have been characterized as a low priority for removal, this public revelation of their status had the practical effect of putting their undocumented families at risk, and in the increased removal regime, they were less well off than they had been before.¹⁵ And in the difficult thermodynamics of immigration, the conservative restrictionists howled, and all the competing GOP presidential candidates in an election year, vied with each other to see who could be the most nativist, build (or electrify) the biggest fence, or engage in the harshest rhetoric. (The only exception was the hapless Texas Governor Rick

¹⁴ See ALEXSA ALONZO & MARY KENNEY, DHS REVIEW OF LOW PRIORITY CASES FOR PROSECUTORIAL DISCRETION (2011), available at http://www.legalactioncenter.org/sites/default/files/DHS_Review_of_Low_Priority_Cases_9-1-11.pdf . See also, Letter from Thomas M. Susman, Director of ABA Governmental Affairs Office, to John Morton, (Dec. 15, 2011), available at http://www.americanbar.org/content/dam/aba/uncategorized/2011/gao/2011dec15_prosecdiscretion_1.authcheckdam.pdf . MAO---

¹⁵ See generally, Alan Gomez, DREAMers Personalize Cases to Stall Deportation; Illegal Immigrants Brought to U.S. As Children 'Outing' Themselves to Garner Public's Sympathy for Staying, USA TODAY, Mar. 13, 2012, at 3A; Adeshina Emmanuel, Illegal Immigrants See Opportunity in New Rule, New York Times, August 10, 2012, at A9; Renee C. Redman, Sorting Out ICE's Prosecutorial Discretion Program; Authorities Consult List of Factors in Making Deportation Decisions, CONNECTICUT LAW TRIBUNE, Jan. 30, 2012, at 16.

Perry, whose having signed the state's DREAM Act legislation twice made him the piñata of the group.)¹⁶

Tens of thousands of undocumented students are making their way through college without federal financial support and with little state financial aid available. Yet they persist—only to find that they cannot accept employment or enter the professions for which they have trained. Thus, cases of undocumented law-school graduates who have passed the bar are surfacing in California, Florida, and New York, and more will surface soon enough concerning lawyers, doctors, teachers, psychologists, and other licensed professionals, as more and more unauthorized students graduate from college. Seeing this brick wall, a number of immigration-law professors drafted and circulated a letter to the president, calling upon him to use the administrative discretion available to him, in lieu of any likely legislative reform of immigration policy right now, to help undocumented college students who find themselves in the worst of all possible worlds.¹⁷ It appears that President Obama heard, and in June, 2012, he announced an even more expansive Deferred Action policy for DREAMers, which is still in the implementation first phases.¹⁸

On the 30th anniversary of *Plyler v. Doe*—the 1982 case in which the U.S. Supreme Court ruled that states could not deny funds for the education of children of unauthorized immigrants—the President announced a halt to the deportation of some undocumented

¹⁶ Philip Rucker, Rick Perry says his remarks on immigration were 'inappropriate,' Wash. Post, September 28, 2011, http://www.washingtonpost.com/politics/rick-perry-says-his-remarks-on-immigration-were-inappropriate/2011/09/28/gIQAr25t5K_story.html?wpsrc=AG0002765&keyword=_inurl:washingtonpost.com/politics&cre=10454304550&g=1

¹⁷ Ben Winograd, President Obama to Halt Removal of DREAMers, ImmigrationImpact, June 15, 2012, <http://immigrationimpact.com/2012/06/15/president-obama-to-halt-removal-of-dreamers>

¹⁸ Helene Cooper and Tripp Gabriel, Obama's Announcement Seizes Initiative and Puts Pressure on Romney, N.Y. Times, June 16, 2012, at A16.

immigrants who came to the United States as children and have graduated from high school and served in the military.¹⁹ Unfortunately, despite the excitement—and outrage from President Obama's Republican opponents—it is not the stalled Dream Act, which would have created a path to citizenship for some immigrants who came to the United States as children and have been admitted to college or registered under the Selective Service Act. The President's decision, which uses existing prosecutorial discretion, gives both too much (if one listens to those who would restrict immigration) and, others believe, far too little. While drawing positive attention to hardworking and law-abiding undocumented immigrants is a good thing, both God and the devil reside in the details. As a practical matter, those who oppose easing their path are likely to resist any substantive change. Gov. Mitt Romney has indicated his determination to veto any version of the DREAM Act, and the 2012 GOP platform urges deportation of these students.²⁰

In reality, the President's adoption of a "deferred action" policy is, to a great extent, old wine in a new wineskin. The policy does not grant legal-residency status, as the DREAM Act would, but only defers deportation for a renewable two-year period. Announcing the policy shows new political will, but it does not change existing law or expand available discretion. Forms of prosecutorial discretion, including deferred action, have been available for many years

¹⁹ Teresa Watanabe and Esmeralda Bermudez, For immigrants' rights activists, battle continues; New deportation policy is a victory but could energize foes even as many goals remain unmet, L. A. Times, June 17, 2012, at A1

²⁰ Immigration Highlights from the Republican and Democratic Party Platforms, AILA InfoNet Doc. No. 12090541 (posted September 5, 2012), http://www.aila.org/content/default.aspx?docid=41168&utm_source=AILA+Mailing&utm_campaign=fed6621cb6-AILA8_9_5_12&utm_medium=email; Julia Preston, Republican Immigration Platform Backs 'Self-Deportation,' NY Times, August 23, 2012, <http://thecaucus.blogs.nytimes.com/2012/08/23/republican-immigration-platform-backs-self-deportation/?emc=eta1>.

(originating in the John Lennon deportation case, in the early 1970s);²¹ nothing substantive has been added to existing authority. Indeed, in the Morton Memo of June 2011, the government announced that it would focus on deporting known criminals and urged prosecutors to use their discretion in considering the cases of students who would qualify for the Dream Act. Yet data from the Department of Homeland Security show that fewer than 300 such students have been granted administrative closure to this day—a remarkably small number, given their clear qualifications for approval.²² While it is impossible to tell just how successful the review ordered by John Morton, director of U.S. Immigration and Customs Enforcement, has been to this point—the government has made the data virtually impossible to gather and analyze in any systematic way—the program has been disappointing. Bear in mind, too, that this administration removed and deported nearly 400,000 unauthorized immigrants in the previous year. Even with those metrics, and the militarization of the U.S.-Mexico border, those who would further restrict

²¹ Leon Wildes, *The United States Immigration Service v. John Lennon: The Cultural Lag*, 40 BROOK. L. REV. 279 (1974). Wildes was Lennon’s lawyer in this case, and has written authoritatively about the larger issue of prosecutorial discretion. *See, e.g.*, Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Cases*, 41 San Diego L. Rev. 819 (2004)

²² *Supra*, at note 14. *See also*, Case-by-Case Review and Administrative Closures, in ICE Case-by-Case Review Statistics, AILA InfoNet Doc. No. 12042756 (Posted Apr. 27, 2012); APNewsBreak: Immigration Officials Offer to Shelve 7.5 Pct of Deportation Cases under Review, Wash. Post (Apr. 24, 2012), http://www.washingtonpost.com/national/apnewsbreakimmigration-officials-offer-to-shelve-75-pct-of-deportation-cases-underreview/2012/04/24/gIQAQhHXfT_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-newobam/#.T5fcw9XkqeM>.

immigration are not convinced that there has been enough enforcement. They adamantly oppose the president's new decision, and in August, 2012 filed suit in federal court.²³

What is clear is that very few (and certainly not all) of those being reviewed have received employment authorization with any reprieve they may have gotten. Their status is essentially frozen. The President's announcement continues the problem, since it indicates that permission to work will be determined on a case-by-case basis.²⁴ Of course, both under Morton rules and throughout U.S. immigration history, the right to work has been handed out only sparingly. Most importantly, the review process in President Obama's plan is essentially designed to build on a process in place for those already in the machinery of deportation or removal. There is a new application procedure for deferred action and many details yet to be determined. Deferred action is a vague and confusing process—and it will probably lead to unscrupulous *notarios* entering the picture.

Furthermore, students who reside in states where they cannot enroll in public colleges or where the states have no resident-tuition provisions for undocumented immigrants may not be able to raise a claim under this policy, because they will have been unable to enroll in college. While a dozen states have laws granting some undocumented immigrants in-state tuition rates,

²³ Julia Preston, Agents Sue Over Deportation Suspensions, N.Y. Times, August 24, 2012, at A17; Ben Winograd, Why Kobach's Lawsuit Against Deferred Action is Unlikely to Stand Up in Court, ImmigrationImpact, August 24, 2012, <http://immigrationimpact.com/2012/08/24/why-kobachs-lawsuit-against-deferred-action-is-unlikely-to-stand-up-in-court> .

²⁴ See, e.g., DACA materials and applications, US CIS: <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD>; USCIS - Consideration of Deferred Action for Childhood Arrivals Process FAQ: <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD>.

most do not.²⁵ Even if the DREAM Act itself were to be enacted tomorrow by Congress, states would still have to pass laws to grant in-state tuition and financial aid to qualified students in the majority of states, or most of them would be unable to afford college.

And some features of President Obama's policy are purely chimerical. The announcement refers to members of the military being "eligible" for this new relief, but undocumented adults cannot legally enlist under current law, nor can deferred-action grantees. Such absurd promises undermine the real value of President Obama's announcement, which calls attention to the vexing issue of how to deal responsibly with the potential, and eventually likely, new members of our American community. One might add, but need not, that Administrations come and go, and that such initiatives can wax and wane. On this point, opponents and supporters of immigration reform can agree: The approach just announced cannot be the only way to resolve the impasse. The real question is: How can this complex issue be resolved in the current climate? Thirty years after the Supreme Court told us that undocumented immigrants deserve an education, we have not resolved the impasse. Deferred Action is not nothing, but until its contours become clear and employment authorization documents (EAD) are extended to them, it is a political act of will and an expression of hope rather than immigration reform of any kind.²⁶

Even if the tens of thousands of undocumented students currently enrolled in our colleges, and the many who have graduated and cannot use their education, do receive Deferred Action, they will still not find themselves on a pathway to permanent residence. Their chances of

²⁵ Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process*, 55 *Wayne Law Review* 1757, Tables One and Two (2009)

²⁶ *See generally*, Michael A. Olivas, *Obama's New Immigration Policy: Disappointment Is in the Details*, *Chronicle of Higher Education*, June 18, 2012, <http://chronicle.com/article/Obamas-New-Immigration/132377> ; Adele Melander-Dayton, *Young immigrants cautioned to apply for Deferred Action program after election*, *Santa Fe New Mexican*, August 24, 2012, <http://www.santafenewmexican.com/Local%20News/082512DeferredAction>.

being deported may be reduced, but without employment authorization and a reasonable opportunity to regularize their status, they will still live in the shadows—with limited hope. Despite the uncertainty, hundreds of thousands of these DREAMers have begun the process of seeking Deferred Action and employment authorization. In major cities, the applicants lined up and applied by the hundreds of thousands, and paid their application fees, which fees are the means by which the program will be administered.²⁷ In the racial thermodynamics of the nativism in Arizona, which has persisted in its restrictionist efforts, Governor Jan Brewer enacted law that took place the day after the Deferred Action programs to be certain that Arizona benefits were still out of the reach of these students.²⁸ History may be on the side of the DREAMers, but they still find themselves in a cruel limbo not of their making, and with no clear way out of the thicket.

Within the first week of the DA program application, which began August 15, 2012, tens of thousands of these students surfaced. By the Spring, 2013 semester, the contours of the DA review process will be more evident, and, depending upon political circumstances, a number of the applicants will have received their DA status and will be newly-eligible for certain benefits and legal status. Because they have had no such eligibility prior to the August 15, 2012 policy, the need for research and practice materials will be extremely high. As just some examples, consider the following issues that arose in the sixty-day period between the announcement of the

²⁷ Alan Gomez, DREAMers Personalize Cases to Stall Deportation; Illegal Immigrants Brought to U.S. As Children 'Outing' Themselves to Garner Public's Sympathy for Staying, USA TODAY, Mar. 13, 2012, at 3A; Ian Lovett, For Many Immigrants, Policy Offers Joy and Relief, N.Y. Times, June 17, 2012, at A4. On the cost issues, *see* Michele Waslin, Don't Jump to Conclusions About Costs of Deferred Action, Immigration Impact, July 25, 2012, <http://immigrationimpact.com/2012/07/25/dont-jump-to-conclusions-about-costs-of-deferred-action>.

²⁸ *See* Executive Order 21012-06, August 15, 2012 (setting out rules for Deferred Action and state benefits), http://azgovernor.gov/dms/upload/EO_081512_2012-06.pdf

revised DA policy and its implementation as a benefit for which the eligible students could apply. (Prior to this, and under any other prosecutorial discretion criteria, applicants could not apply for this status; only prosecutors or other immigration authorities could grant the status.) Early contacts with would-be applicants surfaced many individual issues, likely to be ones that had to be dealt with, finessed, or give rise to exceptions or waivers.

These examples will give a sense of the complexity of adjudications: Deferred action is a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion, in this case, for a two-year renewable period. Under current regulations, individuals whose case has been deferred are eligible to receive employment authorization for the period of deferred action, provided he or she can demonstrate “an economic necessity for employment.” DHS can terminate or renew deferred action at any time at the agency’s discretion. On June 15, 2012, it was announced that certain people who came to the United States as children and meet several key guidelines may request consideration of deferred action for a period of two years, subject to renewal, and would then be eligible for work authorization. Determinations will be made on a case-by-case basis under the DA guidelines. Cases that are likely to have arisen widely include: eligibility for employment authorization, possible only if the applicants can demonstrate an “economic necessity for employment,” necessitating income and expense estimates; eligibility if the applicant is already in removal proceedings, has a final removal order, or has a voluntary departure order (these applicants will not receive deferred action from USCIS, but there are alternative procedures available through ICE); if awarded DA, will any unlawful presence accrue during the two period of deferred action (no); not being in “unlawful presence” and being awarded DA may allow them to be eligible for resident tuition or other benefits, such as driver’s licenses or resident tuition (except in states where special rules were passed to

preclude this scenario, as in Arizona); anyone too old to qualify may have another form of prosecutorial discretion available, but not under DACA guidelines); eligibility will turn on meeting the durational requirements, with no more than a “brief, casual, and innocent” time outside the United States; decisions on what will constitute “non-significant misdemeanors” that will counts towards the “three or more non-significant misdemeanors” rules, not including minor traffic offenses; many judgment calls will be made by the adjudicators, including issues of the criminal criteria, enrollment status, fraud provisions, privacy considerations, expunction experiences, and the like; licensing and cooperative work issues will have to be determined according to applicable state law, such as bar admissions rules, teacher licensing authorities, psychologist certification authorities, or medical boards. The federal government has made it clear that they will not be eligible for additional federal benefits, such as health care.²⁹ Each DA applicant’s history will be considered along with other facts to determine whether, under the totality of the circumstances and on a case-by-case basis, he or she will be granted prosecutorial discretion.³⁰

²⁹ An amazing amount of technical assistance and administrative guidance has surfaced, both by the federal government and by NGO and community organizations. For the former, *see* Policy Guidance Letter from Center for Medicaid and CHIP Services, Dep’t Health & Human Servs., to State Health Officials and Medicaid Directors (Aug. 28, 2012), available at <http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/SHO-12-002.pdf>. Federal Register notice of the amendment to interim final rule: Pre-Existing Condition Insurance Plan Program, 77 Fed. Reg. 52,614 (Aug. 30, 2012) (to be codified at 45 C.F.R. pt. 152). For examples of the information provided by advocates, *see generally*, www.nilc.org and www.aila.org.

³⁰ Early discussions with DHS revealed that its current internal goals for processing of DACA requests were that it would likely take “Four to six months average processing time for the initial group of DACA deferred action requests. DHS anticipates that this timing may slow down as the volume picks up.” *See* DHS Advises On Various DACA Process Questions, AILA InfoNet Doc. No. 12090747 (Sept. 7, 2012), http://www.aila.org/content/default.aspx?docid=41217&utm_source=AILA+Mailing&utm_campaign=d9db041971-AILA8_9_10_12&utm_medium=email.

The first part of this project was current when I submitted it, and by means of this Postscript, I have now brought it up to date with these surprising and serious developments. I have two long-term projects where timeliness and currency are far less important: one involves a New Mexican priest who began a seminary and law school in what is now Taos, New Mexico in the 1830's,³¹ while another is a book project about an early Tejano lawyer who figured prominently in early twentieth century Texas cases and civil rights history.³² There are no recent or current developments in these matters, which is a good thing.

³¹ Michael A. Olivas, *Reflections Upon Old Books, Reading Rooms, and Making History*, 76 UMKC L. Rev. 811 (2008).

³² Michael A. Olivas, ed., "In Defense of My People": Alonso S. Perales and the Development of Mexican-American Public Intellectuals (Houston: Arte Publico Press, forthcoming, 2012).