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

IHELG Monograph

12-01

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(Forthcoming in William & Mary Bill of Rights Journal 21 (2012)

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Michael A. Olivas,

Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students, 21 *William & Mary Bill of Rights Journal* (2012, forthcoming)

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 Subsequent activities at the state level have included Wisconsin (repealed resident tuition statute),[2] Maryland (passed resident tuition statute; "frozen" while certified for state ballot measure);[3] Rhode Island (state board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

[1] See generally, Benjamin Marquez & John F. Witte, Immigration Reform: Strategies for Legislative Action, 7 THE FORUM 1 (2009); Michael A. Olivas, The Political Economy of the DREAM Act and the Legislative Process, 55 Wayne L. Rev. 1757 (2009); Julia Preston, Students Spell Out Messages on Their Immigration Frustration, N.Y. Times, Sept. 21, 2010, at A14; Julia Preston, Political Battle on Immigration Shifts to States, N.Y. Times, Jan. 1, 2011, at A1. See also Gary Reich and Jay Barth, Educating Citizens or Defying Federal Authority? A Comparative Study of In-State Tuition for Undocumented Students, 38 Policy Studies Journal 419 (2010); Danielle Holley-Walker, Searching for Equality: Equal Protection Clause Challenges to Bans on the Admission of Undocumented Immigrant Students to Public Universities, 2011 Mich. St. L. Rev. 357.

[2] Wis. Stat. Ann. § 36.27(2)(cr) (West 2010) (repealed 2011).

[3] Md. Code Ann., Educ. § 15-106.8 (West 2011) (pending November, 2012 repeal ballot referendum).

[4] Gina Macris, Panel: In-state tuition rates for undocumented RI students, Providence Journal, September 19, 2011, available at: http://newsblog.projo.com/2011/09/panel-in-state-tuition-for-und.html ; The Effects of In-State Tuition for Non-Citizens: A Systematic Review of the Evidence, (Providence: Latino Policy Institute, Roger Williams University, 2011), http://www.rwu.edu/sites/default/files/lpi-report.pdf

allowing schools to award non-state-funded scholarships to the undocumented);[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);[6] Connecticut (passed resident tuition statute).[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.[8] In 2012, immigrant groups in Maryland were litigating the ballot measure issue, arguing that the statute had not even been put into effect.[9] Rhode Island was the first state to enact residency

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[5] H.B. 60, 93rd Gen. Assemb., Reg. Sess. (Ill. 2003); 110 ILL. COMP. STAT. ANN. [amended by S.B. 2085, 97th Gen. Assemb., Reg. Sess. (Ill. 2011); 110 ILL. COMP. STAT. ANN.]

[6] A.B. 540, 2001-02 Cal. Sess. (Cal. 2001); CAL. EDUC. CODE §68130.5; A.B. 30 (2011), amending CAL. EDUC. CODE §68130.7 and adding §66021.7, relating to nonstate funded scholarships); A.B. 131, October 8, 2011 (amending Section 68130.7 of and adding Sections 66021.6, 69508.5, and 76300.5 to the Education Code, relating to state financial aid); 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 Nanette Asimov and Wyatt Buchanan, Jerry Brown signs Dream Act for illegal immigrants, San Fran. Chron., Oct. 8, 2011, at A1; Patrick McGreevy and Anthony York, Brown signs California Dream Act, L.A. Times, Oct. 9, 2011, at A1; Stephen Magagnini, Dream Act students live in limbo, Sacramento Bee, Dec. 26, 2011, at 1A.

[7] H.B. 6390, 2011 Leg., Reg. Sess. (Conn. 2011); CONN. GEN. STAT. § 10a-29.

[8] See Patrick McGreevy and Anthony York, Brown signs California Dream Act, L.A. Times, October 9, 2011, at A1; Nanette Asimov and Wyatt Buchanan, Jerry Brown signs Dream Act for illegal immigrants, San Francisco Chronicle, October 8, 2011, at A1; Rebecca R. Ruiz, The Choice: Dream Act Becomes Law in California, NY Times, October 10, 2011, http://thechoice.blogs.nytimes.com/2011/10/10/dream-act/?emc=eta1.CA - ballot

[9] Maryland has an unusual process for challenging new statutes through the ballot measure. See MD Election Law, sec. 7-101, 102 [http://mlis.state.md.us/asp/web_statutes.asp?gel&7-101 and http://mlis.state.md.us/asp/web_statutes.asp?gel&7-102] and the Maryland Constitution, Article XVI, The Referendum: http://www.msa.md.gov/msa/mdmanual/43const/html/16art16.html . See also Aaron C. Davis, Md. Tuition Law May be Halted, Washington Post, June 28, 2011, at B1; Maryland's 'Dream Act' Suspended Amid Petition Drive for Referendum, FoxNews.com, July 1, 2011, http://www.foxnews.com/politics/2011/07/01/marylands-dream-act-suspended-amid-petition-drive-for-referendum

tuition for undocumented college students by administrative action rather than by a statute, as tuition policy is set administratively in the state.[10]

From 2010 through 2012, litigation occurred in California,[11] Nebraska,[12] and Texas[13]—upholding state statutes against restrictionist efforts to eliminate the recent tuition provisions. In New Jersey[14] and Florida,[15] the states were sued due to policies that restricted even citizen

[10] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") provides in § 1621(c) (3) (d) ("State authority to provide for eligibility of illegal aliens for State and local public benefits"): "A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility." Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8, 18 U.S.C.A.). Under this provision, a State such as Rhode Island, which apportions tuition-setting authority to its Board of Governors for Higher Education, would "enact a State law" by this administrative means. See Gina Macris, Undocumented students may qualify for in-state tuition at R.I. public colleges, Providence Journal, September 20, 2011, http://www.projo.com/news/immigration/UNDOCUMENTED_COLLEGE_STUDENTS_09-20-11_HBQFEV_v14.64467.html; Erika Niedowski, RI board approves tuition for illegal immigrants, Boston Globe, September 27, 2011, http://www.boston.com/news/education/higher/articles/2011/09/26/ri_board_votes_on_tuition_for_illegal_immigrants/?s_campaign=8315 .RI – admin.

[11] Martinez v. U.C. Regents, 50 Cal. 4th 1277, 241 P. 3d 855, 117 Cal. Rptr. 3d 359 (2010) (upholding state statute, providing resident tuition to undocumented). Josh Keller, California Supreme Court Upholds Law Giving In-State Tuition to Illegal Immigrants, Chron. of High. Ed., Nov. 15, 2010, http://chronicle.com/article/California-Supreme-Court/125398/.

[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.

[13] IRCOT v Texas, 706 F. Supp. 2d 760 (S.D. Tex. 2010) (dismissing 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.

[14] See generally, http://latino.foxnews.com/latino/politics/2011/06/13/aclu-and-rutgers-law-clinic-take-new-jersey-to-court-for-denying-college/ ; Overcoming the Barriers Faced by Immigrants: A Briefing Report by the New Jersey State Advisory Committee to the United States Commission on Civil Rights (September, 2010), http://www.law.umaryland.edu/marshall/usccr/documents/cr12nj22010.pdf .

[15] Ray Downs, U.S. Citizens in Fla. Charged Higher Tuition Rates Because of Parents' Immigration Status, Christian Post, October 31, 2011, http://global.christianpost.com/news/u-s-citizens-in-fla-charged-higher-tuition-rates-because-of-parents-immigration-status-59881/.

residents from receiving residency or financial aid if their parents were out of status. Litigation also was filed in New Jersey,[16] Maryland,[17] and New York[18] on associated residency tuition issues. In addition to these expansive accomodationist 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),[19] (see Table One) and a small number of states ban them outright, including Alabama,[20] Indiana,[21] and Ohio,[22] which did so in 2011. (For these, see Table Two.) The 2011

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[16] A.Z. v. H.E.S.A.A., New Jersey Superior Court, Appellate Division/Direct, (filed 2011) (US citizen student not eligible for NJ state financial aid because parent is undocumented), http://www.aclu-nj.org/legaldocket/a.z.-v.-h.e.s.a.a./. See also, *Arturo Cortes v. HESAA*, NJ, Superior Court, App. Div. No. A-2142-11-T1 (2012) (appeal to reverse the action of the Higher Education Assistance Authority ("HESAA"), dated August 15, 2011, and reaffirmed after appeal on November 21, 2011, denying assistance under the Tuition Aid Grant and Educational Opportunity Fund ("EOF") programs).

[17] Erin Cunningham, Montgomery College sued over illegal immigrant policy; School is breaking law by granting in-county tuition, McDonough says Gazette, Jan. 21, 2011, http://www.gazette.net/stories/01212011/polinew205826_32538.php ; Len Lazarick, Montgomery College sued for giving in-county tuition to illegal immigrants, Maryland Reporter, January 21, 2011, http://marylandreporter.com/2011/01/21/montgomery-college-sued-for-giving-in-county-tuition-to-illegal-immigrants/#ixzz1p8GIb8Mc.

[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).

[19] See, e.g. Michael A. Olivas, IIRIRA, The DREAM Act, and Undocumented College Student Residency, 30 Journal of College & University Law, 435, 449-455 (2004) (statutory analysis of Sec. 505, 1621 and 1623). See generally Victor C. Romero, Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls, 27 N.C. INT'L L. & COM. REG. 393 (2002); Victor C. Romero, Noncitizen Students and Immigration Policy Post-9/11, 17 GEO. IMMIGR. L.J. 357 (2003); Jessica Salsbury, Comment, Evading "Residence": Undocumented Students, Higher Education, and the States, 53 AM. U. L. REV. 459 (2003).

[20] HICA v Bentley (Dist. Ct and 11th Cir. 2011). Also see Michael A. Olivas, Sweet Home Alabama? InsideHigherEd.com, October 13, 2011, http://www.insidehighered.com/views/2011/10/13/essay_on_the_alabama_immigration_law_and_higher_education (reviewing federal litigation enjoining comprehensive Alabama restrictionist statute). See generally Campbell Robertson, Critics See 'Chilling Effect' in Alabama Immigration Law, N.Y. Times, Oct. 28, 2011, at A14; Campbell Robertson, In Alabama, Calls for Revamping Immigration Law, N.Y. Times, Nov. 17, 2011, at A15; Alan Gomez, Immigrants Return to Alabama; Scores Fled State after Illegal Immigration Law Went into Effect, USA TODAY, Feb. 21, 2012, at 3A.

Alabama bill would have restricted even refugees from enrolling, and was enjoined by the federal district judge.[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.[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.[25] On October 20, 2011, the Southern Poverty Law Center filed *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.[26] In a major development, in late 2010, the California Supreme Court

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[21] Tom LoBianco, Immigrant tuition fight derails bill, indiana.onpolitix.com, March 1, 2012, http://indiana.onpolitix.com/news/106622/immigrant-tuition-fight-derails-bill.

[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.

[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).

[24] 11th Cir. stays part of Alabama law, including Sec 28 (K-12 school recordkeeping) http://www.ca11.uscourts.gov/unpub/ops/201114532ord.pdf . See Jay Reeves, Hispanic Children Bullied in Law's Wake; Parents Report More Taunts after Ala. Crackdown, BOSTON GLOBE, Oct. 23, 2011, at 2; Campbell Robertson, Critics See 'Chilling Effect' in Alabama Immigration Law, N.Y. Times, Oct. 28, 2011, at A14.

[25] Supra note 16. See also New Jersey Denies College Financial Aid to U.S. Citizen Because Her Mother is Undocumented, Fox.com, June 14, 2011, http://latino.foxnews.com/latino/politics/2011/06/13/aclu-and-rutgers-law-clinic-take-new-jersey-to-court-for-denying-college/#ixzz1pCZaCrex. Litigation in the Cortes and A.Z. cases continued in 2012.

[26] Wendy Ruiz v. Gerard Robinson, Florida Commissioner of Education, in his official capacity and Frank T. Brogan, Chancellor of the State University System, in his official capacity, http://www.splcenter.org/get-informed/case-docket/wendy-ruiz-et-al-v-gerard-robinson-et-al . See Michael R. Vasquez, U.S.-citizen children of immigrants protest higher tuition rates, Miami Herald, Oct. 24, 2011, at B1.

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 accomodationist 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

[27] Martinez v. Regents, 241 P.3d 855 (Cal.2010). See Laurel Rosenhall, California high court upholds college tuition break for illegal immigrants, Sacramento Bee, Nov. 16, 2010, at 1A; Josh Keller, California Supreme Court Upholds Law Giving In-State Tuition to Illegal Immigrants, Chron. of High. Educ., November 15, 2010, available at: http://chronicle.com/article/California-Supreme-Court/125398/; Maura Dolan and Larry Gordon, In-State Tuition Benefit Upheld, L. A. Times, Nov. 16, 2010, at A1. See also Seth Hoy, *Colorado, Hawaii and Delaware Progress on Tuition Equity for Undocumented Students*, ImmigrationImpact.com, April 16, 2012, http://immigrationimpact.com/2012/04/16/colorado-hawaii-and-delaware-progress-on-tuition-equity-for-undocumented-students/. A careful study of state initiatives showed that many of the anti-immigrant bills, including those concerning K-12 and higher education, were being proposed by the Republican Party to embarrass Democrats or get them on the record when they control the legislative agenda. See Joshua Zingher, Get on the Omnibus: Immigration Reform and the Electoral Motivations of State Legislators (SSRN, 2012).

[28] Trip Gabriel, Stance on Immigration May Hurt Perry Early On, N.Y. Times, Sept. 24, 2011, at A12; Kelly Field, For Undocumented Students, Obama's New Deportation Policy Offers Limited Relief, Chron. of High. Educ., Sept. 16, 2011, at A27; Peter Catapano, The Thread: Battle of the Borders, N.Y. Times, Oct. 21, 2011, http://opinionator.blogs.nytimes.com/2011/10/21/battle-of-the-borders/?emc=etal. On the withdrawal of Gov. Perry, see Mimi Swartz, Overmisunderestimating Rick Perry, campaign.blogs.nytimes.com, January 20, 2012, http://campaignstops.blogs.nytimes.com/2012/01/20/overmisunderestimating-rick-perry/?scp=2&sq=perry%20withdraws&st=cse ; Philip Rucker, Romney campaign looks to consolidate support of GOP establishment, Wash. Post, Jan. 20, 2012, at A6.

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]

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[29] Erika Bolstad, Rivera introduces a military-only version of DREAM Act, Miami Herald, Jan. 27, 2012, http://www.miamiherald.com/2012/01/27/v-print/2610853/rivera-introduces-a-military-only.html#storylink=cp . Sen. Marco Rubio (R-FL) also introduced a version of the DREAM Act, one that provided no immigration legalization. Mary Giovagnoli, *Rubio Proposal Overlooks Obstacles Ahead For DREAMers*, ImmigrationImpact.com, May 4, 2012, http://immigrationimpact.com/2012/05/04/rubio-proposal-overlooks-obstacles-ahead-for-dreamers/; Lizette Alvarez, With G.O.P.'s Ear, Rubio Pushes Dream Act Proposal, N. Y. Times, Apr. 27, 2012, at A13.

[30] Elise Foley, Senate Dems To Obama: Stop Deporting DREAM Act Students, Huffington Post, April 14, 2011, http://www.huffingtonpost.com/2011/04/14/senate-dems-to-obama-stop_n_849419.html + Schumer).

[31] Department of Homeland Security Oversight: Hearing Before the Senate Committee on the Judiciary, 112th Cong. (March, 2011) (testimony of Sec. Janet Napolitano, U.S. Department of Homeland Security).

In June 2011, with the release of what came to be known as the "Morton Memo" and in August and November, 2011,[32] 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.[33] 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

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[32] John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, U.S. Immigration and Customs Enforcement (June 17, 2011) http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf . A year earlier, Director Morton had begun to lay the groundwork for the 2011 initiative by estimating that ICE could afford with its current budget and personnel to remove approximately 400,000 noncitizens. Memorandum from John Morton, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Jun. 30, 2010) (available at http://www.ice.gov/doclib/civil_enforcement_priorities.pdf).

[33] Thereafter, ICE and DHS released a number of memoranda outlining the many details regarding prosecutorial discretion. For a listing and review of these memoranda and other documents, see Shoba Sivaprasad Wadhia, Prosecutorial Discretion in Immigration Agencies: A Year in Review, http://www.lexisnexis.com/community/immigration-law/blogs/emergingissues/archive/2012/01/12/prosecutorial-discretion-in-immigration-agencies-a-year-in-review.aspx.

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.[34] 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.[35] 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.

[34] On the issue of the marches, which were attended by several hundreds of thousands of participants, see Sylvia R. Lazos, The Immigrant Rights Marches (Las Marchas): Did the "Gigante" (Giant) Wake Up or Does it Still Sleep Tonight? 10 Nev. L.J. 780 (2007); Kevin R. Johnson and Bill Ong Hing, The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement, 42 Harv. Civ. Rts-Civ. Lib. L. Rev. 99 (2007); Alfonso Gonzalez, The 2006 Mega Marchas in Greater Los Angeles: Counterhegemonic Moment and the Future of El Migrante Struggle," 7 Latino Stud. 30 (2009). See also Caroline B. Brettell, Immigrants as Netizens: Political Mobilization in Cyberspace, in Deborah Reed-Danahay and Caroline B. Brettell, eds., Citizenship, Political Engagement, and Belonging: Immigrants in Europe and the United States 226-243 (New Brunswick, NJ: Rutgers University Press, 2008); Roberto G. Gonzales and Leo R. Chavez, "Awakening to a Nightmare": Abjectivity and Illegality in the Lives of Undocumented 1.5- Generation Latino Immigrants in the United States, 53 Curr. Anthro. 255 (2012)

[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,[36] 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]

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[36] "Olivas kicks out the jams, UHLC professor explores the law and business of rock and roll" [report of CLE workshop, March, 2012], http://www.law.uh.edu/news/spring2012/0301RockRoll.asp.

[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.

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removable from the U.S. See Wildes, id., 14 San Diego L. Rev. 42, 43-44, fn. 4 (1976); Leon Wildes, All you need is love — and a good Jewish lawyer, NJ Jewish Standard, December 10, 2010: http://www.jstandard.com/index.php/content/item/all_you_need_is_love_and_a_good_jewish_lawyer/. See also Jon Wiener, Come Together: John Lennon in His Time. New York: Random House, 1984; Jon Wiener, Gimme Some Truth: The John Lennon FBI Files. Berkeley: University of California Press, 2000. For the details of the underlying child custody dispute and family court matter, much of which occurred in Houston, Texas, see Mark Davidson, Cause No. 893,663; Anthony D. Cox v. Yoko Ono Lennon, I Really Want To See You, Hous. Lawyer 24 (September-October, 2011).

> 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

[38] 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, 44-46 (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), Interp. Rel. 25-32 (Jan. 26, 1976); Part II at 33-42 (January 30, 1976); Leon Wildes, The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?, 17 San Diego L. Rev. 99, 102-106 (1979).

[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.[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.[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.[44] This shrinking of discretionary jurisdiction is essentially the case in the year 2012, forty years after *U.S. v. Lennon* and fifteen years after the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[45] the Antiterrorism and Effective Death Penalty Act (AEDPA),[46] and the Personal Responsibility and Work Opportunity

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

[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).

[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).

[45] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), 8 U.S.C. § 1103 (2008).

[46] Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), 8 U.S.C. § 1105 (2006).

Reconciliation Act (PRWORA)[47]—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."[48]

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.[49] Even with the

[47] Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), 42 U.S.C 1305, 110 Stat. 2105.

[48] Adam B. Cox and Cristina M. Rodríguez, The President and Immigration Law, 119 Yale L.J. 458, 517-518 (2009). See also Mary Kenney, *Prosecutorial Discretion: How to Advocate for Your Client*, AMERICAN IMMIGRATION COUNCIL (June 24, 2011) available at http://www.aila.org/content/default.aspx?docid=33749.

[49] There are reams of materials on this important intersection of national security law and immigration in the border control and enforcement contexts. Two of the better articles linking and critiquing the two domains are Jennifer M. Chacón, Unsecured Borders: Immigration Restrictions, Crime Control and National Security, 39 CONN. L. REV. 1827 (2007) and Kevin R. Johnson and Bernard Trujillo, Immigration Reform, National Security After September 11, and the Future of North American Integration, 91 MINN. L. REV. 1369 (2007).

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."[50]

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

[50] Cox and Rodríguez, 119 Yale L.J. 458, 518-519 (2009).

A final appeal option for a failed immigration matter is a private relief bill,[51] legislation so daunting at the present that Congress has only passed two such extraordinary measures since 2005.[52] 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;[53] 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

[51] See Robert Hopper & Juan P. Osuna, Remedies of Last Resort: Private Bills and Deferred Action Status, IMMIGR. BRIEFINGS, June 1997 (97-06), at 2-9 (history and procedures for forms of private relief); Kati L. Griffith, Perfecting Public Immigration Legislation: Private Immigration Bills and Deportable Lawful Permanent Residents 18 Geo. Immigr. L.J. 273 (2004); Richard S. Beth, Private Bills: Procedure in the House (CRS Report 98-628, 2005); Penn State Law School, Duane Morris & Maggio+Kattar, Private Bills & Deferred Action, Toolkit (May 17, 2011), http://law.psu.edu/_file/PBDA_Toolkit.pdf (accessed on March 27, 2012).

[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%3Aprivate+legislation

[53] Congress Passes Two Private Immigration Relief Bills, 87 Inter. Rel. 2414 (2010) (case of Shigeru Yamada); An Act for the Relief of Shigeru Yamada, Private Law No: 111-1 (2010). See also Ruxandra Guidi, Undocumented Immigrant Granted Rare Pathway to Legalization, Kpbs.org, Jan. 31, 2011, http://www.kpbs.org/news/2011/jan/31/undocumented-immigrant-chula-vista-be-granted-rare/ (Shigeru Yamada); Roxana Popescu, Bob Filner Leads House In Sponsoring Private Bills, Kpbs.org, Oct. 27, 2011, http://www.kpbs.org/news/2011/oct/27/bob-filner-leads-congress-passing-private-bills/ (Shigeru Yamada).

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]

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[54] An Act for the Relief of Hotaru Nakama Ferschke, Private Law No: 111-2 (2010). See also Congress Passes Two Private Immigration Relief Bills, 87 Inter. Rel. 2414 (2010) (case of Hotaru Nakama Ferschke).

[55] Griffith, supra at note 51. See also, generally, Michael J. Wishnie, Immigrants and the Right to Petition, 78 N.Y.U. L. Rev. 667 (2003) (reviewing redress rights for noncitizens). See Toolkit, supra note 51.

[56] Alfonso Chardy, Undocumented Daughter of I-75 Crash Victims Won't Be Deported, MIAMI HERALD, Feb. 2, 2012, http://www.miamiherald.com/2012/02/02/2621892/undocumented-daughter-of-i-75.html.

[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."[58] 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]

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[58] Wadhia, The Role of Prosecutorial Discretion in Immigration Law 9 CONN. PUBL. INT. L. J. 243, 250 (2010), supra at note 42.

[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 footnotation 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[60] or its statutory cousin Temporary Protected Status,[61] 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.[62] CIS issued "Interim Relief" Guidelines in the circumstances, and was flexible in allowing the affected colleges and students

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with deportations, Sacr. Bee, Mar. 14, 2012, http://www.sacbee.com/2012/03/14/4338217/navarrette-quit-playing-favorites.html (high school valedictorian given two year stay); Michael Biesecker and Gosia Wozniacka, NC Judge Could Terminate Parental Rights of Deported Worker, Put US-Born Sons up for Adoption, [NC] STAR TRIB., Mar. 9, 2012, http://www.startribune.com/nation/142093133.html (deporting father and putting U.S. citizen children up for adoption); Montgomery County student, family win reprieve from deportation, Washington Post.com, Mar. 14, 2012, http://www.washingtonpost.com/local/montgomery-county-student-family-win-reprieve-from-deportation/2012/03/14/gIQAlKX7CS_gallery.html?wpisrc=emailtoafriend (DREAM Act student wins one year stay). The Appendix to this article includes over two hundred stories of DREAM Act students, in various stages of their legal action.

[60] "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 from countries (such as Liberia) deemed to require the temporary protection. The President designates DED for nationals of a particular country by means of either an Executive Order or a Presidential Memorandum.

[61] INA § 244(a), 8 U.S.C. § 1254(a) (2006).

[62] "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.[63] 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.[64] 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.[65]

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[63] 70 Fed. Reg. 70992-70996 (Nov. 25, 2005). See also, Brian Huddleston, Legal Education under Extreme Stress: A Semester in Exile: Experiences and Lessons Learned During Loyola University New Orleans School of Law's Fall 2005 Hurricane Katrina Relocation, 57 Journal of Legal Education 319 (2007).

[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).

[65] 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).

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

[66] The Inspector's Field Manual, several hundred pages long, is available at: http://www.gani.com/public/immigration/forms/fieldman.pdf (last visited February 28, 2012).

[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.'[70]

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."[71]

[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)."[72]

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."[73]

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

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

[73] Leon Wildes, The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases, 41 SAN DIEGO L. REV. 819, 826 (2004).

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."[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.

[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.[76] 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.[77]

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,[78] and even

[76] In 2005-2008, the last years of its eight years in office, the Bush Administration averaged 771 DA grants per year and 301,418 deportations; the Obama Administration averaged 661 DA grants annually and 391,348 deportations during 2009-2010, its first two years in office. Dara Lind, La Opinion: Obama Has Granted a Record Low Number of Deferred Actions to Immigrants, America's Voice, http://americasvoiceonline.org/blog/entry/la_opinion_obama_has_granted_a_record_low_number_of_deferred_actions (Apr. 28, 2011). See also Julia Preston, Federal Policy Resulting in Wave of Deportations Draws Protests, N. Y. Times, Aug. 17, 2011, at A12; Julia Preston and Sarah Wheaton, Meant to Ease Fears of Deportation Program, Federal Hearings Draw Anger, NY Times, Aug. 26, 2011, at A13; Julia Preston, Deportation Program Sows Mistrust, U.S. Is Told, N.Y. Times, Sept. 16, 2011, at A12; Julia Preston, Latinos Said to Bear Weight of a Deportation Program, N.Y. Times, Oct. 19, 2011, at A16.

[77] Senator McCain's absence during DREAM Act deliberations was widely regarded as strategic, as he was in the thick of the 2007-2008 Republican primary fight. See, e.g., Stephen Dinan, McCain Caters to GOP Voters, WASH. TIMES, Oct. 31, 2007, at A1 (stating that "Sen. John McCain has quietly been piling up flip-flops," citing previous DREAM Act support). See generally, Michael A. Olivas, The Political Economy of the DREAM Act and the Legislative Process, 55 Wayne Law Review 1757, 1797-1798 (2009)(details of DREAM Act voting).

[78] See generally, Michael Hoefer, Nancy Rytina, and Bryan C. Baker, Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010 (D.C.: DHS Office of Immigration Statistics, 2010), available at: http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf (last visited February 28, 2012) (review of declining number of unauthorized noncitizens in US); Demetrios G. Papademetriou, Madeleine Sumption, and Aaron Terrazas, eds. Migration and the Great Recession: The Transatlantic

citizen children were being removed with their parents who were in unauthorized status.[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.[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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Experience (D.C.: Migration Policy Institute, 2011); William H. Frey, Population Growth in Metro America since 1980: Putting the Volatile 2000s in Perspective (DC: Brookings Metropolitan Policy Program, March 2012) http://www.brookings.edu/~/media/Files/rc/papers/2012/0320_population_frey/0320_population_frey.pdf (accessed March 27, 2012).

[79] See International Human Rights Law Clinic, University of California, Berkeley, School of Law; Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity, University of California, Berkeley, School of Law; and Immigration Law Clinic, University of California, Davis, School of Law, In the Child's Best Interest? The consequences of losing a lawful immigrant parent to deportation (Berkeley: March 2010), available at: http://www.law.berkeley.edu/files/Human_Rights_report.pdf (last visited, February 28, 2012); Julia Preston, Risks Seen for Children Of Illegal Immigrants, N.Y. Times, September 21, 2011, at A17; Carola Suárez-Orozco, Hirokazu Yoshikawa, Robert T. Teranishi, and Marcelo M. Suárez-Orozco, Growing Up in the Shadows: The Developmental Implications of Unauthorized Status, 81 Harv. Educ. Rev. 438 (2011); Jacqueline Stevens, U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens, 18 Va J. of Soc. Pol. and the L. 606 (2011); Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System (NY: Applied Research Center, 2011), available at: http://www.arc.org/shatteredfamilies (last visited February 28, 2012); Julia Preston, Latinos Said to Bear Weight of a Deportation Program, N.Y. Times, October 19, 2011, at A16.

[80] In a series of detailed articles, New York Times reporter Julia Preston has followed the complex issues involved in the DA policy and the resultant changes in immigrant communities. See, e.g., Julia Preston, Deportation Halted for Some Students as Lawmakers Seek New Policy, N.Y. Times, April 27, 2011, A20; Julia Preston, Federal Policy Resulting in Wave of Deportations Draws Protests, August 17, 2011, A12; Julia Preston and Sarah Wheaton, Meant to Ease Fears of Deportation Program, Federal Hearings Draw Anger, N.Y. Times, August 26, 2011, A13 Julia Preston, Deportation Program Sows Mistrust, U.S. Is Told, N.Y. Times, September 16, 2011, A12; Julia Preston, Obama Policy On Deporting Used Unevenly, NY Times, November 13, 2011, A16; Julia Preston, New Rules for Guest Workers Are Issued by the Labor Dept, N.Y. Times, February 11, 2012, A11.

removed.[81] 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.[82]

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 outed themselves and made their undocumented status known to the larger public during the DREAM Act deliberations.[83] Additional news stories had begun to appear regularly about

[81] Napolitano, supra, note 31. In April, 2011, lawyers who had served as INS General Counsel and other immigration bar leaders issued a brief memo indicating the various administrative and discretionary means available to the several immigration authorities, none of which require Congressional action. See American Immigration Council, Legal Experts Weigh in on Executive Branch Authority (May 2, 2011) http://www.immigrationpolicy.org/just-facts/legal-experts-weigh-executive-branch-authority. See also Julia Preston, Immigration Decreases, But Tensions Remain High, N.Y. Times, March 11, 2012, at A15.

[82] Using comprehensive FOIA-initiated data from Executive Office for Immigration Review (EOIR), TRAC has analyzed case-by-case data; reported data are available at: http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php (last visited February 28, 2012) (reporting deportation proceedings by state, nationality, court, and city). See also, Julia Preston, In Test of Deportation Policy, 1 in 6 Get a Fresh Look and a Reprieve, N.Y. Times, January 20, 2012, A13.

[83] Elise Foley, Senate Dems To Obama: Stop Deporting DREAM Act Students, HuffingtonPost.com April 14, 2011, http://www.huffingtonpost.com/2011/04/14/senate-dems-to-obama-stop_n_849419.html (last visited February 28, 2012). See Appendix I for a sampler of the hundreds of news stories about undocumented college students, including those engaged in civil disobedience and self-identifying to make public points. See, e.g., Alfonso Gonzalez, The 2006 Mega Marchas in Greater Los Angeles: Counterhegemonic Moment and the Future of El Migrante Struggle," 7 Latino Stud. 30 (2009); Susan Carroll, Student's Hopes Ride on DREAM; He came to U.S. at age 5, and now he faces deportation: Fraternity Took up Cause, HOUS. CHRON., Dec. 13, 2010, at B1; Michael A. Olivas, Some DREAM Students Face Nightmare Scenarios: Obama Administration Must Honor Commitment, CHRON.COM (Apr. 6, 2011), http://www.chron.com/opinion/outlook/article/Some-DREAM-students-face-nightmare-scenarios-1591501.php; Erin Kelly, Successful Young Illegal Migrants Daring to Dream, ARIZONA REPUBLIC, June 29, 2011, at A1; Kevin Freking, Immigrants Protest State Education Policy, Waterloo Region Record, June 29, 2011, D11; Suzy Khimm, Obama DREAMs On; The DREAM Act is dead in Congress, but the White House is quietly moving to limit deportations of certain undocumented immigrants, Mother Jones, June 27, 2011, available at: http://motherjones.com/politics/2011/06/obama-dream-act-deportations ; René Galindo, Undocumented & Unafraid: The DREAM Act 5 and the Public Disclosure of Undocumented Status as a Political Act (IHELG Research Monograph No. 11-02, 2011), http://www.law.uh.edu/ihelg/monograph/11-02.pdf (last visited February 28, 2012).

students without status being discovered in traffic court, random police encounters, and travel security.[84] 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.[85]

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.[86] In August 2011, DHS established a joint DHS-Department of Justice (DOJ) working group to review and

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[84] See e.g. Nathan Pippenger, One Family in Limbo: What Obama's Immigration Policy Looks Like in Practice, New Republic, September 16, 2011, available at: http://www.tnr.com/article/politics/95005/pippenger-immigration-obama-deportation-ice ; Marisa Gerber, Vaya Con Mom, After their mother was deported to Mexico, the Brito children embarked on a two-year journey trying to navigate life in the United States on their own, OC WEEKLY (Oct. 20, 2011) at 10; Jason Buch, Graduate's Deportation Case Dropped, SAN ANTONIO EXPRESS-NEWS, Nov. 3, 2011, at A1; Julia Preston, Obama Policy On Deporting Used Unevenly, NY Times, November 13, 2011, A16.

[85] See generally, Alfonso Gonzalez, The 2006 Mega Marchas in Greater Los Angeles: Counterhegemonic Moment and the Future of El Migrante Struggle," 7 Latino Stud. 30 (2009); Ronald Trowbridge, Educated Illegal Immigrants Bring Fiscal Gain, InsideHigherEd.com, November 17, 2011, http://www.insidehighered.com/views/2011/11/17/essay-educated-illegal-immigrants-are-net-financial-gain-us#.TsWF5CS78cQ.email#ixzz1ncSl59Lx ; Erin Kelly, Successful Young Illegal Migrants Daring to Dream, ARIZONA REPUBLIC, June 29, 2011, at A1; Kimberly Hefling, Duncan praises push to help immigrant students; Education Secretary Arne Duncan said Monday he's encouraged that some states are allowing the children of illegal immigrants to pay in-state tuition at public colleges, Seattle Times, November 7, 2011, http://seattletimes.nwsource.com/html/politics/2016710163_apuseducationsecretaryillegalimmigrants.html ; Maria Sacchetti, Two Reprieves Give Immigrants Cautious Hope; Advocates See Signs of Prioritizing Cases, BOSTON GLOBE, Nov. 26, 2011, at Metro-1. See also, Alvin Melathe and Suman Raghunathan, Tuition Equity Bills Continue to Build Momentum in State Legislatures, ImmigrationImpact.com, February 10, 2012, http://immigrationimpact.com/2012/02/10/tuition-equity-bills-continue-to-build-momentum-in-state-legislatures/ ; Leah Muse-Orlinoff, Staying Put but Still in the Shadows: Undocumented Immigrants Remain in the Country Despite Strict Laws (D.C.: Center for American Progress, 2012) http://www.americanprogress.org/issues/2012/02/mexico_immigration.html (last visited March 3, 2012).

[86] Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel, 17 June 2011, available at http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf (last visited February 28, 2012). + other June 17, 2011 memo on victims

resolve the hundreds of thousands cases then in the process of Executive Office for Immigration Review (EOIR) review.[87] 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.[88] 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.[89]

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.[90] And some political opportunists saw this as

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[87] Letter from DHS Sec. Janet Napolitano, to Sen. Dick Durbin (Aug. 18, 2011), available at http://durbin.senate.gov/public/index.cfm/files/serve?File_id=1180a746-c6d4-4fe9-b11f-cf9be50b6226.

[88] See, e.g., Memorandum from Peter Vincent, Principal Legal Advisor, ICE, *Case-by-Case Review of Incoming and Certain Pending Cases* (Nov. 17, 2011), available at http://www.ice.gov/doclib/foia/dro_policy_memos/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf; U.S. DEP'T OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, GUIDANCE TO ICE ATTORNEYS REVIEWING THE CBP, USCIS, AND ICE CASES BEFORE THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (2011), available at http://www.ice.gov/doclib/foia/dro_policy_memos/guidance-to-ice-attorneys-reviewing-cbp-uscis-ice-cases-before-eoir.pdf.; U.S. DEP'T OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, NEXT STEPS IN THE IMPLEMENTATION OF THE PROSECUTORIAL DISCRETION MEMORANDUM AND THE AUGUST 18TH ANNOUNCEMENT ON IMMIGRATION ENFORCEMENT PRIORITIES (2011), available at http://www.ice.gov/doclib/about/offices/ero/pdf/pros-discretion-next-steps.pdf.

[89] Julia Preston, In Test of Deportation Policy, 1 in 6 Get a Fresh Look and a Reprieve, N.Y. Times, January 20, 2012, at A13.

[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]

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hearing on "Safeguarding the Integrity of the Immigration Benefits Adjudication Process," available at: http://www.aila.org/content/default.aspx?docid=38574 (last visited February 28, 2012). See also, Susan Carroll, Report: Feds downplayed ICE case dismissals, Documents show agency had approval to dismiss some deportation cases, Hous. Chron., June 27, 2011, available at: http://www.chron.com/news/houston-texas/article/Report-Feds-downplayed-ICE-case-dismissals-2080532.php (last visited February 28, 2012) (GOP reactions to DA review proposals). The chair of the House Judiciary Committee, Rep. Lamar Smith (R-TX) has been a persistent critic of any DA initiatives. See, e.g., Julian Aguilar, DHS Refutes Lamar Smith's Immigration "Stonewalling" Allegations, Texas Tribune, November 22, 2011, http://www.texastribune.org/immigration-in-texas/immigration/smithdhs-stonewalling-committee-information/ (last visited February 28, 2012); Rep. Lamar Smith, SMITH: Obama budget's backdoor amnesty, President's spending plan weakens immigration enforcement, Washington Times, February 23, 2012, http://www.washingtontimes.com/news/2012/feb/23/obama-budgets-backdoor-amnesty/ . But see Editorial: The Forgetful Mr. Smith, N.Y. Times, July 13, 2011, at A26 (noting examples of Rep. Smith's support for discretion during President George W. Bush administration). In Spring, 2012, Rep. Smith memorably characterized the security accommodations for detainees as "Holiday on ICE." Julia Preston, Union Chief Says New U.S. Rules for Immigration Detention Are Flawed, N.Y. Times, Mar. 29, 2012, at A18.

[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, http://blog.heritage.org/2011/08/19/backdoor-amnesty-abusing-the-constitution-and-presidential-authority/ (last visited February 28, 2012); Alana Goodman, Feds Misled Public on "Backdoor Amnesty" Scandal, Commentary, June 27, 2011, http://www.commentarymagazine.com/2011/06/27/feds-misled-public-on-%E2%80%9Cbackdoor-amnesty%E2%80%9D-scandal/ .

[92] Kristian Ramos, The Problem With the GOP's Love Affair With "Backdoor Amnesty," HuffingtonPost.com, September 2, 2011, http://www.huffingtonpost.com/kristian-ramos/backdoor-amnesty_b_944118.html (last visited February 28, 2012); Editorial: How a Democracy Works: President Obama has the authority to start fixing immigration, if only he would use it, N.Y. Times, June 4, 2011, at 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 review of how immigration rhethoric has played out in strategic and terrorism-terms, see Geoffrey A. Hoffman & Susham M. Modi, The War on Terror as a Metaphor for Immigration Regulation: A Critical View of a Distorted Debate, 15 J. of Gender, Race & Just. 449 (2012).

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;[93]
>
> Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens, 2 March 2011;[94]

[93] John Morton, *Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions* (August 20, 2010), http://www.ice.gov/doclib/detention-reform/pdf/aliens-pending-applications.pdf .

[94] John Morton, *Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens* (March 2, 2011), http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf. See generally Shoba Sivaprasad Wadhia, *The Morton Memo and Prosecutorial Discretion: An Overview*, IMMIGRATION POLICY CENTER (July 20, 2011), http://www.immigrationpolicy.org/special-reports/morton-memo-and-prosecutorial-discretion-overview.

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

[95] John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011), http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

[96] John Morton, *Prosecutorial Discretion: Certain Crime Victims, Witnesses and Plaintiffs* (June 17, 2011), http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf.

[97] Memorandum from Peter Vincent, Principal Legal Advisor, U.S. ICE, *Case-by-Case Review of Incoming and Certain Pending Cases* (Nov. 17, 2011), available at http://www.ice.gov/doclib/foia/dro_policy_memos/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf. See also U.S. DEP'T OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, GUIDANCE TO ICE ATTORNEYS REVIEWING THE CBP, USCIS, AND ICE CASES BEFORE THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (2011), available at http://www.ice.gov/doclib/foia/dro_policy_memos/guidance-to-ice-attorneys-reviewing-cbp-uscis-ice-cases-before-eoir.pdf.; U.S. DEP'T OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, NEXT STEPS IN THE IMPLEMENTATION OF THE PROSECUTORIAL DISCRETION MEMORANDUM AND THE AUGUST 18TH ANNOUNCEMENT ON IMMIGRATION ENFORCEMENT PRIORITIES (2011), available at http://www.ice.gov/doclib/about/offices/ero/pdf/pros-discretion-next-steps.pdf;.

[98]SHOBA SIVAPRASAD WADHIA, PROSECUTORIAL DISCRETION IN IMMIGRATION AGENCIES: A YEAR IN REVIEW [2012], http://www.lexisnexis.com/community/immigration-law/blogs/emergingissues/archive/2012/01/12/prosecutorial-discretion-in-immigration-agencies-a-year-in-review.aspx; The Legal Action Center and Alexsa Alonzo, DHS Review Of Low Priority Cases For

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;
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> •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
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> •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]

Prosecutorial Discretion, THE AMERICAN IMMIGRATION COUNCIL (Feb. 13, 2012), http://www.legalactioncenter.org/sites/default/files/DHS_Review_of_Low_Priority_Cases_2-13-12.pdf

[99] John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, 2-3 (June 17, 2011), http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

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,"[100] a different standard than that which had been employed since the Clinton Administration, "whether a substantial federal interest was present."[101] 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.[102]

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),[103] Homeland Security Investigations (HSI),[104] and Office of the Principal Legal Advisor (OPLA),[105] and those who practice or have executive responsibilities before the Executive Office for Immigration

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[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).

[102] See, e.g., Julia Preston, U.S. Issues New Deportation Policy's First Reprieves, N.Y. Times, August 23, 2011, at A15 (revised policy is more forgiving to students and others, including some removable gays and lesbians); Susan Carroll, Immigration: Gay Costa Rican wed in California can stay in U.S., HOUS. CHRON., Mar. 10, 2012, at B5 (deportation from Houston stayed for same sex spouse married in California).

[103] Enforcement and Removal Operations (ERO). http://www.ice.gov/about/offices/enforcement-removal-operations/index.htm.

[104] Homeland Security Investigations (HSI). http://www.ice.gov/about/offices/homeland-security-investigations/.

[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;
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> •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;

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[106] Executive Office for Immigration Review (EOIR). http://www.justice.gov/eoir/.

[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 .

[108] Customs and Border Patrol (CBP). http://www.cbp.gov/.

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

[110] See generally, Jill E. Family, Administrative Law Through the Lens of Immigration Law (SSRN, 2012).

•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.[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."[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.[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:

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[111] John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, 4 (June 17, 2011), http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf .

[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.

[113] John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, 5 (June 17, 2011), http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

> •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.[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:

> 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. . .

[114] *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 to—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

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[115] Leon Wildes and Shoba Sivaprasa Wadhia, Prosecutorial Discretion and the Legacy of John Lennon, ImmigrationImpact.com, July 20, 2011, http://immigrationimpact.com/2011/07/20/prosecutorial-discretion-and-the-legacy-of-john-lennon (last visited March 3, 2012).

[116] Michelle Malkin, Document drop: ICE memos open another door to illegal alien amnesty-by-fiat, June 22, 2011, http://michellemalkin.com/2011/06/22/document-drop-ice-memos-open-another-door-to-illegal-alien-amnesty-by-fiat/ (last visited March 3, 2012).

[117] Walter Ewing, Border Patrol to Roll Out New "Get Tough" Policy on Unauthorized Immigrants, ImmigrationImpact.com, January 19, 2012, http://immigrationimpact.com/2012/01/19/border-patrol-to-roll-out-new-get-tough-policy-on-unauthorized-immigrants/ (last visited March 3, 2012). Immigration Policy Center, Authority of U.S. Customs and Border Protection Agents: An Overview (Washington, DC: American Immigration Council,

"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."[118] 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."[119]

February 2012), http://immigrationpolicy.org/just-facts/authority-us-customs-and-border-protection-agents-overview (last visited March 3, 2012).

[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,"[120] 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. [121]

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

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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).

[120] U.S. CIS, Secure Communities, http://www.ice.gov/secure_communities/ (last visited March 3, 2012). See Secure Communities: A Fact Sheet (D.C.: Immigration Policy Center, 2011), http://www.immigrationpolicy.org/just-facts/secure-communities-fact-sheet (last visited March 3, 2012).

[121] Julia Preston, States Resisting Program Central to Obama's Immigration Strategy, N.Y. Times, May 6, 2011, at A18; Editorial: Glad Gov. Cuomo's withdrawal from program to catch criminal illegal aliens will have little effect, N. Y. Daily News, June 4, 2011, http://articles.nydailynews.com/2011-06-04/news/29636255_1_illegal-immigrants-immigration-laws-comprehensive-immigration-reform (last visited March 3, 2012); Kirk Semple, Cuomo Ends State's Role in U.S. Immigrant Checks, N.Y. Times, June 2, 2011, at A21; Julia Preston and Sarah Wheaton, Meant to Ease Fears of Deportation Program, Federal Hearings Draw Anger, NY Times, August 26, 2011, A13; Julia Preston, Deportation Program Sows Mistrust, U.S. Is Told, NY Times, September 16, 2011, A12; Dave Harmon, From Minor Violations, Deportations, Austin American-Statesman, Mar. 18, 2012, at A1(criticizing "Secure Communities" efforts in Austin as excessive, particularly with emphasis upon misdemeanors).

"Morton Memoranda."[122] 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.[123]

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

[122] The ICE Union held a unanimous Vote of No Confidence in Assistant Secretary Morton and Executive Director Coven in June, 2010. See http://www.iceunion.org/download/259-259-vote-no-confidence.pdf (last visited March 3, 2012). See also John W. Slagle, Fraudulent documents Puerto Rico /ICE administration policies, St. Louis Law Enforcement Examiner, January 16, 2012, http://www.examiner.com/law-enforcement-in-st-louis/fraudulent-documents-puerto-rico-ice-administration-policies (last visited March 3, 2012) (recounting employee dissatisfaction, no confidence votes).

[123] The details of the program are maintained at the DHS website: US CIS, Fugitive Operations, http://www.ice.gov/fugitive-operations/ (last visited March 3, 2012); in 2007, an evaluation of the program and its growth was conducted by the DHS Inspector General, An Assessment of United States Immigration and Customs Enforcement's Fugitive Operations Teams http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_07-34_Mar07.pdf (last visited March 3, 2012).

staff.[124] 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."[125]

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.[126] 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

[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).

[126] See generally, Norman Abrams, Internal Policy: Guiding the Exercise of Prosecutorial Discretion, 19 U.C.L.A. L. Rev. 1 (1971) (pre-Lennon administrative law PD issues in US Attorney offices); David H.E. Becker, Judicial Review of INS Adjudication: When May the Agency Make Sudden Changes in Policy and Apply Its Decisions Retroactively? 52 Admin. L. Rev. 219 (2000); Jill E. Family, Administrative Law Through the Lens of Immigration Law (SSRN, 2012); Shoba Sivaprasad Wadhia, Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law, 10 U. New Hampshire L. Rev. xxx (2012). A growing number of scholars also note the vertical problems of coordination across governmental jurisdiction in immigration enforcement, inasmuch as immigration is a federal domain, even with local coordination dimensions. See, e.g., Michael A. Olivas, Immigration-Related State Statutes and Local Ordinances: Preemption, Prejudice, and The Proper Role for Enforcement, University of Chicago Legal Forum 27, 51-54 (2007); Monica Varsanyi, Paul G. Lewis, Doris Marie Provine, and Scott Decker, A Multilayered Jurisdictional Patchwork: Immigration Federalism in the United States, 34 Law & Pol 138 (2012); Mathew Coleman, The "Local" Migration State: The Site-Specific Devolution of Immigration Enforcement in the U.S. South, 34 Law & Pol. 159 (2012).

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]

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[127] See, e.g., Wadhia, id.; Hiroshi Motomura, The Rights of Others: Legal Claims and Immigration Outside the Law, 59 Duke L. J. 1723, 1746 (analyzing agency monitoring issues); Stephen Lee, Monitoring Immigration Enforcement, 53 Ariz. L. Rev. 1089, 1096-1113 (2011) (detailing asymmetric enforcement authority issues between ICE and DOL).

[128] Samaia Hernandez, 11 New Haven Men Arrested In Immigration Raid Reach Landmark Settlement With U.S. Government, Hartford Courant, February 15 2012, http://www.courant.com/community/new-haven/hc-new-haven-immigration-settlement-0216-20120215,0,1283842.story; Kirk Semple, U.S. to Pay Immigrants Over Raids, N.Y. Times, February 15, 2012, at A22.

[129] See, e.g. Wadhia, supra at note 126, at 52-60. She analyzes "the values of equal justice, accuracy, consistency, efficiency, and acceptability in the deferred action context." (at 52.) Mary E. O'Leary, Yale Law School immigration clinic files class action lawsuit challenging Secure Communities detainers, New Haven Register, Feb. 22, 2012, http://www.nhregister.com/articles/2012/02/22/news/doc4f45623a99923180233858.txt. (another suit filed in New Haven, Connecticut)

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."[130]

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,"[131] 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.[132] 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.[133] 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

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[130] See June 2011 Morton PD Memo, supra at note 96. See also Julia Preston, In Test of Deportation Policy, 1 in 6 Get a Fresh Look and a Reprieve, N.Y. Times, January 20, 2012, at A13.

[131] Preston, id., at A13.

[132] Jeff Bliss, U.S. Agency Said to Urge Closing 1,600 Deportation Cases, Bloomberg.com, January 19, 2012, http://www.bloomberg.com/news/2012-01-19/u-s-agency-said-to-recommend-closing-1-600-deportation-cases.html (last visited March 3, 2012); P. Solomon Banda, Courts Suspend Hearings to Deport; US Reviews Illegal Immigrant Status, BOSTON GLOBE, Jan. 17, 2012, at 6.

[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.[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.[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.[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.

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[134] Preston, supra note 130, at A13. See also Legal Action Center and Alexsa Alonzo, DHS REVIEW OF LOW PRIORITY CASES FOR PROSECUTORIAL DISCRETION (DC: LAC/American Immigration Council, 2012), http://www.legalactioncenter.org/sites/default/files/DHS_Review_of_Low_Priority_Cases_2-13-12.pdf (last visited March 3, 2012).

[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).

[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.[137] Truth be told, if these noncitizens had

[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.

Moreover, as long as restrictionists are already loudly challenging any such use of discretion, the more expansive version should be issued. Doing less than is possible within existing practice seems completely feckless and underachieving, especially with the relentless

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memo regarding prosecutorial discretion, and the November 17, 2011 follow-up memo providing guidance to ICE Attorneys, the government shall advise the court by March 19, 2012, whether the government intends to exercise prosecutorial discretion in this case and, if so, the effect, if any, of the exercise of such discretion on any action to be taken by this court with regard to Petitioner's pending petition for rehearing." http://www.ca9.uscourts.gov/datastore/opinions/2012/02/06/06-74444.pdf , at 1113-1114 (last visited March 4, 2012). ICE responded XXXX-------. Additional lower court skepticism arose when a federal judge ordered clarification about US removal policy, and it was suggested that the U.S. Solicitor may have misled SCOTUS on the policy. The judge noted, in tart language: "'Trust everybody, but cut the cards,'" as the old saying goes. When the Solicitor General of the United States makes a representation to the Supreme Court, trustworthiness is presumed. Here, however, plaintiffs seek to determine whether one such representation was accurate or whether, as it seems, the Government's lawyers were engaged in a bit of a shuffle." Joe Palazzolo, Rakoff: SCOTUS May Have Been Misled in Immigration Case, Wall St. J., February 10, 2012, http://blogs.wsj.com/law/2012/02/10/rakoff-scotus-may-have-been-misled-in-immigration-case/# (last visited March 6, 2012); Jess Bravin, Judge Suggests U.S. Misled Court on Immigration Policy, Wall St. J., Feb. 10, 2012, at A6. Adam Liptak reported that DOJ apologized for its misrepresentation. *Justice Department Submits Correction Letter to Supreme Court*, N.Y. Times, Apr. 24, 2012, http://thecaucus.blogs.nytimes.com/2012/04/24/justice-department-submits-correction-letter-to-supreme-court/See also Julian Aguilar, Few Satisfied by Obama's Immigration Policies, Texas Tribune, September 22, 2011, available at: http://www.texastribune.org/immigration-in-texas/immigration/will-obamas-immigration-policy-help-gop/print/ (last visited March 6, 2012). In addition, other politically-sensitive issues, such as potential beneficiaries from gay and lesbian immigrant marriages, were also in play under the general review of case-by-case situations. Kirk Semple, U.S. Drops Deportation Proceedings Against Immigrant in Same-Sex Marriage, NY Times, June 30, 2011, A16. Ruben Navarrette, Quit playing favorites, politics with deportations, Sacr. Bee, Mar. 14, 2012, http://www.sacbee.com/2012/03/14/4338217/navarrette-quit-playing-favorites.html (two year stay); Montgomery County student, family win reprieve from deportation, Washington Post.com, Mar. 14, 2012, http://www.washingtonpost.com/local/montgomery-county-student-family-win-reprieve-from-deportation/2012/03/14/gIQAlKX7CS_gallery.html?wpisrc=emailtoafriend (one year stay); Yasmin Amer, Despite immigration reforms, many young immigrants still in limbo, CNN.com, December 24, 2011, http://www.cnn.com/2011/12/24/us/immigration-quagmire/index.html (removal stayed but no work authorization). For a good summary of the highly-technical details of administrative closure, EAD, and the like, see Alexsa Alonzo, DHS REVIEW OF LOW PRIORITY CASES FOR PROSECUTORIAL DISCRETION (DC: The Legal Action Center 7-8 [PRACTICE ADVISORY, Updated: February 13, 2012]), http://www.legalactioncenter.org/sites/default/files/DHS_Review_of_Low_Priority_Cases_2-13-12.pdf (noting "independent basis" issue and consequences for noncitizens).

criticism that is occurring in any event. In the increasing number of states that have enacted restrictionist statutes, these "sleeping beauties"[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.[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

[138] 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.

[139] See, e.g., Wadhia, supra at note 126, at 52-60; Julian Aguilar, Few Satisfied by Obama's Immigration Policies, Texas Tribune, September 22, 2011, available at: http://www.texastribune.org/immigration-in-texas/immigration/will-obamas-immigration-policy-help-gop/print/ (last visited March 6, 2012). See also Andrew Thangasamy, State Policies for Undocumented Immigrants: Policy-Making and Outcomes in the U.S., 1998-2005 (El Paso, TX: LFB Scholarly Publ., 2010); Graeme Boushey and Adam Luedtke, Immigrants across the U.S. Federal Laboratory: Explaining State-Level Innovation in Immigration Policy, 11 State Politics & Pol. Q. 390 (2011); Patricia Zavella, I'm Neither Here nor There: Mexicans' Quotidian Struggles with Migration and Poverty (Durham, NC: Duke University Press, 2011).

undertaking,' she said of the docket review. 'But it is also a major lost opportunity.'[140]

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

[140] Preston, supra note 130, at A13. See also Jenna Greene, Discretionary Program Draws Praise, Derision; Reaction to Pilot for Undocumented Immigrants Mixed, DAILY BUS. REV., Jan. 11, 2012, at A3 (options for clients are "the difference between the fifth and the eighth circles of hell."); 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 (mixed reactions to proposals by immigration attorneys).

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

[141] See David Leopold, Why Morton's Memo is the Best Road Map on Prosecutorial Discretion Yet, Immigrationimpact.com, July 1, 2011, http://immigrationimpact.com/2011/07/01/why-morton%E2%80%99s-memo-is-the-best-road-map-on-prosecutorial-discretion-yet (last visited March 6, 2012); Jenna Greene, Deportation Cases Get a Fresh Look; Feds Test Effort to Prioritize Most Serious Immigration Cases, NAT'L L.J., Jan. 9, 2012, at 1; Jenna Greene, Discretionary Program Draws Praise, Derision; Reaction to Pilot for Undocumented Immigrants Mixed, DAILY BUS. REV., Jan. 11, 2012, at A3. But see, Angelo A. Paparelli and Ted J. Chiappari, No More Waiting on Legal Immigration, seyfarth.com, February 2012, http://www.seyfarth.com/dir_docs/publications/NoMoreWaitingonLegalImmigration.pdf ("an assertive President Obama, with his eyes transfixed on the reelection prize, can do much more to improve our immigration regulations and agency practices, which the President oversees through the Departments of Homeland Security, State, Justice and Labor") (last visited March 6, 2012).

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).[142] 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.[143] 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.[144] National data tracking ICE

[142] See David Leopold, Why Morton's Memo is the Best Road Map on Prosecutorial Discretion Yet, Immigrationimpact.com, July 1, 2011, available at:http://immigrationimpact.com/2011/07/01/why-morton%E2%80%99s-memo-is-the-best-road-map-on-prosecutorial-discretion-yet (last visited March 6, 2012); Shoba Sivaprasad Wadhia, Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law, 10 U. of New Hamp. L. Rev. 1, 9-18, 66-67 (2011); 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 6, 2012).

[143] See, e.g., Alexa Alonzo & Mary Kenney, DHS Review of Low Priority Cases for Prosecutorial Discretion (2011), http://www.legalactioncenter.org/sites/default/files/DHS_Review_of_Low_Priority_Cases_9-1-11.pdf; Letter from Thomas M. Susman to John Morton (Dec. 15, 2011), http://www.americanbar.org/content/dam/aba/uncategorized/2011/gao/2011dec15_prosecdiscreetion_l.authcheckdam.pdf ; Wadhia, id., supra note 142, at 60-65.

[144] See, e.g., Jess Bravin, Immigration Case Challenges Justice Department's Credibility, Wall St. J. (Mar. 13, 2012), http://online.wsj.com/article/SB10001424052970203961204577272053518420934.html ;

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.[145]

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

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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 .

[145] Julia Preston, Immigration Decreases, But Tensions Remain High, N.Y. Times, Mar. 11, 2012, at A15 (describing shifting national data and enforcement issues); Karoun Demirjian, Immigration court's caseload keeps growing in Las Vegas, Las Vegas Sun (July 4, 2011), http://www.lasvegassun.com/news/2011/jul/04/courts-caseload-keeps-growing/ (rising immigration court caseloads and enforcement data in Nevada). Due to the difficulty in obtaining criminal enforcement data after unsuccessful open records requests, immigration advocates filed suit in 2012: American Immigration Council, et al., v. Department of Homeland Security, No. 3:12-cv-00355-WWE (D. Conn., filed Mar. 8, 2012). See also Douglas S. Massey and Karen A. Pren, Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America, 38 Population and Development Review 1–29 (2012); Damien Cave, For Mexicans Looking North, a New Calculus Favors Home, N.Y. Times, July 6, 2011, at A1.

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 under Review*, Wash. Post (Apr. 24, 2012), http://www.washingtonpost.com/national/apnewsbreak-immigration-officials-offer-to-shelve-75-pct-of-deportation-cases-under-review/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-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 Immigration Law, U. N. Hamp. L. Rev., xxx, xxx-xxx (2012).

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,[148] 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.[149]

[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 for Legal Status Under the DREAM Act, (Oct. 2006) available at http://www.migrationpolicy.org (accessed 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 http://www.insidehighered.com/news/2009/03/17/undocumented (accessed from homepage by entering 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 http://pewhispanic.org/files/reports/107.pdf (last visited February 29, 2012) ("[A]mong unauthorized 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, 2007) (last visited Feb. 29, 2012). Elise Foley, ICE drops immigration charges, releases Alabama woman after Gutierrez meeting with Napolitano, Huffington Post, Dec. 11, 2011, at: http://www.huffingtonpost.com/2011/12/09/alabama-immigration-janet-napolitano_n_1140280.html (last visited March 6, 2012); Jeremy Redmon, Deportation Rules Free 2 Ga. Teens, Atlanta Journal-Constitution, August 24, 2011, A1. See Appendix I (Partial Review of News Stories on Undocumented 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, Latino.FoxNews.com, November 25, 2011, http://soc.li/udJWxZb (last visited March 6, 2012); Erin 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 24, 2010, at B1.

[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 1A; 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), http://www.lasvegassun.com/news/2012/mar/11/reid-hoping-renewed-interest-dream-act-will-give-p/;

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.[150] 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 accomodationist 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

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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; Paloma Esquivel, Young Immigrants Are Paying for Parents' Choices, L.A. TIMES, Mar. 25, 2012, at A27; Joan Friedland, Falling Through The Cracks: How Gaps in ICE's Prosecutorial Discretion Policy Affect Immigrants Without Legal Representation (DC: IPC, 2012) [IPC Perspectives, May, 2012, http://www.immigrationpolicy.org/sites/default/files/docs/friedland_-_unrepresented_immigrants_051412.pdf ; Lawmakers Want To Ensure NJ Students Have Equal Access To College Regardless Of Parents' Immigration Status, NJToday.net, May 14, 2012, http://njtoday.net/2012/05/14/lawmakers-want-to-ensure-nj-students-have-equal-access-to-college-regardless-of-parents-immigration-status/#ixzz1v4PcgLPs; Law Graduate in Immigration Limbo Hopes California Court Approves License, Foxnews.com, May 23, 2012, http://latino.foxnews.com/latino/news/2012/05/23/law-graduate-in-immigration-limbo-hopes-california-court-approves-license/.

Occasionally, the story is not as sympathetic, as in restrictionist responses in Rhode Island: The Truth-O-Meter Says: Immigration Enforcement Advocate Terry Gorman Says Giving Undocumented Rhode Island High School Graduates a College Tuition Price Break Will Still Make Them Unemployable, PROVIDENCE J. POLITIFACT R. I. (May 13, 2012), http://www.politifact.com/rhode-island/statements/2012/may/13/terry-gorman/immigration-enforcement-advocate-terry-gorman-says/.

[150] See generally, Michael A. Olivas, The Political Economy of the DREAM Act and the Legislative Process, 55 Wayne Law Review 1757 (2009); H. Kenny Nienhusser and Kevin J. Dougherty, Implementation of College In-state Tuition for Undocumented Immigrants in New York (MYC: NYLARNet, 2010); Carola Suarez-Orozco, Hirokazu, Robert T. Teranishi, and Marcelo M. Suarez-Orozco, Growing Up in the Shadows: The Developmental Implications of Unauthorized Status, 81 Harv. Educ. Rev. 438 (2011).

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; [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.[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.[153] In Georgia and Massachusetts, traffic infractions and driving with

[151] Alfonso Gonzalez, The 2006 Mega Marchas in Greater Los Angeles: Counterhegemonic Moment and the Future of El Migrante Struggle," 7 Latino Stud. 30 (2009); Leisy J. Abrego, Legal consciousness of undocumented Latinos: fear and stigma as barriers to claims-making first- and-1.5-generation immigrants, 45 Law & Soc'y Rev. 337 (2011).

[152] Gary Reich and Jay Barth, Educating Citizens or Defying Federal Authority? A Comparative Study of In-State Tuition for Undocumented Students, 38 Policy Studies Journal 419 (2010); Roxana Orellana, DREAM Act supporter jailed for refusing to leave federal building, Salt Lake Tribune, December 1, 2010, A1; René Galindo, Undocumented & Unafraid: The DREAM Act 5 and the Public Disclosure of Undocumented Status as a Political Act (IHELG Research Monograph No. 11-02, 2011), http://www.law.uh.edu/ihelg/monograph/11-02.pdf (last visited March 6, 2012); Alvin Melathe and Suman Raghunathan, Tuition Equity Bills Continue to Build Momentum in State Legislatures, ImmigrationImpact.com, February 10, 2012, http://immigrationimpact.com/2012/02/10/tuition-equity-bills-continue-to-build-momentum-in-state-legislatures/ (last visited March 6, 2012).

[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).

[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.[154] 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,[155] 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.[156] However, citing the new priorities for immigration enforcement, ICE announced that it would not deport the students, four of whom were undocumented.[157]

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").[158] But some

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http://www.deseretnews.com/article/765556620/Desperate-immigrants-turn-to-the-Internet-to-fight-deportation.html.

[155] Jose Antonio Vargas, OUTLAW: My Life as an Undocumented Immigrant, NY Times Magazine, June 26, 2011, at MM 22.

[156] Carrie Ritchie, Arrested students will not be deported, Indianapolis Star, May 11, 2011, available at: http://www.indystar.com/apps/pbcs.dll/article?AID=2011105110389.

[157] *Ibid.*

[158] Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel, 17 June 2011, http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf (Last visited March 23, 2012).

students have not been given DA, and others were not accorded DA until national attention was paid[159]. And in some cases, no DA was available.[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

[159] See APNewsBreak: Immigration Officials Offer to Shelve 7.5 Pct of Deportation Cases under Review, Wash. Post (Apr. 24, 2012), http://www.washingtonpost.com/national/apnewsbreak-immigration-officials-offer-to-shelve-75-pct-of-deportation-cases-under-review/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-new-obam/#.T5fcw9XkqeM. In June, 2012, new DHS figures were released, showing that a small number of cases would likely be "administratively closed," even after full scale criminal checks had been completed. The figures did not separate out those whose cases were DREAM Act-eligible low-priority applicants. See DHS Prosecutorial Discretion Initiative Falls Short, http://www.aila.org/content/default.aspx?docid=40035 ; AILA InfoNet Doc. No. 12060752 (posted Jun. 7, 2012), http://www.aila.org/content/default.aspx?docid=40030 (data); Ben Winograd, Updated Figures Highlight Shortfalls of Prosecutorial Discretion Program, Immigrationimpact.com, June 7, 2012, http://immigrationimpact.com/2012/06/07/updated-figures-highlight-shortfalls-of-prosecutorial-discretion-program/ ; Julia Preston, Deportations Go On Despite U.S. Review Of Backlog, N.Y. Times, June 7, 2012, at A13.

[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.[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.[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.[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

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[161] See Diane Smith, Illegal Immigrants Seek Equal Access to Higher Education, STAR-TELEGRAM (Nov. 12, 2011), http://www.star-telegram.com/2011/11/11/3519781/illegal-immigrants-seek-equal.html (last visited March 6, 2012). Maggie Jones, Coming Out Illegal, N.Y. Times Magazine, Oct. 24, 2010, at MM36; Travis Wentworth, DREAM Advocates Begin a 3,000-mile March from California to Washington, ImmigrationImpact.com, March 23, 2012, http://immigrationimpact.com/2012/03/23/dream-advocates-begin-a-3000-mile-march-from-california-to-washington/.

[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.

[163] In early 2012, the Colorado Senate passed in-state tuition legislation for the undocumented, with a rate greater than that of residents and less than that of out-of-state students, but the House did not enact a companion bill. Kristen Wyatt, Colorado Senate Supports New Tuition Rate for Illegal Immigrants, Denver Post, Feb. 11, 2012, http://www.denverpost.com/breakingnews/ci_19946198 (last visited March 6, 2012); Tim Hoover, Tim Hoover, Illegal-immigrant tuition break fails again in Colorado House, Denver Post, Apr. 26, 2012, http://www.denverpost.com/breakingnews/ci_20481859/illegal-immigrant-tuition-break-fails-again-colorado-house. Colorado unauthorized residents do not qualify for a driver's license in the state.

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":

> 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

> 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.[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.

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[164] Roberto G. Gonzales and Leo R. Chavez, "Awakening to a Nightmare": Abjectivity and Illegality in the Lives of Undocumented 1.5- Generation Latino Immigrants in the United States, 53 Curr. Anthrop. 255, 267 (2012).

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"[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

[165] 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, SCPR.org, February 13, 2012, http://multiamerican.scpr.org/2012/02/dhs-to-begin-discontinuing-287g-in-some-jurisdictions/ (last visited March 6, 2012). U.S. CIS, Secure Communities, http://www.ice.gov/secure_communities/ (last visited March 3, 2012). For criticisms of Secure Communities, see Julia Preston and Sarah Wheaton, Meant to Ease Fears of Deportation Program, Federal Hearings Draw Anger, N.Y. Times, August 26, 2011, at A13;
Julia Preston, Latinos Said to Bear Weight of a Deportation Program, N.Y. Times, October 19, 2011, at A16; Julia Preston, Obama Policy On Deporting Used Unevenly, N.Y. Times, November 13, 2011, at A16; Edgar Aguilasocho, David Rodwin, and Sameer Ashar, MISPLACED PRIORITIES: The Failure of Secure Communities in Los Angeles County (Immigrant Rights Clinic, University of California, Irvine School of Law, 2012), http://www.law.uci.edu/pdf/MisplacedPriorities_aguilasocho-rodwin-ashar.pdf (last visited March 6, 2012).

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"[166] or the OMB "Good Guidance Practices"),[167] EOIR immigration court manual,[168] CBP Inspector's Field Manual (Online),[169] Warning letters,[170] Agency memoranda,[171]

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[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).

[167] In 2007, the Office of Management and Budget (OMB) published in a final Bulletin for "Agency Good Guidance Practices," [No. 07-02] which "establishes policies and procedures for the development, issuance, and use of significant guidance documents by Executive Branch departments and agencies . . . [and] to increase the quality and transparency of agency guidance practices and the significant guidance documents produced through them." 70 Fed. Reg. 71,866 (November 30, 2005) and 70 Fed. Reg. 76,333 (December 23, 2005).

[168] In 2008, the Executive Office for Immigration Review (EOIR), in consultation with the Immigration Judges, issued an online "Practice Manual" for the parties who practice in the Immigration Courts. The comprehensive Practice Manual also includes practice updates and amendments online for the immigration bar: http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm (last visited March 7, 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 20manual#s=eyJzZiI6eyIxMTAyMzUiOnsiZmlsdGVycyI6eyJub190cnVuY2F0ZSI6MCwicGFnZSI6MSwic2VhcmNoVHlwZSI6eyJmaWx0ZXJzIjp7ImRhdGEiOjV9fSwia2V5d29yZCI6eyJmaWx0ZXJzIjp7ImRhdGEiOiJJbnNwZWN0b3JzIGZpZWxkIG1hbnVhbCJ9fSwicCI6eyJmaWx0ZXJzIjp7ImRhdGEiOnsiMCI6bnVsbH19fSwiYyI6eyJmaWx0ZXJzIjp7ImRhdGEiOnsiMCI6bnVsbH19fX19fSwiYyI6Mn0 . 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, OI 214.4 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/HTML/SLB/0-0-0-1/0-0-0-53690/0-0-0-56217/0-0-0-58247.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,[172] formal and informal agency postings,[173] various "Interpretations," and other nonbinding means of regulation,[174] 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*,[175] 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

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[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.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=6abe6d26d17df110VgnVCM1000004718190aRCRD&vgnextchannel=6abe6d26d17df110VgnVCM1000004718190aRCRD .

[174] http://www.uscis.gov/ilink/docView/SLB/HTML/SLB/itp.html.

[175] Michael A. Olivas, Plyler v. Doe, the Education of Undocumented Children, and the Polity, in David Martin and Peter Schuck, eds. 197-220 IMMIGRATION STORIES (2005); Michael A. Olivas, No Undocumented Child Left Behind: *Plyer v. Doe* and the Education of Undocumented School Children. New York: New York University Press, 2012.

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.[176] 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?[177] When white thugs on Long Island go "beaner-hopping" to wreak harm on Mexicans,

[176] See, e.g. Leo R. Chavez, The Latino Threat: Constructing Immigrants, Citizens, and the Nation (2008); Leticia M. Saucedo, National Origin, Immigrants, and the Workplace: The Employment Cases, in Latinos and the Law and the Advocates' Perspective, 12 Harv. Latino L. Rev. 53 (2009) (reviewing Latino employment law cases); Michael A. Olivas, Review Essay — The Arc of Triumph and the Agony of Defeat: Mexican Americans and the Law, 60 J. of Leg. Educ. 354 (2010) (reviewing books on Latino legal themes); Michael A. Olivas, The Political Efficacy of Plyler v. Doe: The Danger and the Discourse, 45 UC Davis L. Rev. 101, 110-116 (2011) (citing examples of anti-Mexican prejudice). See also, Sara Hebel & Michael Sewall, Legal or Illegal, Mexican Immigrants Pose an Educational Challenge to States, CHRON. HIGHER EDUC., July 30, 2010, at A18; Michael Sewall, 'Dream Act' Would Not Be Enough for Many Undocumented Students, Chron. Higher Educ. (Aug. 15, 2010), http://chronicle.com/article/Dream-Act-Would-Not-Be/123898/ ; Michele Waslin, Law Professors Push White House to Grant Administrative Relief to DREAMers, ImmigrationImpact.com, May 31, 2012, http://immigrationimpact.com/2012/05/31/law-professors-push-white-house-to-grant-administrative-relief-to-dreamers.

[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,[178] or when nationally prominent presidential candidates can urge electrification of border fences to turn back the undocumented,[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

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Taxpayer and Citizen Protection Act, ("H.B. 56"), the legal challenges began, and in late 2011, a number of the more restrictionist provisions were enjoined. See United States v. State of Alabama, No. 11 Civ. 14532, 6 (11th Cir. Oct. 14, 2011); see also Michael A. Olivas, Sweet Home Alabama?, InsideHigherEd.com, October 13, 2011, available at http://www.insidehighered.com/views/2011/10/13/essay_on_the_alabama_immigration_law_and_higher_education; Campbell Robertson, After Ruling, Hispanics Flee an Alabama Town, N.Y. Times, Oct. 4, 2011 at A1; Campbell Robertson, Part of Alabama Immigrant Law Blocked, N.Y. Times, Oct. 15, 2011 at A13; Jaclyn Zubrzycki, Ala. Immigration Law Puts Squeeze on Schools, EDUCATION WEEK, Oct. 7, 2011, http://www.edweek.org/ew/articles/2011/10/07/07immigrants_ep.h31.html?tkn=PYUFzInKyaZ6KBG4Ol8PIZoga5o8WkenO%2Bas&intc=es.

[178] For a useful compendium of New York Times stories and coverage of the trial, see http://topics.nytimes.com/topics/reference/timestopics/people/l/marcelo_lucero/index.html. A PBS documentary has appeared, providing fuller coverage of the murder and the trial, Not In Our Town: Light in the Darkness, http://video.pbs.org/program/not-our-town-light-darkness/ .

[179] Nia-Malika Henderson, Herman Cain meets with Sheriff Joe Arpaio, stands by electric border fence comments [Election 2012], Washington Post, October 18, 2011, http://www.washingtonpost.com/blogs/election-2012/post/herman-cain-meets-with-sherriff-joe-arpaio-stands-by-electric-border-fence/2011/10/18/gIQAju5luL_blog.html.

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]

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[180] Bernard Trujillo, Immigrant Visa Distribution: The Case of México, Wisc. L. Rev. 713 (2000).

[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.

[182] The statutory waivers for Immigration Benefits in EOIR Removal Proceedings are available at: http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=3ebc829cbf3ae010VgnVCM1000000ecd190aRCRD&vgnextchannel=02729c7755cb9010VgnVCM10000045f3d6a1RCRD . For a comprehensive summary of the complexity of these various relief provisions, see Irene Scharf, Dagmar Butte, Shirley Sadjadi, and Cora D Tekach, The Waivers Book: Advanced Issues in Immigration Law Practice (2011).

[183] See generally, Norton Tooby & Jennifer N. Foster, Crimes of Moral Turpitude (2002); Maryellen Fullerton & Noah Kinigstein, Strategies for Ameliorating the Immigration Consequences of Criminal Convictions: A Guide for Defense Attorneys, 23 Am. Crim. L. Rev. 425, 433–37 (1986); (several CIMT categories); Nate Carter, Shocking the Conscience of Mankind: Using International Law to Define "Crimes Involving Moral Turpitude" in Immigration Law, 10 Lewis & Clark L. Rev. 955, 957-958 (2006) (tracing CIMT to Immigration Act of 1891).

reasonable bond, release, and detention practices;[184] the essential provisions for a fair amount of judicial review;[185] reconsideration of the various caps and quotas that have resulted in waiting queues of nearly twenty years in some instances.[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,[187] and similar recommendations made by the 2011 Ombudsman.[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 *Chevron*.[189] I realize that

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[184] See, e.g., Margaret H. Taylor, Dangerous by Decree: Detention without Bond in Immigration Proceedings, 50 Loy. L. Rev. 149 (2004).

[185] See, e.g., Lenni B. Benson, You Can't Get There from Here: Managing Judicial Review of Immigration Cases, U. Chi. Leg. For. 405 (2007); Michele Benedetto, Crisis on the Immigration Bench: An Ethical Perspective, 73 Brook. L. Rev. 467 (2008).

[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).

[187] USCIS Responses to CISO Recommendations, CIS Ombudsman Annual Report 2007, http://www.dhs.gov/xlibrary/assets/USCISO_Recommend_Response_2007_FINAL_OMB_cleared.pdf .

[188] USCIS Response to Formal Recommendation 48, Deferred Action (October 2011), http://www.uscis.gov/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Formal%20Recommendations/cisomb-2011-response-48.pdf.

[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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Proceedings in Light of INS v. Ventura, 18 Geo. Immigr. L.J. 605 (2008) (deference to agency determinations for statutory interpretation). Then, I would adopt the reorganizational proposals of Stephen H. Legomsky, Restructuring Immigration Adjudication, 59 Duke L. J. 1635 (2010).

[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 (Partial listing)

Kathleen McGrory, *Hopes for Florida 'Dream' Act die*, TAMPA BAY TIMES, Feb. 20, 2012, at 1A.

Our Towns, NEWSDAY (N.Y.), Feb.17, 2012, at A24.

Sandhya Somashekhar, *For Republicans, Spotlight turns to Florida- and Rubio,* WASH. POST, Jan. 28, 2012, at A6.

Kelly Kirschner, *Immigrants Help Power Economy*, TAMPA BAY TIMES, Jan. 27, 2012, at 13A.

Lizette Alvarez, *In Florida, Romney Plays Down Immigration*, N.Y. TIMES, Jan. 25, 2012, at A13.

Nicholas Riccardi, *Dream Act Opponents' Petition Drive Fails*, L.A. TIMES, Jan. 7, 2012, at AA5.

Maria La Ganga, *Loved, Reviled, But Hard to Peg: KFI's John and Ken Delight in Stirring Furors*, L.A. TIMES, Jan. 6, 2012, at A1.

Scott Powers, *Dems Bash GOP Hopefuls on Immigration Stances*, ORLANDO SENTINEL (Fla.), Jan. 5, 2012, at A6.

Gary Martin, S.A. *Woman Blasts Romney Stance on DREAM Act*, SAN ANTONIO EXPRESS-NEWS, Jan. 5, 2012, at 4A.

Ashley Parker, *Romney Says He Would Veto the Dream Act*, N.Y. TIMES BLOGS (The Caucus), Dec. 31, 2011.

Paloma Esquivel, *Dream Act Opponents Are Pushing To Repeal It*, L.A. TIMES, Dec. 18, 2011, at A41.

James Hebert, 21. *'La Pastorela,' Always Fresh*, SAN DIEGO UNION-TRIB., Dec. 15, 2011, at ND18.

DREAM Act Foes Seek Signatures at 3 Events, SAN DIEGO UNION-TRIB., Dec. 15, 2011, at B2.

Lynn Brezosky, *Suicide Not Tied To Illegal Status?*, HOUS. CHRON., Dec. 3, 2011, at B1.

Lynn Brezosky, *DREAM Act Not In Suicide Notes*, SAN ANTONIO EXPRESS-NEWS, Dec. 3, 2011, at 1A.

Pamela Constable, *Unlikely Foes of Md. Dream Act*, WASH. POST, Nov. 28, 2011, at B1.

Larry Gordon, *DREAM Act has State's Voters Divided*, L.A. TIMES, Nov. 19, 2011, at A1.
Mark Curnutte, Bernard Pastor - A Year Later, CINCINNATI ENQUIRER (Ohio), Nov. 17, 2011.

World Briefing, BALT. SUN, Nov. 16, 2011, at 14A.

World Briefing, CHI. TRIB., Nov. 16, 2011, at 24.

World Briefing, ORLANDO SENTINEL (Fla.), Nov. 16, 2011, at A18.

Jason Buch, *Graduate's Deportation Case Dropped*, SAN ANTONIO EXPRESS-NEWS, Nov. 3, 2011, at 1A.

Kathleen Haughney, *Orlando Senator Files DREAM Act-Esque Bill*, SUN-SENTINEL (Fort Lauderdale, Fla.), Nov. 1, 2011.

Fernanda Santos, *Regents Expected to Press for Laws to Allow Tuition Aid for Illegal Immigrants*, N.Y. TIMES, Oct. 15, 2011, at A14.

Patrick McGreevy & Anthony York, *Brown Signs California Dream Act Funding Bill*, L.A. TIMES, Oct. 9, 2011, at A1.

Associated Press, *Dream Act Becomes Law in California*, N.Y. TIMES, Oct 9, 2011, at A28.

Christopher Cadelago, *Student-Aid Bill Signed for Illegal Immigrants*, SAN DIEGO UNION-TRIB., Oct. 9, 2011, at A1.

Nanette Asimov & Wyatt Buchanan, *Brown OKs Student Aid for Illegal Immigrants*, S.F. CHRON., Oct. 9, 2011, at A1.

James Rainey, *On the Media: A Fever Incited by the Dream Act*, L.A. TIMES, Oct. 5, 2011, at D1

Paloma Ezquivel, *'John and Ken' Foes Talking Boycott*, L.A. TIMES, Sept. 30, 2011, at AA1.

Rhode Island OKs Dream Act, HOUS. CHRON., Sept. 28, 2011, at A5.

Patricia Kilday Hart, *Dream Act becoming Nightmare for Perry*, HOUS. CHRON, Sept. 28, 2011, at A1.

Teresa Watanabe, *More Anxiety over the Dream Act*, L.A. TIMES, Sept. 25, 2011, at A37.

Jeff Kunerth, *Keeping the DREAM Alive*, ORLANDO SENTINEL (Fla.), Sept. 24, 2011, at J4.

Sandhya Somashekhar, *GOP Opponents Pile on Perry's DREAM Act*, WASH. POST, Sept. 24, 2011, at A5.

Patricia Kilday Hart, *Debate Turns to Free-For-All Against Perry: Romney, Others Attack Views on Illegal Immigrants*, Social Security, HOUS. CHRON., Sept. 23, 2011, at A1.

Jeff Kunerth, *Keeping the DREAM Alive: Faith-Based Groups Lobby to Pass Immigration Bill*, ORLANDO SENTINEL (Fla.), Sept. 22, 2011, at G1.

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

Patricia Kilday Hart, *A Triumph for Perry and Texas Dream Act*, HOUS. CHRON., Sept. 18, 2011, at B1.

Daniel B. Wood, *Dream Act: California Embraces Anti-Arizona Role on Illegal Immigration*, CHRISTIAN SCI. MONITOR, Sept.1, 2011.

Teresa Watanabe and Patrick McGreevy, *Senate OKs Key Part of Dream Act: Bill Would Let State's Illegal Immigrant Students Receive Public Financial Aid*, L.A. TIMES, Sept. 1, 2011, at AA3.

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