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DREAMS DEFERRED: DEFERRED ACTION, PROSECUTORIAL DISCRETION, AND THE VEXING CASE(S) OF DREAM ACT STUDENTS

Michael A. Olivas*

Imagine there's no heaven
It's easy if you try. . . .

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"[1]

INTRODUCTION: THE AFTERMATH OF THE DREAM ACT DEFEATS

In Fall 2010, at the urging of Latino groups, Senator Harry Reid (D-NV) brought forward a bill, the Development, Relief, and Education for Alien Minors (DREAM) Act,[2] 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,[3] 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

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[1] JOHN LENNON, IMAGINE (Apple Records 1971).

[2] S. 3992, 111th Cong. (2010).

[3] S. 2205, 110th Cong. (2007).

again fell short of the sixty Senate votes required to move the DREAM Act legislation forward in December 2010.[4]

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since the December 2010 Congressional failure.[5] Subsequent activities at the state level have included Wisconsin (repealed resident tuition statute),[6] Maryland (passed resident tuition statute; "frozen" while certified for state ballot measure);[7] Rhode Island (state board responsible for residency tuition policy enacted rule allowing residency tuition in 2012);[8] Illinois (passed state statute allowing schools to award non-state-funded scholarships to the undocumented);[9] 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);[10] Connecticut (passed resident tuition statute).[11] While Maryland

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[4] *See* 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: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757 (2009); Julia Preston, *Political Battle on Immigration Shifts to States*, N.Y. TIMES, Jan. 1, 2011, at A1 [hereinafter Preston, *Political Battle*]; Julia Preston, *Students Spell Out Messages on Their Immigration Frustration*, N.Y. TIMES, Sept. 21, 2010, at A14; *see also* 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 (2011); Gary Reich & Jay Barth, *Educating Citizens or Defying Federal Authority? A Comparative Study of In-State Tuition for Undocumented Students*, 38 POL'Y STUD. J. 419 (2010).

[5] *See* Preston, *Political Battle*, *supra* note 4, at A1.

[6] WIS. STAT. ANN. § 36.27(2)(cr) (West 2010) (repealed 2011).

[7] MD. CODE ANN., EDUC. § 15-106.8 (West 2011) (pending November 2012 repeal ballot referendum).

[8] Gina Macris, *Panel: In-State Tuition Rates for Undocumented RI Students*, PROVIDENCE J., Sept. 19, 2011, http://news.providencejournal.com/breaking-news/2011/09/panel-in-state-tuition-for-und.html; LATINO POL'Y INST., ROGER WILLIAMS U., THE EFFECTS OF IN-STATE TUITION FOR NON-CITIZENS: A SYSTEMATIC REVIEW OF THE EVIDENCE (2011), *available at* http://www.rwu.edu/sites/default/files/lpi-report.pdf.

[9] 110 ILL. COMP. STAT. ANN. 947/67 (West 2011); H.B. 60, 93d Gen. Assemb., Reg. Sess. (Ill. 2003).

[10] A.B. 131, 2011 Leg., Reg. Sess. (Cal. 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, 2011 Leg., Reg. Sess. (Cal. 2011) (amending CAL. EDUC. CODE § 72023.5 and adding Sections 66016.3 and 66016.4, relating to state financial aid to certain student leadership positions); A.B. 130, 2011 Leg., Reg. Sess. (Cal. 2011) (amending CAL. EDUC. CODE § 68130.7 and adding § 66021.7, relating to non-state-funded scholarships); A.B. 540, 2001 Leg., Reg. Sess. (Cal. 2001) (adding CAL. EDUC. CODE § 68130.5); *see* Nanette Asimov & Wyatt Buchanan, *Brown Oks Student Aid for Illegal Immigrants*, S.F. CHRON., Oct. 8, 2011, at A1; Stephen Magagnini, *Dream Act Students Live in Limbo—Aid Doesn't Help Get Citizenship or Career*, SACR. BEE, Dec. 26, 2011, at A1; Patrick McGreevy & Anthony York, *Brown Signs California Dream Act Funding Bill*, L.A. TIMES, Oct. 9, 2011, at A1.

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

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.[12] In 2012, immigrant groups in Maryland were litigating the ballot measure issue, arguing that the statute had not even been put into effect.[13] Rhode Island was the first state to enact residency tuition for undocumented college students by administrative action rather than by a statute, as tuition policy is set administratively in the state.[14]

From 2010 through 2012, litigation occurred in California,[15] Nebraska,[16] and Texas[17]—upholding state statutes against restrictionist efforts to eliminate the recent

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[12] Nicholas Riccardi, *Effort To Repeal California Dream Act Comes Up Short*, POLITICAL (Jan. 6, 2012, 9:59 AM), http://latimesblogs.latimes.com/california-politics/2012/01/california-dream-act-repeal-falls-short.html; *see* Asimov & Buchanan, *supra* note 10, at A1; McGreevy & York, *supra* note 10, at A1; Rebecca R. Ruiz, *Dream Act Becomes Law in California*, N.Y. TIMES (Oct. 10, 2011, 4:01 PM), http://thechoice.blogs.nytimes.com/2011/10/10/dream-act/?emc=eta1.CA-ballot.

[13] Maryland has an unusual process for challenging new statutes through the ballot measure. *See* MD. CONST. art XVI, *available at* http://www.msa.md.gov/msa/mdmanual/43const/html/16art16.html; MD. CODE ANN., ELEC. LAW, §§ 7-101–7-102 (2012); *see also* Aaron C. Davis, *Md. Tuition Law May Be Halted*, WASH. POST, June 29, 2011, at B1; *Maryland's 'Dream Act' Suspended Amid Petition Drive for Referendum*, FOX NEWS (July 1, 2011), http://www.foxnews.com/politics/2011/07/01/marylands-dream-act-suspended-amid-petition-drive-for-referendum.

[14] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) provides:

> 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.

8 U.S.C. § 1621(c)(3)(d) (2006). 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 also* Gina Macris, *A Bid to Extend In-State Tuition*, PROVIDENCE J., Sept. 20, 2011, at 1; Erika Niedowski, *RI Education Board OK's In-State Tuition for Undocumented Students*, BOS. GLOBE, Sept. 27, 2011, http://articles.boston.com/2011-09-27/news/30209209_1_illegal-immigrants-tuition-rates-reward-illegal-behavior.

[15] Martinez v. Regents of Univ. of Cal, 241 P.3d 855 (Cal. 2010) (upholding state statute, providing resident tuition to undocumented), *cert. denied*, 131 S. Ct. 2961 (2011); Josh Keller, *California Supreme Court Upholds Law Giving In-State Tuition to Illegal Immigrants*, CHRON. HIGHER EDUC. (Nov. 15, 2010), http://chronicle.com/article/California-Supreme-Court/125398/.

[16] Mannschreck v. Clare, ci:10-8 (Neb. Dist. Ct. Aug. 19, 2010) (challenging the Nebraska residency statute, but dismissed in 2010 on standing); *see* Kevin Abourezk, *Judge Tosses Suit on Tuition to Illegal Immigrants; Plaintiffs Likely to Refile Suit*, LINCOLN J. STAR, Dec. 18, 2010, at A1.

[17] Immigration Reform Coal. of Tex. v. Texas, 706 F. Supp. 2d 760 (S.D. Tex. 2010) (dismissing federal jurisdiction based on lack of standing); *see* Susan Carroll, *In-State Rates for Illegal Immigrants Attacked*, HOUS. CHRON., Dec. 16, 2009, at B1. This case is languishing

tuition provisions. In New Jersey[18] and Florida,[19] the states were sued due to policies that restricted even citizen residents from receiving residency or financial aid if their parents were out of status. Litigation also was filed in Maryland[20] and New York[21] 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)[22] (see Table One), and a small number of states ban them outright, including

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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 was voluntarily dismissed on June 19, 2012. *See* Plaintiff's Rule 41(a)(1)(A) Notice of Voluntary Dismissal Without Prejudice Against All Defendants, Marderosian v. Barr Topinka, 12-cv-2262 (N.D. Ill. June 19, 2012).

[18] *New Jersey Denies College Financial Aid to U.S. Citizen Because Her Mother Is Undocumented*, LATINO FOX NEWS (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/; N.J. ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, U. MD. FRANCIS KING CAREY SCH. OF LAW, OVERCOMING THE BARRIERS FACED BY IMMIGRANTS: BRIEFING REPORT (2010), *available at* http://www.law.umaryland.edu/marshall/usccr/documents/cr12nj22010.pdf; *see* A.Z. *ex. rel.* B.Z. v. Higher Educ. Student Assistance Auth., 48 A. 3d 1151 (N.J. Super. Ct. App. Div. 2012) (reversing the administrative agency's determination that a US citizen student was ineligible for New Jersey state financial aid because her parents were undocumented); *see also* Brief and Appendix of Appellant Arturo Cortes, Cortes v. Higher Educ. Student Assistance Auth., No. A-2142-11-T1 (N.J. Super. Ct. App. Div. Mar. 26, 2012) (appealing 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).

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

[20] Erin Cunningham, *Montgomery College Sued Over Illegal Immigrant Policy*, GAZETTE.NET (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*, MARYLANDREPORTER.COM (Jan. 21, 2011), http://marylandreporter.com/2011/01/21/montgomery-college-sued-for-giving-in-county-tuition-to-illegal-immigrants/#ixzz1p8GIb8Mc.

[21] Lisa W. Foderaro, *In Suing SUNY, Out-of-State Students Seek In-State Tuition*, N.Y. TIMES, Feb. 6, 2011, at CT1 (describing a suit for N.Y. resident tuition by N.J. residents who had attended high school in New York).

[22] *See, e.g.*, Michael A. Olivas, *IIRIRA, The DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435, 449–55 (2004) (providing a statutory analysis of Sections 505, 1621, and 1623 of the IIRIRA). *See generally* Victor C. Romero, *Noncitizen Students and Immigration Policy Post–9/11*, 17 GEO. IMMIGR. L.J. 357 (2003) [hereinafter Romero, *Noncitizen Students*]; Victor C. Romero, *Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C. J. INT'L L. & COM. REG. 393

Alabama,[23] Indiana,[24] and Ohio,[25] which did so in 2011 (for these, see Table Two). The 2011 Alabama bill would have restricted even refugees from enrolling, and was enjoined by the federal district judge.[26] 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.[27] Existing New Jersey policy denied state financial aid to a student who was a U.S. citizen, but whose mother was undocumented.[28]

(2002) [hereinafter Romero, *Postsecondary School Education*]; Jessica Salsbury, Comment, *Evading "Residence": Undocumented Students, Higher Education, and the States*, 53 AM. U. L. REV. 459 (2003).

[23] *See* Hispanic Interest Coal. of Ala. v. Governor of Ala., Nos. 11-14535, 11-14675, 2012 WL 3553613 (11th Cir. Aug. 20, 2012); *see also* Michael A. Olivas, *Sweet Home Alabama?*, INSIDE HIGHER ED (Oct. 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* Alan Gomez, *Immigrants Return to Alabama; Scores Fled State After Illegal Immigration Law Went into Effect*, USA TODAY, Feb. 21, 2012, at 3A; 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.

[24] Tom LoBianco, *Immigrant Tuition Fight Derails Bill*, ONPOLITIX (Mar. 1, 2012), http://indiana.onpolitix.com/news/106622/immigrant-tuition-fight-derails-bill.

[25] 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. *See* OHIO REV. CODE § 3333.31(D) (2011). The policy now states in relevant parts:

> (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.

Id.; *see* Aaron Marshall & 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.

[26] Hispanic Interest Coal. of Ala. v. Bentley, No. 5:11-CV-2484-SLB, 2011 WL 5516953 (N.D. Ala. Sept. 28, 2011), *vacated as moot*, Nos. 11-14535, 11-14675, 2012 WL 3553613 (11th Cir. Aug. 20, 2012) (enjoining the Section 8 college provisions of the Beason-Hammon Alabama Taxpayer and Citizen Protection Act, "H.B. 56").

[27] Hispanic Interest Coal. of Ala. v. Governor of Ala., Nos. 11-14535, 11-14675, 2012 WL3553613 (11th Cir. Aug. 20, 2012); *see* Jay Reeves, *Hispanic Children Bullied in Law's Wake*, BOS. GLOBE, Oct. 23, 2011, http://www.articles.boston.com/2011-10-23/news/303/3879_1_illegal-immigrants-new-law-justice-department-officials; Campbell Robertson, *Critics See 'Chilling Effect' in Alabama Immigration Law*, N.Y. TIMES, Oct. 28, 2011, at A14.

[28] *See New Jersey Denies College Financial Aid to U.S. Citizen Because Her Mother Is Undocumented*, LATINO FOX NEWS (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/#1x221pCZaCrex.

Suit was filed on this issue in 2011.[29] On October 20, 2011, the Southern Poverty Law Center filed *Ruiz v. Robinson*,[30] which would require Florida to extend its in-state tuition rates to citizen residents who qualify, even if their parents are undocumented.[31] In a major development, in late 2010, the California Supreme Court overturned the state appellate court,[32] which had the effect of upholding the state's residency statute, exempting unlawful aliens from paying nonresident tuition at California state schools, which had been in place since 2001.[33] There have been other stutters and half-steps in states on the topic of such residency statutes, both accomodationist and restrictionist.[34]

Table One: State Laws Allowing Undocumented College Students to Establish Residency, 2012

Texas, H.B. 1403, 77th Leg., Reg. Sess. (Tex. 2001) [amended by S.B. 1528, 79th Leg., Reg. Sess. (Tex. 2005), relating to student financial aid]; TEX. EDUC. CODE ANN. § 54.052

California, 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)

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[29] *See supra* note 20 and accompanying text; *see also New Jersey Denies College Financial Aid to U.S. Citizen Because Her Mother is Undocumented*, *supra* note 28. Litigation in the *Cortes* and *A.Z.* cases continued in 2012.

[30] 1:11-cv-23776-KMM, 2012 WL 3278644 (S.D. Fla. Aug. 9, 2012).

[31] *Id.; see* Michael R. Vasquez, *U.S.-Citizen Children of Immigrants Protest Higher Tuition Rates*, MIAMI HERALD, Oct. 24, 2011, at B1.

[32] *See* Maura Dolan & Larry Gordon, *In-State Tuition Benefit Upheld*, L.A. TIMES, Nov. 16, 2010, at A1; Keller, *supra* note 15.

[33] CAL. EDUC. CODE § 68130.5 (2011).

[34] Martinez v. Regents of Univ. of Cal., 241 P.3d 855 (Cal. 2010), *cert. denied*, 131 S. Ct. 2961 (2011); *see* Dolan & Gordon, *supra* note 32, at A1; Keller, *supra* note 15; Laurel Rosenhall, *California High Court Upholds College Tuition Break for Illegal Immigrants*, SACR. BEE, Nov. 16, 2010, at 1A; *see also* Seth Hoy, *Colorado, Hawaii and Delaware Progress on Tuition Equity for Undocumented Students*, IMMIGR. IMPACT (Apr. 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* (Working Paper SSRN, 2012) (arguing that the Republican Party has used restrictive immigration bills to divide the Democratic Party).

Utah, H.B. 144, 54th Leg., Gen. Sess. (Utah 2002); UTAH CODE ANN. § 53B-8-106

New York, S. B. 7784, 225th Leg., 2001 NY Sess. (NY 2002); N.Y. EDUC. LAW § 355(2)(h)(8)

Washington, H.B. 1079, 58th Leg., Reg. Sess. (Wash. 2003); WASH. REV. CODE ANN § 28B.15.012

Oklahoma, S.B. 596, 49th Leg., 1st Reg. Sess. (OK 2003) [financial assistance provisions rescinded, Oklahoma Taxpayer and Citizen Protection Act of 2007 (H.B. 1804)]; OKLA. STAT. ANN. TIT. 70, § 3242

Illinois, 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.]

Kansas, H.B. 2145, 2003–2004 Leg., Reg. Sess. (KS 2004); K.S.A. § 76-731a

New Mexico, S.B. 582, 47th Leg. Reg. Sess. (2005); N.M. STAT. ANN. § 21-1-1.

Nebraska, L.B. 239, 99th Leg. 1st Sess. (Neb. 2006); NEB REV. STAT. ANN. § 85-502

Wisconsin, 2009 Assembly Bill 75 (2009 WISCONSIN ACT 28); WIS. STAT. § 36.27 [repealed by AB 40, June 26, 2011]

Maryland, S.B. 167, 2011 Leg., Reg. Sess. (Md. 2011); MD. CODE ANN. § 15-106.8 ["suspended," pending state referendum: MD Const. XVI, Sec. 2] [Ballot measure approved in general election, November, 2012]

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

Rhode Island, S. 5.0, R.I. Board of Governors for Higher Education, September 26, 2011[35]

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[35] *Table One: State Laws Allowing Undocumented College Students to Establish Residency*, 2012, U. HOUSTON L. CENTER, http://www.law.uh.edu/ihelg/documents/Statute-TableOne.html (last visited Dec. 6, 2012).

Table Two: States Restricting Access to Postsecondary Education, 2012

By statute:

Alabama, H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011); ALA. CODE § 31-13-8 [added section barring undocumented students from enrolling in or attending any institutions of postsecondary education; Enjoined by federal district court, October, 2011]

Arizona, S.C.R. 1031, § 3, Proposition 300, approved election Nov. 7, 2006, eff. Dec. 7, 2006 (Ariz. 2006); ARIZ. REV. STAT. ANN. § 15-1803 [amended to ban in-state tuition for undocumented students]

Colorado, H.B. 06S-1023, 63rd Gen. Assemb., 1st Spec. Sess. (Colo. 2006); COLO. REV. STAT. ANN. § 24-76.5-103 [added section to ban in-state tuition for undocumented students]

Georgia, S.B. 492, 149th Gen. Assemb., Reg. Sess. (Ga. 2008); GA. CODE ANN. § 20-3-66(d) [amended to ban in-state tuition for undocumented students]

Indiana, H.B. 1402, 2011 Gen. Assemb., Reg. Sess. (Ind. 2011); IND. CODE ANN. § 21-14-11 [added Ch. 11 to title 21, banning in-state tuition for undocumented students]

Ohio, 129th General Assembly File No. 28, HB 153, § 101.01; O.R.C. 3333.31 (D), (E) (2011) [banning in-state tuition for undocumented students]

South Carolina, H.B. 4400, 117th Gen. Assem. Reg. Sess. (S.C. 2008); S.C. CODE ANN. § 59-101-430 [added section 430 to bar undocumented students from attending public institutions of higher learning, and also bar them from being able to receive in-state tuition]

By policy or regulation:
Georgia Board of Regents, October, 2010
Section 4: Student Affairs
4.1.6 Admission of Persons Not Lawfully Present in the United States
A person who is not lawfully present in the United States shall not be eligible for admission to any University System institution which, for the two most recent academic years, did not admit all academically qualified applicants (except for cases in which applicants were rejected for non-academic reasons).

> 4.3.4 Verification of Lawful Presence
> Each University System institution shall verify the lawful presence in the United States of every successfully admitted person applying for resident tuition status, as defined in Section 7.3 of this Policy Manual, and of every person admitted to an institution referenced in Section 4.1.6 of this Policy Manual.
>
> **University of North Carolina** Board of Governors:
> Chapter 700
> 700.1.4[G]
> Guidelines on the Admission of Undocumented Aliens
> Undocumented aliens are eligible to be considered for admission as undergraduates at UNC constituent institutions [1] based on their individual qualifications with limitations as set out below:
>
> 1. An undocumented alien may be considered for admission only if he or she graduated from high school in the United States.
> 2. Undocumented aliens may not receive state or federal financial aid in the form of a grant or a loan.
> 3. An undocumented alien may not be considered a North Carolina resident for tuition purposes; all undocumented aliens must be charged out-of-state tuition.
> 4. All undocumented aliens, whether or not they abide in North Carolina or graduated from a North Carolina high school, will be considered out of State for purposes of calculating the 18 percent cap on out of State freshmen pursuant to Policy 700.1.3.
> 5. When considering whether or not to admit an undocumented alien into a specific program of study, constituent institutions should take into account that federal law prohibits the states from granting professional licenses to undocumented aliens.
>
> [1] The North Carolina School of Science and Mathematics admits and enrolls only legal residents of the state of North Carolina. G.S. 116-235.[36]

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.[37] In the early stages of the 2011 campaign period, Texas Governor Rick Perry, who had signed the original state law in his state in 2001, drew

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[36] *Table Two: States Restricting Access to Postsecondary Education, 2012*, U. HOUSTON L., CENTER, http://www.law.uh.edu/ihelg/documents/Statute-TableTwo.html (last visited Dec. 6, 2012).

[37] *See* Peter Catapano, *Opinionator: Battle of the Borders*, N.Y. TIMES (Oct. 21, 2011, 8:11 PM), http://opinionator.blogs.nytimes.com/2011/10/21/battle-of-the-borders/?emc=etal.

the attention of his opponents, all of whom aligned themselves against his record.[38] When he withdrew from the race in early 2012, virtually all observers noted that not only his poor performance in the debates[39] but his earlier actions concerning the tuition matter (and his spirited defense of those actions) had hurt him with voters and the public.[40] Buoyed by his leaving the race, the remaining candidates piled on against his views, and indicated their opposition to the DREAM Act.[41] During the course of the campaign, among ethnic and immigration politics, the DREAM Act was excoriated, and only when a military-limited path to legal status surfaced, stripping out the original beneficiary noncitizen college students, did the Republican frontrunners Newt Gingrich and Mitt Romney endorse the revised policy.[42]

In April 2011, Senator Harry Reid (D-NV) and twenty-one other Democratic 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 United States for many years—who would have benefitted from the DREAM Act.[43] The cosigners said in the letter that they would bring the DREAM Act back to the Senate for a vote, but the Republican-led House was likely this time to block the bill,[44] a reversal of the previous December 2010 bill, when the House passed the bill but the Senate failed to gain the sixty Senators it needed.[45] Senator Chuck Schumer (D-NY),

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[38] Trip Gabriel, *Stance on Immigration May Hurt Perry Early On*, N.Y. TIMES, Sept. 24, 2011, at A12. On the withdrawal of Gov. Perry, see Mimi Swartz, *Overmisunderestimating Rick Perry*, N.Y. TIMES (Jan. 20, 2012, 1:45 PM), http://campaignstops.blogs.nytimes.com/2012/01/20/overmisunderestimating-rick-perry/?scp=2&sq=perry%20withdraws&st=cse; *see also* Philip Rucker, *Romney Works To Round Up Key Support*, WASH. POST, Jan. 21, 2012, at A6.

[39] *See* Editorial, *Rick Perry's 'Oops' Moment Isn't All*, L.A. TIMES, Nov. 11, 2011, http://articles.latimes.com/2011/nov/11/opinion/la-ed-perry-20111111.

[40] *See* Jennifer Raab, *Rick Perry's Tuition Policy, Immigrants' Dream: Why Students Need a Path to Citizenship*, N.Y. DAILY NEWS (Sept. 30, 2011), http://articles.nydailynews.com/2011-09-30/news/30244620_1_illegal-aliens-citizenship-illegal-immigrants.

[41] *See* Gabriel, *supra* note 38.

[42] Erika Bolstad, *Rivera Introduces a Military-Only Version of the DREAM Act*, MIAMI HERALD (Jan. 26, 2012, 5:32 PM), http://www.miamiherald.typepad.com/nakedpolitics/2012/01/rivera-introduces-a-military-only-version-of-the-dream-act-.html. Senator Marco Rubio (R-FL) also introduced a version of the DREAM Act, one that provided no immigration legalization. Lizette Alvarez, *With G.O.P.'s Ear, Rubio Pushes Dream Act Proposal*, N.Y. TIMES, Apr. 27, 2012, at A13; Mary Giovagnoli, *Rubio Proposal Overlooks Obstacles Ahead For DREAMers*, IMMIGR. IMPACT (May 4, 2012), http://immigrationimpact.com/2012/05/04/rubio-proposal-overlooks-obstacles-ahead-for-dreamers/.

[43] *See* Wendy Sefsaf, *22 Senators Demand President Obama Exercise Executive Action on Immigration*, IMMIGR. IMPACT (Apr. 14, 2011), http://immigrationimpact.com/2011/04/14/22-senators-demand-president-obama-exercise-executive-action-on-immigration/.

[44] *See id.*

[45] *See* Julia Preston, *Immigration Vote Leaves Policy in Disarray*, N.Y. TIMES, Dec. 19, 2010, at A35.

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 Department of Homeland Security (DHS) Secretary Janet Napolitano, calling upon her to not target DREAM Act–eligible young people for deportation.[46] While Napolitano said that the students were "not the [Department's] priority,"[47] she insisted that no category of Prosecutorial Discretion (PD) 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."[48]

In June 2011, with the release of what came to be known as the "Morton Memo" and in August and November 2011,[49] there were developments in the issue of Deferred Action (DA) and the extent to which the Obama Administration would extend a form of PD to DREAM Act students and others in the country without legal status.[50] 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 PD nationwide.[51] 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:[52] their pending deportations could be put on hold under the test program, as low priority populations.[53] In the predictable

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[46] Elise Foley, *Senate Dems to Obama: Stop Deporting DREAM Act Students*, HUFFINGTON POST (June 14, 2011), http://www.huffingtonpost.com/2011/04/14/senate-dems-to-obama-stop_n_849419.html%20+%20Schumer.

[47] *See* Elise Foley, *Officials Refuse to Budge on Deportation of Students, Families*, HUFFINGTON POST (June 1, 2011), http://www.huffingtonpost.com/2011/04/01/obama-administration-refu_1_n_843729.html.

[48] *Id.*

[49] Memorandum from John Morton, Dir. U.S. Immigration and Customs Enforcement, to All Field Office Directors, All Special Agents in Charge & All Chief Counsel, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011) [hereinafter Morton, PD with Civil Immigration], *available at* 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. *See* Memorandum from John Morton, Dir. U.S. Immigration and Customs Enforcement, to All ICE Employees, on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (June 30, 2010) [hereinafter Morton, Civil Immigration Enforcement], *available at* http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.

[50] *See* Morton, PD With Civil Immigration, *supra* note 49.

[51] *See* Julia Preston, *U.S. to Review Cases Seeking Deportations*, N.Y. TIMES, Nov. 17, 2011, at A1.

[52] Morton, PD With Civil Immigration, *supra* note 49, at 4–5; *see* Preston, *supra* note 51, at A4.

[53] Thereafter, ICE and DHS released a number of memoranda outlining the many details regarding PD. For a listing and review of these memoranda and other documents, see Shoba

thermodynamics of immigration politics, however, there was an equal and opposite reaction against employing such discretion, particularly for the population of potential DREAM Act enrollees. In addition, DA, however advantageous in stopping the clock or in throwing sand into the deportation and removal gears, is not a true or final resolution of undocumented immigration status, and will likely leave many DREAMers unassisted and ineligible for any ultimate change in their legal status. The uncertainty and complexity have made the status quo very frustrating for many observers, particularly the affected students.

Moreover, there were many potentially eligible students who had grown frustrated at the slow pace and their lack of options during college and after graduation, and with a series of large public marches in 2006, they began a systematic practice of outing and revealing themselves to authorities in public fashion. This landscape brought attention to the students—negative and positive—but even over time, has not created any valence for revisiting the failed 2010 federal legislation.[54] 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.[55] This article addresses the contours of PD and

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Sivaprasad Wadhia, *Prosecutorial Discretion in Immigration Agencies: A Year in Review*, LEXISNEXIS 2012 EMERGING ISSUES 6173 (Jan. 12, 2012).

[54] On the issue of the marches, which were attended by several hundreds of thousands of participants, see Alfonso Gonzales, *The 2006 Mega Marchas in Greater Los Angeles: Counter-Hegemonic Moment and the Future of El Migrante Struggle*, 7 LATINO STUD. 30 (2009); Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.–C.L. L. REV. 99 (2007); Sylvia R. Lazos, *The Immigrant Rights Marches (Las Marchas): Did the "Gigante" (Giant) Wake Up or Does It Still Sleep Tonight?*, 7 NEV. L.J. 780 (2007); *see also* Caroline B. Brettell, *Immigrants as Netizens: Political Mobilization in Cyberspace*, *in* CITIZENSHIP, POLITICAL ENGAGEMENT, AND BELONGING 226–43 (Deborah Reed-Danahay & Caroline B. Brettell eds., 2008); Roberto G. Gonzales & 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 CURRENT ANTHROPOLOGY 255, 257–59 (2012).

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> 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

DA, including their unusual provenance and history, widespread use in a variety of 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.

I. 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 Continuing Legal Education credit for entertainment lawyers.[56] Among the many fascinating topics are the adhesion contracts that many young artists sign in their early ambition and naivete,[57] a number of riveting cases that have arisen over the years with dead and living artists,[58] 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.[59] Among this treasure trove of materials, I discuss the relationship between rock and roll and DA, 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 DA (at the time, also called "prosecutorial discretion" and "non-priority status"), as he and

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> 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, Mar. 2012, at 54, 69–70.

[56] *Olivas Kicks Out the Jams: UHLC Professor Explores the Law and Business of Rock and Roll*, U. HOUS. L. CTR. (Mar. 1, 2012), http://www.law.uh.edu/news/spring2012/0301RockRoll.asp [hereinafter *Olivas Kicks Out the Jams*] (reporting on Continuing Legal Education workshop).

[57] *See* Starr Nelson, Comment, *Rock and Roll Royalties, Copyrights and Contracts of Adhesion: Why Musicians May be Chasing Waterfalls*, 1 J. MARSHALL REV. INTELL. PROP. L. 163 (2001).

[58] *See, e.g.*, Fogerty v. Fantasy, 510 U.S. 517 (1994) (regarding attorney's fees from a copyright infringement claim that a jury trial found in favor of musician John Fogerty); Croce v. Kurnit, 737 F.2d 229 (2d Cir. 1984) (affirming trial court decision to award the surviving spouse of entertainer Jim Croce royalties for breach of contract claim); Elvin Assocs. v. Franklin, 735 F. Supp 1177 (S.D.N.Y. 1990) (finding singer Aretha Franklin liable for failure to appear in musical production under theory of promissory estoppel).

[59] *See Olivas Kicks Out the Jams*, *supra* note 56.

his wife Yoko Ono attempted to remain in the United States, in the face of Lennon's earlier drug conviction in the United Kingdom.[60]

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 Lennon's 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.
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> *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

[60] The litigation in the John Lennon immigration matter included three interrelated lawsuits and a BIA petition for review. *See* Lennon v. INS, 527 F.2d 187 (2d Cir. 1975) (vacating and remanding BIA decision that had upheld his deportation); Lennon v. United States, 387 F. Supp. 561 (S.D.N.Y. 1975) (seeking to enjoin deportation on grounds of political beliefs); Lennon v. Richardson, 378 F. Supp. 39 (S.D.N.Y. 1974) (suing under the Administrative Procedure Act, 5 U.S.C. § 522 (1966), to obtain Immigration Service records concerning nonpriority status); 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). After the remand, Immigration Judge Fieldsteel granted relief to Lennon, allowing him to remain in the country. *See also* Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service—A Measure of the Attorney General's Concern for Aliens* (Parts I & II), 53 INTERPRETER RELEASES 25, 33 (Jan. 26–30, 1976) [hereinafter Wildes, *Attorney General's Concern*]. *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 n.4 (1976) [hereinafter Wildes, *Nonpriority Program*] (identifying the three district court actions and Petition for Review before the Second Circuit as a result of Lennon's difficulties with the INS). The court had held that Lennon's earlier 1968 guilty plea in London for cannabis possession had violated British drug laws and rendered him removable from the U.S. *See* Wildes, *Nonpriority Program*; at 44 n.4; Leon Wildes, *All You Need Is Love—and a Good Jewish Lawyer*, N.J. JEWISH STANDARD, Dec. 10, 2010, http://www.jstandard.com/index.php/content/item/all_you_need_is_love_and_a_good_jewish_lawyer/ [hereinafter Wildes, *All You Need Is Love*] (providing a first-person account of the litigation in the Lennon immigration matter from the perspective of his attorney); *see also* JON WIENER, COME TOGETHER: JOHN LENNON IN HIS TIME 225–80 (1984); JON WIENER, GIMME SOME TRUTH: THE JOHN LENNON FBI FILES (2000). For the details of the underlying child custody dispute and family court matter, much of which occurred in Houston, Texas, see Mark Davidson, *I Really Want to See You! Cause No. 893, 663*; *Anthony D. Cox v. Yoko Ono Lennon*, HOUS. LAW., Sept.–Oct. 2011, at 24, 25–26.

> 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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> 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.[61]

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."[62] 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*,"[63] which not only made the Operations Instruction (OI) and its implementing details known to the practitioner community, but the resultant regularization of the practice resulted in more transparency in the process.[64] In their earlier existence, the INS internal

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[61] Wildes, *The Nonpriority Program*, *supra* note 60, at 44–46 (footnotes omitted); *see also* Wildes, *Attorney General's Concern*, *supra* note 60; Leon Wildes, *The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?*, 17 SAN DIEGO L. REV. 99, 102–06 (1979) [hereinafter Wildes, *Operations Instructions*] (explaining circuit courts' use of the Nonpriority Operations Instruction during the 1970s).

[62] Wildes, *The Nonpriority Program*, *supra* note 60, at 42–43.

[63] *Id.* at 46.

[64] *See id.* at 46–47.

regulations were never made available and had carried little weight.[65] These more open provisions continued over two decades, with modifications and significant litigation, until 1997, when they were rolled into a revised and reformatted "Standard Operating Procedures" (SOP) manual, one whose contents were public and available to the immigration bar.[66]

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.[67] In the 1970s, when this status came to be known, remaining in the United States was an unalloyed positive feature, which diminished with the 1996 appearance of prohibitive and punitive three-year and ten-year bars on relief.[68] Therefore, the discovery of this discretionary status was a substantial practice tool for the immigration bar that has shrunk over the years, as Congress has, in a series of actions, which squeezed much of the previously available discretion from the system and made relief unavailable except in substantially narrowed and limited circumstances.[69] This shrinking of discretionary jurisdiction is essentially the case in the year 2012, forty years after *U.S. v. Lennon*[70] and fifteen years after the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[71] the Antiterrorism and Effective Death Penalty Act (AEDPA),[72] and the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)[73]—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.[74]

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[65] *See id.* at 43. 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. *See, e.g.*, Velasco-Gutierrez v. Crossland, 732 F.2d 792, 798 (10th Cir. 1984).

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

[67] Of course, this happened most famously after *Lennon v. INS* where the Second Circuit reversed the BIA decision that had upheld Lennon's deportation and remanded to the Immigration Court. 527 F.2d 187 (2d Cir. 1975). Then, Immigration Judge Fieldsteel granted relief to Lennon, allowing him to remain in the country. *See* Wildes, *The Nonpriority Program*, *supra* note 60, at 43 n.4 (providing an overview of Lennon's five-year court battle and identifying that Lennon was granted residence after the July 27, 1976, Immigration Court hearing).

[68] *See* Wadhia, *supra* note 66, at 252–53.

[69] *See id.* at 246–65 (summarizing the complex trend of the discretionary status).

[70] 527 F.2d 187 (2d Cir. 1975).

[71] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009.

[72] Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214.

[73] Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105.

[74] *See generally* Wadhia, *supra* note 66, at 252–56.

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 agency authority to exercise residual prosecutorial flexibility.[75] 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,[76] as noted by Professors Adam Cox and Cristina Rodríguez, who have written:

> [T]he 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.[77]

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.[78] These acts of terrorism on the United States within its own borders immeasurably strengthened the Executive's hand.[79] Even with the rise of the multitude of post–9/11 immigration reform legislation and the rise of executive action, such as the growth and reorganization of the immigration function within the larger omnibus DHS, the die had been cast and additional centralization of the discretion function became evident.[80] Although the emergent Executive Office for Immigration Review (EOIR) immigrant courts' function

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[75] *Id.*

[76] Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 517–18 (2009).

[77] *Id.*; *see also* Mary Kenney, *Prosecutorial Discretion: How to Advocate for Your Client*, AM. IMMIGR. COUNCIL (June 24, 2011), http://www.aila.org/content/default.aspx?docid=33749.

[78] *See* Wadhia, *supra* note 66, at 256–59.

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

[80] *See* Wadhia, *supra* note 66, at 257–59.

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.[81]

Inasmuch as the legislative record of 2010–2012 reveals deep and growing enmity between the two major parties,[82] 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.[83] 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.[84] 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.[85]

II. PROSECUTORIAL DISCRETION AND DEFERRED ACTION IN THE COURSE OF IMMIGRATION POLICY

A final appeal option for a failed immigration matter is a private relief bill,[86] legislation so daunting at the present that Congress has only passed two such extraordinary

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[81] Cox & Rodríguez, *supra* note 76, at 518–19.

[82] *See* Suzy Khimm, *Obama DREAMs On*, MOTHER JONES (June 27, 2011), http://www.motherjones.com/politics/2011/06/obama-dream-act-deportations.

[83] *See id.* (explaining the President's use of executive power to drive immigration policy).

[84] *See* Cox & Rodríguez, *supra* note 76, at 460–63 (explaining the history of the allocation of powers between the President and Congress in the immigration context).

[85] *See infra* Part IV.

[86] *See* RICHARD S. BETH, CONG. RESEARCH SERV., 98-628 GOV, PRIVATE BILLS: PROCEDURE IN THE HOUSE (2005); Kati L. Griffith, *Perfecting Public Immigration Legislation:*

measures since 2005.[87] 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.[88] One avenue of PD and relief is DA, such as that sussed out by the matter of John Lennon.[89]

While the odds of getting a private relief bill enacted are very small,[90] 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 involved a would-be beneficiary whose mother had fled spousal abuse in Japan but died in a car crash before she was remarried to a U.S. citizen who was not yet in a statutory position to confer any derivative status upon the boy.[91] The other was the widow of a U.S. Marine 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.[92] (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 combat.)[93] These extraordinary provisions are rare in part because they require unanimity and

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Private Immigration Bills and Deportable Lawful Permanent Residents, 18 GEO. IMMIGR. L.J. 273 (2004); Robert Hopper & Juan P. Osuna, *Remedies of Last Resort: Private Bills and Deferred Action Status*, 97-106 IMMIGR. BRIEFINGS, June 1997, at 2–9 (history and procedures for forms of private relief); PENN STATE LAW SCH. ET AL., PRIVATE BILLS & DEFERRED ACTION TOOLKIT (2011), http://law.psu.edu/_file/PBDA_Toolkit.pdf [hereinafter PENN STATE LAW SCH. ET AL., TOOLKIT].

[87] MARGARET MIKYUNG LEE, CONG. RESEARCH SERV., RL33024 PRIVATE IMMIGRATION LEGISLATION (2007). For a useful and comprehensive site where all such private immigration legislation is tracked, see *Search of Private Immigration Legislation*, LIBR. CONGRESS, http://www.loc.gov/search/?q=private+immigration+legislation&fa=digitized%3Atrue%7CSubject%3Aprivate+legislation (last visited Dec. 6, 2012).

[88] *See* PENN STATE LAW SCH. ET AL., TOOLKIT, *supra* note 86, at 33–34.

[89] *See supra* note 60 and accompanying text.

[90] *See* PENN STATE LAW SCH. ET AL., TOOLKIT, *supra* note 86, at 7–9.

[91] An Act for the Relief of Shigeru Yamada, Priv. L. No. 111-1 (2010), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-111pvtl1/pdf/PLAW-111pvtl1.pdf; *Congress Passes Two Private Immigration Relief Bills*, 87 INTERPRETER RELEASES 2414 (2010) (explaining the case of Shigeru Yamada); *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/; 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/.

[92] Ben Pershing, *Bill to Help Marine Widow Hotaru Ferschke Set to Become Law*, *Federal Eye*, WASH. POST (Dec. 15, 2010, 2:40 PM), http://voices.washingtonpost.com/federal-eye/2010/12/on_an_august_day_two.html.

[93] An Act for the Relief of Hotaru Nakama Ferschke, Priv. L. No. 111-2 (2010), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-111pvtl2/pdf/PLAW-111pvtl2.pdf; *see also Congress Passes Two Private Immigration Relief Bills*, *supra* note 91, at 2414 (explaining the case of Hotaru Nakama Ferschke).

because the Congressional committee rules for enacting them have become very strict and unavailing.[94] 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.[95]

DA is another "Hail Mary pass" form of immigration relief, but it 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) is widely available within DHS.[96] 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 was involved 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.[97] Being orphaned in such a horrific way enabled her to obtain DA status and avoid removal in 2012,[98] 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.[99]

DA 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.[100] Immigration authorities treat DA as an act of

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[94] *See* Lee, *supra* note 87, at 3–5.

[95] Griffith, *supra* note 86, at 293 (quoting representative Barney Frank that these private bills should be reviewed case-by-case); *see also* Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667 (2003) (reviewing redress rights for noncitizens); PENN STATE LAW SCH. ET AL., TOOLKIT, *supra* note 86, at 9 (suggesting a private bill as a remedy for only "extraordinary cases").

[96] *See* PENN STATE LAW SCH. ET AL., TOOLKIT, *supra* note 86, at 33 ("Deferred action is a limited remedy in that the [Department of Homeland Security] can alternatively choose to terminate at any time.").

[97] *Lidiane Carmo, Sole Survivor of Family Killed in I-75 Crash, Won't Be Deported*, HUFFINGTON POST (Feb. 3, 2012), http://www.huffingtonpost.com/2012/02/02/lidiane-carmo-sole-surviv_n_1250796.html.

[98] *Id.*

[99] The various and complicated provisions for "special immigrant juveniles" (SIJ) are found in Section 203(b)(4) of the Immigration and Nationality Act (INA), Immigration and Nationality Act § 203(b)(4), 8 U.S.C. § 1153(b)(4) (2006), which sets aside immigrant visas for children considered "special immigrants" under section 101(a)(27). Immigration and Nationality Act § 101(a)(27), 8 U.S.C. § 1101(a)(27) (2006) (defining "special immigrant"). Section 113 of Public Law No. 105-119 amended the class to noncitizen juveniles deemed eligible for long-term foster care based on abuse, neglect, or abandonment, and added other stringent requirements. Immigration and Nationality Act § 101(a)(27)(J), Pub. L. No. 105-119, 11 Stat. 2460 (1997). *See generally Interoffice Memorandum*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/sij_memo_052704.pdf (describing field guidance on Special Immigrant Juvenile Status Petitions); *Special Immigrant Juveniles (SIJ) Status*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, http://www.uscis.gov (follow Green Card hyperlink; then follow Special Immigrant Juveniles hyperlink) (last visited Dec. 6, 2012) (setting out the SIJ criteria and policies).

[100] *See* PENN STATE LAW SCH. ET AL., TOOLKIT, *supra* note 86, at 37.

"administrative choice by [ICE, CBP, and CIS]" to give some cases lower priority in appropriate circumstances "and [is] in no way an 'entitlement.'"[101] 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.[102] It grants no other benefit, although it can include work authorization, and does not always extend to family beneficiaries or even immediate relatives.[103] In essence, each case and its constituent parts have to be made on their own facts and circumstances.[104]

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[101] Wadhia, *supra* note 66, at 250.

[102] 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, 823 (2004) ("The [DA] status is granted for a temporary period and reviewed biennially . . . .").

[103] Wadhia, *supra* note 66, at 246.

[104] *See id.* at 248, 251–52 (detailing discretionary features in determining whether a case is eligible for deferred action). *See generally* Shoba Sivaprasad Wadhia, *The Policy and Politics of Immigrant Rights*, 16 TEMP. POL. & CIV. RTS. L. REV. 387 (2007) (examining the impact of immigration policies on immigrant rights). Professor Stephen Lee, in a detailed article, *Monitoring Immigration Enforcement*, noted that the grant of prosecutorial discretion was itself "a response to Congress's failure to pass the DREAM Act" but also, "[i]mportantly, those noncitizens who receive the benefit of this exercise of discretion become eligible for work authorization." Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1109 & n.72 (2011). However, his footnote 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.

Frequently Asked Questions on the Administration's Announcement Regarding a New Process to Further Focus Immigration Enforcement Resources on High Priority Cases, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/doclib/about/offices/ero/pdf/immigration-enforcement-facts.pdf (last visited Dec. 6, 2012). 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.*, Mark Curnutte, *Pastor's Stay of Deportation Extended*, NKY.COM (Dec. 19, 2011), http://nky.cincinnati.com/article/AB/20111219/NEWS01/312190139 (reporting ICE granting deferred action status to a church pastor); Michael A. Olivas, *Some DREAM Students Face Nightmare Scenarios, Obama Administration Must Honor Commitment*, HOUS. CHRON., Apr. 6, 2011, http://www.chron.com/opinion/outlook/article/Some-DREAM-students-face-nightmare-scenarios-1591501.php (reporting on a college student who was given a one-year stay from Representative Sheila Jackson); *see also* Roberto G. Gonzales, *Learning to Be Illegal: Undocumented Youth and Shifting Legal Contexts in the Transition to Adulthood*, 76 AM. SOC. REV. 602, 613–15 (2011) (following up with 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 PD has not always resolved or even frozen the case. Some noncitizens who would appear from the

In a technical sense, it has no formal group eligibility, such as its close non-statutory cousin, Deferred Enforced Departure (DED), formerly known as Extended Voluntary Departure[105] or its statutory cousin Temporary Protected Status (TPS),[106] which may be extended to groups for long periods of time and in similarly compelling circumstances.[107] It is predominantly a case-by-individual-case determination.

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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 (reporting that a K–12 teacher with illness was removed); Daniel González, *Deportee Struggles to Readjust*, ARIZ. REPUBLIC, Jan. 23, 2012, at A1 (reporting that a former Phoenix high school cross-country coach failed to gain discretionary relief and was deported to Mexico); *Montgomery County Student, Family Win Reprieve from Deportation*, WASH. POST, Mar. 14, 2012, http://www.washingtonpost.com/local/montgomery-county-student-family-win-reprieve-from-deportation/2012/03/14/gIQAlKX7CS_gallery.html?wpisrc=emailtoafriend (chronicling a DREAM Act student who won a one-year stay); 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 (reporting on a high school valedictorian who was given two-year stay); Michael Biesecker & Gosia Wozniacka, *NC Judge Could Terminate Parental Rights of Deported Worker, Put US-Born Sons up for Adoption*, FOX NEWS (Mar. 9, 2012), http://us.foxnews.mobi/quickPage.html?page=26028&content=70199782&pageNum=-1 (reporting that a father was deported and U.S. citizen children were put up for adoption). A Listing on the University of Houston's website includes over two hundred stories of DREAM Act students, in various stages of their legal action. *See* IHELG, *DREAM Act Newspaper, Magazine, and Website Stories, 2002–2012 (Partial Listing)*, U. HOUSTON L. CENTER, http://www.law.uh.edu/ihelg/documents/dream-act-listing.html (last visited Dec. 6, 2012) [hereinafter IHELG, *Listing*].

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> 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 SERVS., AFFIRMATIVE ASYLUM PROCEDURES MANUAL 56 (2010), *available at* http://www.uscis.gov/USCIS/Humanitarian /Refugees%20& %20Asylum /Asylum/2007_AAPM .pdf. DED, which was designated Extended Voluntary Departure until 1990, is conferred upon nationals from countries (such as Liberia) deemed to require temporary protection. *See, e.g.*, Lynda J. Oswald, Note, *Extended Voluntary Departure: Limiting the Attorney General's Discretion in Immigration Matters*, 85 MICH. L. REV. 152, 157 (1986) ("EVD is granted to aliens who are temporarily unable to return to their home country because of dangerous conditions there.").

[106] Immigration and Nationality Act § 244(a), 8 U.S.C. § 1254(a) (2006).

[107] *See How Do I Apply for Temporary Protected Status (TPS)?*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov (search USCIS for "How do I Apply for Temporary Protected Status"; then follow How do I apply for temporary protected status (TPS)? hyperlink) (last visited Dec. 6, 2012) (explaining who is eligible for TPS and how to apply).

DED and TPS, however, do accord work authorization and other privileges, and arise from the same humanitarian motivation.[108] 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 course work, disrupted their studies, and in a number of cases, displaced them to other cities.[109] CIS issued "Interim Relief" Guidelines in the circumstances and was flexible in allowing the affected colleges and students to waive certain requirements and procedures.[110] 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.[111] The use of Humanitarian Parole, which does not count as a formal means of "entry" into the United States, also functionally

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[108] 8 U.S.C. § 1254(a); *Affirmative Asylum Procedures Manual*, *supra* note 105, at 71.

[109] Press Release, U.S. Citizenship & Immigration Servs., USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina (Nov. 25, 2005), *available at* http://www.uscis.gov/files/pressrelease/F1Student_11_25_05_PR.pdf (outlining 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. *Id.*

[110] *Short-Term Employment Authorization and Reduced Course Load for Certain F-1 Nonimmigrant Students Adversely Affected by Hurricane Katrina,* 70 Fed. Reg. 70992-96 (Nov. 25, 2005). *See generally* 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 J. LEGAL EDUC. 319 (2007) (documenting a day-by-day analysis of Katrina and its aftermath on Loyola University New Orleans School of Law).

[111] 8 U.S.C. § 1101(a)(15)(U) (2006) (outlining the availability of a visa to those aliens who have "suffered substantial physical or mental abuse as a result of having been a victim of criminal activity"). In an April 6, 2007 "Recommendation from the CIS Ombudsman [Prakash Khatri] to the Director, USCIS [Emilio T. Gonzalez]," there was acknowledgment that U visa holders could receive DA, including work authorization and family beneficiary eligibility. *See* § 1101(a)(15)(U); Memorandum from Prakash Khatri, CIS Ombudsman, to Emilio T. Gonzales, Dir. USCIS, on Recommendations to USCIS (Apr. 6, 2007), *available at* http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_32_O_Deferred_Action_04-06-07.pdf. Gonzalez published his response to the Ombudsman on August 7, 2007, agreeing on the need for data but stressing the infeasibility of doing so. Memorandum from Emilio T. Gonzalez, Dir. USCIS, to Prakash Khatri, USCIS Ombudsman, Response to Recommendation #32, Deferred Action (Aug. 7, 2007), *available at* http://www.dhs.gov/xlibrary/assets/cisombudsman_rr_32_o_deferred_action_uscis_response_08-07-07.pdf. 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 visa, both because they were not made available for almost seven years and can require severe abuse and violence to be visited upon the victims, but also because the normal rough and tumble of court cases involving victims can often revictimize the witnesses. *See* Jessica Farb, *The U Visa Unveiled: Immigrant Crime Victims Freed from Limbo*, 15 HUM. RTS. BRIEF 26, 26–27 (2007) (examining the delay in implementing the U visa); 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) (analyzing delays and problems involved with using U visas).

resembles DA status, and may be granted on a case-by-case basis, often for emergency medical treatment or other humanitarian purposes.[112]

Eligibility for DA had originally appeared at 242.1(a)(22)(A)–(D) of the OI, 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."[113] 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"),[114] but these have not occurred. The previous OI, 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.[115]

As an example of how DA operated under this OI regime, consider *Bull v. INS*,[116] a 1986 Eleventh Circuit case, which construed the OI as requiring more process than would otherwise be due to the petitioners, even unsympathetic intending immigrants.[117] 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

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[112] *See Refugee, Asylum and International Operations Directorate: Humanitarian Parole Program*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/USCIS/Resources/Resources%20for%20Congress/Humanitarian%20Parole%20Program.pdf (last visited Dec. 6, 2012) (giving an overview of humanitarian parole).

[113] 8 C.F.R. § 274a.12(c)(14). *See generally Inspector's Field Manual*, http://www.gani.com/public/immigration/forms/fieldman.pdf (last visited Dec. 6, 2012) (including a memorandum canceling the OI).

[114] Khatri, *supra* note 111.

[115] Hopper & Osuna, *supra* note 86, at 10.

[116] 790 F.2d 869 (11th Cir. 1986) (holding that refusal to grant Bull a continuance was an abuse of discretion).

[117] *Id.*

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 involving moral turpitude (CIMT).[118] But the Eleventh 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 PRWORA 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.
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> 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).
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> . . . .
>
> [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

[118] *Id.* at 870 ("In sum, Bull's request for a continuance was denied because . . . he and his wife had been too late in commencing the official procedure to obtain an adjustment of status and that, in any case, his adjustment application would be denied as a result of his Florida guilty plea.").

> 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."
> . . . 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."[119]

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 was not the actual facts that rendered his claims for relief plausible, but the failure of the Immigration Judge (IJ) or the Board of Immigration Appeals (BIA) to articulate the actual reasons that DA was not considered or applied in his review:

> [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.[120]

Remarkably, even then the denial would have been upheld, except neither the IJ nor the BIA articulated their reasoning.[121] 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

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[119] *Id.* at 871–72 (citations omitted). The DA OI at the time were 242.1(a)(22), but the point of *Bull* is how the OI worked, and how some courts have deferred considerably to the weight of the OI.

[120] *Id.* at 872.

[121] *Id.* at 872–73.

> 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).[122]

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.[123] 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.[124]

In a 1997 study of DA and private relief bills, Robert Hopper & Juan P. Osuna noted how rare PD 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 Region, only 49 deferred-action cases were pending at the beginning of

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[122] *Id.*
[123] Wildes, *supra* note 102 (analyzing new DA files).
[124] *Id.* at 826 (footnotes omitted).

> 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.[125]

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.[126] Because the data are so spotty and irregular, neither side can say with certainty which form of perdition has occurred.[127]

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.[128] 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)

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[125] Hopper & Osuna, *supra* note 86, at 11.

[126] *See* Julia Preston, *U.S. Says Fast Pace Continues*, N.Y. TIMES, Sept. 15, 2012, at A17 [hereinafter Preston, *Fast Pace*] (reporting on data released by DHS on deferred action applications); *see also* Julia Preston, *Quick Start to Program Offering Immigrants a Reprieve*, N.Y. TIMES, Sept. 12, 2012, at A19 ("As the deferral program expands, resistance to it has grown among Republicans in Congress, who say it is undermining the administration's broader enforcement against illegal immigration and making it difficult for immigration agents to do their jobs.").

[127] *See* Preston, *Fast Pace*, *supra* note 126.

[128] *See, e.g.*, Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. REV. 1 (2012).

> were pending or unknown; forty-eight (48/118 or 40.7%) were granted; and eleven (11/118 or 9.3%) were denied.
>
> 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.
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> 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.[129]

In a surprising turn of events, the Bush Administration employed DA an average of 771 times in the years 2005–2008, while the pace dropped to 661 per year, on average, during the first two years of the Obama Administration.[130] In response to the GOP insistence that the border be "tightened" before discussion of comprehensive immigration reform would take place, ICE in a Democratic administration seriously advanced enforcement measures and by 2010, the most recent year for which such figures were available, was deporting almost 400,000—an historic high record.[131] Yet, disagreement

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[129] *Id.* at 42–43 (footnotes omitted). Remarkably, these data included more than one hundred emergency Haitian cases, following the 2010 earthquake in that country. *Id.* at 40. 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." *Id.* at 39. Her impressive forensic skills in gathering and analyzing the data were at the level of television's CSI quality.

[130] *Id.* at 22.

[131] *See id.* 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. *Id.* (citing Dara Lind, *La Opinion: Obama Has Granted a Record Low Number of*

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.[132] 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 he never again spent his political capital on this issue.[133]

III. 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 noncriminal undocumented persons was that of internal administration, including the tools available for PD, or the small number of non-statutory and other non-regulatory mechanisms.[134] 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,[135] and even citizen children were being removed

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Deferred Actions to Immigrants, AMERICA'S VOICE ONLINE BLOG (Apr. 28, 2011, 4:23 PM), http://americasvoiceonline.org/blog/entry/la_opinion_obama_has_granted_a_record_low_number_of_deferred_actions); *see also* Julia Preston, *Deportation Program Sows Mistrust, U.S. Is Told*, N.Y. TIMES, Sept. 16, 2011, at A12 [hereinafter Preston, *Sows Mistrust*]; Julia Preston, *Federal Policy Resulting in Wave of Deportations Draws Protests*, N.Y. TIMES, Aug. 17, 2011, at A12 [hereinafter Preston, *Federal Policy*]; Julia Preston, *Latinos Said to Bear Weight of a Deportation Program*, N.Y. TIMES, Oct. 19, 2011, at A16 [hereinafter Preston, *Bear Weight*]; Julia Preston & Sarah Wheaton, *Meant to Ease Fears of Deportation Program, Federal Hearings Draw Anger*, N.Y. TIMES, Aug. 26, 2011, at A13.

[132] *See* Liz Halloran, *Supporters Ponder Next Move as DREAM Act Fades*, NPR (Dec. 9, 2010), http://www.npr.org/2010/12/10/131934348/supporters-ponder-next-move-as-dream-act-fades (reporting that the DREAM Act likely died because of lack of bipartisan support).

[133] 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 also* Olivas, *supra* note 4, at 1796–98 (detailing of DREAM Act voting in Congress).

[134] *See, e.g.*, Morton, PD with Civil Immigration, *supra* note 49 (advising on how ICE agents should exercise PD).

[135] *See generally* MIGRATION POLICY INST., MIGRATION AND THE GREAT RECESSION: THE TRANSATLANTIC EXPERIENCE (Demetrios G. Papademetriou, Madeleine Sumption, & Aaron Terrazas, eds., 2011); William H. Frey, *Population Growth in Metro America since 1980: Putting the Volatile 2000s in Perspective*, BROOKINGS INST. METRO. POL'Y PROGRAM (Mar. 2012), http://www.brookings.edu/~/media/Files/rc/papers/2012/0320_population_frey/0320_population_frey.pdf (revealing growth has slowed in metropolitan areas in the 2000s). Michael Hoefer, Nancy Rytina, & Bryan C. Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010*, DHS OFFICE OF IMMIGR. STATISTICS

with their parents who were in unauthorized status.[136] 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.[137] By this time, a curious phenomenon had occurred. The administration had developed an impressive and successful enforcement regime, but one that employed forms of PD (such as DA) 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.[138]

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 removed.[139] The numbers also reveal how immigration cases overall have

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(Feb. 2011), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf (reviewing the declining number of unauthorized noncitizens in the United States).

[136] *See generally* Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA J. SOC. POL'Y & L. 606 (2011) (arguing Immigration and Customs Enforcement is detaining and deporting U.S. citizens without jurisdiction); Carola Suárez-Orozco, Hirokazu Yoshikawa, Robert T. Teranishi, & Marcelo M. Suárez-Orozco, *Growing Up in the Shadows: The Developmental Implications of Unauthorized Status*, 81 HARV. EDUC. REV. 438 (2011) (outlining the developmental challenges children with illegal parents face); Preston, *Bear Weight*, *supra* note 131, at A16; Julia Preston, *Risks Seen for Children Of Illegal Immigrants*, N.Y. TIMES, Sept. 21, 2011, at A17 (reporting that children with illegal parents have negative effects on social development); INT'L HUMAN RIGHTS LAW CLINIC, UNIV. OF CAL., BERKELEY, SCH. OF LAW ET AL., IN THE CHILD'S BEST INTEREST? THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION (2010), *available at* http://www.law.berkeley.edu/files/Human_Rights_report.pdf (chronicling the effects on children of having a parent deported); *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, APPLIED RESEARCH CTR. (Nov. 2011), http://www.arc.org/shatteredfamilies (investigating the lack of foster children reuniting with their deported families).

[137] Julia Preston, *Deportation Halted for Some Students as Lawmakers Seek New Policy*, N.Y. TIMES, Apr. 27, 2011, at A20.

[138] 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.*, Preston, *supra* note 137; Preston, *Sows Mistrust*, *supra* note 131, at A12; Preston, *Federal Policy*, *supra* note 131, at A12; Preston & Wheaton, *supra* note 131, at A13; Julia Preston, *New Rules for Guest Workers Are Issued by the Labor Dept.*, N.Y. TIMES, Feb. 11, 2012, at A11; Julia Preston, *Obama Policy On Deporting Used Unevenly*, N.Y. TIMES, Nov. 13, 2011, A16 [hereinafter Preston, *Unevenly*].

[139] *Oversight of the Department of Homeland Security: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 32–33 (2011) (statement of Janet Napolitano, Sec'y, U.S. Dep't of Homeland Security). 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* Memorandum from Jeanne Butterfield, Former Exec. Dir., Am.

clogged the system and ground it almost to a halt.[140] 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.[141]

Democrat members of the House and Senate began in the spring of 2011 to press for expanded use of DA, PD, 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.[142] Additional news stories had begun to appear regularly about students without status being discovered in traffic court, random police encounters, and travel security.[143] 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.[144]

Immigration Lawyers Ass'n et al., to Interested Parties (Apr. 29, 2011), http://www.immigrationpolicy.org/sites/default/files/docs/Memo_exec_branch_authority.pdf; *see also* Julia Preston, *Immigration Decreases, But Tensions Remain High*, N.Y. TIMES, Mar. 11, 2012, at A15.

[140] *See* Julia Preston, *In Test of Deportation Policy, 1 in 6 Get a Fresh Look and a Reprieve*, N.Y. TIMES, Jan. 20, 2012, at A13 (noting the "huge backlogs [of immigration cases] swamping the immigration courts").

[141] Using comprehensive FOIA-initiated data from the EOIR, TRAC has analyzed case-by-case data. *U.S. Deportation Proceedings in Immigration Courts*, TRACIMMIGRATION, http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php (last visited Dec. 6, 2012) (reporting deportation proceedings by state, nationality, court, and city); *see also* Preston, *supra* note 140, at A13.

[142] Foley, *supra* note 46. See IHELG, *Listing*, *supra* note 104, for a sample 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.*, Susan Carroll, *Student's Hopes Ride on DREAM Act as He Faces Deportation*, HOUS. CHRON., Dec. 13, 2010, http://www.chron.com/news/houston-texas/article/Student-s-hopes-ride-on-DREAM-Act-as-he-faces-1698425.php; Kevin Freking, *Immigrants Protest State Education Policy*, WATERLOO REGION REC., June 29, 2011, at D11; Gonzales, *supra* note 54; Erin Kelly, *Successful Young Illegal Migrants Daring to Dream*, ARIZ. REPUBLIC, June 29, 2011, at A1; 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, http://motherjones.com/politics/2011/06/obama-dream-act-deportations; Olivas, *supra* note 104; René Galindo, *Undocumented & Unafraid: The DREAM Act 5 and the Public Disclosure of Undocumented Status as a Political Act*, UNIV. OF HOUS. L. CTR. (IHELG Research Monograph No. 11-02, 2011), http://www.law.uh.edu/ihelg/monograph/11-02.pdf (last visited Dec. 6, 2012).

[143] *See, e.g.*, Jason Buch, *Graduate's Deportation Case Dropped*, SAN ANTONIO EXPRESS-NEWS, Nov. 3, 2011, at A1; Christopher Connell, *Keeping the Dream Alive*, INT'L EDUCATOR, Jan.–Feb. 2012, at 4, 5; Preston, *Unevenly*, *supra* note 138, at A16.

[144] *See generally* 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*

Then, in June 2011, ICE Director John Morton released directives announcing the expanded use of PD in enforcement and began a pilot project process in two offices, where additional legal review and discretion would be undertaken.[145] In August 2011, DHS established a joint DHS–DOJ working group to review and resolve the hundreds of thousands cases then in the process of EOIR review.[146] In November 2011, DHS revealed additional details on how the review was to proceed and how the large number of cases would be whittled down to the most urgent and serious.[147] Six months

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United States on Their Own, OC WEEKLY, Oct. 20, 2011, at 10; Gonzales, *supra* note 54; 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, Nov. 7, 2011, http://seattletimes.nwsource.com/html/politics/2016710163_apuseducationsecretaryillegalimmigrants.html; Kelly, *supra* note 142; Nathan Pippenger, *One Family in Limbo: What Obama's Immigration Policy Looks Like in Practice*, NEW REPUBLIC, Sept. 16, 2011, http://www.tnr.com/article/politics/95005/pippenger-immigration-obama-deportation-ice; Maria Sacchetti, *Two Reprieves Give Immigrants Cautious Hope; Advocates See Signs of Prioritizing Cases*, BOS. GLOBE, Nov. 26, 2011, at Metro-1; Ronald Trowbridge, *Educated Illegal Immigrants Bring Fiscal Gain*, INSIDE HIGHER ED, Nov. 17, 2011, http://www.insidehighered.com/views/2011/11/17/essay-educated-illegal-immigrants-are-net-financial-gain-us; *see also* Alvin Melathe & Suman Raghunathan, *Tuition Equity Bills Continue to Build Momentum in State Legislatures*, IMMIGR. IMPACT (Feb. 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*, CENTER FOR AM. PROGRESS (Feb. 22, 2012), http://www.americanprogress.org/issues/2012/02/mexico_immigration.html.

[145] Morton, PD With Civil Immigration, *supra* note 49; Memorandum from John Morton, Dir. U.S. Immigration and Customs Enforcement, to All Field Office Directors., All Special Agents in Charge, and All Chief Counsel on Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011) [hereinafter Morton, PD with Certain Victims], *available at* http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf.

[146] Legal Action Ctr. & Alexsa Alonzo, *DHS Review of Low Priority Cases for Prosecutorial Discretion*, AM. IMMIGR. COUNCIL (Feb. 13, 2012), http://www.legalactioncenter.org/sites/default/files/DHS_Review_of_Low_Priority_Cases_2-13-12.pdf; *see also* Letter from Janet Napolitano, Secretary, Department of Homeland Security, to Senator Dick Durbin (Aug. 18, 2011), *available at* http://durbin.senate.gov/public/index.cfm/files/serve?File_id=1180a746-c6d4-4fe9-b11f-cf9be50b6226 (identifying the establishment of the interagency working group and implementation of a "case by case" review process).

[147] *See, e.g.*, Memorandum from Peter Vincent, Principal Legal Advisor, Immigration and Customs Enforcement, to All Chief Counsel, Office of the Principal Legal Adivsor, on Case-by-Case Review of Incoming and Certain Pending Cases (Nov. 17, 2011), *available at* http://www.ice.gov/doclib/foia/prosecutorial-discretion/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf; *Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (2011) [hereinafter *ICE Guidance*], *available at* http://www.ice.gov/doclib/foia/prosecutorial-discretion/guidance-to-ice-attorneys-reviewing-cbp-uscis-ice-cases-before-eoir.pdf; *Next Steps in the Implementation of the Prosecutorial Discretion Memorandum and the August 18th Announcement on Immigration Enforcement Priorities*, U.S. IMMIGR.

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.[148]

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.[149] The political thermodynamics of this complex initiative were quick to emerge and complicate the overall project.[150] 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 PD as an end run around legitimate legislative options and the more limited regulatory procedures, one that they felt enabled the Administration to act unilaterally.[151] And some political opportunists saw this as 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

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& CUSTOMS ENFORCEMENT (2011) [hereinafter *Next Steps*], *available at* http://www.ice.gov/doclib/about/offices/ero/pdf/pros-discretion-next-steps.pdf.

[148] Preston, *supra* note 140, at A13.

[149] *See, e.g.*, *ICE Guidance*, *supra* note 147, at 1–2.

[150] *See, e.g.*, Julián Aguilar, *DHS Refutes Immigration "Stonewalling" Allegations*, TEX. TRIBUNE, Nov. 22, 2011, http://www.texastribune.org/immigration-in-texas/immigration/smithdhs-stonewalling-committee-information.

[151] *See, e.g.*, *House Judiciary Immigration Subcommittee Holds Hearing on OIG Adjudications Report*, *AILA InfoNet Doc. No. 12021649*, AILA INFONET (Feb. 16, 2012), http://www.aila.org/content/default.aspx?docid=38574 ("On February 15, 2012, the House Judiciary's Subcommittee on Immigration Policy and Enforcement held a hearing 'Safeguarding the Integrity of the Immigration Benefits Adjudication Process.'"); *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, http://www.chron.com/news/houston-texas/article/Report-Feds-downplayed-ICE-case-dismissals-2080532.php (asserting that "Homeland Security officials misled the public and Congress last year in an effort to downplay a wave of immigration case dismissals in Houston and other cities amid accusations that they had created 'back-door amnesty'"). The chair of the House Judiciary Committee, Rep. Lamar Smith (R-TX) has been a persistent critic of any DA initiatives. *See, e.g.*, Aguilar, *supra* note 150 (reporting that Smith "threatened to hold the [DHS] in contempt for failing to provide immigration enforcement information" and "accused DHS of 'stonewalling'"); Lamar Smith, *SMITH: Obama Budget's Backdoor Amnesty: President's Spending Plan Weakens Immigration Enforcement*, WASH. TIMES, Feb. 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's Administration). In Spring 2012, Rep. Smith memorably characterized the security accommodations for detainees as "Holiday on ICE." *See* Julia Preston, *Union Chief Says New U.S. Rules for Immigration Detention Are Flawed*, N.Y. TIMES, Mar. 29, 2012, at A18.

of perdition and political cowardice.[152] 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.[153]

In real life, the "Morton Memorandum" was not just one memorandum, but collectively a series of memoranda, promulgated before and after the June 17, 2011, memorandum on prosecutorial discretion with T and U visas.[154] Moreover, the Morton Memorandum is an administrative Rosetta Stone of policy and procedure, one that contains many interrelated sections and complex characteristics.[155] 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.[156] A large-scale national discourse is beginning

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[152] This genre has wide and deep roots. *See, e.g.*, Editorial, *The Forgetful Mr. Smith*, *supra* note 151; 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; Hans von Spakovsky, *Backdoor Amnesty—Abusing the Constitution and Presidential Authority*, HERITAGE.ORG (Aug. 19, 2011, 3:30 PM), http://blog.heritage.org/2011/08/19/backdoor-amnesty-abusing-the-constitution-and-presidential-authority.

[153] 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; Julia Preston, *U.S. Pledges to Raise Deportation Threshold*, N.Y. TIMES, June 18, 2011, at A14 (describing a "groundswell of local resistance" to Secure Communities programs); Kristian Ramos, *The Problem With the GOP's Love Affair with "Backdoor Amnesty,"* HUFFINGTON POST (Sept. 2, 2011), http://www.huffingtonpost.com/kristian-ramos/backdoor-amnesty_b_944118.html; Gary Endelman & Cyrus D. Mehta, *Keeping Hope Alive: President Obama Can Use His Executive Power Until Congress Passes The DREAM Act*, THE INSIGHTFUL IMMIGR. BLOG—COMMENTARIES ON IMMIGR. POL'Y, CASES, AND TRENDS (Dec. 18, 2010), http://cyrusmehta.blogspot.com/2010/12/keeping-hope-alive-president-obama-can.html. As the war on terrorism has escalated, a number of initiatives have arisen. For a critical and comprehensive review of how immigration rhetoric 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. GENDER RACE & JUST. 449 (2012).

[154] Morton, PD with Certain Victims, *supra* note 145; *see infra* notes 158–62 and accompanying text.

[155] *See, e.g.*, Morton, PD with Civil Immigration, *supra* note 49; Morton, PD with Certain Victims, *supra* note 145.

[156] *Id.*; *see also* Maritza Reyes, *Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion in the Removal of Lawful Permanent Residents*, TEMP. L. REV. 637, 692 (2012) (identifying that the Morton Memo "provides guidance for ICE agents, officers, and

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.[157]

In chronological order, the collective "Morton Memoranda" have thus far included: Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions, August 20, 2010;[158] Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens, March 2, 2011;[159] Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, June 17, 2011;[160] Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, June 17, 2011;[161] Case-by-Case Review of Incoming and Certain Pending Cases, November 17, 2011; and other CIS and EOIR memos.[162]

These policy documents set out the broad outlines of the comprehensive and overarching ICE PD 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 concern," those negative factors to be used in determining enforcement policies, and the timing or preferable points at which PD might be best applied.[163] In addition, Morton indicated which of the many memoranda had been issued by previous immigration officials would be incorporated into the new mix of priorities, and which were to be rescinded or discarded.

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attorneys to consider when deciding whether to exercise prosecutorial discretion"); Shoba Sivaprasad Wadhia, *The Morton Memo and Prosecutorial Discretion: An Overview*, IMMIGR. POL'Y CENTER (July 20, 2011), http://www.immigrationpolicy.org/special-reports/morton-memo-and-prosecutorial-discretion-overview.

[157] *See* Carroll, *supra* note 17 (identifying Immigration Reform Coalition of Texas, an anti-illegal immigration organization that has challenged a Texas law offering in-state rates to illegal immigrant students attending colleges and universities).

[158] Memorandum from John Morton, Assistant Sec'y, U.S. Immigration and Customs Enforcement, to Peter S. Vincent, Principal Legal Advisor, on Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions (Aug. 20, 2010) [hereinafter Morton, Handling of Removal Proceedings], *available at* http://www.ice.gov/doclib/detention-reform/pdf/aliens-pending-applications.pdf.

[159] Morton, Civil Immigration Enforcement, *supra* note 49. *See generally* Wadhia, *supra* note 156.

[160] Morton, PD with Civil Immigration, *supra* note 49.

[161] Morton, PD with Certain Victims, *supra* note 145.

[162] Vincent, *supra* note 147; *see also Ice Guidance*, *supra* note 147; *Next Steps*, *supra* note 147.

[163] Legal Action Ctr. & Alonzo, *supra* note 146 (identifying DHS enforcement policies regarding cases of "particular care and concern" and those categories of individuals "who are to receive particular care and attention" pursuant to the Morton Memoranda); *see also* Wadhia, *Prosecutorial Discretion*, *supra* note 53 (overviewing the pros and cons of the Morton Memoranda).

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

- deciding to issue or cancel a notice of detainer;
- deciding to issue, reissue, serve, file, or cancel a Notice to Appear (NTA);
- focusing enforcement resources on particular administrative violations or conduct;
- deciding whom to stop, question, or arrest for an administrative violation;
- deciding whom to detain or to release on bond, supervision, personal recognizance, or other condition;
- seeking expedited removal or other forms of removal by means other than a formal removal proceeding in immigration court;
- settling or dismissing a proceeding;
- granting deferred action, granting parole, or staying a final order of removal;
- agreeing to voluntary departure, the withdrawal of an application for admission, or other action in lieu of obtaining a formal order of removal;
- pursuing an appeal;
- executing a removal order; and
- responding to or joining in a motion to reopen removal proceedings and to consider joining in a motion to grant relief or a benefit.[164]

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,"[165] a different standard than that which had been employed since the Clinton Administration, "whether a substantial federal interest was present."[166] 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.[167]

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[164] Morton, PD with Civil Immigration, *supra* note 49, at 2–3.

[165] *Id.* at n.1.

[166] *Id.* 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 as in determining whether a minor can be prosecuted under the Juvenile Justice and Delinquency Act of 1974, as amended, 18 U.S.C.A. §§ 5031–5042 (West 1985 & Supp. 1995); *see* United States v. W.P., 898 F. Supp. 845 (M.D. Ala. 1995).

[167] *See, e.g.*, Susan Carroll, *Immigration: Gay Costa Rican Wed in California Can Stay in U.S.*, HOUS. CHRON., Mar. 10, 2012, at B5 (describing a deportation from Houston that was stayed for a same-sex spouse married in California); Julia Preston, *U.S. Issues New Deportation*

The various ICE actors and authorized agents and employees are numerous and spread horizontally across many agencies and departments, and vertically from the Secretary of DHS to the many subordinates who undertake the comprehensive work of immigration, naturalization, and the multiple diplomatic, programmatic, and enforcement tasks.[168] As in any complex organization, there is a substantial chain of command with many lower level policy players and officials.[169] The Memorandum spells these out in some detail for the various administrative units within ICE: Enforcement and Removal Operations (ERO),[170] Homeland Security Investigations (HSI),[171] and Office of the Principal Legal Advisor (OPLA),[172] and those who practice or have executive responsibilities before the EOIR,[173] the DHS/DOL/DOJ/State Department counterparts,[174] or the other immigration enforcement authorities, writ large, such as Customs and Border Patrol (CBP),[175] or other Citizenship and Immigration Services proceedings.[176] 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.[177]

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;

Policy's First Reprieves, N.Y. TIMES, Aug. 23, 2011, at A15 (describing the revised policy as more forgiving to students and others, including some removable gays and lesbians).

[168] *See* Morton, PD with Civil Immigration, *supra* note 49, at 2 (describing agencies with which Immigrations and Customs Enforcement work).

[169] *Id.* (listing agencies and concomitant authority).

[170] *See generally Enforcement and Removal Operations*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/about/offices/enforcement-removal-operations/index.htm (last visited Dec. 6, 2012).

[171] *See generally Homeland Security Investigations*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/about/offices/homeland-security-investigations/ (last visited Dec. 6, 2012).

[172] *See generally Office of the Principal Legal Advisor (OPLA)*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/about/offices/leadership/opla/ (last visited Dec. 6, 2012).

[173] *See generally Executive Office for Immigration Review*, U.S. DEPT. OF JUST., http://www.justice.gov/eoir/ (last visited Dec. 6, 2012).

[174] For example, the Department of Labor has jurisdiction over many of the employment-based immigration enforcement provisions. *See Compliance Assistance by Law—The Immigration and Nationality Act (INA)*, U.S. DEPT. OF LABOR, http://www.dol.gov/compliance/laws/comp-ina.htm (last visited Dec. 6, 2012).

[175] *About CBP*, U.S. CUSTOMS & BORDER PROTECTION, http://www.cbp.gov/xp/cgov/about/ (last visited Dec. 6, 2012).

[176] U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis (last visited Dec. 6, 2012).

[177] *See generally* Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565 (2012).

- 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 [sic] at a legitimate institution of higher education in the United States;
- whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat;
- 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.[178]

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."[179]

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.[180]

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:

- 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.[181]

These detailed criteria, even sketched in necessarily broad (and sometimes confusing and duplicative) strokes, show the folk wisdom of both God and the Devil residing

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[178] Morton, PD with Civil Immigration, *supra* note 49, at 3–4.

[179] *Id.* 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.

[180] *Id.* at 5.

[181] *Id.*

in the details of any complex scheme.[182] 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.[183] Of course, the mere announcement of such initiatives, which emphasize ongoing and previously established priorities, and 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.[184]

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.
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> . . . .
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> 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.[185]

Nativist columnist Michelle Malkin railed indelibly against the initiatives as examples of the "deadly '13 strikes you're out' policies of border-state prosecutors."[186]

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[182] *See generally* Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971).

[183] Leon Wildes & Shoba Sivaprasad Wadhia, *Prosecutorial Discretion and the Legacy of John Lennon*, IMMIGR. IMPACT (July 20, 2011), http://immigrationimpact.com/2011/07/20/prosecutorial-discretion-and-the-legacy-of-john-lennon.

[184] *See id.*

[185] *Id.*

[186] *Document Drop: ICE Memos Open Another Door to Illegal Alien Amnesty-by-Fiat*, MICHELLE MALKIN (June 22, 2011, 10:22 AM) http://michellemalkin.com/2011/06/22/document-drop-ice-memos-open-another-door-to-illegal-alien-amnesty-by-fiat/.

She saw the Memorandum as a political ploy and power play designed to accomplish administratively what the Obama Administration could not do—or has not been able to do—that is, enact any form of immigration reform that would provide some pathway for some unauthorized aliens to earn or become eligible for a more regularized status.[187]

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."[188] Labeled the "Consequence Delivery System," the proposed Border Patrol initiative will prioritize its apprehended immigrants to priority categories, from first timers to criminal aliens with violent records.[189] 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."[190] This new strategy was piloted in 2009 in Arizona, home of statewide restrictionist policies designed to discourage undocumented workers from establishing residence or working.[191] 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.[192] Even with moderate enforcement, immigration cases have completely saturated Southwestern court dockets.[193]

> 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

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[187] *Id.*

[188] Walter Ewing, *Border Patrol to Roll Out New "Get Tough" Policy on Unauthorized Immigrants*, IMMIGR. IMPACT (Jan. 19, 2012), http://immigrationimpact.com/2012/01/19/border-patrol-to-roll-out-new-get-tough-policy-on-unauthorized-immigrants/; *see also Authority of U.S. Customs and Border Protection Agents: An Overview*, IMMIGR. POL'Y CENTER (Feb. 2012), http://immigrationpolicy.org/just-facts/authority-us-customs-and-border-protection-agents-overview.

[189] Ewing, *supra* note 188.

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Id.*

> growth rates in case backlogs. Las Vegas, Nevada just missed out being included in these ranks with a growth rate of 27 percent.[194]

And when examining the actual "wait times" (from start to final resolution of cases already docketed),[195] 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.[196]

Meanwhile, other comprehensive enforcement initiatives such as the ICE "Secure Communities Program,"[197] 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 Section 287(g) cooperative arrangements.[198] In other words, these relationships are complex, fluid, and highly politicized.[199]

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[194] *Rising Immigration Backlog at All-Time High Yet Criminal, National Security, and Terrorism Cases Fall*, TRACIMMIGRATION (Sept. 14, 2011), http://www.trac.syr.edu/immigration/reports/261/.

[195] *Id.*

[196] *Id.* The Syracuse University Transactional Records Access Clearinghouse (TRAC) reported that immigration-related prosecutions referred by the DHS immigration enforcement agencies totaled 59% 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). *Id.* Reporting October 2011 data, the study also found that the number of immigration-related prosecutions filed in that period were 119.5% greater than were such prosecutions filed in 2006. *Id.* The data is also reported by federal judicial districts, by the largest number of prosecutions per capita for immigration matters during this period. *Id.* 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 to: California Southern District; Arizona; Texas Western District; New Mexico; Texas Southern District. *Id.*

[197] *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited Dec. 6, 2012) [hereinafter *Secure Communities*]; *see Secure Communities: A Fact Sheet*, IMMIGR. POL'Y CENTER, http://www.immigrationpolicy.org/just-facts/secure-communities-fact-sheet (last visited Dec. 6, 2012).

[198] Julia Preston, *States Resisting Program Central to Obama's Immigration Strategy*, N.Y. TIMES, May 6, 2011, at A18.

[199] *Id.*; *see also* 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; Dave Harmon, *Undocumented Immigrants in Jail: Who Gets Deported?*, AUSTIN AM.-STATESMAN (Mar. 18, 2012), http://www.statesman.com/news/news/special

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.[200] 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 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's support of the DREAM Act and the Summer 2011 "Morton Memoranda."[201] They considered the proposed resource allocation to be undermining their enforcement authority and rewarding illegal behavior.[202] 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.[203]

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,[204] one that is likely increased due to the DHS relocation and the increased general emphasis upon immigration control as national security and border security in the war on terrorism.[205] As one internal measure of this mixed-function issue, ICE has

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reports/undocumented-immigrants-in-jail-who-gets-deporte-1/nRmHz/ (criticizing "Secure Communities" efforts in Austin as excessive, particularly with emphasis upon misdemeanors); Preston, *Sows Mistrust, supra* note 131, at A12; Preston & Wheaton, *supra* note 131, at A13; Kirk Semple, *Cuomo Ends State's Role in U.S. Immigrant Checks*, N.Y. TIMES, June 2, 2011, at A21.

[200] Harmon, *supra* note 199.

[201] The ICE Union held a unanimous Vote of No Confidence in Assistant Secretary Morton and Executive Director Coven in June, 2010. *See* AM. FED. GOV'T EMP. NAT'L COUNCIL, VOTE OF NO CONFIDENCE IN ICE DIRECTOR JOHN MORTON AND ICE ODPP ASSISTANT DIRECTOR PHYLLIS COVEN (2010), *available at* http://www.iceunion.org/download/259-259-vote -no -confidence.pdf; *see also* John W. Slagle, *Fraudulent Documents Puerto Rico/ICE Administration Policies*, ST. LOUIS L. ENFORCEMENT EXAMINER, Jan. 16, 2012, http://www .examiner .com/law-enforcement-in-st-louis/fraudulent-documents-puerto-rico-ice-administration-policies (recounting employee dissatisfaction and no confidence votes).

[202] Slagle, *supra* note 201 (defining the issue to be "amnesty through policy" because "[t]he majority of ICE ERO Officers are prohibited from making street arrests or enforcing United States immigration laws outside of the institutional (jail) setting").

[203] *See id.* (noting that "[r]arely was any political appointee considered in a position of 'No Confidence' for leadership abilities dating from 1972").

[204] *See id.*

[205] *Fugitive Operations*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov /fugitive-operations/ (last visited Dec. 6, 2012).

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 through their having crossed a border without inspection.[206]

In addition, work-site 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.[207] These figures do not include the extensive support and administrative CBP staff.[208] 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."[209]

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.[210] Taking on new jurisdictions or having complex adjudicatory powers reveals serious fault lines in many

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[206] *Id.* The details of the program are maintained at the DHS website. *Id.* 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 OIG-07-34,* DEP'T OF HOMELAND SEC. OFFICE OF THE INSPECTOR GEN. (Mar. 2007), http://www.oig.dhs.gov/assets/Mgmt/OIG_07-34_Mar07.pdf.

[207] *Southwest Border Security Operations*, NAT'L IMMIGR. FORUM 7 (Dec. 2010) http://www.immigrationforum.org/images/uploads/SouthwestBorderSecurityOperations.pdf; *see also U.S. Immigration and Naturalization Service—Populating a Nation: A History of Immigration and Naturalization*, U.S. CUSTOMS & BORDER PROTECTION, http://www.cbp.gov/xp/cgov/about/history/legacy/ins_history.xml (last visited Dec. 6, 2012).

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> 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).
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> 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*, S. CAL. PUBLIC RADIO (Feb. 14, 2012), http://multiamerican.scpr.org/2012/02/dhs-to-begin-discontinuing-287g-in-some-jurisdictions/; *see also* Wadhia, *supra* note 66, at 293.

[209] Wadhia, *supra* note 66, at 293; *see also* Helen B. Marrow, *Immigrant Bureaucratic Incorporation: The Dual Roles of Professional Missions and Government Policies*, 74 AM. SOC. REV. 756 (2009).

[210] *See* Darrin Bush, *Mission Creep: Antitrust Exemptions and Immunities as Applied to Deregulated Industries*, 2006 UTAH L. REV. 761 (discussing the "Mission Creep" phenomena).

governmental organizations.[211] 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.[212] If the sign of a mature intellect is the ability to hold incongruous and nuanced positions or ideologies, so it is with administrative agencies. The ICE functions in the relatively new DHS 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.[213] 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.[214]

Perhaps as an indication 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.[215] 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.[216] ICE conceded no admission of liability or fault, but settled the matter for discretionary purposes and

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[211] *See generally* Abrams, *supra* note 182 (discussing pre-Lennon administrative law PD issues in U.S. 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); Family, *supra* note 177; Wadhia, *supra* note 128, at 18–20. 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.*, Mathew Coleman, *The "Local" Migration State: The Site-Specific Devolution of Immigration Enforcement in the U.S. South*, 34 LAW & POL'Y 159 (2012); Michael A. Olivas, *Immigration-Related State Statutes and Local Ordinances: Preemption, Prejudice, and The Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 51–54; Monica Varsanyi, Paul G. Lewis, Doris Marie Provine, & Scott Decker, *A Multilayered Jurisdictional Patchwork: Immigration Federalism in the United States*, 34 LAW & POL'Y 138 (2012).

[212] *See generally* Coleman, *supra* note 211.

[213] *Id.* at 164–66.

[214] *See, e.g.*, Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1096–1113 (2011) (detailing asymmetric enforcement authority issues between ICE and DOL); Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1746 (2010) (analyzing agency monitoring issues); Wadhia, *supra* note 128, at 15–16.

[215] Kirk Semple, *U.S. to Pay Immigrants Over Raids*, N.Y. TIMES, Feb. 15, 2012, at A22.

[216] *Id.*

because the men were not criminal aliens, thus fitting the DA-priority criteria.[217] 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.[218]

IV. 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."[219] 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."[220]

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.[221] In what one observer called a "lightning review,"[222] 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.[223] This review resulted in the identification of over 1,300

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[217] Hilda Muñoz et al., *11 New Haven Men Arrested in Immigration Raid Reach Landmark Settlement With U.S. Government*, HARTFORD COURANT, Feb. 15, 2012, http://www.courant.com/community/new-haven/hc-new-haven-immigration-settlement-0216-20120215,0,1283842.story; Semple, *supra* note 215, at A22.

[218] *See, e.g.*, Wadhia, *supra* note 128, at 52–60. She analyzes "the values of equal justice, accuracy, consistency, efficiency, and acceptability in the deferred action context." *Id.* at 52; *see also* Mary E. O'Leary, *Yale Law School Immigration Clinic Files Class Action Lawsuit Challenging Secure Communities Detainers*, NEW HAVEN REG., Feb. 22, 2012, http://www.nhregister.com/articles/2012/02/22/news/doc4f45623a99923180233858.txt (detailing another suit filed in New Haven, Connecticut).

[219] *Next Steps*, *supra* note 147.

[220] *Id.*; *see* Morton, PD with Certain Victims, *supra* note 145; *see also* Preston, *supra* note 140, at A13.

[221] Preston, *supra* note 140, at A13.

[222] Julia Preston, *In Test of Deportation Policy, 1 in 6 Offered Reprieve*, ARETZ & HEISE IMMIGR. LLC (Jan. 20, 2012), http://www.immigrationdenver.com/01/in-test-of-deportation-policy-1-in-6-offered-reprieve/ (reprinting an earlier version of Preston, *supra* note 140).

[223] P. Solomon Banda, *Courts Suspend Hearings to Deport: US Reviews Illegal Immigrant Status*, BOS. GLOBE, Jan. 17, 2012, http://www.bostonglobe.com/news/nation/2012/01/17/immigration-courtrooms-silent-during-review-deportation-backlog-federal-agency/joQirs7KDGgWhQ5Dkxkx4I/story.html; Jeff Bliss, *U.S. Agency Said to Urge Closing 1,600 Deportation Cases*, BLOOMBERG.COM (Jan. 19, 2012), http://www.bloomberg.com/news/2012-01-19/u-s-agency-said-to-recommend-closing-1-600-deportation-cases.html.

(16.4%) instances the lawyers considered "low priority," constituting one-sixth of the pending cases, ranging from DREAM Act–type students outed in routine traffic infractions 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.[224] 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 1,300 cases each, with an average of 18 months in the queue per case.[225] 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 DA recommendations to close or terminate cases.[226]

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.[227] 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.[228] 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.[229] 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

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[224] Preston, *supra* note 140, at A13; *see also* Nancy Lofholm, *Prosecutorial Review Puts Immigration Cases in Holding Pattern, Infuses a Sense of Hope*, DENV. POST, Dec. 21, 2011, http://www.denverpost.com/search/ci_19589923#.TvOCsll0vhM.email.

[225] Preston, *supra* note 140, at A13; *see also* Legal Action Ctr. & Alonzo, *supra* note 146.

[226] John Fritze, *Hundreds of Deportation Cases May Be Closed: Baltimore, Denver Pilot Cities for Expedited Review*, BALT. SUN, Jan. 19, 2012, http://articles.baltimoresun.com/2012-01-19/news/bs-md-immigration-pilot-20120119_1_illegal-immigrants-deportation-cases-immigration-cases. 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*, 10 U.N.H. L. REV. 1 (2012).

[227] *See* Preston, *supra* note 140, at A13.

[228] *See* Muzaffar Chishti & Faye Hipsman, *Key Factors, Unresolved Issues in New Deferred Action Program for Immigrant Youth Will Determine Its Success*, MIGRATION POL'Y INST. (Aug. 16, 2012), http://www.migrationinformation.org/Feature/display.cfm?ID=903.

[229] *See* Preston, *supra* note 140, at A13.

to pursue matters and to assign priority to enforcement efforts.[230] Removing or accelerating such a large part of the docket are attractive incentives for the government lawyers to participate in these efforts.

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 processes, and the array of nongovernmental organizations (NGOs) and other actors in the large universe of immigration adjudication in the United States.[231] While they surely share in the hope that these revised processes 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.[232]

Even successful instances of awards of PD 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 unresolved place.[233] 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.[234] To be sure, this is better than not receiving the status; it is not nothing. However, the fortunate recipients still are likely ineligible for driver's 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.[235] 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.[236] 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.[237] Truth be told, if these noncitizens had plausible cases for asylum or other

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[230] *See, e.g.*, Lafler v. Cooper, 132 S. Ct. 1376, 1381 (2012) (noting the prevalence of plea bargains and prosecutorial discretion in the criminal justice system: "the reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials").

[231] *See* Christi & Hipsmun, *supra* note 228.

[232] *Id.* (noting the difficulty of measuring effectiveness).

[233] *See* Yasmin Amer, *Despite Immigration Reforms, Many Young Immigrants Still in Limbo*, CNN.COM (Dec. 24, 2011), http://www.cnn.com/2011/12/24/us/immigration-quagmire/index.html.

[234] Preston, *supra* note 140, at A13 (describing the situation as "indefinite limbo").

[235] *Id.*

[236] *See, e.g.*, Amer, *supra* note 233 (staying removal but "without an exact timeline or a plan of action"); Navarrette, *supra* note 104 (granting a two-year stay).

[237] *See, e.g.*, Muzaffar Chishti & Claire Bergeron, *Questions Arise with Implementation of Obama Administration's New Prosecutorial Discretion Policy*, MIGRATION POL'Y INST.

forms of relief, they would have invoked them already, quite apart from the DHS initiative and the Morton Memoranda.[238] Inasmuch as the discretion regime is designed over the long haul to integrate them into the society of eventual citizens, not providing

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(Feb. 29, 2012), http://www.migrationinformation.org/USfocus/display.cfm?ID=883. And the policy's reach is still not entirely clear. For example, on February 6, 2012, the U.S. Court of Appeals for the Ninth Circuit demanded that DHS explain how it would apply the new PD policy to noncitizens already ordered to be removed and who were in the appeals process if they qualified for such discretion—whether detained or released on bond. *Court Ruling Could Prompt More Deportation Reviews*, CBSNEWS.COM (Feb. 11, 2012), http://www.cbsnews.com/8301-501704_162-57375905/court-ruling-could-prompt-more-deportation-reviews/?tag=mcnol;lst;1. In *Rodriguez v. Holder*, the Circuit court wrote:

> In light of ICE Director John Morton's June 17, 2011 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.

668 F.3d 670, 671 (9th Cir. 2012). Additional lower court skepticism arose when a federal judge ordered clarification about U.S. removal policy, and it was suggested that the U.S. Solicitor General 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.

Nat'l Immigration Project v. U.S. Dep't of Homeland Sec., 842 F. Supp. 2d 720, 722 (S.D.N.Y. 2012); *see also* Jess Bravin, *Judge Suggests U.S. Misled Court on Immigration Policy*, WALL ST. J., Feb. 10, 2012, at A6; Joe Palazzolo, *Rakoff: SCOTUS May Have Been Misled in Immigration Case*, WALL ST. J. (Feb. 10, 2012, 9:26 AM), http://blogs.wsj.com/law/2012/02/10/rakoff-scotus-may-have-been-misled-in-immigration-case/. Adam Liptak reported that DOJ apologized for its misrepresentation. Adam Liptak, *Justice Department Submits Correction Letter to Supreme Court*, N.Y. TIMES (Apr. 24, 2012, 11:43 PM), http://thecaucus.blogs.nytimes.com/2012/04/24/justice-department-submits-correction-letter-to-supreme-court/; *see also* Julián Aguilar, *Few Satisfied by Obama's Immigration Policies*, TEX. TRIB., Sept. 22, 2011, http://www.texastribune.org/immigration-in-texas/immigration/will-obamas-immigration-policy-help-gop/. 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. Amer, *supra* note 233; Pamela Constable, *Montgomery County Student Wins Reprieve from Deportation*, WASH. POST, Mar. 14, 2012, http://www.washingtonpost.com/local/montgomery-county-student-family-win-reprieve-from-deportation/2012/03/14/gIQAFvieCS_story.html (granting a one year stay); Navarrette, *supra* note 104 (granting a two year stay); Kirk Semple, *U.S. Drops Deportation Proceedings Against Immigrant in Same-Sex Marriage*, N.Y. TIMES, June 30, 2011, at A16. For a good summary of the highly technical details of administrative closure, EAD, and the like, see Legal Action Ctr. & Alonzo, *supra* note 146 (noting "independent basis" issue and consequences for noncitizens).

[238] *See generally* Morton, Handling of Removal Proceedings, *supra* note 158; *Next Steps*, *supra* note 147.

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 criticism that is occurring in any event.[239] In the increasing number of states that have enacted restrictionist statutes, these "sleeping beaut[ies]"[240] 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.[241] Their ineligibility for these incorporating and mediating programs isolates them even further into their liminal status[242] and makes it more difficult for them to become members of the society that they are on the verge of joining permanently.[243]

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, and others like them are deemed to be eligible for any form of prosecutorial discretion, 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?[244] An article described one Denver AILA official's opinion:

> 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 undertaking," she said of the docket review. "But it is also a major lost opportunity."[245]

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[239] *See* Aguilar, *supra* note 237 (describing wide-spread criticisms of new policy).

[240] A Denver ICE prosecutor called the deferred cases "sleeping beaut[ies]," 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 140, at A13.

[241] *See generally* Olivas, *supra* note 22; Romero, *Noncitizen Students*, *supra* note 22.

[242] *See generally* Cecilia Menjívar, *Liminal Legality: Salvadoran and Guatemalan Immigrants' Lives in the United States*, 111 AM. J. SOC. 999 (2006).

[243] *See, e.g.*, Aguilar, *supra* note 237; Wadhia, *supra* note 128, at 52–60; *see also* PATRICIA ZAVELLA, I'M NEITHER HERE NOR THERE (2011); Graeme Boushey & Adam Luedtke, *Immigrants Across the U.S. Federal Laboratory: Explaining State-Level Innovation in Immigration Policy*, 11 ST. POL. & POL'Y Q. 390 (2011); Andrew Thangasamy, *State Policies for Undocumented Immigrants*, *in* THE NEW AMERICANS (Stephen J. Gold & Rubén G. Rumbaut eds., 2010).

[244] *See* Preston, *supra* note 140, at A13.

[245] *Id.*; *see also* Julián Aguilar, *Immigration Proposal Not Seen as Major Step*, TEX. TRIB., Jan. 11, 2012, http://www.texastribune.org/immigration-in-texas/immigration/caution-patience

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 decisionmakers may then decide to play hardball with the cases that were not resolved and accorded such status.[246] 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.[247] 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 could gain some tactical advantages or 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.[248]

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.[249] In the stark arithmetic

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-urged-after-tweak-proposed (noting mixed reactions to proposals by immigration attorneys); 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 (describing options for clients as "the difference between the fifth and the eighth circles of Hell").

[246] *Cf.* Ralph Adam Fine, *Plea-Bargaining: An Unnecessary Evil*, 70 MARQ. L. REV. 615, 616 (1987) (arguing against plea-bargaining in the criminal justice system because "leniency" operates as a "quid pro quo" for reduced transaction costs and conserved prosecutorial resources, rather than a reduced punishment reflecting less certainty of conviction or an offense of lesser severity). If Fine's reasoning applies to immigration proceedings as it does to criminal prosecutions—and there is little reason to think it should not—then prosecutors may trade "leniency" for "hardball" tactics for those who press for permanent relief rather than the "half-loaf of DA." *See supra* note 245 and accompanying text.

[247] Preston, *supra* note 140, at A13; *see also* Mirela Iverac, *Seeking Deferred Action, Young Immigrants with Blemished Records Give Pause*, WNYC NEWS (Aug. 29, 2012), http://www.wnyc.org/articles/wnyc-news/2012/aug/29/those-tarnished-records-hold-back-applying-deferred-action/ ("'No one is going to want to be the guinea pig,' [an immigration lawyer] said. 'No one wants to bring a test case in a program like this that hasn't been implemented before.'").

[248] *See, e.g.*, *Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 34 (2006) (statement of Sen. Jeff Sessions, member, S. Comm. on the Judiciary) (expressing surprise that an illegal immigrant might appeal the result of a BIA deportation hearing and "get to stay here [two] more years" as the appeals can take as long as twenty-seven months to reach the U.S. Circuit Courts of Appeals).

[249] *See generally* Wildes, *All You Need Is Love*, *supra* note 60 (sharing stories about his client, John Lennon).

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% of DA cases satisfactorily might make the remaining 84% virtually impossible to adjudicate.[250] Expanded to all of the approximately 400,000 national cases pending would mean that between 40,000 and 64,000 cases could be affected by the enhanced review, if the 10% to 16% figures played out in the remaining districts.[251] 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.[252]

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.[253] 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 those that 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.[254] In many respects, these would be a salutary development, even if targeted towards a subset of

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[250] Preston, *supra* note 140, at A13.

[251] *See* Greene, *supra* note 245, at 1; Jenna Greene, *Discretionary Program Draws Praise, Derision; Reaction to Pilot for Undocumented Immigrants Mixed*, DAILY BUS. REV., Jan. 11, 2012, at A3; David Leopold, *Why Morton's Memo Is the Best Road Map on Prosecutorial Discretion Yet*, IMMIGR. IMPACT (July 1, 2011), http://immigrationimpact.com/2011/07/01/why-morton%E2%80%99s-memo-is-the-best-road-map-on-prosecutorial-discretion-yet. *But see* Angelo A. Paparelli & Ted J. Chiappari, *No More Waiting on Legal Immigration*, SEYFARTH SHAW LLP, http://www.seyfarth.com/dir_docs/publications/NoMoreWaitingonLegalImmigration.pdf ("[A]n 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 Dec. 6, 2012).

[252] *See* Press Release, N.Y. Immigration Coal., On First Day of Historic Immigration Policy Change, Over a Thousand DREAMers and Family Members Sought Application Assistance at the NYIC Legal Clinic So Far Today (Aug. 15, 2012), http://www.thenyic.org/media-DAevent.

[253] *See* Greene, *supra* note 245 (describing how the trial runs apply only to a portion of pending cases).

[254] *See generally* Jeanne Batalova & Margie McHue, *DREAM vs. Reality: An Analysis of Potential DREAM Act Beneficiaries*, MIGRATION POL'Y INST. (July 2010), http://www.migrationpolicy.org/pubs/DREAM-Insight-July2010.pdf.

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 NGOs to gear up for the legal representation, advocacy, and litigation sure to result.[255] Nonetheless, a form of standoff has occurred, with unclear messages and results.[256]

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.[257] 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.[258] Their operating and reference documents included all the applicable memoranda, particularly those of August 20, 2010,[259] March 2, 2011,[260] June 17, 2011,[261] and November 17, 2011,[262] 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).[263] 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.[264] And all these discrete pieces had to fit within a somewhat

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[255] *See* Richard Herman, *If Immigration Is a Game, Let's Play to Win*, HUFFINGTON POST (Aug. 8, 2012, 1:52 PM), http://www.huffingtonpost.com/richard-herman/how-immigration-helps_b_1752425.html ("The USCIS is ramping up for an avalanche of applications. Processing them in a fair and timely manner will be a herculean task.").

[256] *See infra* notes 257–62; *see also* Nati Carrera, *Immigrants Wary of Deferred Action for Childhood Arrivals Memo*, INDEPENDENT VOTER NETWORK (Aug. 31, 2012), http://ivn.us/2012/08/31/immigrants-wary-of-deferred-action-for-childhood-arrivals-memo/ (noting that, because the new policy guarantees so little, many immigrants are unwilling to apply for DA).

[257] *See, e.g.*, Drax v. Reno, 338 F.3d 98, 99–100 (2d Cir. 2003) (noting the "inscrutability" and confusingly complicated "labyrinthine character of modern immigration law," before determining "[w]ith regret and astonishment . . . that this case still cannot be decided definitively but must be remanded to the District Court, and then to the Board of Immigration Appeals . . . for further proceedings").

[258] *See, e.g.*, Morton, PD with Civil Immigration, *supra* note 49, at 3.

[259] Morton, Handling of Removal Proceedings, *supra* note 158.

[260] Morton, Civil Immigration Enforcement, *supra* note 49.

[261] Morton, PD with Civil Immigration, *supra* note 49.

[262] *Next Steps*, *supra* note 147.

[263] *See* Wadhia, *supra* note 128, at 66–67; Alicia A. Caldwell, *Court Ruling Could Prompt More Deportation Reviews*, CBSNEWS.COM, Feb. 11, 2012, http://www.cbsnews.com/8301-501704_162-57375905/court-ruling-could-prompt-more-deportation-reviews/; Leopold, *supra* note 251.

[264] *See, e.g.*, Wadhia, *supra* note 128, at 60–65; Letter from Thomas M. Susman, Dir. Of ABA Governmental Affairs Office, to John Morton, Dir. of Immigration and Customs Enforcement (Dec. 15, 2011), http://www.americanbar.org/content/dam/aba/uncategorized/2011/gao

transparent national model, with algebraic variations on the "case-by-case basis" and applying a "totality of the circumstances" test.[265] The mid-course change in administration policy was so fluid and complex that the Ninth Circuit initiated action to ascertain if the DOJ 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.[266] National data tracking ICE prosecutorial discretion revealed that new filings involving deportation orders in immigration courts in the last three months of 2011 fell substantially, as the grants of relief increased accordingly, and economic circumstances in the United States proved not to provide as much incentive to emigrate for Mexicans in particular.[267]

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 % having been identified to warrant prosecutorial discretion.[268] ICE also reviewed "179,518 pending non-detained cases, with approximately 16,518, or 9%, identified as amenable for prosecutorial discretion," and another 40,036 pending detained cases led to 26 (less than 1%) as amenable for prosecutorial discretion.[269] In addition, it revealed that 2,722 (0.01%) of the cases of people in actual deportation proceedings were administratively closed.[270] 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."[271] In other words, this entire winnowing process appears to have led to only 182 DREAM

/2011dec15_prosecdiscreetion_l.authcheckdam.pdf [hereinafter Susman Letter]; Legal Action Ctr. & Alonzo, *supra* note 146.

[265] Morton, PD with Civil Immigration, *supra* note 49, at 4.

[266] *See, e.g.*, Aguilar, *supra* note 245; Jess Bravin, *Immigration Case Challenges Justice Department's Credibility*, WALL ST. J., Mar. 13, 2012, http://online.wsj.com/article/SB10001424052970203961204577272053518420934.html.

[267] 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/ (noting rising immigration court caseloads and enforcement data in Nevada); Preston, *supra* note 136, at A15 (describing shifting national data and enforcement issues). Due to the difficulty in obtaining criminal enforcement data after unsuccessful open records requests, immigration advocates filed suit in 2012. Am. Immigration Council v. Dep't of Homeland Sec., No. 3:12-cv-00355-WWE (D. Conn., filed Mar. 8, 2012); *see also* Douglas S. Massey & Karen A. Pren, *Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America*, 38 POPULATION & DEV. REV. 1, 25–26 (2012); Damien Cave, *Better Lives for Mexicans Cut Allure of Going North*, N.Y. TIMES, July 6, 2011, at A1.

[268] *Case-by-Case Review Statistics*, ILW.COM, http://www.ilw.com/immigrationdaily/news/2012,0430-prosecutorialdiscretion.pdf (last visited Dec. 6, 2012).

[269] *Id.*

[270] *Id.*

[271] *Id.*

Act–eligible students having their records administratively closed by ICE, and it is not clear how many of them received employment authorization.[272]

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.[273] The data did reveal that approximately 650 cases had been terminated by an Immigration Judge (25% of all such cases), with ICE concurrence through prosecutorial discretion.[274] The other 1,959 cases (that is, 75% of all the resolved cases) were administratively closed by an IJ, "freezing" the individuals' status but not finally resolving their situation.[275] These detailed TRAC data do not reveal which of these cases were DREAM Act–eligible individuals.[276] Further, it is impossible to 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

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[272] *Id.* 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* Jill Replogle, *Fewer Than 3,000 Immigration Cases Closed Under New Obama Policy*, FRONTERAS DESK (Apr. 24, 2012), http://www.fronterasdesk.org/news/2012/apr/24/fewer-3000-immigration-cases-closed-under-new-obam/; Amy Taxin, *APNewsBreak:7.5 Pct of Deportations May Get Held*, CNSNEWS.COM (Apr. 24, 2012), http://cnsnews.com/news/article/apnewsbreak-75-pct-deportations-may-get-held.

[273] *ICE Prosecutorial Discretion Initiative: Latest Figures*, TRACIMMIGRATION (Apr. 19, 2012), http://trac.syr.edu/immigration/reports/278/.

[274] *Id.*

[275] *See id.*

[276] 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.
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> 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.
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> . . . .
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> 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.

Id. Professor Wadhia has also investigated a number of the overarching data issues, and has combined her critical work with FOIA requests and suits. *See* Wadhia, *supra* note 128, at 4, 34–38.

deferred action and they have not made their data available, etc.).[277] Also unknown is the method by which the PD data are captured or the scope of the data.[278] In addition, it is not always clear if the cases were provided administrative closure or DA, 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.[279] 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.[280] 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.[281] 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.

V. THE VEXING CASES OF THE DREAMERS

Remarkably, given how few undocumented college students there are (most estimates suggest approximately 50,000 to 60,000),[282] there is a substantial media presence attesting to their existence and situations.[283] There have been literally hundreds of newspaper and other media stories,[284] as well as books and scholarly articles[285] 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,[286]

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[277] Wadhia, *supra* note 128, at 8–9, 49–50, 54–55.

[278] *Id.* at 8–9, 39, 55.

[279] *Id.* at 39.

[280] *See id.* at 50 n.193.

[281] *See id.* at 65.

[282] Jeanne Batalova & Michael Fix, *New Estimates of Unauthorized Youth Eligible for Legal Status Under the DREAM Act*, MIGRATION POL'Y INST. (Oct. 2006), http://www.migrationpolicy.org/pubs/Backgrounder1_Dream_Act.pdf.

[283] *See, e.g.*, Elizabeth Redden, *Data on the Undocumented*, INSIDE HIGHER ED (Mar. 17, 2009), http://www.insidehighered.com/news/2009/03/17/undocumented.

[284] *See, e.g.*, *Dueling Cost Estimates on DREAM Act*, INSIDE HIGHER ED (Dec. 6, 2010), http://insidehighered.com/quicktakes/2010/12/06/dueling-cost-estimates-dream-act; Redden, *supra* note 283.

[285] *See, e.g.*, JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., PEW RESEARCH CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES (2009), *available at* http://pewhispanic.org/files/reports/107.pdf ("[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%."); Batalova & Fix, *supra* note 282.

[286] A 2006 Migration Policy Institute (MPI) study estimated that approximately 50,000 undocumented college students were enrolled, either full time or part time, and would be eligible

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.[287]

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for permanent status under the DREAM Act. Batalova & Fix, *supra* note 282. This data does not include persons who might be eligible for the Act's military options for legalization. *See Dueling Cost Estimates on DREAM Act*, *supra* note 284; Elise Foley, *Immigration Authorities Release Alabama Woman After Appeal to Janet Napolitano*, HUFFINGTON POST (Dec. 11, 2011), http://www.huffingtonpost.com/2011/12/09/alabama-immigration-janet-napolitano_n_1140280.html; Dawn Konet, *Unauthorized Youths and Higher Education: The Ongoing Debate*, MIGRATION POL'Y INST. (2007), http://www.migrationinformation.org/Feature/display.cfm?id=642; Redden, *supra* note 283; Jeremy Redmon, *Deportation Rules Free 2 Ga. Teens*, ATLANTA J.-CONST., Aug. 24, 2011, at A1; *see also* Marcia Yablon-Zug & Danielle R. Holley-Walker, *Not Very Collegial: Exploring Bans on Undocumented Immigrant Admissions to State Colleges and Universities*, 3 CHARLESTON L. REV. 421 (2009); IHELG, *Listing*, *supra* note 104. For a sample of individuals invoking civil rights traditions, see Kate Brumback, *Rallying Cry: "Undocumented, Unafraid,"* ST. LOUIS POST-DISPATCH, June 26, 2011, at A16; Buch, *supra* note 143, at A1; Kelly, *supra* note 142, at A1; E.J. Montini, *Dream Act Kids Facing a Political Nightmare*, ARIZ. REP., Nov. 24, 2010, at B1; Elizabeth Llorente, *Two Undocumented Immigrants Who Sought Arrest Are Released and Face Deportation*, LATINO FOX NEWS (Nov. 25, 2011), http://latino.foxnews.com/latino/politics/2011/11/25/two-undocumented-immigrants-who-sought-arrest-are-released-and-face-deportation/.

[287] As the many articles cited in the Listing show, not a week goes by where no story—most of them sympathetic—appears on hapless students and their difficult personal situations. *See, e.g.*, Banda, *supra* note 223, at 6; 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/; Paloma Esquivel, *Young Immigrants Are Paying for Parents' Choices*, L.A. TIMES, Mar. 25, 2012, at A27; Manny Fernandez, *Vying for Campus President, Illegal Immigrant Gets a Gamut of Responses*, N.Y. TIMES, Mar. 10, 2012, at A11; 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; Magagnini, *supra* note 10; Joan Friedland, *Falling Through the Cracks: How Gaps in ICE's Prosecutorial Discretion Policies Affect Immigrants Without Legal Representation*, IMMIGR. POL'Y CENTER PERSPECTIVES (May 2012), http://www.immigrationpolicy.org/sites/default/files/docs/friedland_-_unrepresented_immigrants_051412.pdf; *Law Graduate in Immigration Limbo Hopes California Court Approves License*, LATINO FOX NEWS (May 24, 2012), http://latino.foxnews.com/latino/news/2012/05/23/law-graduate-in-immigration-limbo-hopes-california-court-approves-license/; *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/.

Occasionally, the story is not as sympathetic, as in restrictionist responses in Rhode Island. *See 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/.

As the failure of Congress and the Obama Administration to produce DREAM Act legislation in Fall 2010 revealed,[288] there were complex social and political dynamics at play, beyond the usual difficulties in enacting features of comprehensive immigration reform or its constituent parts.[289] 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.[290] 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.[291]

The Listing 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 2009–2010, when it became evident that there was some Congressional traction for a DREAM Act vote.[292] Indeed, the issues of these students had more fully entered the public imagination during the immigrant rights marches of Spring 2006, when tens of thousands of undocumented immigrants and their supporters took to the streets and statehouses to advocate for immigration reform;[293] a steady trickle of stories emerged, with substantially more as the frustrations grew and the possibilities for them regularizing their status dimmed.[294] 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.[295] For example, the student body president of California State University–Fresno had been in deportation proceedings, and another

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[288] *See, e.g.*, Foley, *supra* note 46.

[289] *See generally* Olivas, *supra* note 4; Suárez-Orozco et al., *supra* note 136; H. Kenny Nienhusser & Kevin J. Dougherty, *Implementation of College In-State Tuition for Undocumented Immigrants in New York,* NYLARNET (2010), http://www.nylarnet.org/reports/imm_in%20state%20tuition.pdf.

[290] *See* Olivas, *supra* note 4, at 1759, 1804 (discussing postsecondary *Plyler* policies).

[291] *See id.* at 1759, 1763–65, 1769–83 (analyzing state legislative developments).

[292] *See id.* at 1785–1802 (analyzing the federal development of the DREAM Act in Congress); *see also* IHELG, *Listing*, *supra* note 104.

[293] Leisy J. Abrego, *Legal Consciousness of Undocumented Latinos: Fear and Stigma as Barriers to Claims-Making for First- and 1.5-Generation Immigrants*, 45 LAW & SOC'Y REV. 337, 356 (2011) (describing the use of marches); Gonzales, *supra* note 54 (reporting on the Mega March as of 2006).

[294] *See, e.g.*, Gonzales, *supra* note 54 (describing the use of the marches as expression of rising tensions).

[295] Gary Reich & Jay Barth, *Educating Citizens or Defying Federal Authority? A Comparative Study of In-State Tuition for Undocumented Students*, 38 POL'Y STUD. J. 419 (2010); Roxana Orellana, *DREAM Act Supporter Jailed for Refusing to Leave Federal Building*, SALT LAKE TRIB., Dec. 1, 2010, at A1; Galindo, *supra* note 142; Melathe & Raghunathan, *supra* note 144.

California student was also jailed by ICE when U.S. Senator Dianne Feinstein (D-CA) intervened to convince the agency not to remove him.[296] In Georgia and Massachusetts, traffic infractions and driving with licenses—for which they were ineligible under state laws—revealed cases of undocumented students.[297] 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,[298] he announced he had never gained formal legal status in the United States.[299] Five college students in Indiana were arrested for criminal trespass, after they entered Gov. Mitch Daniels's statehouse office; they did so to protest legislation being enacted that would require them to pay out-of-state tuition.[300] However, citing the new priorities for immigration enforcement, ICE announced that it would not deport the students, four of whom were undocumented.[301]

Even with the new form of low-priority status accorded to some undocumented, noncriminal college students, ICE officials continued to render decisions in each instance on a case-by-case basis, rather than extend DA to them as a discrete group.[302] 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

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[296] Juliet Williams, *Bill Would Let Illegal Immigrant Students Get Aid*, SAN DIEGO UNION-TRIB. (Aug. 31, 2011), http://www.utsandiego.com/news/2011/aug/31/bill-would-let-illegal-immigrant-students-get-aid/?print&page=all; *see also* Diana Marcum, *Standing Up for a Dream*, L.A. TIMES, Nov. 28, 2010, at A1. In addition, legislation was enacted, which gave undocumented California college student leaders the right to be paid for their service. A.B. 844 2011 Leg., Reg. Sess. (Cal. 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*, SFGATE (Nov. 19, 2010, 9:18 AM), http://www.sfgate.com/cgi-bin/blogs/cityinsider/detail?entry_id=77413.

[297] Due to the inability to receive driver's licenses, many undocumented would-be-licensed drivers operate vehicles without proper authority or insurance coverage. *See, e.g.*, Damien Cave, *Crossing Over and Over*, N.Y. TIMES, Oct. 3, 2011, at A1; Editorial, *Two Deportation Cases, Two Disparate Outcomes*, DENVER POST, Sept. 7, 2011, at B10; Elizabeth Stuart, *Desperate, Immigrants Turn to the Internet to Fight Deportation*, DESERET NEWS, Mar. 4, 2012, http://www.deseretnews.com/article/765556620/Desperate-immigrants-turn-to-the-Internet-to-fight-deportation.html; Iliana Perez, *Life After College: A Guide for Undocumented Students*, EDUCATORS FOR FAIR CONSIDERATION (2012), http://www.e4fc.org/images/E4FC_LifeAfterCollegeGuide.pdf.

[298] Jose Antonio Vargas, *OUTLAW: My Life as an Undocumented Immigrant*, N.Y. TIMES MAGAZINE, June 26, 2011, at 22.

[299] *Id.*

[300] Carrie Ritchie, *Arrested Students Will Not Be Deported*, INDIANAPOLIS STAR, May 11, 2011, http://www.indystar.com/apps/pbcs.dll/article?AID=2011105110389.

[301] *Id.*

[302] Morton, PD With Civil Immigration, *supra* note 49 (maintaining that PD should always be considered on a case-by-case basis).

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 [sic] at a legitimate institution of higher education in the United States").[303] But some students have not been given DA, and others were not accorded DA until national attention was paid.[304] And in some cases, no DA was available.[305]

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

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[303] *Id.*

[304] *See* Replogle, *supra* note 272; Taxin, *supra* note 272. 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* Julia Preston, *Deportations Go On Despite U.S. Review of Backlog*, N.Y. TIMES, June 7, 2012, at A13; Am. Immigr. Lawyers Ass'n, *DHS Prosecutorial Discretion Initiative Falls Short*, *AILA InfoNet Doc. No. 12060752*, AILA INFONET (June 7, 2012), http://www.aila.org/content/default.aspx?docid=40035; Ben Winograd, *Updated Figures Highlight Shortfalls of Prosecutorial Discretion Program*, IMMIGR. IMPACT (June 7, 2012), http://immigrationimpact.com/2012/06/07/updated-figures-highlight-shortfalls-of-prosecutorial-discretion-program/.

[305] 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., Aug. 14, 2007, http://www.abqjournal.com/news/appolicy08-14-07.htm. 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.

Frequently Asked Questions on the Administration's Announcement Regarding a New Process to Further Focus Immigration Enforcement Resources on High Priority Cases, *AILA InfoNet Doc. No 11083064*, AILA INFONET (2011), http://www.aila.org/content/default.aspx?docid=36804 [hereinafter *FAQ on the Administration's Announcement*]. DREAM Act–eligible noncitizens have been removed even after the Administration's review was undertaken and determined to apply to students and educators on a case-by-case basis. *See, e.g.*, Susan Carroll, *Despite Policy, Friendswood Teacher Deported*, HOUS. CHRON., Aug. 27, 2011, http://www.chron.com/news/houston-texas/article/Despite-policy-Friendswood-teacher-deported-2143472.php; Elise Foley, *DREAM Act–Eligible Man Faces Deportation, Despite Policy Change*, HUFFINGTON POST (Dec. 24, 2011), http://www.huffingtonpost.com/2011/10/24/dream-act-eligible-man-deportation_n_1029201.html.

calculated risk assessment that the self-reporting would be strategic and would lead to the inchoate form of relief.[306] Inasmuch as there were a number of highly publicized cases where such relief was accorded for self-outing, the risky behavior was rewarded, and proved to be efficacious as far as receiving DA went, which in turn emboldened additional students to come forward.[307] 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.[308] 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.[309] 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.[310] Awarding them a form of PD 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.[311]

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[306] *See* Replogle, *supra* note 272; Winograd, *supra* note 304.

[307] *See* Maggie Jones, *Coming Out Illegal*, N.Y. TIMES MAG., Oct. 24, 2010, at MM37; 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; Travis Wentworth, *DREAM Advocates Begin a 3,000-Mile March from California to Washington*, IMMIGR. IMPACT (Mar. 23, 2012), http://immigrationimpact.com/2012/03/23/dream-advocates-begin-a-3000-mile-march-from-california-to-washington/.

[308] *See, e.g.*, Russell Contreras, *Groups to Keep Pressure After N.M. License Fight*, SANTA FE NEW MEXICAN, Feb. 25, 2012, http://www.santafenewmexican.com/localnews/Groups-to-keep-pressure-after-N-M--license-fight#.UH_th4GH5Rc.

[309] *See, e.g.*, Sara Van Note, *Despite New Rule, Undocumented Students Face Uncertain Future*, KUNM (Oct. 4, 2012), http://kunm.org/post/despite-new-rule-undocumented-students-face-uncertain-future.

[310] 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; *see also* 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's unauthorized residents do not qualify for a driver's license in the state. *Frequently Asked Questions: Fees, Payments, ID Requirements, Expiration*, COLO. DEP'T OF REVENUE, http://www.colorado.gov/cs/Satellite/Revenue-MV/RMV/1251573915277 (last visited Dec. 6, 2012).

[311] Hoover, *supra* note 310 (stating that the law would apply to students that have graduated from high school).

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.[312] In many respects, they are indistinguishable from other college students who are making their way through to careers and young adulthood. However, with the impossibility of 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.[313]

If there is any single source of frustration, it is the remote likelihood that legislators will enact the required legislation, whether the DREAM Act specifically 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.[314] 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,

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[312] *See, e.g.*, Romero, *Noncitizen Students*, *supra* note 22; Galindo, *supra* note 142.
[313] Gonzales & Chavez, *supra* note 54, at 255.
[314] *See, e.g.*, Guidi, *supra* note 91; Hoy, *supra* note 34.

> 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.[315]

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 DA or discretionary mechanisms available to it under traditional administrative relief regimes.[316] 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.[317] 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.[318] 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;[319] 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.[320] If the proof is in the pudding, the newly relaxed DA and PD measures, following the reduced use of DA policy since the Bush Administration, will still be both too little and too late.

In addition, if DA were to be awarded to DREAM Act–eligible students as a class of beneficiaries, it would be decried by restrictionists as "back door" amnesty, thwarting the will of Congress, which has declined to enact remedial DREAM Act legislation.[321] Even if it were to extend an inchoate form of relief, ICE would not ultimately resolve the students' liminal status, absent employment authorization and other final relief or

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[315] Gonzales & Chavez, *supra* note 54, at 267.

[316] *See* Michele Waslin, *Law Professors Push White House to Grant Administrative Relief to DREAMers*, IMMIGR. IMPACT (May 31, 2012), http://www.immigrationimpact.com/2012/05/31/law-professors-push-white-house-to-grant-administrative-relief-to-dreamers/.

[317] David Leopold, *ICE's Union "On the Water Front,"* AM. IMMIGR. L. ASS'N (June 24, 2011), http://ailaleadershipblog.org/2011/06/24/ices-union-on-the-water-front/.

[318] *See generally* Wadhia, *supra* note 66.

[319] *See* Aguilar, *supra* note 237.

[320] *Id.*

[321] *Republicans Decry DHS Deportation Review as 'Amnesty,'* FOX NEWS (Aug. 19, 2011), http://www.foxnews.com/politics/2011/08/19/republicans-decry-dhs-deportation-review-as-amnesty/.

more permanent measures. If other community-policing-cum-immigration interactions ebb and flow between success and disfavor, as have Section 287(g) programs and "Secure Community"[322] 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.[323] 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.[324] Their desperate pleas will have been for naught, and their purgatory will be extended in unproductive fashion. As a final consideration, any discretionary switch can be turned on by one administration and can be turned off by its successor, as administrative and political priorities will inevitably differ, so there may be no continuity.

One additional feature came prominently to light during this period of DA practice: the increasing and complex role of memoranda such as the "Morton Memorandum" and other sub-regulatory guidance and mediating structures and documents to facilitate the role of administrative law functions in the agency and between the immigration bar. This full list would include several dozens of sources and products for explanation and implementation of the comprehensive regime. Even an incomplete list would include many practice guidance policy documents and manuals (such as the CIS Memorandum on the Role of Private Attorney and "Other Representatives"[325] or

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[322] 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."

Rojas, *supra* note 208; *Secure Communities*, *supra* note 197. For criticisms of Secure Communities, see Edgar Aguilasocho, David Rodwin, & Sameer Ashar, Immigrants Rights Clinic, Univ. of Cal., Irvine Sch. of Law, *Misplaced Priorities: The Failure of Secure Communities in Los Angeles County*, U.C. IRVINE (Jan. 2012), http://www.law.uci.edu/pdf/Misplaced Priorities_aguilasocho-rodwin-ashar.pdf; Preston, *Bear Weight*, *supra* note 131, at A16; Preston, *Unevenly*, *supra* note 138, at A16; Preston & Wheaton, *supra* note 131, at A13.

[323] *See FAQ on the Administration's Announcement*, *supra* note 305.

[324] *See, e.g.*, Magagnini, *supra* note 10.

[325] 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.*, Policy Memorandum from USCIS, The Role of Private Attorneys and Other Representatives; Revisions to Adjudicator's Field Manual (AFM) Chapters 12 and 15; AFM Update AD11-42 (Dec. 21, 2011), *available at* http://www.uscis.gov/USCIS/Outreach /Feedback %20Opportunities/Interim%20Guidance%20for%20Comment/Role_of_Private_Attorneys _PM_Approved_122111.pdf.

the OMB "Good Guidance Practices"),[326] the EOIR immigration court manual,[327] the CBP Inspector's Field Manual (online),[328] warning letters,[329] agency memoranda,[330] letters,[331] formal and informal agency postings,[332] various "Interpretations," and other

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[326] In 2007, the Office of Management and Budget (OMB) published a final Bulletin for "Agency Good Guidance Practices," [No. 07-02] which "propose[d] policies and procedures for agencies to develop, issue, and use guidance documents" and "to increase the quality and transparency of agency guidance practices and the guidance documents produced through them." Proposed Bulletin for Good Guidance Practices, 70 Fed. Reg. 71866 (Nov. 30, 2005); Proposed Bulletin for Good Guidance Practices, 70 Fed. Reg. 76333 (Dec. 23, 2005).

[327] In 2008, the Executive Office for Immigration Review (EOIR), in consultation with the IJs, 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. *The Immigration Court Practice Manual*, U.S. DEP'T JUST. (Aug. 2009), http://www.justice.gov/eoir/vll/OCIJPracManual/Practice%20Manual%20Final_compressed PDF.pdf.

[328] U.S. CUSTOMS & BORDER PROT., INSPECTOR'S FIELD MANUAL (2007), *available at* http://foiarr.cbp.gov /streamingWord.asp?i=910.

[329] For example, if a school certified to admit nonimmigrants 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).

Withdrawal of School Approval, U.S. CITIZENSHIP & IMMIGR. SERVICES, 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 Dec. 6, 2012). This issue was litigated in *Blackwell Coll. of Bus. v. U.S. Att'y Gen.*, 454 F.2d. 928 (D.C. Cir. 1971).

[330] *Immigration Policy and Procedural Memoranda*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/memoranda (last visited Dec. 6, 2012).

[331] *See, e.g.*, *Questions and Answers: Expedited Processing Available for Certain Supplemental Security Income (SSI) Beneficiaries*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http:// www.uscis.gov (search USCIS for "questions and answers expedited processing"; then follow Questions and Answers: Expedited Processing Available for Certain Supplemental Security Income (SSI) Beneficiaries hyperlink) (last visited Dec. 6, 2012) (providing as an example of technical questions, the answer to the burning and existential question: why is expedited processing available for SSI beneficiaries?).

[332] Most long-term users of the various immigration-related web sites would concede 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, e.g.*, *id.*

nonbinding means of regulation,[333] each of which fits into the larger administrative law structure in immigration and naturalization. In addition, a substantial scholarship has grown,[334] 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.[335]

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 U.S. citizen parents, and I suspect my interests in immigration generally arise from my Mexican heritage. I have lived in Texas since 1982, hence my interest in the 1982 Texas case, *Plyler v. Doe*,[336] 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 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 DA and PD 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. As a member of the community, I am concerned over major changes and developments in the basic text of the INA,[337] enormous cracks in the infrastructure of this critical task,[338] and the declining role of bipartisanship in the national political venues.[339]

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[333] *See Interpretations*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/ilink/docView/SLB/HTML/SLB/itp.html (last visited Dec. 6, 2012).

[334] *See, e.g.*, *infra* note 355 (introducing articles regarding recent scholarship in immigration law and policy).

[335] *See, e.g.*, Stanley Renshon, *A Statement of Principles for American NGOs Dealing with Immigrant Assimilation*, CENTER FOR IMMIGR. STUD. (Feb. 18, 2011), http://cis.org/renshon/assimilation-principles-for-ngos.

[336] 457 U.S. 202 (1982). *See generally* MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND: PLYLER V. DOE AND THE EDUCATION OF UNDOCUMENTED SCHOOL CHILDREN (2012); Michael A. Olivas, Plyler v. Doe*, the Education of Undocumented Children, and the Polity*, *in* IMMIGRATION STORIES 197 (David Martin & Peter Schuck eds., 2005).

[337] *See, e.g.*, Mary Kenney, *Practice Advisory, Federal Court Jurisdiction Over Discretionary Decisions After Real ID: Mandamus, Other Affirmative Suits and Petitions for Review*, AM. IMMIGR. L. FOUND. (Apr. 5, 2006), http://ailF.org/lac/pa/realid_update_040506.pdf (providing an example of changes made to INA).

[338] *See generally* Marquez & Witte, *supra* note 4 (describing potential problems with the passage of immigration reform).

[339] *See generally* Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273 (2011) (discussing the causes of the declining role of bipartisanship in America).

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, fueled by opportunists at both extremes and, especially by what I believe to be anti-Mexican and anti-Latino prejudice.[340] 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?[341] When white thugs on Long Island go "beaner-hopping" to wreak harm on Mexicans, whom they ascribe as low-caste, threatening, illegal lawbreakers, and instead beat Marcelo Lucero to death, mistaking this lawful permanent resident Ecuadorian for an undocumented immigrant,[342] or when nationally prominent presidential candidates can urge electrification of border fences to turn back the undocumented,[343] our discourse and actions have regressed to a vile and demonstrably dangerous point.

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[340] *See, e.g.*, LEO R. CHAVEZ, THE LATINO THREAT (2008); Michael A. Olivas, *Review Essay—The Arc of Triumph and the Agony of Defeat: Mexican Americans and the Law*, 60 J. LEGAL 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 U.C. DAVIS L. REV. 101, 110–16 (2011) (citing examples of anti-Mexican prejudice); 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); *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/; Waslin, *supra* note 316.

[341] *See generally* GLOBAL CONNECTIONS AND LOCAL RECEPTIONS (Fran Ansley & Jon Shefner eds., 2009) (describing the slow but sure Latinization of the U.S. South); 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 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. Alabama, Nos. 11-14532, 11-14674 (11th Cir. Aug. 20, 2012); *see also* 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*, EDUC. WEEK, Oct. 7, 2011, http://www.edweek.org/ew/articles/2011/10/07/07immigrants_ep.h31.html?tkn=PYUFzInKyaZ6KBG4Ol8PIZoga5o8WkenO%2Bas&intc=es; Olivas, *supra* note 23.

[342] *See Articles About Marcelo Lucero*, N.Y. TIMES, http://topics.nytimes.com/topics/reference/timestopics/people/l/marcelo_lucero/index.html (last updated June 4, 2010); *see also Not in Our Town: Light in the Darkness* (PBS 2011), *available at* http://video.pbs.org/program/not-our-town-light-darkness/ (providing fuller coverage of the murder and the trial).

[343] Nia-Malika Henderson, *Herman Cain Meets with Sheriff Joe Arpaio, Stands by Electric Border Fence Comments*, WASH. POST (Oct. 18, 2011, 1:38 PM), http://www.washingtonpost

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 affecting millions of persons, no matter how much reform comes, it will likely be impossible to deal satisfactorily with them, whether one is an accommodationist or a restrictionist, and no matter what regime is adopted. I personally prefer a strong administration, one that is being thoughtful and resolute about applying the discretionary tools available to its enforcement officers, especially as this discretion is likely to survive across political upheavals, administrations, administrative styles, changing populations and their personal circumstances, and varying financial and political resources. I would prefer that Article III judges not have biases and that they hold administrative and regulatory decisionmakers accountable in a fair fashion. And I would prefer a rollback of the various unsuccessful fixes we placed upon the system in the overreaction that was the 1996 immigration statutes. No matter how successful ICE is in awarding a small number of DA determinations, the increased efficiency is welcome but illusory. That system has broken irretrievably,[344] and we should say so. And we should fix it.

No amount of DA or PD 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;[345] availability of waivers for certain LPRs, and elimination of the bars to reentry;[346] statutory waivers of relief from removal that have been rendered inoperable;[347] reconstitution of the draconian criteria and features of "unlawful

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.com/blogs/election-2012/post/herman-cain-meets-with-sherriff-joe-arpaio-stands-by-electric-border-fence/2011/10/18/gIQAju5luL_blog.html.

[344] *See generally* Olivas, *supra* note 211.

[345] Bernard Trujillo, *Immigrant Visa Distribution: The Case of México*, 2000 WIS. L. REV. 713.

[346] 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 (three-year bar) renders inadmissible for three years those aliens who were unlawfully present for more than 180 days but less than one 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 (ten-year bar) renders inadmissible an alien who was unlawfully present for one year or more, and who seeks again admission within ten years of the date of the alien's departure or removal from the United States. *See* 8 U.S.C. § 1182 (2006). Although the three- and ten-year bars may be waived pursuant to Section 212(a)(9)(B)(v), this discretion is not often exercised. *Id.*

[347] *Immigration Benefits in EOIR Removal Proceedings*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov (search USCIS for "EOIR removal proceedings"; then follow

presence," "entry," "admission," and "aggravated" felonies and "crimes involving moral turpitude";[348] reasonable bond, release, and detention practices;[349] the essential provisions for a fair amount of judicial review;[350] and reconsideration of the various caps and quotas that have resulted in waiting queues of nearly twenty years in some instances.[351] 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,[352] and similar recommendations made by the 2011 Ombudsman.[353] And I would make PD policy into a firmer practice by submitting it to the Federal Register for notice and comment. These features have been in effect since the 1970s,[354] 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 of 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*.[355] I realize that openness and transparency

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Immigration Benefits in EOIR Removal Proceedings hyperlink) (last visited Dec. 6, 2012). For a comprehensive summary of the complexity of these various relief provisions, see IRENE SCHARF, DAGMAR BUTTE, SHIRLEY SADJADI, & CORA D. TEKACH, THE WAIVERS BOOK (2011).

[348] *See generally* NORTON TOOBY & JENNIFER N. FOSTER, CRIMES OF MORAL TURPITUDE (2002); 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, 957–58 (2006) (tracing CIMT to Immigration Act of 1891); 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).

[349] *See, e.g.*, Margaret H. Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149 (2004).

[350] *See, e.g.*, Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 73 BROOK. L. REV. 467 (2008); Lenni B. Benson, *You Can't Get There from Here: Managing Judicial Review of Immigration Cases*, 2007 U. CHI. LEGAL F. 405.

[351] Trujillo, *supra* note 345; *see* Peter H. Schuck, *Morality of Immigration Policy*, 45 SAN DIEGO L. REV. 865, 878–83 (2008) (explaining another approach and useful summary of the various arguments used to support various queuing policies and theories).

[352] *USCIS Responses to CISO Recommendations, CIS Ombudsman Annual Report 2007*, IMMIHELP (Jan. 2008), http://immihelp.com/articles/2008/USCISO_Recommend_Response_2007_FINAL_OMB_cleared.pdf.

[353] Memorandum from Alejandro N. Mayorkas, Dir. USCIS, to January Contreras, CIS Ombudsman, on USCIS Response to Formal Recommendation 48, Deferred Action (Oct. 27, 2011), *available at* http://www.uscis.gov/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Formal%20Recommendations/cisomb-2011-response-48.pdf.

[354] *See, e.g.*, Abrams, *supra* note 182 (discussing PD in an article published in 1971).

[355] 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

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 of 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.[356] 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.[357] He is largely correct in his careful parsing of the problems.[358] I fear that in not heeding his strong warnings here, I will not learn the lessons he has prophetically taught over the years.[359] 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 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 DA and the levers of power—that is, not fully engaging or exercising what social observer James Fallows sagely calls the

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HOUS. L. REV. 11 (2008); *see also* John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of* INS v. Ventura, 18 GEO. IMMIGR. L.J. 605 (2008) (giving 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).

[356] *See* Johnson, *supra* note 355.

[357] *Id.*

[358] *See id.*; 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 Section 287(g) agreements and Secure Communities and deeming it to be "fundamentally reactive").

[359] *See generally* Johnson, *supra* note 355; Johnson & Trujillo, *supra* note 79.

"decision-making muscle."[360] 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.[361] 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.

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[360] *See* Fallows, *supra* note 55. President Obama predicted he will accomplish significant immigration reform in his second term, should he be reelected. *See* 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#.UEDKmtZITia. Vamos a ver (We shall see).

[361] 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.*, Ben Winograd, *STARS Act Highlights Potential Pitfalls of Rubio DREAM Proposal*, IMMIGR. IMPACT (June 1, 2012), http://immigrationimpact.com/2012/06/01/stars-act-highlights-potential-pitfalls-of-rubio-dream-proposal/; *A Comparison of the DREAM Act and Other Proposals for Undocumented Youth*, IMMIGR. POL'Y CENTER (2012), http://www.immigrationpolicy.org/sites/default/files/docs/dream_comparison_060112.pdf.

POSTSCRIPT: RECENT DEVELOPMENTS (EFFECTIVE, SEPTEMBER 10, 2012)

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

I. UNDOCUMENTED LAW STUDENTS AND UNDOCUMENTED LAWYERS

In the spring of 2012, the state supreme courts in Florida and California considered two unprecedented requests from their bar licensing authorities: would federal and state law allow them to admit undocumented law students to the practice of law in their states? By July 15, 2012, both state bars had formal legal requests before their highest courts, asking for permission to admit the graduates, both of whom had passed the required bar exams and navigated the moral character and fitness provisions and other bar criteria.[362] In both instances, the graduates had been brought to the United States by their parents, and both had attended state K–12 schools, college, and law school.[363] Somewhat caught off guard by the questions of first impression, both courts requested amici to submit briefs on the issues that were raised. On May 16, 2012, for example, the California State Supreme Court issued the following order:

> The California Supreme Court today unanimously issued an order directing the Committee of Bar Examiners of the State Bar

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[362] *See* Miranda Leitsinger, *California Bar: Illegal Immigrant Should Get Law License*, NBC NEWS (June 19, 2012), http://usnews.nbcnews.com/_news/2012/06/19/12298380-california-bar-illegal-immigrant-should-get-law-license?lite.

[363] Don J. DeBenedictis, *Hard Questions on Undocumented Bar Applicant*, L.A. DAILY J., May 18, 2012, at 5; Don J. DeBenedictis, *Undocumented Bar Hopeful Has Many Friends*, L.A. DAILY J., July 19, 2012, at 1; Ben Winograd, *Courts Weigh Issuance of Law Licenses to Undocumented Attorneys*, IMMIGR. IMPACT (Aug. 10, 2012), http://immigrationimpact.com/2012/08/10/courts-weigh-issuance-of-law-licenses-to-undocumented-attorneys; Policy Ctr., *Young, Professional DREAMers Deserve Recognition*, IMMIGR. IMPACT (Apr. 19, 2012), http://immigrationimpact.com/2012/04/19/young-professional-dreamers-deserve-recognition/.

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

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

The Supreme Court's order directs the Committee of Bar Examiners and Garcia to file opening briefs in support of the Committee's motion by June 18, 2012, and invites others to file amicus curiae briefs in the Supreme Court, either in support of or in opposition to the motion. In particular, the order invites amicus participation by the Attorneys General of California and the United States.

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

"1. Does 8 U.S.C. section 1621, subdivision (c) apply and preclude this court's admission of an undocumented immigrant to the State Bar of California? Does any other statute, regulation, or authority preclude the admission?
"2. Is there any state legislation that provides—as specifically authorized by 8 U.S.C. section 1621, subdivision (d)—that undocumented immigrants are eligible for professional licenses in fields such as law, medicine, or other professions, and, if not, what significance, if any, should be given to the absence of such legislation?
"3. Does the issuance of a license to practice law impliedly represent that the licensee may be legally employed as an attorney?
"4. If licensed, what are the legal and public policy limitations, if any, on an undocumented immigrant's ability to practice law?
"5. What, if any, other concerns arise with a grant of this application?"[364]

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[364] *See* News Release, Cal. Courts, California Supreme Court To Decide Whether Undocumented Immigrant May Be Admitted to the California State Bar (May 16, 2012), *available at* http://www.courts.ca.gov/documents/oc12-May_16SC.pdf; *see also* Maura Dolan, *Court Takes up Bid of Illegal Immigrant to Be Attorney*, L.A. TIMES, May 17, 2012, at LATEXTRA 1 (correction appended substituting "moral examination" for erroneous "oral examination" in *For the Record*, L.A. TIMES, May 18, 2012, at A4).

Similarly, in Florida, four former ABA presidents filed an action with the Florida Supreme Court, seeking to determine whether or not their undocumented client (who has passed the Florida bar examination) could be admitted to the State Bar.[365] At first, the Florida Board of Bar Examiners had denied the applicant's application, but still sought clarification about its authority from the court.[366] Following President Barack Obama's announcement of a new policy on DA and the use of his PD, it appeared that the candidate's unlawful status in the U.S. would be reconstituted so that he would no longer accrue unlawful presence.[367] Therefore, the Florida Board ruled in August 2012, that under the new guidelines, the candidate appeared to qualify for a law license, but it still wanted an advisory opinion from the state Supreme Court about his immigration status and its effect upon licensing before making a final decision.[368] This brought the Florida matter to exactly the same posture as that pending in California—two state authorities seeking clarification of the legal authority to allow the graduates to be licensed, with positive recommendations from both bars. This issue is pending in September 2012.

The new Deferred Action for Childhood Arrivals (DACA) policy by the President will also guarantee that more undocumented students will not only surface and work their way through the pipeline (another is awaiting developments in New York, and more are in the DACA application process), but the permission to gain employment authorization will affect their applications as well. The California law school deans collectively prepared and submitted a brief in the California matter, as did immigration law professors, indicating that there is a substantial stake in this issue for legal educators and the lawyer establishment.[369] Virtually all of the California regional and

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[365] Rafael A. Olmeda, *Illegal Immigrant Seeks Admission to Florida Bar*, SUN-SENTINEL, Apr. 15, 2012, http://articles.sun-sentinel.com/2012-04-15/news/Fl-illegal-immigrant-lawyer-20120415_1_immigration-status-william-gheen-americans-for-legal-immigration.

[366] David Royse, *Bar Says Illegal Immigrant Qualifies*, SUN-SENTINEL (Fort Lauderdale, Fla.), Aug, 13, 2012, at 4B.

[367] David Royse, *Florida Bar: Immigrant Not Disqualified from Practicing Law*, MIAMI HERALD, Aug. 11, 2012, http://www.miamiherald.com/2012/08/09/2947363/florida-bar-immigrant-not-disqualify.html.

[368] Royse, *supra* note 366, at 4B. In October 2012, an undocumented law school graduate in New York took and passed the bar, applied for DACA, and has sought membership in the New York Bar. *See* Roque Planas, *Cesar Vargas, Undocumented Immigrant, Applies To Practice Law in New York*, HUFFINGTON POST (Oct. 23, 2012), http://www.huffingtonpost.com/2012/10/23/cesar-vargas-undocumented-lawyer-new-york_n_2003454.html.

[369] *See* Application for Leave to File Brief Amici Curiae in Support of Applicant; Brief Amici Curiae of Seven California Law School Deans in Support of Applicant, *In re* Garcia, Bar Misc. 4186, S202512 (Cal. 2012). Copies of all the briefs and other materials on this subject have been archived at http://www.law.uh.edu/ihelg. Full disclosure: I assisted in drafting the Immigration Law Professors brief, archived at http://www.law.uh.edu/ihelg (with ReedSmith, LLP). *See* Application for Permission to File and Proposed Amicus Curiae Brief in Support of Applicant Sergio C. Garcia and the Committee of Examiners of the State Bar of California, *In re* Garcia, Bar Misc. 4186, S202512 (Cal. 2012).

specialized bar associations, chief among them the State Bar, submitted careful briefs in favor of the petitioner, also revealing the deep and broad interest and support for his admission to their Bar.[370] Finally, licensing in other professional fields will be affected, as there will now be undocumented graduates applying for teaching certificates, psychologist licenses, and licenses in medicine, engineering, architecture, pharmacy, and many other related fields.[371] In this sense, the law license issue has been the lead runner in the marathon, but other fields will also be in this same situation.

II. CASES INVOLVING CITIZENS, RESIDENCY REQUIREMENTS, AND TUITION BENEFITS/STATUS

A number of cases challenging the various state laws concerning in-state tuition requirements have been filed by restrictionist advocates, and as of September 2012, none had prevailed, falling short either on civil procedure grounds (that is, the plaintiffs had not been harmed by someone else receiving the lower, in-state tuition—so they could not be provided a remedy in law)[372] or, as in the important 2010 *Martinez v. Board of Regents*[373] case, the state statute was upheld as a legitimate state policy.[374] In another higher education immigration/residency case that occurred in California during this time period, a number of immigrant organizations filed suit in November 2006 to challenge California's postsecondary residency and financial aid provisions in *Student Advocates for Higher Education v. Board of Trustees*.[375] Citizen students with undocumented parents were being prevented from receiving the tuition and financial aid benefits due to them, at least in part because the California statute was not precisely drawn (or was being imperfectly administered).[376] The challenge highlights several overlapping policies: immigration, financial aid independence/dependence upon parents, and the age of majority/domicile. The state agreed to discontinue the practice, and entered into a consent decree, resolving the matter in the plaintiffs' favor.[377] The order overturned California State University's odd and likely unconstitutional take

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[370] The Department of Justice filed a brief against admitting Garcia to the California bar. *See* Application and Proposed Brief for Amicus Curiae the United States of America, *In re* Garcia, Bar Misc. 4186, S202512 (Cal. 2012).

[371] Gosia Wozniacka, *Illegal Immigrants Find Paths to College, Careers*, ASSOCIATED PRESS, May 26, 2012, http://bigstory.ap.org/content/illegal-immigrants-find-paths-college-careers.

[372] *See, e.g.*, Day v. Sebelius, 376 F. Supp. 2d. 1022, 1033–34 (D. Kan. 2005), *aff'd sub. nom.* Day v. Bond, 500 F.3d 1127 (10th Cir. 2007).

[373] 241 P.3d 855 (Cal. 2010).

[374] *Id.* at 855.

[375] No. CPF-06-506755 (Cal. Super. Ct. Apr. 19, 2007). *See generally* Michael A. Olivas, *Undocumented College Students, Taxation, and Financial Aid: A Technical Note*, 32 REV. HIGHER EDUC. 407 (2009) (chronicling various state residency and financial aid provisions).

[376] Consent Decree, Student Advocates for Higher Educ. v. Bd. of Trs., No. CPF-06-506755 (Cal. Super. Ct. Apr. 19, 2007).

[377] *Id.*

on undocumented college student residency—that a citizen, majority-age college student with undocumented parents, was not able to take advantage of the California statute according the undocumented in-state residence, even if the student were otherwise eligible.

Rulings such as these have been made a virtue of necessity, inasmuch as citizen children (whether birthright or naturalized) who reach the age of majority by operation of law establish their own domicile, so that their parents' undocumented status is irrelevant to the ability of the children to establish residency. In *A.Z. ex rel B.Z. v. Higher Education Student Assistance Authority*,[378] a New Jersey appeals court ruled that a similar program in the state (the Tuition Assistance Grant or TAG) could not withhold the grants from citizen children whose parents were undocumented:

> Given our determination that A.Z. is the intended TAG recipient and that she meets the residency and domicile requirements independently of her mother, we need not determine B.Z.'s legal residence or domicile nor review HESAA's conclusion that B.Z. lacks the capacity to become a legal resident or domiciliary of New Jersey. We note, however, substantial authority supporting the proposition that a person's federal immigration status does not necessarily bar a person from becoming a domiciliary of a state.
>
> In sum, A.Z. is the intended recipient of a TAG. She is a citizen. The record also supports that she is a legal resident of, and domiciled in, New Jersey, based upon her lengthy and continuous residence here. To the extent the agency's 2005 regulation irrebuttably established that a dependent student's legal residence or domicile is that of his or her parents, it is void. Therefore, HESAA erred in denying A.Z. a TAG.[379]

The latest instance of such a restriction upon birthright citizens was discovered in Florida, when the *Ruiz v. Robinson*[380] case, filed in 2011, challenged a similar practice in the state. The state regulation denied resident tuition to U.S. citizen children whose parents were undocumented, as the New Jersey and California practices had done for state financial aid. On August 31, 2012, the federal court in Florida struck down this statute.[381]

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[378] 48 A.3d 1151 (N.J. Super. Ct. App. Div. 2012).

[379] *Id.* at 1159 (citations omitted); *see also* Carlos Avila, *Court: American-Born Student Wrongfully Denied State Tuition Assistance*, TRENTONIAN, Aug. 9, 2012, http://www.trentonian.com/article/20120809/NEWS01/120809724/court-american-born-student-wrongfully-denied-state-tuition-assistance.

[380] No. 11-cv-23776-KMM, 2012 U.S. Dist. LEXIS 124209 (S.D. Fla. Aug. 31, 2012).

[381] *Id.* at 1–2; *see also* Michael R. Vasquez, *Suit: Some Born Here Denied In-State Tuition*, MIAMI HERALD, Oct. 20, 2011, at 6B; Jay Weaver, *Judge: Fla. Rule on Tuition Flouts Constitution*, MIAMI HERALD, Sept. 5, 2012, at 1A.

III. PROSECUTORIAL DISCRETION AND DEFERRED ACTION IN 2012

One might usefully ask: Can the DREAM Act pass as a standalone bill, if at all, or must it be a part of a larger legislative strategy? President Barack Obama determined that he would find executive authority to address the inchoate and marginal status where these students found themselves, and in summer of 2011, within six months of the failure of the DREAM Act to attract the required sixty votes, his Administration indicated it would simply assign low enforcement priority to DREAMers, and would not remove or deport them if they were caught in the immigration enforcement mechanism, unless they had criminal records or other disqualifying characteristics.[382] In June 2011, in a series of detailed "Morton" memoranda, the Administration rolled out a series of reviews of all the 400,000 persons then in immigration proceedings, and began closing the removal cases and granting two year stays and possible employment authorization (permission for the DREAMers, certifying them to work without violating federal law).[383]

The review, which had seemed so promising, was underwhelming by any measure. The Obama Administration had begun the most aggressive enforcement in U.S. history, militarizing the border, building the futile fence that is supposed to deter unauthorized entry, and removing over 400,000 persons in 2011, more than any recent presidency.[384] In addition, the reset of DA was used more sparingly than had been the case in President George Bush's presidency.[385] Yet, even with these demonstrable enforcement priorities and results, congressional restrictionists were not satisfied and would not acknowledge the metrics of immigration enforcement, as the stated predicate for what everyone knew was needed, comprehensive immigration reform of one sort or another, to regularize the flow, to reorganize the complicated and unsuccessful employment provisions (especially those designed for short-term high-skilled work) and to provide some tradeoff for increased legal immigration: a pathway to eventual legalization or "amnesty," perhaps along the lines of the last such program, that of the Immigration Reform and Control Act of 1986 (IRCA) legalization provisions. The data have not been transparent or easily available, but the preliminary figures revealed fewer than 2% of the test-case reviews for DA led to closed cases, and only 54% of those fortunate few were given permission to work—and these were considered the easy, most deserving, "low-hanging fruit"—and while their removals were temporarily stayed, they received no benefits, remained ineligible for most forms of relief, and

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[382] *Dream Act Students Won't Be Deportation Targets, Officials Say*, L.A. TIMES BLOG (Aug. 18, 2011, 12:57 PM), http://latimesblogs.latimes.com/lanow/2011/08/dream-act-students-not-targeted-for-deportatiom.html.

[383] *See generally* Wadhia, *supra* note 128, 11–15; Shoba Sivaprasad Wadhia, *The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions*, 13 HARV. LATINO L. REV. (forthcoming 2013).

[384] Lind, *supra* note 131.

[385] *Id.*

were, in many respects, no better off than before. Fewer than 300 of these closed cases were DREAM Act–eligible students.[386] They were now known to the government, yet had no hope of any reconstitution of their unlawful status.

Worse, a number of DREAMers had become frustrated by the legislative failures, and with no futures, they began to "out" themselves in a longstanding United States protest tradition and civil rights argot.[387] While their status may have been characterized as a low priority for removal, this public revelation of their status had the practical effect of putting their undocumented families at risk, and in the increased removal regime, they were less well off than they had been before.[388] And in the difficult thermodynamics of immigration, the conservative restrictionists howled, and all the competing GOP presidential candidates in an election year, vied with each other to see who could be the most nativist, build (or electrify) the biggest fence, or engage in the harshest rhetoric. The only exception was the hapless Texas Governor Rick Perry, whose having signed the state's DREAM Act legislation twice made him the piñata of the group.[389]

Tens of thousands of undocumented students are making their way through college without federal financial support and with little state financial aid available.[390] Yet they persist—only to find that they cannot accept employment or enter the professions for which they have trained. Thus, cases of undocumented law school graduates who have passed the bar are surfacing in California, Florida, and New York, and more will surface soon enough concerning lawyers, doctors, teachers, psychologists, and other licensed professionals, as more and more unauthorized students graduate from college. Seeing this brick wall, a number of immigration law professors drafted and circulated a letter to the president, calling upon him to use the administrative discretion available to him, in lieu of any likely legislative reform of immigration policy right now, to help undocumented college students who find themselves in the worst of all possible worlds.[391] It appears that President Obama listened, and in June 2012,

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[386] *See* Legal Action Ctr. & Alonzo, *supra* note 146; *see also* Susman Letter, *supra* note 264.

[387] Janell Ross, *Dream Act Activists Push Into Mainstream with American Protest Movement Tactics*, HUFFINGTON POST (Aug. 21, 2012), http://www.huffingtonpost.com/2012/08/21/dream-act-activists-protest-tactcics_n_1813273.html.

[388] *See generally* Adeshina Emmanuel, *Illegal Immigrants See Opportunity in New Rule*, N.Y. TIMES, Aug. 10, 2012, at A9; Gomez, *supra* note 287, at 3A; Renee C. Redman, *Sorting Out ICE's Prosecutorial Discretion Program; Authorities Consult List of Factors in Making Deportation Decisions*, CONN. L. TRIB., Jan. 30, 2012, at 16.

[389] Philip Rucker, *Rick Perry Says His Remarks on Immigration Were 'Inappropriate,'* WASH. POST, Sept. 28, 2011, http://www.washingtonpost.com/politics/rick-perry-says-his-remarks-on-immigration-wereinappropriate/2011/09/28/gIQAr25t5K_story.html?wpsrc=AG0002765&keyword=_inurl:washingtonpost.com/politics&cre=10454304550&g=1.

[390] *See* Emmanuel, *supra* note 388, at A9.

[391] Ben Winograd, *President Obama to Halt Removal of DREAMers*, IMMIGR. IMPACT (June 15, 2012), http://immigrationimpact.com/2012/06/15/president-obama-to-halt-removal-of-dreamers.

he announced an even more expansive DA policy for DREAMers, which is still in the first phase of implementation.[392]

On the thirtieth anniversary of *Plyler v. Doe*—the 1982 case in which the U.S. Supreme Court ruled that states could not deny funds for the education of children of unauthorized immigrants[393]—the President announced a halt to the deportation of some undocumented immigrants who came to the United States as children and have graduated from high school and served in the military.[394] Unfortunately, despite the excitement—and outrage from President Obama's Republican opponents—it is not the stalled DREAM Act, which would have created a path to citizenship for some immigrants who came to the United States as children and have been admitted to college or registered under the Selective Service Act. The President's decision, which uses existing PD, gives both too much (if one listens to those who would restrict immigration) and, others believe, far too little. While drawing positive attention to hardworking and law-abiding undocumented immigrants is a good thing, both God and the Devil reside in the details. As a practical matter, those who oppose easing their path are likely to resist any substantive change. Governor Mitt Romney has indicated his determination to veto any version of the DREAM Act, and the 2012 GOP platform urges deportation of these students.[395]

In reality, the President's adoption of a DA policy is, to a great extent, old wine in a new wineskin. The policy does not grant legal-residency status, as the DREAM Act would, but only defers deportation for a renewable two-year period.[396] Announcing the policy shows new political will, but it does not change existing law or expand available discretion. Forms of PD, including DA, have been available for many years (originating in the John Lennon deportation case, in the early 1970s);[397] nothing substantive has been added to existing authority. Indeed, in the Morton Memorandum of June 2011, the government announced that it would focus on deporting known criminals

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[392] Helene Cooper & Tripp Gabriel, *Obama's Announcement Seizes Initiative and Puts Pressure on Romney*, N.Y. TIMES, June 16, 2012, at A16.

[393] Plyler v. Doe, 457 U.S. 202 (1982).

[394] Teresa Watanabe & Esmeralda Bermudez, *For Immigrants' Rights Activists, Battle Continues*, L.A. TIMES, June 17, 2012, at A1.

[395] *Immigration Highlights from the Republican and Democratic Party Platforms, AILA InfoNet Doc. No. 12090541*, AILA INFONET (Sept. 5, 2012), http://www.aila.org/content/default.aspx?docid=41168&utm_source=AILA+Mailing&utm_campaign=fed6621cb6-AILA8_9_5_12&utm_medium=email; Julia Preston, *Republican Immigration Platform Backs 'Self-Deportation,'* N.Y. TIMES (Aug. 23, 2012, 10:46 AM), http://thecaucus.blogs.nytimes.com/2012/08/23/republican-immigration-platform-backs-self-deportation/?emc=eta1.

[396] *See* Ross, *supra* note 387.

[397] Leon Wildes, The United States Immigration Service v. John Lennon: *The Cultural Lag*, 40 BROOK. L. REV. 279, 285–86, 312–13 n.192 (1974). Wildes was Lennon's lawyer in this case, and has written authoritatively about the larger issue of PD. *See generally* Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Cases*, 41 SAN DIEGO L. REV. 819 (2004).

and urged prosecutors to use their discretion in considering the cases of students who would qualify for the DREAM Act.[398] Yet data from the DHS show that fewer than 300 such students have been granted administrative closure to this day—a remarkably small number, given their clear qualifications for approval.[399] While it is impossible to tell just how successful the review ordered by John Morton, Director of U.S. Immigration and Customs Enforcement, has been to this point—the government has made the data virtually impossible to gather and analyze in any systematic way—the program has been disappointing.[400] Bear in mind, too, that this administration removed and deported nearly 400,000 unauthorized immigrants in the previous year.[401] Even with those metrics, and the militarization of the U.S.-Mexico border, those who would further restrict immigration are not convinced that there has been enough enforcement. They adamantly oppose the president's new decision, and in August 2012, filed suit in federal court.[402]

What is clear is that very few (and certainly not all) of those being reviewed have received employment authorization with any reprieve they may have gotten. Their status is essentially frozen. The President's announcement continues the problem, since it indicates that permission to work will be determined on a case-by-case basis.[403] Of course, both under Morton rules and throughout U.S. immigration history, the right to work has been handed out only sparingly.[404] Most importantly, the review process in President Obama's plan is essentially designed to build on a process in place for those already in the machinery of deportation or removal. There is a new application procedure for DA and many details have yet to be determined.[405] DA is a vague

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[398] *See* Morton, PD with Civil Immigration, *supra* note 49.

[399] *See supra* note 386; *see also Case-by-Case Review and Administrative Closures, in ICE Case-by-Case Review Statistics, AILA InfoNet Doc. No. 12042756*, AILA INFONET (Apr. 27, 2012); *7.5 Pct of Deportations May Get Held*, *supra* note 272; Replogle, *supra* note 272.

[400] *See* Replogle, *supra* note 272.

[401] Elise Foley, *Obama Administration Sets Deportation Record*, HUFFINGTON POST (Oct. 18, 2011), http://huffingtonpost.com/2011/10/18/deportations/customs-remove-record-number_n_1018002.html?view=print&com_ref=false.

[402] Julia Preston, *Agents Sue Over Deportation Suspensions*, N.Y. TIMES, Aug. 24, 2012, at A17; Ben Winograd, *Why Kobach's Lawsuit Against Deferred Action Is Unlikely to Stand Up in Court*, IMMIGR. IMPACT (Aug. 24, 2012), http://immigrationimpact.com/2012/08/24/why-kobachs-lawsuit-against-deferred-action-is-unlikely-to-stand-up-in-court.

[403] *See generally Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/ (follow Consideration of Deferred Action for Childhood Arrivals Process hyperlink under "Humanitarian" section on USCIS main page) (last visited Dec. 6, 2012).

[404] *See* William R. Tamayo, *Do Immigrant Workers in the United States Have a Right to Earn a Living?*, 39 GUILD PRAC. 84, 85–86 (1982) (documenting various enactments of anti-alien legislation in the United States).

[405] *Undocumented Immigrants Won't Be Departed Based on Deferred Action Applications, Administration Says*, HUFFINGTON POST (last updated Aug. 4, 2012, 9:06 AM), http://www.huffingtonpost.com/2012/08/03/deferred-action-undocumented-immigrants_n_1738334.html?view=print&comm_ref=false.

and confusing process—and it will probably lead to unscrupulous *notarios* entering the picture.

Furthermore, students who reside in states where they cannot enroll in public colleges or where the states have no resident-tuition provisions for undocumented immigrants may not be able to raise a claim under this policy, because they will have been unable to enroll in college.[406] While a dozen states have laws granting some undocumented immigrants in-state tuition rates, most do not.[407] Even if the DREAM Act itself were to be enacted tomorrow by Congress, states would still have to pass laws to grant in-state tuition and financial aid to qualified students in the majority of states, or most of them would be unable to afford college.[408]

And some features of President Obama's policy are purely chimerical. The announcement refers to members of the military being "eligible" for this new relief, but undocumented adults cannot legally enlist under current law, nor can deferred-action grantees.[409] Such absurd promises undermine the real value of President Obama's announcement, which calls attention to the vexing issue of how to deal responsibly with the potential, and eventually likely, new members of our American community. One might add, but need not, that Administrations come and go, and that such initiatives can wax and wane. On this point, opponents and supporters of immigration reform can agree: The approach just announced cannot be the only way to resolve the impasse. The real question is: How can this complex issue be resolved in the current climate? Thirty years after the Supreme Court told us that undocumented immigrants deserve an education,[410] we have not resolved the impasse. DA is not nothing, but until its contours become clear and employment authorization documents (EADs) are extended to them, it is a political act of will and an expression of hope rather than immigration reform of any kind.[411]

Even if the tens of thousands of undocumented students currently enrolled in our colleges, and the many who have graduated and cannot use their education, do receive DA, they will still not find themselves on a pathway to permanent residence. Their chances of being deported may be reduced, but without employment authorization and

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[406] Yablon-Zug & Holley-Walker, *supra* note 286, at 433–34.

[407] Olivas, *supra* note 4, at 1764–65.

[408] *See* Yablon-Zug & Holley-Walker, *supra* note 286, at 433–34.

[409] Tracy Jan, *Policy Shift Will Have Little Impact on Military*, BOS. GLOBE, June 23, 2012, at A6.

[410] *See generally* Plyler v. Doe, 457 U.S. 202 (1981) (holding that a state statute authorizing school districts to deny undocumented immigrants access to education violated the Equal Protection Clause).

[411] *See generally* Adele Melander-Dayton, *Young Immigrants Cautioned to Apply for Deferred Action Program After Election*, SANTA FE NEW MEXICAN, Aug. 24, 2012, http://www.santafenewmexican.com/Local%20News/082512DeferredAction; Michael A. Olivas, *Obama's New Immigration Policy: Disappointment Is in the Details*, CHRON. HIGHER ED. (June 18, 2012), http://chronicle.com/article/Obamas-New-Immigration/132377 (describing DA as a "vague and confusing process").

a reasonable opportunity to regularize their status, they will still live in the shadows—with limited hope. Despite the uncertainty, hundreds of thousands of these DREAMers have begun the process of seeking DA and employment authorization. In major cities, the applicants lined up and applied by the hundreds of thousands, and paid their application fees (the means by which the program will be administered).[412] In the racial thermodynamics of the nativism in Arizona, which has persisted in its restrictionist efforts, Governor Jan Brewer enacted law that took place the day after the DA programs to be certain that Arizona benefits were still out of the reach of these students.[413] History may be on the side of the DREAMers, but they still find themselves in a cruel limbo not of their making, and with no clear way out of the thicket.

Within the first week of the DA program application, which began August 15, 2012, tens of thousands of these students surfaced.[414] By the Spring 2013 semester, the contours of the DA review process will be more evident, and, depending upon political circumstances, a number of the applicants will have received their DA status and will be newly eligible for certain benefits and legal status. Because they have had no such eligibility prior to the August 15, 2012, policy, the need for research and practice materials will be extremely high. As just some examples, consider the following issues that arose in the sixty-day period between the announcement of the revised DA policy and its implementation as a benefit for which the eligible students could apply.[415] Early contacts with would-be applicants surfaced many individual issues, likely to be ones that had to be dealt with, finessed, or give rise to exceptions or waivers.

These examples will give a sense of the complexity of adjudications: DA is a discretionary determination to defer removal action of an individual as an act of PD, in this case, for a two-year renewable period. Under current regulations, individuals whose cases have been deferred are eligible to receive employment authorization for the period of DA, provided he or she can demonstrate "an economic necessity for employment."[416] DHS can terminate or renew DA at any time at the agency's discretion.[417] On June 15, 2012, it was announced that certain people who came to the

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[412] *Deferred Action Immigration Event Draws Thousands of DREAMers on First Day*, HUFFINGTON POST (Aug. 16, 2012), http://huffingtonpost.com/2012/08/15/deferred-action-immigration_n_1785443.html?view=print&comm_ref=false. On the cost issues, see Michele Waslin, *Don't Jump to Conclusions About Costs of Deferred Action*, IMMIGR. IMPACT (July 25, 2012), http://immigrationimpact.com/2012/07/25/dont-jump-to-conclusions-about-costs-of-deferred-action/ (estimating the costs associated with DA at more than $585 million).

[413] *See Exec. Order No. 2012-06*, OFFICE OF ARIZ. GOVERNOR (Ariz. Aug. 15, 2012) http://azgovernor.gov/dms/upload/EO_081512_2012-06.pdf (setting out rules for DA and state benefits).

[414] *See supra* note 412.

[415] Prior to this, and under any other PD criteria, applicants could not apply for this status; only prosecutors or other immigration authorities could grant the status. *See* Morton, PD with Civil Immigration, *supra* note 49.

[416] 8 C.F.R. § 274a.12(c)(14) (2012).

[417] *See Consideration of Deferred Action for Childhood Arrivals Process*, *supra* note 403.

United States as children and met several key guidelines "may request consideration of DA for a period of two years, subject to renewal, and would then be eligible for work authorization."[418] Determinations will be made on a case-by-case basis under the DA guidelines.[419] Cases that are likely to have arisen widely include: eligibility for employment authorization, possible only if the applicants can demonstrate an "economic necessity for employment," necessitating income and expense estimates; eligibility if the applicant is already in removal proceedings, has a final removal order, or has a voluntary departure order (these applicants will not receive DA from USCIS, but there are alternative procedures available through ICE); if awarded DA, will any unlawful presence accrue during the two period of DA (no); not being in "unlawful presence" and being awarded DA may allow them to be eligible for resident tuition or other benefits, such as driver's licenses or resident tuition (except in states where special rules were passed to preclude this scenario, as in Arizona); anyone too old to qualify may have another form of PD available (but not under DACA guidelines); eligibility will turn on meeting the durational requirements, with no more than a "brief, casual, and innocent" time outside the United States; decisions on what will constitute "non-significant misdemeanors" that will count towards the "three or more non-significant misdemeanors" rules, not including minor traffic offenses; many judgment calls will be made by the adjudicators, including issues of the criminal criteria, enrollment status, fraud provisions, privacy considerations, expunction experiences, and the like; licensing and cooperative work issues will have to be determined according to applicable state law, such as bar admissions rules, teacher licensing authorities, psychologist certification authorities, or medical boards. The federal government has made it clear that they will not be eligible for additional federal benefits, such as health care.[420] Each DA applicant's history will be considered along with other facts to determine whether, under the totality of the circumstances and on a case-by-case basis, he or she will be granted PD.[421]

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[418] *Id.*

[419] *Id.*

[420] *See* Elise Foley, *Affordable Care Act Won't Apply to Immigrants Granted Deferred Action*, HUFFINGTON POST (Aug. 31, 2012), http://www.huffingtonpost.com/2012/08/31/affordable-care-act-immigrants-deferred-action_n_1846485.html?view=print&comm_ref=false. An amazing amount of technical assistance and administrative guidance has surfaced, both by the federal government and by NGO and community organizations. For the former, see Policy Guidance Letter from Center for Medicaid and CHIP Services to State Health Officials and Medicaid Directors (Aug. 28, 2012), *available at* http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/SHO-12-002.pdf. Federal Register notice of the amendment to interim final rule regarding the Pre-Existing Condition Insurance Plan Program is available at 77 Fed. Reg. 52614 (Aug. 30, 2012) (to be codified at 45 C.F.R. § 152). For examples of the information provided by advocates, see generally http://www.nilc.org and http://www.aila.org.

[421] Early discussions with DHS revealed that its current internal goals for processing of DACA requests were that it would likely take "[f]our to six months average processing time for the initial group of DACA deferred action requests. DHS anticipates that this timing may

The first part of this project was current when I submitted it, and by means of this Postscript, I have now brought it up to date with these surprising and serious developments. I have two long-term projects where timeliness and currency are far less important: one involves a New Mexican priest who began a seminary and law school in what is now Taos, New Mexico in the 1830s,[422] while another is a book project about an early Tejano lawyer who figured prominently in early twentieth century Texas cases and civil rights history.[423] There are no recent or current developments in these matters, which is a good thing.

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slow down as the volume picks up." *See DHS Advises On Various DACA Process Questions, AILA InfoNet Doc. No. 12090747*, AILA INFONET (Sept. 7, 2012), http://www.aila.org/content/default.aspx?docid=41217&utm_source=AILA+Mailing&utm_campaign=d9db041971-AILA8_9_10_12&utm_medium=email.

[422] *See* Michael A. Olivas, *Reflections Upon Old Books, Reading Rooms, and Making History*, 76 UMKC L. REV. 811 (2008).

[423] MICHAEL A. OLIVAS, "IN DEFENSE OF MY PEOPLE": ALONSO S. PERALES AND THE DEVELOPMENT OF MEXICAN-AMERICAN PUBLIC INTELLECTUALS (forthcoming 2013). The DACA program is nothing short of a modern day miracle—announced in June 2012, set in place sixty days later, and clearing or almost clearing applicants a month later. With EAD, these DACA recipients will have substantially improved life trajectories. I cannot imagine another program (one that is very complex and detailed for the individuals and the government) getting off to such a flying start. That they are doing so without the full support of staff makes it even more remarkable, in my view. As this article reveals, I am usually the first in line to be critical of this agency, but I give credit where it is due. For early appraisals of the complexities, see Brian Bennett, *First Work Permits Sent to Illegal Immigrants; More than 72,000 Have Applied To Avoid Deportation Under a New Obama Program*, L.A. TIMES, Sept. 13, 2012, at A12 (problems with Los Angeles–area school districts being able to keep up with documentation requests) and Julia Preston, *A Flood of Applications, With a Trickle of Approvals*, N.Y. TIMES, Sept. 28, 2012, at A21 (citing problems that have arisen and progress at the one-month mark). Most importantly for this narrative, the November 2012 election results were such that DACA will live for another day. *See* Jeff Zeleny & Jim Rutenberg, *Obama's Night: Tops Romney For 2nd Term In Bruising Run; Democrats Turn Back G.O.P Bid For Senate: Still Facing Challenge of a Deeply Divided Country*, N.Y. TIMES, Nov. 7, 2012, at A1.