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# Discretionary Reform

## PROSECUTORIAL DISCRETION AS THE ONLY EFFECTIVE IMMIGRATION REFORM IN TODAY'S POLARIZED CONGRESS

### INTRODUCTION

Prosecutorial discretion is the authority vested in certain officers to select whom to charge and prosecute.<sup>1</sup> In response to a limitation on resources and overbearing caseloads, the government has authorized enforcement officers to refrain from using the full scope of their enforcement power.<sup>2</sup> As a result, enforcement discretion has been exercised upon certain individuals who may have redeeming qualities despite having violated a law.<sup>3</sup>

Although there is no statutory authority for prosecutorial discretion in the immigration law context, a series of agency statements have recognized its use.<sup>4</sup> Most recently, on June 15, 2012, Secretary of Homeland Security Janet Napolitano published a memorandum setting forth standards for exercising prosecutorial discretion for young immigrants who unintentionally violated immigration laws when they were brought to the U.S. as minors.<sup>5</sup> Pursuant to this memorandum, the Department of Homeland Security, through the United States Citizenship and Immigration Services (USCIS), began accepting applications for Consideration of Deferred Action for Childhood Arrivals (DACA) on August 15, 2012.<sup>6</sup> Secretary Napolitano's use of prosecutorial discretion in

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<sup>1</sup> BLACK'S LAW DICTIONARY 534 (9th ed. 2009).

<sup>2</sup> Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT'L L.J. 243, 244-45 (2010).

<sup>3</sup> *Id.* at 244.

<sup>4</sup> *Id.*

<sup>5</sup> Memorandum from Janet Napolitano, Secretary of Homeland Security, on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, 1 (June 15, 2012), [hereinafter Napolitano Memo], available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

<sup>6</sup> News Release, U.S. Citizenship and Immigration Services, USCIS Begins Accepting Requests for Consideration of Deferred Action for Childhood Arrivals (Aug. 15, 2013), available at <http://www.uscis.gov/news/uscis-begins-accepting-requests-consideration-deferred-action-childhood-arrivals>.

DACA is a natural outgrowth of the steady increase in the exercise of prosecutorial discretion within immigration agencies since 2000.<sup>7</sup>

The approval of prosecutorial discretion was a necessary response to Congress's failure to address the complex issues posed by the growing rate of illegal immigration in the United States, including the continued separation of loved ones from U.S. citizen family members,<sup>8</sup> the mandatory detention and deportation of criminal aliens,<sup>9</sup> and the validity of deporting productive young immigrants who have contributed to American society.<sup>10</sup> Congress has, thus far, failed to enact reform of any kind, such as in the refusal to pass the Development, Relief, and Education for Alien Minors (DREAM) Act in December 2010, versions of which have sought passage since 2001.<sup>11</sup> Legislative gridlock has prevented Congress from responding to this problem.<sup>12</sup>

Humanitarian interests should naturally be a part of the American discussion on immigration reform given the tragic circumstances that inform, and arguably compel, many immigrants' decision to come to the United States, with or without lawful status.<sup>13</sup> For example, asylum and refugee laws are an illustration of a deep-rooted belief in humanitarian aid in the immigration system.<sup>14</sup> In addition, policies with regard to

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<sup>7</sup> See generally Memorandum from Doris Meissner, Commissioner of Immigration and Naturalization Service, on Exercising Prosecutorial Discretion, 3 (Nov. 17, 2000), [hereinafter Meissner Memo], available at <http://www.scribd.com/doc/22092970/INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00>.

<sup>8</sup> Cindy Huang, *Family Separated by Immigration Woes, Waiting for Reform*, PBS NEWSHOUR (June 27, 2013), <http://www.pbs.org/newshour/rundown/2013/06/family-separated-by-immigration-bill-waiting-for-reform.html>.

<sup>9</sup> *US: Mandatory Deportation Laws Harm American Families*, HUMAN RIGHTS WATCH (July 18, 2007), <http://www.hrw.org/news/2007/07/17/us-mandatory-deportation-laws-harm-american-families>.

<sup>10</sup> See generally Katie Annand, *Still Waiting for the Dream: The Injustice of Punishing Undocumented Immigrant Students*, 59 HASTINGS L.J. 683 (2008).

<sup>11</sup> Development, Relief, and Education for Alien Minors ("DREAM") Act, S. 1291, 107th Cong. (2001); Naftali Bendavid, *Dream Act Fails in Senate*, WALL ST. J. (Dec. 19, 2010), <http://online.wsj.com/article/SB10001424052748704368004576027570843930428.html>; Carl Hulse, *Senate Democrats put 'Dream Act' on Hold*, N.Y. TIMES (Dec. 9, 2010), <http://thecaucus.blogs.nytimes.com/2010/12/09/senate-democrats-put-dream-act-on-hold/>.

<sup>12</sup> This is true in other areas of law as well; much of the dysfunction of our current immigration system is due to the inability of the leaders of this nation to come to terms with their political inconsistencies and differences. See Wadhia, *supra* note 2, at 298; see also *A Congress Too Polarized to Protect Itself*, BLOOMBERG NEWS (Oct. 25, 2012), <http://www.bloomberg.com/news/2012-10-25/a-congress-too-polarized-to-protect-itself.html>; see also *How Washington's Dysfunction Harms Economic Growth*, BLOOMBERG NEWS (Oct. 7, 2012), <http://www.bloomberg.com/news/2012-10-07/how-washington-s-dysfunction-harms-economic-growth.html>.

<sup>13</sup> See generally John J. Ammann, *No Need for Comprehensive Immigration Reform: The Incomplete Compassion of U.S. Immigration Policy*, 79 UMKC L. REV. 853, 854 (2011).

<sup>14</sup> 8 U.S.C. § 1158 (2012).

victims of domestic violence,<sup>15</sup> crimes,<sup>16</sup> or human trafficking<sup>17</sup> reinforce this concept. Many of these humanitarian reforms grant temporary relief but fail to provide immigrants with much-needed stability; very few of them provide permanent residence or a pathway to citizenship.<sup>18</sup> Even these humanitarian policies have a narrow scope and do not address the growing problem of illegal immigration to the United States.

Furthermore, the laws in place to prevent the growth of illegal immigration raise serious concerns for the undocumented immigrant population. The passage of both the Antiterrorism and Effective Death Penalty Act and the Illegal Immigrant Reform and Immigrant Responsibility Act in 1996 refocused the discourse on immigration reform to strengthen border enforcement procedures<sup>19</sup> and enacted mass mandatory detention and deportation of documented and undocumented immigrants with criminal convictions.<sup>20</sup> As a result, “[j]ust about any offense . . . could render the alien deportable.”<sup>21</sup> Therefore, the humanitarian-based compassion that had been exercised toward certain groups of immigrants<sup>22</sup> has not been applied to the estimated 11 million undocumented immigrants in the nation today.<sup>23</sup>

Today’s comprehensive immigration reform debate frequently ignores the real, human, and often very young, lives that are affected by these laws.<sup>24</sup> On the other hand, authorities

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<sup>15</sup> Violence Against Women and Department of Justice Reauthorization Act, Pub. L. No. 109-162, 119 Stat. 2960 (2000).

<sup>16</sup> Victims of Trafficking and Violence Protection Act, Pub. L. No. 106-386, 114 Stat. 1464-1491 (2000).

<sup>17</sup> *Id.* at 1491-1548 (2000).

<sup>18</sup> Getting a U or T visa, being granted asylum, or adjusting status under VAWA is very difficult. See generally Katherine L. Vaughns, *Taming the Asylum Adjudication Process: An Agenda for the Twenty-First Century*, 30 SAN DIEGO L. REV. 1 (1993); Greta D. Stoltz, Comment, *The U Visa: Another Remedy for Battered Immigrant Women*, 7 SCHOLAR 127 (2004).

<sup>19</sup> See generally Ellen G. Yost, *Immigration and Nationality Law*, 31 INT’L LAW. 589, 590 (1997).

<sup>20</sup> See generally Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1936-38 (2000).

<sup>21</sup> THOMAS ALEXANDER ALENIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 28-29 (7th ed. 2012).

<sup>22</sup> See *supra* notes 14-18 and accompanying text.

<sup>23</sup> MICHAEL HOEFER ET AL., DEP’T HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2010, (Feb. 2011), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf).

<sup>24</sup> Mary Ann Walsh, *A Plea for Common Sense and Compassion in the Immigration Debate*, WASH. POST (Aug. 8, 2013), <http://www.washingtonpost.com/blogs/on-faith/wp/2013/08/08/finding-common-sense-and-compassion-in-the-immigration-debate/>.

have used prosecutorial discretion in the immigration law context to address humanitarian concerns for certain immigrant groups.<sup>25</sup> The direction the Obama administration has taken with respect to prosecutorial discretion reflects some of the more humanitarian values that should play a role in enforcing our immigration laws. Ultimately, the most meaningful chance of reform for certain immigrant populations may be through prosecutorial discretion.<sup>26</sup>

This note argues for the increased use of prosecutorial discretion as a temporary and humanitarian measure to address immigration reform in lieu of failed legislation. Part I of this note provides a short historical discussion of the development of prosecutorial discretion within the Department of Homeland Security. It also gives a brief overview of the DACA program as an exemplary form of prosecutorial discretion. Part II compares DACA with Temporary Protected Status, and with the amnesty provision of the 1986 Immigration Reform and Control Act to elucidate the differences between congressionally enacted immigration reform and temporary reform via prosecutorial discretion, arguing in favor of the latter. Part III of this note discusses the comprehensive immigration reform bill that the Senate recently passed to showcase the tensions Congress continues to experience with immigration. Part IV points to the evolution of prosecutorial discretion as an economically efficient, fair, and humanitarian resource, advocating that it be maintained as a useful tool within the discourse on immigration reform. Finally, this note concludes by suggesting that a comprehensive exercise of prosecutorial discretion may be, as a temporary measure, more effective in reforming immigration laws in today's volatile political landscape.

## I. THE HISTORY OF PROSECUTORIAL DISCRETION

In both administrative and criminal law, prosecutorial discretion is a concept that accepts the authority of an agency to exercise judgment in determining against whom and when to prosecute certain cases. This discretion is partly based on the agency's priorities and resources, and on the underlying purpose of the immigration laws.<sup>27</sup> Prosecutorial discretion is also an

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<sup>25</sup> See *infra* notes 43-56 and accompanying text.

<sup>26</sup> For a compelling analysis of advocacy through prosecutorial discretion for young undocumented immigrants, see M. Aryah Somers, *Zealous Advocacy for the Right to Be Heard for Children and Youth in Deportation Proceedings*, 15 CUNY L. REV. 189 (2011).

<sup>27</sup> Wadhia, *supra* note 2, at 244.

exercise in deciding when *not* to prosecute, which reflects the balance the agency must espouse in deciding who should avail themselves of the immigration laws.<sup>28</sup> This authority has been confirmed and accepted by the Supreme Court, which held that “[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities,”<sup>29</sup> and that “courts generally will defer to an agency’s construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute.”<sup>30</sup>

Top officials from the Department of Homeland Security, and formerly the Department of Justice, have recognized and accepted prosecutorial discretion as part of the nation’s immigration laws.<sup>31</sup> The first significant public mention of prosecutorial discretion came in the former Immigration and Naturalization Service (INS) Operations Instructions in 1975.<sup>32</sup> The Operation Instructions revealed specific criteria that immigration officers were to consider in adjudicating what were aptly called “nonpriority” cases.<sup>33</sup> Lurking behind this murky phrase, prosecutorial discretion became a mysterious form of relief in immigration law for many years. In an examination of this program, known as “deferred action,”<sup>34</sup> Professor Leon Wildes, did several studies<sup>35</sup> of the number of cases that were granted and the specific criteria used for these affirmations.<sup>36</sup> Data from the study showed that USCIS repeatedly used seven factors in determining whether to defer action in deportation proceedings.<sup>37</sup> Particularly, USCIS granted deferred action in cases involving: (1) separation of family or hardship, (2) the medically infirm, (3) the young, (4) the mentally incompetent, (5) potential negative publicity, (6)

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<sup>28</sup> *Id.* at 255.

<sup>29</sup> *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985); *see also Chevron USA v. Natural Res. Defense Council*, 467 U.S. 837, 842 (1984).

<sup>30</sup> *Heckler*, 470 U.S. at 831-32; *see also Chevron*, 467 U.S. at 842.

<sup>31</sup> *See generally* Wadhia, *supra* note 2, at 244.

<sup>32</sup> *See generally* Leon Wildes, *The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?*, 17 SAN DIEGO L. REV. 99 (1979).

<sup>33</sup> Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 S.D. L. REV. 819, 820 (2004).

<sup>34</sup> Deferred action means to literally defer action on deportation so that beneficiaries of deferred action have their deportations halted but receive no actual legal immigration status.

<sup>35</sup> *See generally* Wildes, *supra* note 32; 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 (1976).

<sup>36</sup> Wildes, *supra* note 33, at 824, 830-32.

<sup>37</sup> *Id.* at 830-31, Table 3 & Table 4.

victims of domestic violence, and (7) the elderly.<sup>38</sup> Wildes concluded that the variety of factors used elucidated the structured approach the agency took in implementing deferred action, though applied mostly in unofficial secrecy.<sup>39</sup>

In a more recent study on deferred action, Professor Shoba Sivaprasad Wadhia detailed the difficulties she experienced in making numerous Freedom of Information Act requests to U.S. Immigration and Customs Enforcement (ICE) and USCIS regarding the current state of the deferred action program.<sup>40</sup> Professor Wadhia's 19-month quest revealed that an overwhelmingly low number of deferred action cases had been granted. "These numbers suggest that the real concern lies in the fact that many non-citizens who meet the common criteria utilized by the agency in assessing deferred action lack access or knowledge about deferred action . . . ."<sup>41</sup> Professor Wadhia concluded that this was a result of the lack of transparency in the program.<sup>42</sup>

The criteria from the Operation Instructions of 1975 were reaffirmed and publicized in a memorandum by former Commissioner of INS, Doris Meissner, on November 17, 2000.<sup>43</sup> The Meissner memo identifies a range of possible actions undertaken by immigration enforcement officers that fall within the ambit of prosecutorial discretion. In particular, the memo suggests that prosecutorial discretion can be exercised in a proactive manner by granting affirmative immigration relief to the extent applicable, such as in the form of deferred action.<sup>44</sup>

This is not to say that prosecutorial discretion can be used to grant one legal permanent residence or citizenship<sup>45</sup>—which can only be conferred through statutory authority—but rather, that exercising discretion in deciding *not* to enforce removal may inadvertently grant some temporary immigration benefits.<sup>46</sup> Emphasizing the finite resources of the INS, the memo

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<sup>38</sup> *Id.*

<sup>39</sup> See generally Wildes, *supra* note 33.

<sup>40</sup> Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U. N. H. L. REV. 1, 4 (2012).

<sup>41</sup> *Id.* at 47.

<sup>42</sup> See generally *id.*

<sup>43</sup> Meissner Memo, *supra* note 7, at 1.

<sup>44</sup> *Id.* at 2.

<sup>45</sup> *Id.* at 3.

<sup>46</sup> Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 517-18 (2009) ("[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.")

set forth particular standards for immigration officials to consider when deciding whether to exercise prosecutorial discretion, such as length of residence in the United States, humanitarian concerns, lack of resources, and criminal history.<sup>47</sup>

Despite a significant reorganization of the immigration system following the September 11, 2001 attacks,<sup>48</sup> the Meissner memo's endorsement of prosecutorial discretion survived and was supplemented by additional policy statements. The most significant were a series of memoranda published in March and June of 2011 by ICE Director John Morton.<sup>49</sup> Morton reemphasized the necessity of prosecutorial discretion to immigration enforcement and cited several discretionary factors in determining its use.<sup>50</sup> Acknowledging the historical practice of prosecutorial discretion in the immigration context,<sup>51</sup> the June memo emphasized the limited resources of ICE's enforcement powers and stressed that removal operations were to focus on the "agency's enforcement priorities, namely the promotion of national security, border security, public safety, and the integrity of the immigration system."<sup>52</sup>

Both the Meissner and Morton memos strongly considered humanitarian concerns. The Meissner memo, for example, explicitly identified humanitarian concerns as a factor in deciding whether to exercise prosecutorial discretion. These humanitarian

<sup>47</sup> Meissner Memo, *supra* note 7, at 7-8.

<sup>48</sup> David A. Martin, *Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvements*, INSIGHT: MIGRATION POLY INST., Apr. 2003, available at [http://www.migrationpolicy.org/insight/insight\\_4-2003.pdf](http://www.migrationpolicy.org/insight/insight_4-2003.pdf).

<sup>49</sup> The Immigration and Naturalization Service (INS) was restructured and re-named the U.S. Immigration and Customs Enforcement (ICE). ICE, which fell under the Department of Justice, was transferred to the Department of Homeland Security on March 1, 2003 as part of the Homeland Security Act. For more detailed analysis on this reorganization see *id.*

<sup>50</sup> Memorandum from John Morton, Director of Immigration and Customs Enforcement, on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens, 2 (Mar. 2, 2011), [hereinafter Morton, Civil Immigration Enforcement], available at <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>; Memorandum from John Morton, Director of Immigration and Customs Enforcement, on Exercising Prosecutorial Discretion Consistent with the Civil Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens, 2 (June 17, 2011), [hereinafter Morton, Exercising Prosecutorial Discretion], available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

<sup>51</sup> Morton refers to numerous agency memoranda discussing prosecutorial discretion including a 1976 memo from INS General Counsel Sam Bernsen, the aforementioned Meissner Memo, memoranda from William J. Howard, Principal Legal Advisor, and Julie L. Myers, Assistant Secretary of ICE, among others. See Morton, Exercising Prosecutorial Discretion, *supra* note 50, at 1.

<sup>52</sup> *Id.* at 2.

concerns included medical conditions, family ties in the United States and, most notably, whether “an alien entered the United States at a very young age” and “whether the alien speaks the language or has relatives in the home country.”<sup>53</sup> Similarly, the June Morton memo noted that “certain classes of individuals” warranted particular care in the favorable exercise of prosecutorial discretion.<sup>54</sup> Such classes included “individuals present in the United States since childhood,” minors, the elderly, veterans, pregnant women, and more.<sup>55</sup>

These factors, coupled with the enforcement priorities delineated in the March memo, evince the clear weight that humanitarian concerns have in determining the appropriate exercise of prosecutorial discretion. ICE’s enforcement priorities were divided into three classifications with an emphasis on criminal aliens: Priority 1 for the detention of aliens who pose a danger to national security or a risk to public safety; Priority 2 for recent illegal entrants; Priority 3 for aliens who are fugitives or otherwise obstruct immigration controls. This emphasis on aliens with criminal convictions highlighted the important option of prosecutorial discretion “when dealing with lawful permanent residents, juveniles, and the immediate family members of U.S. citizens.”<sup>56</sup>

Even the White House has turned to prosecutorial discretion as a means of addressing some of the humanitarian concerns posed by current immigration policies. In response to Congress’ refusal to pass the DREAM Act in December 2010,<sup>57</sup> President Barack Obama announced on June 15, 2012, that the Department of Homeland Security would begin granting temporary relief from deportation to certain young, undocumented immigrants.<sup>58</sup> Given the aforementioned agency statements regarding the use of prosecutorial discretion and President Obama’s deferred action announcement,<sup>59</sup> Secretary Napolitano provided guidelines for extending prosecutorial discretion to certain undocumented young immigrants in her memorandum of June

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<sup>53</sup> Meissner Memo, *supra* note 7, at 7.

<sup>54</sup> Morton, Exercising Prosecutorial Discretion, *supra* note 50, at 5.

<sup>55</sup> *Id.* at 5.

<sup>56</sup> See Morton, Civil Immigration Enforcement, *supra* note 50, at 1-4.

<sup>57</sup> See *supra* note 11.

<sup>58</sup> News Release, Office of the Press Secretary, The White House, Remarks by the President on Immigration (June 15, 2012) [hereinafter June 15, 2012 News Release], available at <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>.

<sup>59</sup> *Id.*

15, 2012, under what is now known as the DACA, or Deferred Action for Childhood Arrivals, program.

Secretary Napolitano's memorandum, like that of its predecessors, considered humanitarian concerns in deciding when to exercise prosecutorial discretion.<sup>60</sup> Secretary Napolitano explained that the policies of general enforcement of immigration laws "are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Nor . . . to remove productive young people [who] have already contributed to our country in significant ways. Prosecutorial discretion, which is used in so many other areas, is *especially justified here*."<sup>61</sup>

Secretary Napolitano set forth specific criteria that every applicant must meet and which were delineated by USCIS following the memorandum's publication. In particular, the applicant must be: under the age of 31; have entered the United States before the age of 16; have continuously resided in the United States since June 15, 2007; have been physically present in the United States on June 15, 2012; be in school, have graduated from high school, or be an honorably discharged veteran of the Coast Guard or Armed Forces; and have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors.<sup>62</sup>

Secretary Napolitano ended the memorandum emphasizing that "no substantive right, immigration status or pathway to citizenship" would derive from this deferred action.<sup>63</sup> "Only the Congress, acting through its legislative authority, can confer these rights," the memo noted.<sup>64</sup> "It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law."<sup>65</sup> The DACA application, if successfully pursued and approved, grants young immigrants a two-year employment authorization, which may be renewed.<sup>66</sup>

As it stands today, DACA is merely an extension of the prosecutorial discretion that was precisely described in the

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<sup>60</sup> See generally Napolitano Memo, *supra* note 5.

<sup>61</sup> *Id.* at 2 (emphasis added).

<sup>62</sup> *Id.* at 1.

<sup>63</sup> *Id.* at 3.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> U.S. Citizenship & Immigration Services, *Consideration of Deferred Action for Childhood Arrivals: Frequently Asked Questions*, U.S. DEPT' HOMELAND SEC. (Jan. 18, 2013), <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions>.

Meissner and Morton memos, with some of the same language echoed throughout the new application. DACA gives applicants temporary relief from deportation while conferring some stability in the form of employment authorization.<sup>67</sup> Agency statements on prosecutorial discretion have emphasized the importance of focusing enforcement power on the agency's priorities, such as the immediate detention of aliens who pose a threat to national security and public safety.<sup>68</sup> Prosecutorial discretion exists as a means to ensure fair results for exactly the kind of immigrants that DACA addresses. DACA is a prime example of the appropriate use of prosecutorial discretion, and may highlight the type of immigration policies that should prevail.

## II. FAILED ATTEMPTS AT IMMIGRATION REFORM

Although it does not confer permanent immigration status, prosecutorial discretion has been a more effective mechanism for temporary immigration reform than current enacted legislation. To demonstrate this, this section compares the exercise of prosecutorial discretion in DACA with the Immigration Reform and Control Act (IRCA) and the Temporary Protected Status (TPS) provision of the Immigration Act of 1990, two congressionally enacted immigration policies that failed to meet their goals. By comparing DACA to IRCA and TPS, this section seeks to demonstrate that prosecutorial discretion, although it does not confer permanent immigration status, is a more effective mechanism for temporary immigration reform.

### A. *The Immigration Reform and Control Act (IRCA)*

The Immigration Reform and Control Act of 1986<sup>69</sup> made it illegal for employers to knowingly hire undocumented immigrants, and imposed a penalty on those who did not verify their employees' immigration status within three days of their hires.<sup>70</sup> In addition, IRCA provided amnesty to certain groups of undocumented immigrants who could prove their continuous

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<sup>67</sup> These are all similar factors that were emphasized for discretionary relief in the Morton memo. See Morton, Civil Immigration Enforcement, *supra* note 50, at 2.

<sup>68</sup> See generally Meissner Memo, *supra* note 7; Memorandum from Julie L. Myers, Assistant Sec. of Immigr. and Customs Enforcement, on Prosecutorial and Custody Discretion (Nov. 7, 2007), [hereinafter Myers Memo], available at <http://www.scribd.com/doc/22092973/ICE-Guidance-Memo-Prosecutorial-Discretion-Julie-Myers-11-7-07>; Morton, Civil Immigration Enforcement, *supra* note 50.

<sup>69</sup> Pub. L. No. 99-603, 100 Stat. 3359 (1986).

<sup>70</sup> 8 U.S.C. § 1324a (2012); see also 8 C.F.R. § 274a.2(b)(1)(ii).

presence in the United States since January 1, 1982,<sup>71</sup> as well as to certain farm workers under the Special Agricultural Worker program.<sup>72</sup> The goals of IRCA were to deter illegal immigration and protect American workers from wage competition with undocumented immigrants.<sup>73</sup> The penalty imposed on employers who hired undocumented immigrants was balanced by an amnesty to the millions of undocumented immigrants already in the country.<sup>74</sup> According to a study by the Migration Policy Institute, the amnesty granted legal status to approximately three million undocumented immigrants.<sup>75</sup> This did not result in a decrease in illegal immigration, however.<sup>76</sup> Instead, illegal immigration and employment discrimination increased in the years following IRCA, defeating the statute's initial goals.<sup>77</sup> Indeed, many opponents of comprehensive immigration reform have used IRCA's failure to decrease illegal immigration to argue against DACA as yet another form of amnesty to another large sector of the undocumented population.<sup>78</sup>

But unlike IRCA, DACA seeks to prioritize immigration enforcement resources by granting a group of young, educated and productive members of American society *temporary* reprieve from deportation.<sup>79</sup> DACA's purpose is not to curb illegal immigration, but rather to give an affirmative structure to the already-utilized mechanism of prosecutorial discretion in granting deferral to certain immigrants whom the executive branch thought to be both worthy of reprieve and crucial to the productivity and cultural fabric of American society.<sup>80</sup> IRCA's

<sup>71</sup> 8 U.S.C. § 1255a(a)(2)(A) (2012).

<sup>72</sup> 8 U.S.C. § 1160(g) (2012).

<sup>73</sup> Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 201 (2007).

<sup>74</sup> Christopher Angevine, *Amnesty and the "Legality" of Illegal Immigration: How Reliance and Underenforcement Inform the Immigration Debate*, 50 S. TEX. L. REV. 235, 240 (2008).

<sup>75</sup> Betsy Cooper & Kevin O'Neil, *Lessons from the Immigration Reform and Control Act of 1986*, Policy Brief No. 3, MIGRATION POL'Y INST., Aug. 2005, available at [http://www.migrationpolicy.org/pubs/PolicyBrief\\_No3\\_Aug05.pdf](http://www.migrationpolicy.org/pubs/PolicyBrief_No3_Aug05.pdf); see also Wishnie, *supra* note 73, at 205-06.

<sup>76</sup> *Id.*

<sup>77</sup> Richard A. Johnson, *Twenty Years of the IRCA: The Urgent Need for an Updated Legislative Response to the Current Undocumented Immigrant Situation in the United States*, 21 GEO. IMMIGR. L.J. 239, 251-52 (2007).

<sup>78</sup> *A Reagan Legacy: Amnesty for Illegal Immigrants*, NAT'L PUB. RADIO (July 4, 2010), <http://www.npr.org/templates/story/story.php?storyId=128303672>.

<sup>79</sup> Napolitano Memo, *supra* note 5, at 3.

<sup>80</sup> See June 15, 2012 News Release *supra* note 58 ("These are young people who study in our schools, they play in our neighborhoods, they're friends with our kids, they pledge allegiance to our flag. . . . [I]t makes no sense to expel talented young people. . . who want to staff our labs, or start new businesses, or defend our country. . .

amnesty provision, on the other hand, was primarily meant to balance strict new sanctions for employers who propagated the influx of undocumented immigrants, in the hopes of directly curtailing illegal immigration.<sup>81</sup> In addition, IRCA's amnesty provision provided a vehicle for undocumented immigrants to adjust status and receive legal permanent residence, and eventually, citizenship.<sup>82</sup> DACA does not and cannot provide amnesty. Indeed, the President does not have the power to confer such a status adjustment unilaterally.<sup>83</sup>

The comparisons between IRCA and DACA stem from the significant immigration relief that DACA confers on its applicants. But DACA is considerably different than the IRCA amnesty. DACA can be more aptly described as a humanitarian exercise of prosecutorial discretion.<sup>84</sup> It aims to maintain the benefits of having particular members of society remain in the United States, and elicits a closer examination of the types of deportations that should be implemented. DACA acknowledges the existence of a class of undocumented immigrants that are not only productive members of American society, but have their lives ingrained in American culture, and often do not remember their home country nor have any family there. For these young immigrants, the United States *is* their home country. DACA is not a permanent solution, but it is a step toward a more humanitarian, efficient, and fair immigration policy. IRCA, on the other hand, was another failed attempt by Congress to please ideologically opposed factions in the immigration reform debate.

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these young people are going to make extraordinary contributions, and are already making contributions to our society.”).

<sup>81</sup> Wishnie, *supra* note 73, at 205-06.

<sup>82</sup> *Id.* at 194-95 n.8.

<sup>83</sup> Congress has delineated the procedures for granting immigration status in the Immigration and Nationality Act. *See* 8 U.S.C. § 1154 (2012); Meissner Memo, *supra* note 7, at 3. These procedures cannot be circumvented by the president and the exercise of prosecutorial discretion does not confer these benefits. *See* U.S. Const. art. II, § 3 (requiring the President to “take care that the laws be faithfully executed” even when he politically disagrees with Congress).

<sup>84</sup> The language in DACA can be traced back to the language used in both the Meissner and Morton Memos. The emphasis on prioritizing deportations of criminal aliens while focusing on humanitarian factors such as young age, length of residency in the United States amongst others in the exercise of prosecutorial discretion makes DACA consistent with the policies of immigration enforcement expounded since 2000. Meissner Memo, *supra* note 7, at 7; Morton, *Exercising Prosecutorial Discretion*, *supra* note 50, at 5.

### B. *Temporary Protected Status (TPS)*

DACA grants temporary status and employment authorization to a specified group of undocumented immigrants.<sup>85</sup> Likewise, the Immigration Act of 1990's Temporary Protected Status provision granted power to the Attorney General to provide temporary status to immigrants who were unable to return to their country due to ongoing armed conflict, environmental disaster, or other extraordinary circumstances.<sup>86</sup> TPS is codified under 8 U.S.C. § 1254a, and its benefits defined as the authorization for “the alien to engage in employment in the United States and provide the alien with an ‘employment authorized’ endorsement or other appropriate work permit.”<sup>87</sup>

TPS arose from a campaign to grant temporary refuge to Salvadorans who fled the civil conflict in that country.<sup>88</sup> Focusing on the humanitarian and political concerns of the Salvadoran war, Congress chose to extend protection to those who fled, granting them a temporary reprieve from deportation and legal employment status.<sup>89</sup> As the Immigration Act of 1990 conference report explained, the TPS legislation was meant to ensure refuge for Salvadorans who faced civil conflict in their home country. The United States’ heavy involvement in the Salvadoran conflict carried “responsibilities [of] humanitarian concern toward the Salvadorans . . . .”<sup>90</sup> Former Democratic

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<sup>85</sup> Napolitano Memo, *supra* note 5, at 2.

<sup>86</sup> The original text of 8 U.S.C. § 1254a(b) reads:

(1) In general The Attorney General, after consultation with appropriate agencies of the Government, may designate any foreign state (or any part of such foreign state) under this subsection only if— (A) the Attorney General finds that there is an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to the part of the state) would pose a serious threat to their personal safety; (B) the Attorney General finds that— (i) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected, (ii) the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and (iii) the foreign state officially has requested designation under this subparagraph; or (C) the Attorney General finds that there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety, unless the Attorney General finds that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States.

8 U.S.C. § 1254a (b)(1)(2012).

<sup>87</sup> *Id.* § 1254a (a)(1)(B).

<sup>88</sup> Eva Segerblom, *Temporary Protected Status: An Immigration Statute That Redefines Traditional Notions of Status and Temporariness*, 7 NEV. L. J. 664, 665 (2007).

<sup>89</sup> *Id.*

<sup>90</sup> 136 Cong. Rec. S17106-01 (1990) (Statement of Sen. Dennis Deconcini).

Senator for Arizona Dennis Deconini added, “I do not believe that we should return these individuals to a country immersed in a civil war in which we are actively involved.”<sup>91</sup> This temporary status was granted at the discretion of the Attorney General as “essentially an exercise of prosecutorial discretion.”<sup>92</sup>

Many problems have emerged, however, from the first grant of state TPS designation to El Salvador in 1990, to the most recent, Syria in 2012. The humanitarian and political purposes behind the statute were dwarfed by the rise of gross unfairness and limited reprieve to TPS recipients.<sup>93</sup> Although congressionally enacted, TPS does not confer tangible immigration benefits to its recipients. This means that anyone who finds himself out of TPS may face deportation, and anyone with TPS is unable to ever obtain permanent residence or citizenship, or give TPS to immediate family.<sup>94</sup> As it stands today, TPS grants nationals of a designated foreign state only temporary work authorization if they meet certain statutory requirements: continuous physical presence from the time of state designation, admissibility as an immigrant pursuant to 8 U.S.C. § 1182,<sup>95</sup> and timely registration during the registration period.<sup>96</sup> Furthermore, as a function of being employed in the United States, these immigrants must pay federal and state taxes,<sup>97</sup> but are barred from receiving Social Security benefits, which they pay into for many years as their state designation is renewed.<sup>98</sup>

When a nation continues to suffer from internal conflict or environmental disaster, and is time and again re-designated under TPS, the beneficiaries of TPS from that nation are left in an 18-month limbo.<sup>99</sup> The 18-month period may be renewed if the country is re-designated under TPS, but it could also be terminated. Although eligible to work legally in the United States, TPS recipients suffer from gross inequalities and no

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<sup>91</sup> *Id.*

<sup>92</sup> Susan Martin et al., *Temporary Protection: Towards A New Regional and Domestic Framework*, 12 GEO. IMMIGR. L.J. 543, 548 n.19 (1998).

<sup>93</sup> Segerblom, *supra* note 88, at 671.

<sup>94</sup> *Id.*

<sup>95</sup> There are several specified health, criminal, and other grounds of inadmissibility for aliens seeking admission as defined under this section of the statute. 8 U.S.C. § 1182 (2012); *see generally* U.S. Citizenship and Immigration Services, *Temporary Protected Status Eligibility Requirements* (last updated June 18, 2013), available at <http://www.uscis.gov/tps>.

<sup>96</sup> 8 U.S.C. § 1254a(c) (2012).

<sup>97</sup> *See* Segerblom, *supra* note 88, at 671.

<sup>98</sup> *Id.*

<sup>99</sup> Temporary Protected Status state designation is re-evaluated every 18 months. *See* 8 U.S.C. § 1254a (b)(3) (2012); *Temporary Protected Status Eligibility Requirements*, *supra* note 95.

pathways to permanently remain in the nation they have worked and fostered a life in. When designation is terminated, frequently without sensible consideration as to the current condition of the designated nation, hundreds of former-TPS recipients face deportation, often to a country they no longer recognize.<sup>100</sup> As described in relation to the termination of TPS for Montserrat,<sup>101</sup> “292 nationals of Montserrat were thrown out of a country they had lived in for eight years . . . [T]axes and Social Security . . . paid are of no benefit to them now as they are forced out of the country. [I]f a national of Montserrat TPS recipient is found . . . he will be placed in removal proceedings.”<sup>102</sup>

A 2011 study by the Congressional Research Service found that there are approximately 217,000 Salvadorans, 48,000 Haitians, and 66,000 Hondurans currently living in the United States under TPS.<sup>103</sup> If terminated, deportation proceedings would commence for 331,000 individuals. The harsh consequences of termination of TPS designation create pockets of American immigrant society that are living with a constant fear that their immigrant-status will be revoked—a circular kind of immigration reform that is inefficient and cold.

The similarities between TPS and DACA are undeniable. Both forms of relief arose from political, humanitarian, or economic factors. Both applications grant a temporary reprieve from deportation, while conferring employment eligibility on its recipients.<sup>104</sup> In addition, both TPS and DACA focus on particular sectors of the immigrant population, and do not act as a comprehensive amnesty provision.<sup>105</sup> And both applications are granted under strictly discretionary terms, with several limiting factors.

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<sup>100</sup> Segerblom, *supra* note 88, at 674-75.

<sup>101</sup> Montserrat TPS was initially designated in 1997 as a result of an active volcano which forced evacuations of more than half the island and destroyed most of its infrastructure. *Id.* at 674.

<sup>102</sup> *Id.*

<sup>103</sup> Ruth Ellen Wassem & Karma Ester, *Temporary Protected Status: Current Immigration Policy and Issues*, Congressional Research Service (Dec. 13, 2011), <http://fpc.state.gov/documents/organization/179582.pdf>.

<sup>104</sup> *U.S. Citizenship and Immigration Services Frequently Asked Questions*, *supra* note 66; see also *Temporary Protected Status Eligibility Requirements*, *supra* note 95.

<sup>105</sup> TPS affected only aliens who were present in the United States at the time their country was designated for protection. Any other national of these designated countries who fled after designation was ineligible for TPS. DACA would similarly affect young undocumented immigrants who are present in the United States at the time of designation, but also aliens under the age of 30, among other specific criteria that limits its impact. See *U.S. Citizenship and Immigration Services Frequently Asked Questions*, *supra* note 66; see also *Temporary Protected Status Eligibility Requirements*, *supra* note 95.

Unlike TPS however, DACA confers more than just employment authorization and tax-paying obligations. DACA recipients are potentially eligible for state benefits such as driver's licenses and in-state college tuition.<sup>106</sup> In addition, DACA is said to affect a larger population than TPS ever did, bringing a significant percentage of young, productive, but undocumented, members of American society out of the shadows.<sup>107</sup> Most significantly though, DACA is a leap in American immigration reform because it breaches the barriers of congressional stalemates by proactively developing new ways to fix the immigration system. Although DACA may result in injustices similar to those created by termination of a TPS designation, DACA's strength lies in the fact that it is not solely a humanitarian policy (as TPS was) but rather a progressive recognition that not all undocumented immigrants should be turned away.<sup>108</sup>

Between August 2012 and August 2013, USCIS accepted 567,563 applications for DACA, of which 455,455 were approved.<sup>109</sup> A study conducted by the Immigration Policy Center has found that 61% of DACA recipients have obtained a new job and 54% opened their first bank account.<sup>110</sup> Also, in the study, "Ninety-four percent of survey respondents indicated that they would apply for citizenship if ever eligible. This finding

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<sup>106</sup> These benefits will vary by state and have already been blocked by several states such as Arizona, Alabama, Florida, and Georgia. This note does not seek to discuss state-specific DACA benefits but rather to elucidate the potential for greater reform through DACA in contrasting it with TPS. See David Adams & Alex Dobuzinskis, *Battle Far From Over for US Immigrants Who Get Deferrals*, REUTERS, Aug. 18, 2012, available at <http://www.reuters.com/article/2012/08/18/us-usa-immigration-dreamers-idUSBRE87H01A20120818>.

<sup>107</sup> Jeffrey Passel and Mark Hugo Lopez, *Up to 1.7 Million Unauthorized Immigrant Youth May Benefit from New Deportation Rules*, PEW HISPANIC CTR. (Aug. 14, 2012), <http://www.pewhispanic.org/2012/08/14/up-to-1-7-million-unauthorized-immigrant-youth-may-benefit-from-new-deportation-rules/>; see *supra* note 100 and accompanying text (detailing current numbers of TPS recipients).

<sup>108</sup> Prosecutorial discretion focuses on the economic efficiency and viability of enforcement priorities. Although DACA is certainly an economics-based exercise of prosecutorial discretion, it is also undeniably humanitarian in its focus on young groups of undocumented immigrants. The language used in Secretary Napolitano's memorandum along with President Obama's announcement exudes humanitarian considerations. See generally Napolitano Memo, *supra* note 5, at 2; June 15, 2012 News Release, *supra* note 58.

<sup>109</sup> Deferred Action for Childhood Arrival Statistics, Data on Individual Applications and Petitions, U.S. Citizenship and Immigration Services, Sept. 15, 2013, <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca-13-9-11.pdf>.

<sup>110</sup> Roberto G. Gonzalez & Veronica Terriquez, *How DACA is Impacting the Lives of Those Who Are Now DACAmented: Preliminary Findings from the National UnDACAmented Research Project*, Figure 1, Aug. 2013, [http://www.immigrationpolicy.org/sites/default/files/docs/daca\\_final\\_ipc\\_csii\\_1.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/daca_final_ipc_csii_1.pdf).

suggests that DACA recipients seek to be further integrated into U.S. society.”<sup>111</sup> Beyond humanitarian inclinations, DACA is more effective than TPS because it implicitly values the benefits to American society that DACA beneficiaries contribute. It also provides a temporary solution in order to push forward legislation that provides a more permanent fix.

### III. COMPREHENSIVE IMMIGRATION REFORM TODAY

In light of changing immigration policies, on June 27, 2013, the United States Senate passed S.744, the “Border Security, Economic Opportunity, and Immigration Modernization Act,”<sup>112</sup> the most significant and moderate immigration legislation to come before Congress in recent years.<sup>113</sup> A bipartisan group of eight senators from both Republican and Democratic parties, known as the “Gang of Eight,” wrote the Bill to address the issues in immigration that so clearly divide Congress.<sup>114</sup>

The Bill suggests both increased border security and granting some form of relief to undocumented immigrants. It slightly modifies the family- and employment-based categories for immigrants in the Immigration and Nationality Act,<sup>115</sup> creates a new category of merit-based immigrant visas,<sup>116</sup> and more controversially, grants a pathway to citizenship, albeit a long one, to the 11 million undocumented immigrants living in the United States today.<sup>117</sup> In the statement of congressional findings, the Senators describe the underlying intent of the Bill: “As a Nation, we have the right and responsibility to make

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<sup>111</sup> *Id.* at 2.

<sup>112</sup> United States Senate Roll Call Votes 113th Congress – 1st Session, Vote Summary, SENATE.GOV (June 27, 2013), available at [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=113&session=1&vote=00168](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00168).

<sup>113</sup> Ashley Parker & Jonathan Martin, *Senate, 68 to 32, Passes Overhaul for Immigration*, N.Y. TIMES (June 27, 2013), <http://www.nytimes.com/2013/06/28/us/politics/immigration-bill-clears-final-hurdle-to-senate-approval.html?smid=pl-share>.

<sup>114</sup> See generally Rachel Weiner, *Immigration’s Gang of 8: Who are they?*, WASH. POST (Jan. 28, 2013, 1:00 PM), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/01/28/immigrations-gang-of-8-who-are-they/>; see generally also Parker & Martin, *supra* note 113.

<sup>115</sup> Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. §§ 2305-23 & 4102-05 (2013).

<sup>116</sup> *Id.* §§ 2301-02 (under “Subtitle C – Future Immigration”).

<sup>117</sup> *Id.* §§ 2101-02 (where Chapter 5 of title II of 8 U.S.C. § 1255 *et seq.* is amended by inserting Section 245B regarding “Adjustment of Status of Eligible Entrants before December 31, 2011, to that of Registered Provisional Immigrant” and where Chapter 5 of title II of 8 U.S.C. § 1255 is amended by inserting section 245C regarding “Adjustment of Status of Registered Provisional Immigrants”); *Immigration Reform, Finally*, N.Y. TIMES (June 27, 2013), <http://www.nytimes.com/2013/06/28/opinion/immigration-reform-finally.html>.

our borders safe, to establish clear and just rules for seeking citizenship, to control the flow of legal immigration, and to eliminate illegal immigration, which in some cases has become a threat to our national security.”<sup>118</sup>

Title I of the Bill addresses border security enhancements, which serve as “triggers” for other reforms before they are implemented.<sup>119</sup> These enhancements include the Comprehensive Southern Border Security Commissions and Southern Border Fencing Strategy, which are executed by creating an additional independent fund to implement the Act.<sup>120</sup> The border security strategies act as a trigger to several provisions, including the Registered Provisional Immigrant Program (RPI), which would allow eligible undocumented immigrants to apply if they have been in the United States since December 31, 2011, have no significant criminal record, pay taxes, pass background checks, and pay the application and penalty fee.<sup>121</sup> RPI status would permit work authorization and protection from deportation for six years.<sup>122</sup> Despite this, RPI status does not grant eligibility for federal public benefits.<sup>123</sup> Eventually, an RPI may adjust status to that of a legal permanent resident after he or she gets to the “Back of the Line”:

The status of a registered provisional immigrant may not be adjusted to that of an alien lawfully admitted for permanent residence under this section until after the Secretary of State certifies that immigrant visas have become available for all approved petitions for immigrant visas that were filed under sections 201 and 203 before the date of the enactment of the Border Security, Economic Opportunity, and Immigration Modernization Act.<sup>124</sup>

In addition to RPI status, the Bill also provides for other forms of legalization including a Merits-Based Point System which allows foreigners to obtain lawful permanent residence in the United States based on points relating to their skills, employment history, and education.<sup>125</sup>

The White House released a statement by President Obama following the Senate’s passage of the bill: “The bipartisan bill that passed today was a compromise. By

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<sup>118</sup> Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 2.

<sup>119</sup> *Id.* § 3.

<sup>120</sup> *Id.* §§ 4-5.

<sup>121</sup> *Id.* § 2101(b).

<sup>122</sup> *Id.* § 2101(d)(1).

<sup>123</sup> *Id.* § 2101(d)(3).

<sup>124</sup> *Id.* § 2102(c)(2).

<sup>125</sup> *Id.* § 2301.

definition, nobody got everything they wanted . . . . Today, the Senate did its job. It's now up to the House to do the same."<sup>126</sup> S.744 currently finds itself mired in congressional stalemate, where the Republican majority in the House of Representatives refuses to address the bill.<sup>127</sup> As of September 2013, the House has yet to consider the Senate bill, leaving millions of undocumented immigrants waiting for reform.<sup>128</sup>

#### IV. THE VARIOUS BENEFITS OF PROSECUTORIAL DISCRETION

Given Congress' inability to effectuate immigration reform, prosecutorial discretion could be a mechanism to educate and inform our leaders of the benefits of retaining certain groups of undocumented immigrants. The benefits of immigration have been consistently recognized in the immigration reform debate. According to the CATO Institute's Policy Recommendations for the 108th Congress, "Immigration gives America an economic edge in the global economy . . . . Immigrants are not a drain on government finances . . . . [T]he typical immigrant and his or her offspring will pay a net \$80,000 more in taxes during their lifetimes than they collect in government services."<sup>129</sup> Similarly, the Center for Immigration Studies has recognized the correlation between increased education in immigrant populations, higher paying jobs, and increased tax revenue, which all serve as benefits to American society.<sup>130</sup>

In advocating for the passage of the DREAM Act, supporters cited to the Supreme Court decision in *Plyler v. Doe*, where the Court held that undocumented immigrant youths are entitled to free public school education from kindergarten through high school.<sup>131</sup> The reasoning behind this decision was

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<sup>126</sup> News Release, Office of the Press Secretary, The White House, Statement by President Obama on Senate Passage of Immigration Reform (June 27, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/06/27/statement-president-obama-senate-passage-immigration-reform-0>.

<sup>127</sup> Ashley Parker & Jonathan Weisman, *Republicans in House Resist Overhaul for Immigration*, N.Y. TIMES (July 10, 2013), <http://www.nytimes.com/2013/07/11/us/politics/gop-in-house-resists-overhaul-for-immigration.html?smid=pl-share>.

<sup>128</sup> Michael D. Shear & Julia Preston, *Immigration Reform Falls to the Back of the Line*, N.Y. TIMES (Sept. 8, 2013), <http://www.nytimes.com/2013/09/09/us/politics/immigration-reform-falls-to-the-back-of-the-line.html?smid=pl-share>.

<sup>129</sup> Cato Institute, The Cato Handbook for Congress: Policy Recommendations for the 108th Congress, (Sept. 1, 2003), available at <http://www.cato.org/sites/cato.org/files/serials/files/cato-handbook-policymakers/2003/9/hb108-63.pdf>.

<sup>130</sup> Steven A. Camarota, *The High Cost of Cheap Labor: Illegal Immigration and the Federal Budget*, CTR. IMMIGR. STUDS., 23 (2004), available at <http://www.cis.org/sites/cis.org/files/articles/2004/fiscal.pdf>.

<sup>131</sup> *Plyler v. Doe*, 457 U.S. 202, 220 (1982).

that undocumented children had committed no crime, and should not be punished for the crimes of their parents.<sup>132</sup> Further, the Court emphasized the need to educate undocumented immigrant children because, “by denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”<sup>133</sup> The children of undocumented immigrants will continue to be part of American society. Today’s immigration system should encourage the American government to take the steps necessary for the U.S. to legally accept them.<sup>134</sup>

Policy statements from top-ranking immigration officials prior to Obama’s DACA program conveyed a similar philosophy. As previously discussed, the Meissner memo on the exercise of prosecutorial discretion discretely weaves into the classic economic concerns of the agency’s enforcement priorities an emphasis on humanitarian concerns. In describing the development of a list of “triggers” to help INS District Directors identify suitable cases for the favorable exercise of prosecutorial discretion, Meissner identifies factors such as “Aliens with lengthy presence in United States (i.e., 10 years or more)” and “Aliens present in the United States since childhood.”<sup>135</sup> The memo concludes that these trigger facts are meant to facilitate “identification of potential cases that may be suitable for prosecutorial review as early as possible in the process.”<sup>136</sup> Through the early targeting of individuals that should receive a favorable exercise of prosecutorial discretion, the agency spends its resources on the crucial enforcement priorities of criminal aliens while reaffirming that the deportation of certain individuals should be reassessed.

Similarly, an October 2005 memorandum by Principal Legal Advisor to ICE, William J. Howard, regarding the necessity of prosecutorial discretion for the agency’s enforcement priorities, combined the concern of prioritizing enforcement with the humanitarian necessity for prosecutorial discretion.<sup>137</sup> After

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 223.

<sup>134</sup> See Annand *supra* note 10, at 709 (advocating for passage of DREAM act given reality that DREAMers will continue to be part of American society).

<sup>135</sup> Meissner Memo, *supra* note 7, at 11.

<sup>136</sup> *Id.*

<sup>137</sup> Memorandum from William J. Howard, Principal Legal Advisor of Immigration and Customs Enforcement, on Prosecutorial Discretion, 4-6 (Oct. 24, 2005), available at <http://www.scribd.com/doc/22092975/ICE-Guidance-Memo-Prosecutorial-Discretion-William-J-Howard-10-24-05>.

detailing the various instances and manners of exercising prosecutorial discretion throughout the lifetime of an immigration case, a discussion that is peppered with considerable humanitarian factors.<sup>138</sup> Howard concluded the memorandum by stressing that prosecutorial discretion was a “very significant tool” that should be used in “cases involving human suffering and hardship.”<sup>139</sup> He added: “our reasoned determination in making prosecutorial discretion decisions can be a significant benefit to the *efficiency and fairness* of the removal process.”<sup>140</sup> Likewise, in a November 2007 memorandum discussing prosecutorial discretion, written by Assistant Secretary of ICE Julie Myers, compassion and family unity were stressed as important factors in considering whether to take nursing mothers into custody.<sup>141</sup> Attached to the Myers memo was the original memorandum on prosecutorial discretion of INS Commissioner Doris Meissner.

Finally, the memoranda published by Director of ICE John Morton in 2011 also joined the economic goals of the agency’s enforcement priorities with significant humanitarian factors to determine the exercise of prosecutorial discretion. First, the memorandum of March 2011 set out enforcement priorities by creating specific and distinguishable categories: aliens who pose a threat to national security (priority 1); aliens who recently reentered the United States illegally (priority 2); and aliens who are fugitives (priority 3).<sup>142</sup>

Given the explicit categories created for enforcement priorities, and the rise in criminal aliens, Morton emphasized that prosecutorial discretion should be soundly exercised, and that “particular care should be given when dealing with lawful permanent residents, juveniles, and the immediate family members of U.S. citizens.”<sup>143</sup> Morton’s June 2011 memorandum reemphasized these priorities, building on previous agency memoranda,<sup>144</sup> and specifically delineating factors to be considered when issuing a favorable exercise of prosecutorial discretion—factors with an emphasis on humanitarian interests and an implicit acknowledgement of the positive impact of certain individuals on American society.<sup>145</sup> These factors include the alien’s length of time in the United States, circumstances of his

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 8.

<sup>140</sup> *Id.* (emphasis added).

<sup>141</sup> See Myers Memo, *supra* note 68, at 1.

<sup>142</sup> Morton, Civil Immigration Enforcement, *supra* note 50, at 1-2.

<sup>143</sup> *Id.* at 4.

<sup>144</sup> Morton, Exercising Prosecutorial Discretion, *supra* note 50, at 1.

<sup>145</sup> *Id.* at 4.

or her arrival (particularly if he or she arrived as a young child) and the person's pursuit of education in the United States.<sup>146</sup>

Recognizing the benefits derived from the retention of certain immigrants who have the potential to positively impact American society has resonated throughout the recent political discourse on immigration reform—sometimes even on both sides of the political spectrum. For instance, at the 2012 Republican National Convention, former Secretary of State Condoleezza Rice expressed this same ideology: “We must continue to welcome the world’s most ambitious people to be a part of us. In that way, we stay young and optimistic and determined. We need immigration laws that protect our borders, meet our economic needs, and yet show that we are a compassionate nation of immigrants.”<sup>147</sup> Similarly, the *New York Times* quoted Republican Senator from Florida Marco Rubio saying that legislation for immigration reform “should also recognize that legal immigration has been a boon to the United States in the past and is ‘critical to our future.’”<sup>148</sup> Some Democratic leaders have even been arrested in the name of immigration reform.<sup>149</sup>

It is clear from the evolution of the above-cited policy memoranda that consideration of the favorable exercise of prosecutorial discretion both addresses the economic necessity of enforcement priorities (given the limited resources of the agencies), and balances humanitarian concerns for fair and compassionate immigration laws. At the same time, use of prosecutorial discretion also provides an opportunity to individually identify and provide relief to those immigrants who contribute positively to the economic and cultural fabric of American society. Secretary Napolitano’s memorandum regarding the use of prosecutorial discretion as a relief tool for certain young immigrants is an extension of the aforementioned policy which has been utilized by the DHS since the Meissner memo.

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<sup>146</sup> *Id.*

<sup>147</sup> Condoleezza Rice, Former Secretary of State, Address to Republican National Convention (Aug. 29, 2012), transcript available at <http://www.foxnews.com/politics/2012/08/29/transcript-condoleezza-rice-speech-at-rnc/#ixzz2HmLITSNI>.

<sup>148</sup> Julia Preston, *Rubio Pushes His Party on Immigration Changes*, N.Y. TIMES (Jan. 14, 2013), <http://www.nytimes.com/2013/01/15/us/politics/marco-rubio-pushes-republican-party-on-immigration-changes.html?hp&r=0>.

<sup>149</sup> Julia Preston, *8 Lawmakers Arrested at Immigration Protest*, N.Y. TIMES (Oct. 8, 2013), <http://www.nytimes.com/2013/10/09/us/8-lawmakers-arrested-at-immigration-protest.html>.

## CONCLUSION

Despite the best efforts of certain members of Congress to find common ground and pass comprehensive immigration reform, little progress has been made. Eleven million undocumented immigrants continue to live in the shadows, contributing to the growth of the American economy yet are consistently marginalized and ignored. It is through the mechanism of prosecutorial discretion that comprehensive, efficient, and humanitarian immigration reform can be effectuated. Given the adjudicative nature of the mechanism, the DACA program would have the potential to affect many eligible noncitizens. This may explain why the agency initially failed to offer proper guidelines for the use of deferred action.<sup>150</sup> The Morton memos clearly evince a greater care in the transparent use of prosecutorial discretion under the Obama administration. Although these agency statements have addressed some of the problems that were prevalent with deferred action, the intense opposition to comprehensive immigration reform is worrisome.

Over the years, although acknowledging the need for serious reform, Congress has been unable to agree on granting relief to hardworking, though undocumented, members of American society. Yet, the economic and cultural benefits of these productive members of American society have been unequivocally demonstrated.<sup>151</sup> Prosecutorial discretion calls for fair humanitarian policies in addition to the need for economic and administrative efficiency. And, given congressional gridlock in immigration reform, the exercise of prosecutorial discretion, of which DACA is an exemplary illustration, has been and can be effectively used as a temporary measure to relieve certain undocumented immigrants from the unfair immigration policies of our time.

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<sup>150</sup> See generally Wadhia, *supra* note 40, at 47.

<sup>151</sup> See *supra* notes 109-11.

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