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## The Failure of Prosecutorial Discretion and the Deportation of Oscar Martinez.

Bill Ong Hing

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## THE FAILURE OF PROSECUTORIAL DISCRETION AND THE DEPORTATION OF OSCAR MARTINEZ

BILL ONG HING\*

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### I. INTRODUCTION

On the night before Oscar Martinez<sup>1</sup> was forced to leave the United States in late September, I stopped by his home to say good-bye, to answer any last minute questions he might have, and to do my best to console his family. The fifty-five-year-old, Mexican immigrant had not been in Mexico for more than twenty-five years, and leaving his wife, Zoila, his

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\* Professor of Law, University of San Francisco, Professor of Law *Emeritus*, University of California, Davis. Many thanks to the USF School of Law summer workshop participants who provided me helpful feedback on an early draft of this Article, especially Tristin Green and Tim Iglesias. I dedicate this Article to Oscar Martinez whom I think about every day, and his daughter Lorena who will grow into a powerful figure in the battle for social justice in the United States.

1. Pseudonyms or initials have replaced the actual names of my client, his family members, friends, and school officials. The family fears that “Mr. Martinez’s” wife could lose her job if her current employer learns that she is an undocumented immigrant.

twenty-one-year-old daughter, Lorena, and his thirteen-year-old son, Oscar Jr.,<sup>2</sup> was the biggest challenge of his life. The usually stoic, peaceful man had tears in his eyes as we reviewed the process of his departure and the documents he would need to sign and submit to the U.S. Consulate in Mexico City in order for his family's bond money to be refunded. In his soft-spoken, humble tone, he explained how he rejected the entreaties of acquaintances who advised him to abscond; he did not want to be a fugitive—what example would that be for his family? He always played by the rules and never cheated at anything. Even his entry to the United States more than a quarter century earlier came at a time when crossing the border was a simple task of walking along a path near San Diego where Border Patrol officers simply turned and looked the other way at certain times of the year when they knew that seasonal workers were coming to harvest crops that needed attention.<sup>3</sup>

Mr. Martinez's daughter, Lorena, a smart, energetic, college senior<sup>4</sup> who handled most of the communications with me over the month long period I represented her father, was somber that evening. She and her mother were crying, but her kid brother was not. Oscar Jr. maintained a blank face for the hour or so I visited with them. He did not say more than a word or two, sitting emotionless at the dinner table as he listened to the conversation. Lorena whispered to me at one point that Oscar Jr. had not cried. She worried about that, because she knew that he was holding a lot inside. About a week earlier, in one of Oscar Jr.'s soccer games, he drew a penalty red card for kicking an opposing player who had stumbled—a violent act so uncharacteristic that the entire family was stunned and left the field ashamed.<sup>5</sup>

The next evening, Lorena called me from the airport after she hugged her father goodbye outside the TSA security area. Her mother fainted from the traumatic experience and was being driven back home by family friends. Oscar Jr. decided not to go to the airport, preferring to stay home, ensconced in his bedroom.

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2. Statement of Oscar Martinez (2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

3. See María Herrera-Sobek, *The Border Patrol and Their Migra Corridos: Propaganda, Genre Adaptation, and Mexican Immigration*, AM. STUD. J., available at <http://www.asjournal.org/archive/57/217.html> (last visited Nov. 15, 2012) ("Since the Mexican immigrant was/is a highly desirable worker, immigration officers tended to look the other way when the harvest season was in full swing in . . . [the] agricultural fields.").

4. Letter from Lorena Cintron to Timothy S. Aitken, Field Office Dir., ICE (Sept. 5, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

5. Statement of Lorena Cintron (Sept. 5, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

A few months later, on November 22, 2011, my wife and I were finishing dinner, half-listening to highlights from the Republican presidential primary debate on national security, broadcast from the Daughter's of the American Revolution Constitution Hall in Washington, D.C.<sup>6</sup> My ears perked up when the moderator, CNN's Wolf Blitzer,<sup>7</sup> posited a question on immigration policy. While candidates like Mitt Romney and Michelle Bachmann espoused a hard line of deporting all undocumented immigrants out of the country,<sup>8</sup> Newt Gingrich pivoted literally and figuratively and announced:

I do not believe that the people of the United States are going to take people who have been here a quarter-century, who have children and grandchildren . . . separate them from their families and expel them . . . . [L]et's be humane in enforcing the law without giving them citizenship but by finding a way to create legality so that they are not separated from their families.<sup>9</sup>

"Wow!" I exclaimed to my wife. "That's [Oscar Martinez] he's talking about."

This Article is an account of my failed efforts to stop the forced deportation of Mr. Martinez from the United States and the lessons I learned from that experience. My representation of Mr. Martinez centered on navigating the administrative process of requesting prosecutorial discretion from Department of Homeland Security (DHS) officials. As a result of my experience with the process and what I have observed of others pursuing the same process, I have unearthed disquieting evidence of inconsistencies in the program and have concluded extensive changes to the process are necessary. Sympathetic applicants, like Mr. Martinez, highlight the challenges in exercising prosecutorial discretion during the de-

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6. *Republican Primary Debate*, WASH. POST, <http://www.washingtonpost.com/wp-srv/politics/2012-presidential-debates/republican-primary-debate-november-22-2011/> (last visited Nov. 15, 2012).

7. See *anchors & Reporters: Wolf Blitzer*, CNN, [http://www.cnn.com/CNN/anchors\\_reporters/blitzer.wolf.html](http://www.cnn.com/CNN/anchors_reporters/blitzer.wolf.html) (last visited Nov. 9, 2012) (detailing the background and credentials of "CNN's lead political anchor" Wolf Blitzer).

8. See *Republican Primary Debate*, *supra* note 6 (quoting Bachman as saying "I don't agree that you would make [eleven] million workers legal, because that, in effect, is amnesty," and quoting Romney as saying "[l]ook, amnesty is a magnet. [W]hen we have in the past, programs that have said that if people who come here illegally are going to [be able to stay here legally] for the rest of their life, that's going to only encourage more people to come here illegally.").

9. Alexander Burns, *GOP Debate: Newt Gingrich Beats Back Immigration Critique*, POLITICO (Nov. 23, 2011, 8:33 AM), <http://www.politico.com/news/stories/1111/69011.html>; *Republican Primary Debate*, *supra* note 6.

portation process and the need for cultural and procedural reform of immigration policies.

I begin this Article with an account of how I came to represent Oscar Martinez, largely through the urging of his stepdaughter, Lorena Cintron and a description of Lorena and Mr. Martinez. Next, I review the “Morton Memo,” from John Morton, the Director of the Department of Homeland Security’s Immigration and Customs Enforcement (ICE) unit, which establishes guidelines for exercising prosecutorial discretion.<sup>10</sup> According to these guidelines, there is strong support for the argument that Mr. Martinez’s deportation should have been terminated. In contrast to Mr. Martinez’s case, I then present the case of another client I represented, which resulted in the termination of deportation proceedings.<sup>11</sup>

Next I provide an overview of the procedural history of the Martinez case prior to my involvement. Three years before Mr. Martinez became my client he qualified for relief and, in fact, was granted relief by an immigration judge.<sup>12</sup> However, the government was successful in appealing his case and Mr. Martinez was ordered deported.<sup>13</sup> I then describe my efforts at staving off the deportation order by invoking the ICE guidelines for prosecutorial discretion.

Following the procedural history is a discussion of the past and recent history of prosecutorial discretion in deportation proceedings and the problem of administrative discretion standards in that context, specifically the seemingly wide latitude provided to field officers.<sup>14</sup> Some ICE

10. See Memorandum from John Morton, Dir., ICE, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, to All Field Office Dirs., All Special Agents in Charge, and All Chief Counsel (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> (providing guidance on the exercise of prosecutorial discretion).

11. See Interview with Abigail Trillin, Attorney for Legal Services for Children (Aug. 16, 2011) (discussing the use of prosecutorial discretion); Letter from Abigail Trillin, Attorney, Legal Services for Children, to Leslie Ungerman, Chief Counsel, ICE (July 25, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (providing a compelling argument and letters of support for the exercise of prosecutorial discretion in deportation proceedings of sixteen-year-old Roberto Lopez).

12. Transcript of Oral Decision at 12-15, *In re* [Martinez], No. A-xx-xxx-xxx (Sept. 12, 2008) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

13. See BIA Decision at 2, *In re* [Martinez], No. A-xx-xxx-xxx (2010) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (sustaining DHS’s appeal, vacating the immigration judge’s decision, and ordering Mr. Martinez removed).

14. See Mickey McCarter, *White House Vows to Drop Low-Priority Cases for Illegal Aliens*, HS TODAY (Aug. 19, 2011, 12:00 AM), <http://www.hstoday.us/briefings/today-s-news-analysis/single-article/white-house-vows-to-drop-low-priority-deportation-cases-for-illegal-aliens/22b3625f617e370d2380c4f24b22b889.html> (quoting Judy Rabinovitz, Deputy Director of the ACLU Immigrants’ Rights Project, as saying, “[w]hile the announcement

agents are inculcated with an enforcement culture that breeds resistance to a more compassionate approach to enforcement and avenues for the review of these discretionary standards are limited. As a result, inconsistent decisions regarding discretion in deportation proceedings have emerged across the country.<sup>15</sup>

Changing the culture of enforcement without exception within the immigration agency would undoubtedly be difficult. Given the challenges involved, I offer suggestions on how to decrease the inconsistencies through various administrative structural actions and reform of the ICE enforcement culture. Finally, I conclude this Article with some reflections on Mr. Martinez and his family.

## II. CAN YOU HELP WITH MY FATHER'S CASE?

In the course of my academic and community work, I often get invited to speak at various community meetings and events related to immigration law and policy. At those events, I meet many individuals who are members of groups that engage in activism on behalf of immigrants and immigrant communities. One such group, Responsibility, Integrity, Strength, Empowerment (R.I.S.E.), is comprised of students from Berkeley High School in Berkeley, California. In the summer of 2011, I received the first in a series of emails from this group:

July 5, 2011, 3:09 PM: Email from the R.I.S.E. Research Team

This is the RISE immigration team, we are writing to you for two reasons.

The first reason is [Lorena]'s father has 5 weeks to report to the detention center, His attorney is out of town and we are working with [her assistant]. We heard that [in immigration] cases [involving individuals who] haven't [committed] any criminal acts, that [their cases will be placed] on hold until all the criminal deportations are done. Is this true or do you have any suggestion?

Second of all, we are preparing . . . and we would like to know if you have time to work with us this summer. So, please call us [at] the RISE Office . . . or you can reach out to [our sponsor].

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sounds like a step in the right direction, the devil is in the details."); *see also* Natalya Shatniy, *Economic Effects of Immigration: Avoiding Past Mistakes and Preparing For The Future*, 14 SCHOLAR 869 (2012) (discussing the many problems with the current immigration scheme and suggesting a way forward).

15. *See* Shoba S. Wadhia, *Reading the Morton Memo: Federal Priorities and Prosecutorial Discretion*, IMMIG. POL'Y CTR., Dec. 2010, at 4–6 (suggesting that the Morton Memo lacks the specificity required to create a uniformly implemented program of prosecutorial discretion).

Thank you.

Sincerely, Rise Research Team<sup>16</sup>

I responded to their email:

July 5, 2011, 4:46 PM: Email to R.I.S.E. Research Team

Who is representing [Lorena]'s father? [First], what you heard about criminal deportations . . . is not exactly true, but the father's attorney should prepare a request for deferred action right away. The grant of such a request is a real long shot, even if the facts are very, very sympathetic.

. . . .

Bill Hing<sup>17</sup>

July 6, 2011, 12:53 PM: Email from the R.I.S.E. Research Team

Thanks Professor.

Angie Bean is representing the father. [Jesse] Lloyd, Angie's [assistant] is preparing the discretionary relief. Angie should be back this week.<sup>18</sup>

Aug 25, 2011, 3:27 PM: Email from the R.I.S.E. Research Team

Hello Professor Hing,

We were wondering if you could have a meeting with us as soon as possible. Monday any time will work for us. We want to draw together a committee of people to brain storm the best strategies for a campaign or action to deal with the large number of deportation of students and non-criminals. How is the recent Obama policy being used[?] [Lorena]'s father's hearing this morning gave him [one] month for deportation.<sup>19</sup>

Aug. 25, 2011: Email to R.I.S.E. Research Team

Hello,

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16. Email from R.I.S.E. Research Team to author, Professor of Law Univ. of San Francisco (July 5, 2011, 3:09 PM) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

17. Email from author, Professor of Law, Univ. of San Francisco, to R.I.S.E. Research Team (July 5, 2011, 4:46 PM) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

18. Email from R.I.S.E. Research Team to author, Professor of Law, Univ. of San Francisco (July 6, 2011, 12:53 PM) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

19. *Id.*

I called and spoke with [your sponsor]. If you want to come speak with me about these issues on Monday, I'm available after 3 pm at USF school of law [sic], 2199 Fulton Street. Just let me know.

I am also available on Tuesday, Aug 30, anytime before 6 pm.

Bill Hing<sup>20</sup>

On August 29, 2011 several students from the R.I.S.E. program—mostly high school students—arrived at my office with their sponsor, Adriana Curley, a counselor at Berkeley High School. We briefly discussed their ideas, including making a presentation at the United Nations on the topic of deportation and having a retreat to educate other young people in the San Francisco Bay Area about the facts and issues associated with deportation. However, the students' main desire to meet was to talk about the pending deportation of Lorena's father, Oscar Martinez, which was scheduled for September 23rd.

Lorena, a fellow member of R.I.S.E., appeared calm, but she was filled with despair. A former student at Berkeley High, Lorena was about to start her senior year at a local college.<sup>21</sup> She explained the details of her father's situation. He entered without inspection twenty-five years ago.<sup>22</sup> He never had any criminal problems, not even minor ones.<sup>23</sup> She and her brother, Oscar Jr., were both born in the United States.<sup>24</sup> Like her father, Lorena's mother also was undocumented.<sup>25</sup>

One day, about four years earlier, ICE agents came to the hotel where Mr. Martinez was employed as a kitchen helper and arrested him.<sup>26</sup> The family managed to scrape together the money to bail him out.<sup>27</sup> Following his arrest an immigration judge granted her father permission to stay and receive a "green card,"<sup>28</sup> but ICE officials appealed the judge's deci-

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20. Email from R.I.S.E. Research Team to author, Professor of Law, Univ. of San Francisco, to R.I.S.E. Research Team (Aug. 25, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

21. Letter from Lorena Cintron, *supra* note 4.

22. Statement of Oscar Martinez, *supra* note 2.

23. Letter from Lorena Cintron, *supra* note 4.

24. *Id.*

25. See Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents from Oscar Martinez to Assistant Chief Counsel, ICE, at 2 (Feb. 12, 2008) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (documenting that Mr. Martinez's wife has no alien registration number).

26. Transcript of Oral Decision at 4, *In re* [Martinez], No. A-xx-xxx-xxx (Sept. 12, 2008) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

27. *Id.* at 12-15.

28. *Id.*



sion and prevailed.<sup>29</sup> As a result of the appeal, her father was ordered deported.<sup>30</sup> According to her father's attorneys, no other appeals were available to her father.<sup>31</sup>

Lorena and the other students wanted to know how this could be happening to Mr. Martinez in light of the Morton Memo, which purported to de-prioritize non-criminals in immigration enforcement.<sup>32</sup> Lorena hinted that she was not confident that Mr. Martinez's current attorneys, Angela (Angie) Bean and Jesse Lloyd, had done their best to advocate for her father or if they understood the effect of the Morton Memo. She inquired if I was willing to assess their competence and if having me intervene would help her father.

I'm familiar with both Angie Bean and Jesse Lloyd. Angie has been practicing immigration law since the 1980s and, in fact, she was one of my students in an immigration law course and the immigration clinic at Golden Gate University. Jesse Lloyd was a student at the University of California, Davis, School of Law during the same time I was a member of the faculty as the director of all the clinical programs. He participated in the immigration law clinic at Davis, and although he was not directly one of my students, the clinic instructors thought highly of Jesse. In my opinion, Jesse and Angie are more than competent and likely did a good job on Mr. Martinez's behalf. However, I was concerned about the reaction they received from local ICE authorities when they mentioned prosecutorial discretion as outlined in the Morton Memo. Knowing Angie and Jesse would likely be forthcoming with information, that the facts were sympathetic, and that the situation for Lorena's family was dire, I agreed to help.

Lorena presented several convincing reasons that persuaded me to help her father avoid deportation. First, from her description of her father, he seemed to deserve the exercise of discretion in his favor. Looking back on my interactions with Mr. Martinez, I still agree that he was deserving of ICE's prosecutorial discretion. Second, I was interested in having firsthand experience with the implementation of the Morton Memo. As discussed in the account below, what I have learned about the process is not pretty. Third, just a few weeks prior to meeting Lorena, I

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29. See BIA Decision at 2, *In re* [Martinez], No. A-xx-xxx-xxx (2010) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (sustaining DHS's appeal, vacating the immigration judge's decision, and ordering Mr. Martinez removed).

30. *Id.*

31. See Interview with Angela Bean, Angela M. Bean & Assoc., Attorney for Oscar Martinez (Sept. 2, 2011) (discussing the lack of appeal options remaining).

32. See Memorandum from John Morton, Dir., ICE, on Exercising Prosecutorial Discretion, *supra* note 10 (listing "long-time lawful permanent residen[cy]" in the United States as a positive factor to warrant consideration for prosecutorial discretion).

assisted Abigail Trillin of Legal Services for Children in terminating proceedings in another sympathetic case involving a young, undocumented teen whose parents also were undocumented immigrants.<sup>33</sup> In that case, the local ICE attorney who facilitated the termination seemed fairly open-minded, even prior to the issuance of the Morton Memo.<sup>34</sup> As it turned out, whatever degree of confidence I developed from handling that case did little good in preparing me for my experience with the Martinez family.

#### A. Lorena Cintron

The day Lorena asked me to help with her father's case was not our first meeting. In addition to meeting with R.I.S.E. students before, I had also spoken with a group called Educators for Fair Consideration, a non-profit organization that raises funds and provides grants to tuition-needy DREAM Act students in college, with whom Lorena worked from time to time. Lorena told me she had heard me give speeches and presentations in the past and found my words and advocacy inspirational. I could see the desperation in her eyes as she implored me to help.

Through meeting with Lorena, I learned more about her background. Her natural father died in a car accident when she was just two-years-old and Oscar Martinez became her stepfather when she was six-years-old.<sup>35</sup> In high school, she was very dedicated to her studies and took several advanced placement classes, where she performed well.<sup>36</sup> She shared that she was one of the few Latinas in most of her classes and confided to a school counselor she sometimes felt like she was fighting society's common "stereotypes" about Latino students.<sup>37</sup> Her desire to overcome these stereotypes was a big reason she worked so hard in her studies.<sup>38</sup> In addition to her academic achievements, Lorena also had a passion for soccer and was selected to be part of the varsity team as a mere fresh-

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33. Letter from Abigail Trillin, Attorney, Legal Servs. for Children, to Leslie Ungerman, Chief Counsel, ICE (July 25, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) ("Mr. Lopez's story is a sympathetic one, and an exercise of prosecutorial discretion would be appropriate for this young man who has proven himself to be a highly regarded member of his community . . .").

34. See Letter from Avantika Shastri, Attorney for Van Der Hout, Brigagliano, & Nightingale, to author, Professor of Law, Univ. of San Francisco (Nov. 10, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (reflecting Leslie Ungerman's opinion that the factors for exercising prosecutorial discretion in the Morton Memo were already in use at ICE and would continue to be considered).

35. Statement of Oscar Martinez, *supra* note 2.

36. Interview with Lorena Cintron, Stepdaughter of Oscar Martinez (Sept. 6, 2011).

37. Statement of Oscar Martinez, *supra* note 2.

38. Interview with Lorena Cintron, *supra* note 36.

man.<sup>39</sup> She was voted Most Inspirational Player on the high school team and was captain of both her high school and club soccer teams.<sup>40</sup> Her proficiency in the sport helped Lorena get hired as a part-time coach in the youth soccer leagues, which allowed her to earn money to pay for her own expenses and alleviate some of the financial stress on her parents.<sup>41</sup> In addition to her already busy schedule, Lorena found time to volunteer in the community and play the violin.<sup>42</sup> She interned for Team-Up for Youth, a non-profit that helps low-income youth in the Bay Area participate in sports.<sup>43</sup> She also has formed a Latina Psychology group in high school.<sup>44</sup>

### B. Oscar Martinez

Mr. Martinez was born in 1955 in a small town in the state of Guanajuato, Mexico.<sup>45</sup> He grew up poor—often lacking food, clothing, and housing.<sup>46</sup> He attended the local elementary school through the third grade—the highest level of education that the hometown elementary school offered.<sup>47</sup> He then attended three more years of school in a town that was five kilometers away, walking two hours each way because the family could not afford to pay for the van ride.<sup>48</sup> As the oldest child, he had to stop school and begin working by age eleven to help put food on the table.<sup>49</sup>

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39. *Id.*; see also Statement of Oscar Martinez, *supra* note 2 (mentioning his sorrow that Lorena ceased playing soccer).

40. Interview with Lorena Cintron, *supra* note 36 (discussing her skill at soccer).

41. *Id.*

42. *Id.*

43. *Id.*

44. See Letter from author, Professor of Law, Univ. of San Francisco, to Timothy S. Aitken, Field Office Dir., ICE (Sept. 12, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (summarizing the positive impact of Mr. Martinez's past and continued residency in the United States on his stepdaughter's academic and personal pursuits); Letter from Oralia Ramirez, Guidance Counselor, Berkeley High Sch., to author, Professor of Law, Univ. of San Francisco (April 7, 2008) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (recalling the various extra-curricular activities Lorena was involved in and her exemplary academic performance); Letter from Lorena Cintron, *supra* note 4 (detailing the her father's involvement in her life, the positive impact of this involvement on her educational and extracurricular pursuits, the importance to her family of her father's ability to remain in the United States, and the legal reasons prosecutorial discretion should be exercised in her father's favor).

45. See Application for Cancellation, *supra* note 25 (providing Mr. Martinez's birth date and birthplace).

46. Interview with Oscar Martinez (Sept. 6, 2011).

47. *Id.*

48. *Id.*

49. See Application for Cancellation, *supra* note 25 (identifying that Oscar Martinez is the eldest of fourteen children born to his parents).

Mr. Martinez's hometown—Valle de Santiago—only had about five hundred residents, and the only work available was in the agricultural fields.<sup>50</sup> Some years later, his father decided to try his luck in Mexico City to earn more money.<sup>51</sup> Mr. Martinez and two of his brothers, who also left school at an early age to help work, remained in Valle de Santiago to work in the fields.<sup>52</sup> In 1975, the entire family moved to Mexico City to join their father, where Mr. Martinez found work in a stationery store making minimum wage—more than what he made in the fields.<sup>53</sup>

Shortly thereafter, Mr. Martinez met Laura Gomez and fell in love.<sup>54</sup> After three years of dating, they decided to get married and form their own family.<sup>55</sup> Even after marrying, Mr. Martinez still felt he had an obligation to help his parents and siblings with expenses, so he continued to share part of his salary with them.<sup>56</sup> His dream was to build a house with his wife and raise children in an environment where they could obtain a good education—an environment very different from his own childhood.<sup>57</sup> Unfortunately, the couple learned that Laura was unable to have children, but they continued to strive for their dream of earning enough money to build a home.<sup>58</sup> However, good work became difficult to find even though expenses were climbing.<sup>59</sup>

Like so many others, Mr. Martinez looked to the United States to pursue his dream. In 1985, he entered with his father-in-law, looking for work in Oakland, California.<sup>60</sup> He soon found work as a potato packer for a produce company earning only \$120 per week.<sup>61</sup> Six months later, he found a better job working the graveyard shift from 11 PM to 7 AM in the kitchen of a Holiday Inn (later purchased by Hilton Hotel).<sup>62</sup> Mr. Martinez worked the graveyard shift for ten years.<sup>63</sup> By working hard, Mr. Martinez was given the opportunity to work the day shift, and he

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50. *See id.* (providing Mr. Martinez's birthplace).

51. Interview with Oscar Martinez, *supra* note 46.

52. *Id.*

53. *See* Transcript of Oral Decision at 6, *In re* [Martinez], No. A-xx-xxx-xxx (Sept. 12, 2008) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (in removal proceeding) (stating Oscar Martinez lived in various parts of Mexico, including Mexico City and had to constantly work to help assist his family).

54. Interview with Oscar Martinez, *supra* note 46.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. Letter from author to Timothy S. Aitken, *supra* note 44.

60. Transcript of Oral Decision at 3–4, *In re* [Martinez], No. A-xx-xxx-xxx (Sept. 12, 2008) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

61. Interview with Oscar Martinez, *supra* note 46.

62. *Id.*

63. *Id.*

maintained that shift until August 2007, when he was arrested by ICE.<sup>64</sup> Although the pay was modest, the job provided medical benefits.<sup>65</sup> In addition to working at the hotel, Mr. Martinez worked part time at a pizza parlor to supplement his income.<sup>66</sup> In total, he averaged sixty-eight to seventy-two hours of work a week to provide for his family's needs.<sup>67</sup> When the Board of Immigration Appeals (BIA) ruled against him in 2010,<sup>68</sup> Mr. Martinez had worked in the hotel kitchen for almost twenty-five years.<sup>69</sup>

After his first trip to the United States, Mr. Martinez returned to Mexico a couple of times.<sup>70</sup> His last entry was in 1987 with his first wife Laura, and he resided in the United States continuously since then.<sup>71</sup> In September 1993, they decided to buy a house in Oakland, with the idea that they would adopt a child in the future.<sup>72</sup> Both continued working, but in 1994 Laura began getting sick.<sup>73</sup> Her illness became so debilitating that after a while she had to stop working.<sup>74</sup> Doctors discovered a problem that affected Laura's lungs and heart, which caused her to suffer a great deal. Sadly, Laura died in January 1995.<sup>75</sup>

The loss of Laura changed Mr. Martinez completely. He was alone in the United States.<sup>76</sup> He did not want his parents or siblings to come to the United States because of the difficulties and dangers of crossing the border.<sup>77</sup> This was a painful period for him, having lost his wife of seven-

64. Letter from author to Timothy S. Aitken, *supra* note 44.

65. *Id.*

66. *Id.*

67. Statement of Oscar Martinez, *supra* note 2.

68. See Letter from author to Timothy S. Aitken, *supra* note 44 (explaining that three years after Judge Geisse granted cancellation of removal, the Board of Immigration Appeals, on January 14, 2010, reversed on the grounds that Mr. Martinez did not meet the burden of proving the requisite hardship). Mr. Martinez sought review from the Ninth Circuit, but his petition for review was denied for lack of jurisdiction. *Id.*

69. See Letter from author to Timothy S. Aitken, *supra* note 44 (indicating that in addition to being a loyal employee at the Hilton Garden, Mr. Martinez took a second job at [Harold's] Pizza in order to make ends meet).

70. Transcript of Oral Decision at 4, *In re* [Martinez], No. A-xx-xxx-xxx (Sept. 12, 2008) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

71. *Id.*

72. Interview with Oscar Martinez, *supra* note 46.

73. Transcript of Oral Decision at 4, *In re* [Martinez], No. A-xx-xxx-xxx (Sept. 12, 2008) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

74. *Id.* at 4–5.

75. *Id.* at 3–4. See Statement of Oscar Martinez, *supra* note 2 (stating that Mr. Martinez's first wife was unable to have children and that Mr. Martinez came to grips with the possibility that he might never be a father). The document further states that Mr. Martinez's first wife passed away from a heart defect. *Id.*

76. Statement of Oscar Martinez, *supra* note 2.

77. Interview with Oscar Martinez, *supra* note 46.

teen years.<sup>78</sup> Mr. Martinez took refuge in his work; he also played baseball to take his mind off the tragedy.<sup>79</sup>

After some time, his friends suggested that Mr. Martinez look for a new partner so he would not be alone.<sup>80</sup> He was doubtful that he could find someone who would understand his situation and state of mind.<sup>81</sup> However, a couple he knew told him about another friend whose spouse had also passed away.<sup>82</sup> They told Mr. Martinez about Zoila, who was now alone with two young children and also needed companionship.<sup>83</sup> Mr. Martinez was interested in meeting Zoila, especially because she had two children.<sup>84</sup>

Mr. Martinez and Zoila were introduced and they eventually married in March 1996.<sup>85</sup> He treated Zoila's two children Donald and Lorena like his own; they were quite young when he became their stepfather.<sup>86</sup> They felt so fortunate to have been brought together when each was in such great pain and need.<sup>87</sup> They truly felt that they were brought together through divine intervention.<sup>88</sup>

Angie Bean gathered supporting documents from Mr. Martinez's friends and neighbors for the deportation hearing that describe him as a humble, caring, and well-respected member of the Berkeley community.<sup>89</sup> Mr. Martinez and his second wife successfully integrated into the community and established roots.<sup>90</sup> Mr. Martinez was a good neighbor, a

78. *Id.*

79. *See* Statement of Oscar Martinez, *supra* note 2 (explaining that after the passing of his first wife, Mr. Martinez felt “. . . completely overcome by the prospect of being totally alone.”).

80. *See id.* (stating that he met Zoila through a mutual friend).

81. Interview with Oscar Martinez, *supra* note 46.

82. *Id.*

83. Statement of Oscar Martinez, *supra* note 2 (explaining that Zoila faced similar emotional hardship after her first husband passed away).

84. *See id.* (explaining that Mr. Martinez's wife Zoila was faced with a similar hardship after her first husband was killed in a car accident). The two were introduced through a mutual friend and turned pain into joy. *Id.*

85. Statement of Zoila Martinez (2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

86. *Id.*

87. Statement of Oscar Martinez, *supra* note 2.

88. *Id.* (“The greatest joy from meeting and marrying [Zoila] was the fact that my lifelong dream of being a father was realized in receiving the beautiful boy and girl that I now call my own.”).

89. *See* Application for Cancellation, *supra* note 25 (according to the cancellation packet, eighteen letters were written from various members of the community on behalf of Mr. Martinez).

90. *See id.* (demonstrating the roots the Martinez family had established during their time in Oakland).

good worker, and a regular churchgoer.<sup>91</sup> He was the godfather to a disabled boy, and participated in church and community events.<sup>92</sup> Reverend A.M., executive director of a local church organizing group, noted that Mr. Martinez and his family “participated in many community activities in our organization . . . . [W]e are grateful for their leadership, responsibility, and commitment to the community.”<sup>93</sup>

Mr. Martinez’s commitment to the community extended beyond religious boundaries. Mr. L.A., a union representative, wrote that Mr. Martinez “has been an active Union member . . . for 22 years. He has always helped his co-workers with problems, attended Union meetings, and worked together with management to resolve any issues as they came up.”<sup>94</sup> Mr. Martinez also was deeply involved in PTA meetings, school activities, and community athletic and cultural programs.<sup>95</sup> Other parents in the community expressed, “Mr. [Martinez] is an active, honest, respectful, and quietly supportive member of our community soccer programs. He and his wife are truly role models for his children as well as their teammates.”<sup>96</sup> Mr. Martinez’s service to the community through many outlets has made him a role model for other children and adults. For example, parents in the community have described Mr. Martinez as “a very responsible person, dedicated to the well being of his family, deeply involved in community and family activities, PTA meetings, school reunions[,] and church issues.”<sup>97</sup> The PTA Council President expressed, “I feel strongly that Mr. [Martinez] is a stabilizing factor in our community.

91. See *id.* (discussing the positive attributes of Mr. Martinez).

92. Letter from B.R. and R.R., to Judge Geisse (Feb. 12, 2008) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (describing Mr. Martinez as an honest and all around good citizen). Benjamin and Rosa Ramirez note that Mr. Martinez is the godfather of their mentally disabled son. *Id.* The R’s also point out that Mr. Martinez took his godson Oswaldo to his First Holy Communion, and his Sacrament of Confirmation. *Id.*

93. Letter from Rev. A.M., to Judge Geisse (Feb. 12, 2008) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (quoting Reverend A.M. the Executive Director of Berkeley Organizing Congregations for Action).

94. Letter from L.A., Union Representative, to Judge Geisse (Nov. 1, 2007) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

95. See Application for Cancellation, *supra* note 25 (including various letters from friends and neighbors highlighting the involvement of Mr. Martinez in the community).

96. See Letter from P.K., to Judge Geisse (Jan. 25, 2008) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (quoting T.P., a friend of Mr. Martinez who is explaining that Mr. Martinez and his wife have strongly supported community soccer programs by attending parent meetings, participating in team events, and participating in fund raising activities).

97. See Application for Cancellation, *supra* note 25 (quoting R.M. and A.M. who have known Mr. Martinez for fourteen years).

We need more men like him, who are loyal and loving to their families.”<sup>98</sup> Another Berkeley parent noted,

year after year, [Mr. Martinez] volunteered with me in events held for the local church and Berkeley Unified School District where our children attended. As part of his nature, [Mr. Martinez] goes out of his way to motivate our Latino population and even organizes cultural celebrations at our church and local senior centers.<sup>99</sup>

### III. THE MORTON MEMO

On June 17, 2011, U.S. Immigration and Customs Enforcement (ICE) Director John Morton issued an important memorandum on the use of prosecutorial discretion in immigration matters.<sup>100</sup> Prosecutorial discretion refers to the agency’s authority to not enforce immigration laws against certain individuals and groups.<sup>101</sup> The memo calls on ICE attorneys and employees to refrain from pursuing noncitizens with close family, educational, military, or other ties in the United States and instead spend the agency’s limited resources on persons who pose a serious threat to public safety or national security.<sup>102</sup> A closer look at the Morton Memo on prosecutorial discretion reveals that it reaffirms many of the

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98. Letter from C.B., Berkeley PTA Council President, to Judge Geisse (Feb. 14, 2008).

99. Letter from A.H., U.S. citizen friend of Mr. Martinez, to Judge Geisse (Feb. 10, 2008).

100. See Memorandum from John Morton, Dir., ICE, Exercising Prosecutorial Discretion, *supra* note 10 (focusing on the first memorandum issued that day by Director Morton on the subject of exercising prosecutorial discretion consistent with the civil Immigration enforcement priorities of the Agency for the apprehension, detention, and removal of aliens). Morton’s second memo focuses on exercising discretion in cases involving victims, witnesses to crimes, and plaintiffs in good faith civil rights lawsuits. Memorandum from John Morton, Dir., ICE, on Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs, to All Field Office Dir., All Special Agents in Charge, and All Chief Counsel (June 17, 2011), available at <http://www.aila.org/content/default.aspx?docid=35939>. That memo instructs “[a]bsent special circumstances or aggravating factors, it is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime.” *Id.*

101. See Memorandum from John Morton, Dir., ICE, on Exercising Prosecutorial Discretion, *supra* note 10 (explaining that the agency faces more violations than its resources can handle, and therefore, the agency should exercise prosecutorial discretion to prioritize its efforts).

102. See *id.* (providing a non-exhaustive list of factors ICE personnel should consider when deciding whether or not to exercise prosecutorial discretion). The memo further asserts that decisions to exercise prosecutorial discretion should be made by considering the totality of the circumstances with the goal of focusing on ICE’s enforcement priorities. *Id.* Morton defined the enforcement priorities as national security, public safety, border security, and the reliability of the immigration system. *Id.*



principles and policies of previous guidance on this subject.<sup>103</sup> The memo, however, takes a further step in articulating the expectations for and responsibilities of ICE personnel when exercising their discretion.<sup>104</sup>

The memorandum issued on June 17, 2011 provides guidance to all ICE officials on the exercise of prosecutorial discretion.<sup>105</sup> Specifically, the memo provides a non-exhaustive list of relevant factors that ICE officers should weigh in determining whether to exercise prosecutorial discretion.<sup>106</sup> Several of these factors have a direct bearing on Mr. Martinez's case, including:

- the agency's civil immigration enforcement priorities;
- the person's length of presence in the United States, with particular consideration given to presence while in lawful status;
- . . . .
- the 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 his home country and conditions in the country;
- . . . .
- whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
- . . . .

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103. *See id.* (identifying that this memorandum supplements several existing memoranda covering prosecutorial discretion and even provides a list of specific memos that should be considered).

104. *See id.* (explaining that certain individuals warrant particular care and listing positive and negative factors that should be considered; the memo also covers the issue of timing and states it is preferable to exercise prosecutorial discretion as soon as possible to conserve government resources).

105. *Id.*

106. *Id.* The memorandum emphasizes that none of the factors is determinative, and that ICE officials should base their decision on the "totality of . . . circumstances" relevant to a given case. *Id.*

whether the person or the person's spouse suffers from severe mental or physical illness[.]<sup>107</sup>

The memo further points out:

[ICE] has limited resources to remove those illegally in the United States. ICE must prioritize the use of its enforcement personnel, detention space, and removal assets to ensure that the aliens it removes represent, as much as reasonably possible, the agency's enforcement priorities, namely the promotion of national security, border security, public safety, and the integrity of the immigration system.<sup>108</sup>

The memo goes on to provide examples of those for whom prosecutorial discretion is not appropriate: gang members, serious felons, repeat offenders, and those who pose national security risks.<sup>109</sup> Importantly, and most relevant to Mr. Martinez, the memo notes that prosecutorial discretion can be exercised at any stage of the enforcement proceedings, although exercising the discretion earlier is better to preserve government enforcement funds.<sup>110</sup>

The Morton memo was greeted with fanfare.<sup>111</sup> Some 400,000 pending deportation cases would be reviewed to cull out the low priority immigrants for cancellation of proceedings.<sup>112</sup> In my view, the stage was set for low priority cases like Mr. Martinez to have deportation set aside.

107. *Id.* Some of the other factors listed include whether the alien arrived in the country during early childhood, the alien's level of education pursued in the United States, U.S. military service, whether the alien is a minor or an elderly person, and whether the alien has cooperated with immigration and law enforcement agencies and continues to do so. *Id.*

108. *Id.*

109. *Id.* Other negative factors to be considered include a lengthy criminal record, posing a danger to public safety, and a history of severe immigration violations, such as illegal re-entry and immigration fraud. *Id.*

110. *Id.* The memo also notes, "[w]hile ICE may exercise prosecutorial discretion at any stage of an enforcement proceeding, it is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing the enforcement proceeding." *Id.* Interestingly, the memo also encourages ICE decision makers to initiate prosecutorial discretion on their own whenever appropriate, without a specific request by the alien or his counsel. *Id.*

111. Jefferson Morley, *Obama's Broken Immigration Promise*, SALON (May 17, 2012, 9:15 PM), [http://www.salon.com/2012/05/17/obamas\\_broken\\_immigration\\_promise/](http://www.salon.com/2012/05/17/obamas_broken_immigration_promise/) (stating that, at the time of its issuance, the new policy was hailed by the Spanish language media, but that it has failed to provide the promised relief for many eligible aliens).

112. *But see* Esther J. Cepeda, *Immigration-Reform Chump Change*, NBC LATINO (June 20, 2012), <http://nbclatino.tumblr.com/post/25538630476/opinion-immigration-reform-chump-change> (providing a sobering assessment of the situation one year after the issuance of the Morton Memo). In reality, higher numbers of noncriminal illegal immi-

### A. Roberto's Case Example

As I mulled over Mr. Martinez's excellent equities in the context of the Morton Memo, I could not help but compare them to the case of Roberto, an undocumented 16-year-old boy whom I met through Abigail Trillin. A few weeks before I met Lorena, I spoke with Abigail, the dedicated, hard-working managing attorney of Legal Services for Children about Roberto who was in the middle of removal proceedings.<sup>113</sup> A couple years earlier, Roberto had been handed over to ICE authorities in San Francisco after he took a plastic pellet gun to school to show his friends.<sup>114</sup> He had to spend Christmas at a juvenile facility hundreds of miles away from his family, while awaiting deportation to Mexico, the country he had left at the age of two.<sup>115</sup> Although the "gun" was not dangerous, and Roberto made no effort to conceal it, it triggered his high school's zero-tolerance policy and he was reported to the police.<sup>116</sup> Roberto was suspended from school for five days and a judge sentenced him to informal probation for one year.<sup>117</sup> He successfully completed his probation without incident.<sup>118</sup> Although his parents were also undocumented, ICE did not arrest them.<sup>119</sup>

Roberto lives with his family in a tight-knit community in San Francisco's Richmond District.<sup>120</sup> He is a soft-spoken and deeply contemplative kid.<sup>121</sup> He is the eldest of four children, with two younger sisters, ages ten and six, and a six-month-old baby brother.<sup>122</sup> His younger sister and baby brother were both born in the country and thus have U.S. citi-

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grants have been deported since the issuance of the memo and the DHS is still facing a tremendous backlog. *Id.*

113. See Letter from Abigail Trillin, *supra* note 33 (asking for prosecutorial discretion and dismissal of Roberto's removal proceedings).

114. *Id.*

115. Jesse McKinley, *San Francisco at Crossroads Over Immigration*, N.Y. TIMES, June 12, 2009, [http://www.nytimes.com/2009/06/13/us/13sanctuary.html?\\_r=1](http://www.nytimes.com/2009/06/13/us/13sanctuary.html?_r=1).

116. Letter from Abigail Trillin, *supra* note 33.

117. *Id.*

118. *Id.*

119. McKinley, *supra* note 115.

120. Letter from Abigail Trillin, *supra* note 33.

121. See Letter from Derrlyn J. Tom, Science Teacher, Mission High Sch., to Leslie Ungerman, Chief Counsel, ICE (May 3, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (describing Roberto as an attentive and focused student who is pursuing his education with "quiet intensity"); see also Letter from Eric Guthertz, Principal, Mission High Sch., to Leslie Ungerman, Chief Counsel, ICE (May 6, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (expressing his opinion that the toy gun incident was nothing but a temporary lapse in judgment by an otherwise "terrific young man who has always been respectful, compassionate, and considerate . . .").

122. Letter from Abigail Trillin, *supra* note 33.

zenship.<sup>123</sup> Roberto's father, a proud taxpayer, supports the family by working over ten hours each day, taking only Sundays off to be with his wife and children.<sup>124</sup> Roberto's mother raises the children and actively participates in the local community and the church, which the whole family regularly attends for Sunday services.<sup>125</sup> Rev. Francisco Gámez describes Roberto as "very active in the Church . . . ."<sup>126</sup>

As the oldest child, Roberto has taken on a central role in caring for his younger siblings and is actively involved in their day-to-day lives. He helps his sisters prepare for school and gets them out the door in the morning, and helps his 10-year-old sister with her homework on a regular basis . . . . Several times a week the task of preparing dinner falls to Roberto . . . ."<sup>127</sup>

His family has come to depend on him as a reliable partner in their success as a family unit.<sup>128</sup>

Roberto enjoys the responsibility of helping his mother to care for the family. The entire family is very close, often sitting for meals together, sharing household chores, and looking out for each other . . . . One of Roberto's teachers who has witnessed many disciplinary incidents at school stated unequivocally that Roberto's parents were more actively involved in the process of Roberto's incident than any other parents she had seen.<sup>129</sup>

Roberto also maintains an active social life. He has many friends and spends several weekday afternoons each week with them at the Boys and Girls Club . . . . On Friday afternoons he participates in a leadership and civic responsibility workshop at the club.<sup>130</sup>

123. *Id.*

124. *Id.*

125. *Id.*

126. Letter from Rev. Francisco J. Gámez, Rev., Cathedral of St. Mary of the Assumption, to U.S. Citizenship and Immigration Service (May 7, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*);

127. Letter from Abigail Trillin, *supra* note 33.

128. Letter from Cynthia Mathison, Counselor, Mission High Sch., to Leslie Ungerman, Chief Counsel, ICE (May 1, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*); Letter from Abigail Trillin, *supra* note 33.

129. Letter from Abigail Trillin, *supra* note 33.

130. Letter from Cynthia Mathison to Leslie Ungerman, *supra* note 128; Letter from Abigail Trillin, *supra* note 33. Boys and Girls Clubs of America is a unique, community-based and building centered club. *Facts and Figures*, BOYS AND GIRLS CLUBS OF AM., <http://www.bgca.org/whoware/Pages/FactsFigures.aspx> (last visited Nov. 15, 2011). The Clubs provide a safe, affordable place for young people during non-school hours and during the summer. *Id.*

Roberto is currently attending Mission High School.<sup>131</sup> All of his teachers and his principal at Mission High School regard him highly.<sup>132</sup> They have described him as a “successful” and “trustworthy student,” with “good attendance;” as a “critical thinker and debater” who has “a great awareness of current events;” and noted that he is an “intelligent and insightful young man,” who is surely destined to attend college upon graduation from high school.<sup>133</sup>

Roberto maintains an excellent grade point average, receiving many “A”s over the course of his high school career. He has never shown behavior issues in class, in fact quite the contrary, his teachers all state that he is an active participant in class who often helps and supports his classmates. Roberto is actively involved in school physical education and sports programs. As a freshman, he played for the Mission High School soccer team, and ran Cross-Country as a sophomore.<sup>134</sup>

No fewer than seven of his teachers, past and present (including the school principal) wrote letters in support of Roberto. Their statements are clear and concise: Roberto is exactly the kind of student their high school seeks to cultivate.<sup>135</sup> They unanimously believed that deportation is not only an inappropriate and disproportionate response to the incident, but that it would send a message that runs counter to their efforts as educators.<sup>136</sup> The Assistant Principal at Mission High School has said that because of the immigration implications in Roberto’s case, the school

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131. See, e.g., Letter from Virginia C. Reyes, ESL/English Teacher, Mission High Sch., to Leslie Ungerman, Chief Counsel, ICE (May 6, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (speaking about Roberto’s determination to succeed, and his limitless thirst for knowledge).

132. Letter from Abigail Trillin, *supra* note 33.

133. Letter from Andra Kimball, Science Teacher, Mission High Sch., to Leslie Ungerman, Chief Counsel, ICE (May 6, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*); Letter from Nancy Rodriguez, Teacher, Mission High Sch., to Leslie Ungerman, Chief Counsel, ICE (May 5, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*); Letter from Derrlyn J. Tom to Leslie Ungerman, *supra* note 121; Letter from Abigail Trillin, *supra* note 33.

134. Letter from Andra Kimball to Leslie Ungerman, *supra* note 133; Letter from Nancy Rodriguez, Teacher, Mission High Sch., to Leslie Ungerman, Chief Counsel, ICE (May 5, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*); Letter from Derrlyn J. Tom to Leslie Ungerman *supra* note 121; Letter from Abigail Trillin, *supra* note 33.

135. Letter from Abigail Trillin, *supra* note 33.

136. *Id.*

has changed its policy and will no longer report this type of offense to the police.<sup>137</sup>

Unfortunately, for Roberto the report of his infraction came right on the heels of a policy change requiring the police to report him to ICE:

On December 9, 2008, Roberto took the toy gun to school.<sup>138</sup> He did not realize that it was improper to bring such a toy to school and made no effort to conceal it.<sup>139</sup> Roberto “never intended to frighten, much less harm anyone. Nevertheless, the toy was discovered and reported to the principal.”<sup>140</sup> “The school’s zero-tolerance policy included toy guns, and Roberto was suspended from school and reported to the police.”<sup>141</sup>

As a result of a policy change implemented just four months earlier in August 2008, the juvenile authorities were required to report children upon arrest to ICE regardless of whether or not they were eventually convicted of a crime . . . .<sup>142</sup>

At 14 years old, he was taken into ICE custody, sent to a criminal detention facility in Seattle, Washington, for seven weeks and scheduled for a deportation hearing.<sup>143</sup> Roberto’s case was heard by a judge, and he was given a sentence of informal probation for one year.<sup>144</sup> Informal probation means that no plea is entered and the minor does not have any sustained charges as long as they complete probation.<sup>145</sup> He successfully completed his probation on July 22, 2009, and consequently has no criminal record.<sup>146</sup>

Based on these facts, Abigail, Michael Dundas (a volunteer law student), and I put together a packet of information requesting that the local ICE chief counsel, Leslie Ungerman, terminate removal proceedings. The Immigration Court agreed to a continuance while the request was pending. Finally, Ms. Ungerman agreed to cancel removal proceedings, and the case was dismissed.

From my perspective, this made sense, especially after the Morton Memo was issued. Roberto presented no public safety threat and had no

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137. *Id.*; Letter from Nancy Rodriguez, Teacher, Mission High Sch., to Leslie Ungerman, Chief Counsel, ICE (May 5, 2011) (on file with *The Scholar: St. Mary’s Law Review on Race and Social Justice*); Letter from Derrlyn J. Tom to Leslie Ungerman *supra* note 121; Letter from Abigail Trillin, *supra* note 33.

138. Letter from Abigail Trillin, *supra* note 33.

139. *Id.*

140. *Id.*

141. *Id.*

142. McKinley, *supra* note 115.

143. Letter from Abigail Trillin, *supra* note 33.

144. *Id.*

145. *Id.*

146. *Id.*

criminal record.<sup>147</sup> The dismissal of the case freed up ICE and immigration court resources.<sup>148</sup> Roberto's removal would have separated him from his parents and U.S. citizen siblings.<sup>149</sup> As I mulled over Mr. Martinez's case, there were very similar policy reasons for terminating deportation efforts against him as well, including family ties, lengthy residence in the United States, excellent community support, and a clean criminal record.<sup>150</sup>

#### IV. THE CANCELLATION CASE THREE YEARS EARLIER

Based on my conversations with Angie Bean, and after reviewing Mr. Martinez's file, I concluded that Angie did a fine job representing Oscar Martinez. This is no surprise. Angie is experienced, smart, knowledgeable of the law, strategic thinking, respectful of her clients, and is committed to following through on every logical angle. Angie also had a special motivation in Mr. Martinez's case because Angie's daughter and Lorena had been teammates on a club soccer team for a number of years and Angie had known Lorena, Mr. Martinez, and the rest of the family for years.<sup>151</sup> So, Mr. Martinez was not a typical client for Angie; this was personal. This was for a family that she knew in extraordinary terms.<sup>152</sup>

Mr. Martinez was arrested by ICE at the Hilton Hotel, where he worked, on August 29, 2007.<sup>153</sup> Although no one knows with certainty, it seems that ICE was operating on an explicit tip about Mr. Martinez.<sup>154</sup> When the agents arrived, they asked for him specifically, and he offered no resistance when they approached him.<sup>155</sup> Apparently, he also readily admitted that he was undocumented.<sup>156</sup> Fortunately, he was eligible for release on bond, so that even though he was in custody for a few days, he was able to post bond and be released from custody pending the deportation proceedings.<sup>157</sup> Lorena was about sixteen at the time, and Angie

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147. *Id.*

148. *Id.*

149. *See id.* (referring to the factors listed in prosecutorial discretion memo entitled "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities and the Agency for the Apprehension, Detention, and Removal of Aliens"). The memo listed factors such as, age, the person's pursuit of education, familial ties and contributions to community, as well as public safety and national security concerns. *Id.*

150. Letter from author to Timothy S. Aitken, *supra* note 44.

151. Interview with Angela Bean, *supra* note 31.

152. *Id.*

153. *See* Transcript of Oral Decision at 4, *In re* [Martinez], No. A-xx-xxx-xxx (Sept. 12, 2008).

154. Interview with Angela Bean, *supra* note 31.

155. *Id.*

156. *Id.*

157. *Id.*

told me that “[Lorena] grew up real fast” during that stressful period, going to see her father while he was in ICE custody.<sup>158</sup>

Angie took full advantage of her personal knowledge of Mr. Martinez’s family, employment, and community background. By the time his removal proceedings finally took place on May 14, 2008,<sup>159</sup> his length of residence, citizen children, clean record, and work history made him statutorily eligible for cancellation of removal and the grant of lawful resident status.<sup>160</sup> The statute requires that the applicant: (1) has ten years of continuous physical presence in the United States; (2) has been a person of good moral character throughout this time; (3) is not otherwise subject to criminal bars arising from certain convictions; and (4) establishes that removal would result in “exceptional and extremely unusual hardship” to the alien’s spouse, parent, or child who is a U.S. citizen or legal permanent resident.<sup>161</sup>

Angie knew that the big challenge in any cancellation of removal case is the hardship requirement.<sup>162</sup> The documents supporting the cancellation application—including many affidavits from friends, neighbors, and acquaintances—were impressive.<sup>163</sup> Hilton co-worker Elijah Esquibel writes of Mr. Martinez’s work ethic, dependability, and good nature.<sup>164</sup> Oscar Jr.’s Fourth Grade schoolteacher, M.C., writes about what a good student Oscar Jr. is and how Mr. Martinez is involved in the school’s PTA and English Learner Advisory Committee, and how he serves as a role model.<sup>165</sup> Another of Oscar Jr.’s teachers, K.K., writes of how Mr. Martinez is a “supportive and positive presence on our campus and in [Oscar] Jr.’s life, in the classroom, at home, and on the soccer field.”<sup>166</sup> A soccer parent, R.G., writes that the desire of “Mr. [Martinez] and his wife [Zoila] . . . to support their daughter [Lorena] led them into every aspect of parent support: from attending parent meetings, to bringing refreshments, to carpooling, to being substitute sideline officials, and fundraising.”<sup>167</sup> Two other soccer parents, C.H. and C.D. write that Mr.

158. *Id.*

159. Application for Cancellation, *supra* note 25.

160. Letter from author to Timothy S. Aitken, *supra* note 44.

161. 8 U.S.C. § 1229(b)(1) (2006).

162. *Id.*

163. See Application for Cancellation, *supra* note 25 (including excerpts from many friends and family of Mr. Martinez).

164. Letter from E.E., Former Colleague, to Judge Geisse (Apr. 24, 2008).

165. Letter from M.M., Teacher, to Timothy S. Aitken, Field Office Dir., ICE (Apr. 6, 2008) (on file with *The Scholar: St. Mary’s Law Review on Race and Social Justice*).

166. Letter from K.K., Teacher, to Timothy S. Aitken, Field Office Dir., ICE (Apr. 7, 2008) (on file with *The Scholar: St. Mary’s Law Review on Race and Social Justice*).

167. Letter from R.G., to Timothy S. Aitken, Field Office Dir., ICE (Apr. 10, 2008) (on file with *The Scholar: St. Mary’s Law Review on Race and Social Justice*).



Martinez's "family is a model of a working family that has clear goals regarding their children's education, moral[,] and religious values."<sup>168</sup> A school parent, C.B., feels "strongly that Mr. Martinez is a stabilizing factor in the community."<sup>169</sup>

Parents of children who are in class with Mr. Martinez's children say the family is involved in the school and supports their children's education, that the family has their priorities right, and that they are good solid people—people that will be role models for other Latino families.<sup>170</sup> Y.W., the parent of one of Oscar Jr.'s classmates, writes that she cannot imagine Oscar Jr. being separated from his father.<sup>171</sup> "His father is a person that spends a lot of quality time with him, during soccer practices and games, homework, and going to church."<sup>172</sup> He went on to state "Mr. Martinez is an important pillar in his family; without him the family would fall apart."<sup>173</sup> S.E. and M.E., fellow-parishioners at the Catholic Church, write that "Mr. Martinez has always been [a] very respectful, hard-working, and very responsible person. Mr. Martinez is a very proper gentleman that is always looking to help others in need."<sup>174</sup> R.P., a former co-worker, was inspired by Mr. Martinez to pursue a master's degree in Social Work: "I feel honored to work with him and learn from his examples."<sup>175</sup> R.P. also stated that "Mr. Martinez is no doubt one of the hardest working, compassionate, and honest people I have ever met and that Mr. Martinez represents everything good in this Nation."<sup>176</sup> Another co-worker, C.T., observed,

[w]hile many in the beginning would regard [Mr. Martinez] as just a dishwasher, he would later convince them that he was beyond that. He proved to be the hardest worker in the workplace, maintaining

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168. Letter from C.H. and C.D., to Timothy S. Aitken, Field Office Dir., ICE (Apr. 8, 2008) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

169. Letter from C.B., to Timothy S. Aitken, Field Office Dir., ICE (Feb. 14, 2008) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

170. See Application for Cancellation, *supra* note 25 (including excerpts from many friends and family of Mr. Martinez that discuss his dedication to the community and his family).

171. Letter from Y.L., to Timothy S. Aitken, Field Office Dir., ICE (Mar. 26, 2008) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

172. *Id.*

173. *Id.*

174. Letter from S.C. and M.E., to Timothy S. Aitken, Field Office Dir., ICE (April 16, 2008) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

175. Letter from R.P., to Timothy S. Aitken, Field Office Dir., ICE (Apr. 8, 2008) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

176. *Id.*

cleanliness and order not just for the sake of his job, but because he genuinely cared for the people he worked with.<sup>177</sup>

As the language of the cancellation statute makes clear, hardship on Mr. Martinez's U.S. citizen children<sup>178</sup>—Lorena was still under eighteen at the time of the hearing—would be critical.<sup>179</sup> Mr. Martinez's personal statement (later reiterated in his hearing testimony) talks about how Oscar Jr.'s birth in 1998 completed their "happy family."<sup>180</sup> He is "very proud" of how well his children are doing in school, and how he supports "them in everything that will bring benefit to their lives; and we keep them in a healthy environment so that they will triumph in the future."<sup>181</sup> He pleaded for permission to remain in the United States "to help my children move forward, and to show that we are a responsible family of good people, and that we can contribute much to the United States."<sup>182</sup> Oscar Jr.'s hand-written statement noted, "My dad always takes me to school and soccer practices, and church. Also, we go to the library; in our free time we play and go to parks."<sup>183</sup> Oscar Jr. was ten-years-old at the time.<sup>184</sup>

Lorena's statement submitted in support of her father's cancellation application was written when she was a high school senior:

I met my father when I was six years old [her natural father had died a few years earlier]. To be exact, I met him on Mother's day in 1996. He took my family . . . out to dinner to celebrate this special day. I remember being really thrilled to go to a fancy restaurant and eat dinner like typical families do. My mother and my birth father came to America, 'the land of opportunity,' to build a better life for their children. Unfortunately, my father died in a car crash in 1992 . . . when I was about [two] years old. My mother was left alone with my older brother and [me] to care for. In 1996, my mother married [Oscar Martinez] whom I not only consider to be my father, but

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177. Letter from C.T., to Timothy S. Aitken, Field Office Dir., ICE (Apr. 24, 2008) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

178. 8 U.S.C. § 1101(b)(1) (2006). Child is defined by the law as "an unmarried person under twenty-one years of age . . ." *Id.*

179. *Id.*

180. Statement of Oscar Martinez, *supra* note 2.

181. *Id.*

182. *Id.*

183. *Id.*

184. Application for Cancellation, *supra* note 25. Lorena met the definition of Mr. Martinez's "child" under the immigration laws because a stepchild is considered a child as long as the relationship came into existence before the youngster is eighteen. 8 U.S.C. § 1101(b)(1)(B) (2006); see *In re Portillo-Gutierrez*, 25 I&N Dec. 148, 149 (B.I.A. 2009).

also my hero. He provided my family with what we lacked; support and unconditional love from a father figure.

My father is a hard-working, law-abiding man, who worked in the same hotel for [twenty-two] years as a utility worker. Even when my father is sick or tired, he always goes to work. He wakes up extra early to make lunch for my brother and [me] whenever we have school. There has not been one day that my father has forgotten to make lunch for me or my brother. I love and look up to my father in many different ways. My father has taught me to be strong and to always pursue my dreams. He motivates me to keep going every day and constantly advises me to never give up even through the most difficult circumstances.

My father is very respectful, kind, and funny. I have engaged his faith in God and have applied it in my life. I have utilized my father's faith to keep me strong and positive throughout this issue. He is extremely passionate about his children and loves playing baseball and soccer with us. He is fully dedicated to my family and is always taking my younger brother and [me] to school, soccer practices, and church. Although he is quiet compared to my mother in [sic] the sidelines, his presence and support means the world to me. I find myself playing better when my father is watching my games because I want to show off my moves and prove to him that I am a good soccer player, like he is in baseball.

I have absorbed my father's persistence and I have taken advantage of all of the opportunities that he never had. He never had a chance to attend school because he had to work from a very young age to support his family's needs. I am proud to say that I will be the first in my family to attend college. I have applied to four UC's (Cal, UCLA, UCSD, UCSB) and two private schools (USF and Bucknell) . . . . Thanks to my father's unconditional love and support I have made it this far and I have accomplished many goals in my life.

The day that my father was apprehended by Homeland Security, I cried and cried. It was the first day of my senior year and this was the very moment that my family dreaded for so long. Although my family has gone through many obstacles, none of them have been as difficult as seeing my father in a San Francisco court cuffed and escorted by a Homeland Security officer . . . .

. . . I fear that I will come home one day and not see my father there. I am scared that I won't get the chance to hold my father and tell him how much I love him when I graduate from high school. My father is seen as a criminal for coming into this country but in my eyes, he

truly is a hero and a survivor . . . . I beg you Judge Geisse, with all of my heart, to give my father permission to stay in this country legally.<sup>185</sup>

Reading Lorena's moving and articulate words provide some understanding of why it was difficult to resist her call to me for assistance years after her statement was written.

Angie Bean's strategy at the removal hearing made sense. Besides Mr. Martinez's own testimony, Lorena and Oscar Jr. needed to testify, of course. After all, likely hardship to them was militated by the statutory requirement of "exceptional and extremely unusual" hardship to citizen children.<sup>186</sup> To support the hardship claim, Angie called as a witnesses, A.B. the high school counselor and director of the East Bay Asian Youth Center, who knew both Lorena and Oscar Jr., O.S., Lorena's high school guidance counselor, and C.S., the PTA council president.<sup>187</sup>

The day of the hearing, things went well. The judge, Loreto S. Geisse, had been an immigration judge for almost four years, having previously worked for the Chief Immigration Judge of the Executive Office of Immigration Review, and as a trial attorney with the Office of Immigration Litigation.<sup>188</sup> Judge Geisse had a reputation among immigration attorneys for being fair. She was open to receiving all the evidence offered by Angie, however, she only thought that the actual testimony of Mr. Martinez and Lorena was necessary for the record, since the information contained in the written statements of the other prospective witnesses were not contested by the government.<sup>189</sup>

At the hearing, the government challenged Mr. Martinez's application on the moral character as well as the hardship grounds because of a false birth certificate he had once used.<sup>190</sup> On the good moral character issue, Judge Geisse ruled in this manner:

The government has submitted evidence that respondent has used a false [U.S.] birth certificate, and respondent himself testified he has used a false [U.S.] birth certificate and also made an attempt to obtain a U.S. passport. This Court notes, first of all, that respondent is

185. Letter from Lorena Cintron to Judge Geisse (2008) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (submitted into evidence at trial).

186. 8 U.S.C. § 1229b(b)(1)(D) (2006).

187. See Application for Cancellation, *supra* note 25 (including the witness list at trial).

188. News Release, Dep't of Justice, Immigration Judge Takes Oath of Office In San Francisco (Oct. 29, 2004), <http://www.justice.gov/eoir/press/04/GeisseRelease102904.pdf>.

189. Transcript of Oral Decision at 3, *In re* [Martinez], No. A-xx-xxx-xxx (Sept. 12, 2008).

190. *Id.* at 10-12.

not statutorily barred from establishing good moral character from the use of this false birth certificate. However, respondent's use and false claims to U.S. citizenship is a very significant factor. Our immigration laws are very strict with respect to individuals who make false claims to U.S. citizenship. Indeed, there are some actual bars statutorily from them obtaining certain types of immigration benefits . . . . [T]his is a very serious issue; however, the Court is not persuaded that this would bar respondent from establishing good moral character.

First of all, respondent testified that he was not sure when this last [I-9 employment eligibility verification form] was created. He does acknowledge having used such a [birth] certificate, but stated that it was confiscated in 1987 in his last contact with the Border Patrol. He indicated it is not his writing on this document, and this Court agrees it does not appear to be respondent's writing on this I-9 Form. The documentation is very poor, and it could very well be that it was prepared by someone at the Garden Hilton on respondent's behalf and [the Government] was unable to show that it was him that prepared this, particularly in light of the fact that he testified he had not used this since 1987.

Moreover, very significant here is the [fact that the] Government declined to prosecute the respondent based on this. These factors together raise serious questions about whether this was actually something that respondent created himself or whether it was used by the personnel at the Garden Hilton just based on the original documents that respondent presented to them back in 1987. The bars created by individuals who make false claims to U.S. citizenship are significant. This Court is not inclined to make such a finding in light of the serious nature of such facts. In addition, respondent did testify that he did use it. He expressed remorse and stated that he had not made such claims since 1987. And in light of his lack of sophistication and lack of education, this Court is not persuaded that this would bar him from good moral character. And on balance, this Court believes that the fact the respondent has had no arrests and is obviously well-respected and cared for in his community and has contributed to the community on a whole balance in favor of respondent, therefore, this Court believes respondent has met the good moral character requirement.<sup>191</sup>

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191. *Id.*

After considering all the evidence, Judge Geisse issued her decision on September 12, 2008, cancelling Mr. Martinez's removal.<sup>192</sup> Judge Geisse found that the exceptional and extremely unusual hardship requirement was met because of the likely effect that Mr. Martinez's removal would have on Lorena and Oscar Jr.<sup>193</sup>

[Lorena] relies on the respondent and her family to support her financially and certainly emotionally. She has a loving and close relationship with her stepfather and believes that if he were removed [to] Mexico not only would she suffer emotionally and not only would her grades suffer as evidenced by her previous experience as a senior in high school, but also she would very likely[,] at minimum[,] have to stop playing soccer, which is an important part of her life. And secondly, she might even have to stop school because of her inability to be able to continue going to school while assisting her mother . . . .

With respect to [Oscar Jr.], this Court notes that he is 10 years old, [and] on the verge of adolescence, which is a significant time in a child's development. He has a close and loving relationship with his father, who serves as a positive role model . . . . [H]e is reaching a point in life where he needs his father even more to assist him going through adolescence. He appears to be doing well in school and is actively involved also in soccer, and much of this is due to his father's involvement in his life.

. . . .

. . . [W]ith respect to [Oscar Jr.], this Court notes that although he is doing well in school, there has certainly been information demonstrated in this record that he has some emotional challenges that have occurred as a result of his father's [i]mmigration problems.

. . . This Court is precluded from considering hardship to [Mr. Martinez's wife because she is undocumented]. However, with viewing the record as a whole, this Court is allowed to consider the hardship to . . . undocumented family members . . . . As for respondent's wife, she has had a difficult life, being widowed with two young children and having to provide for her family, this does not minimize the hardship to them as it would indirectly affect the respondent's U.S.-citizen qualifying relatives. Therefore, based on the record as a whole, this Court believes respondent has met the exceptional and extremely unusual hardship to establish eligibility for cancellation of removal.<sup>194</sup>

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192. *Id.* at 12–15.

193. *Id.*

194. *Id.*

Victory. Hooray! Well, not so fast.

A. *Appeal to the BIA and the Aftermath*

The grant of cancellation by the immigration judge was a glorious, magnificently hopeful moment for Mr. Martinez and his family. The family was elated. It would mean lawful permanent residence status for Mr. Martinez. It would mean that his family could go back to their normal life—perhaps even better than their normal life. Mr. Martinez could likely resume his work at the Hilton, but now with lawful immigrant status, he might be able to get an even better job. Perhaps, at some point, he and his family could figure out a way to help his wife regularize her status. The tremendous weight of being in undocumented status was lifted. The possibilities were endless.

No doubt it was a glorious moment for Angie Bean as well. For immigration lawyers, their primary goal for clients is to secure a visa or immigration status of some sort. When the client is undocumented, the best achievement is to attain lawful permanent residence status for the person. One cannot do much better than getting a grant of cancellation of removal for an undocumented client who faces deportation. This must have been a terrific relief for Angie as well; the added pressure of representing a family friend had been enormous.

Unfortunately, the government had other things in mind for Mr. Martinez and, by extension, his family. Something about Mr. Martinez's case was hard to swallow for the ICE attorneys who handled and reviewed the case. Was it the look of the I-9 employment form that had been generated back in 1987? Were they really not convinced of the great hardship that Lorena and Oscar Jr. would suffer if their father was deported? What would the government have to gain from appealing the case? For whatever reason, the government decided to appeal Judge Geisse's decision to the Board of Immigration Appeals (BIA).<sup>195</sup> Apparently, in 2008, appealing the grant of cancellation was an important priority even though the applicant had lived in the United States for almost twenty-five years, had no criminal history, had an excellent work history, had strong community support, was civically engaged, and had two U.S. citizen children who loved and relied on their father. Ronald LeFevre, the ICE Chief Counsel at the time, made the decision to file the appeal; LeFevre had a reputation among local immigration attorneys as being harsh, not happy with any government "loss," and willing to file unreasonable appeals on even the most sympathetic cases.

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195. BIA Decision at 1, *In re* [Martinez], No. A-xx-xxx-xxx (2010) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

Perhaps those who made the decision on the part of the government to appeal the case felt vindicated, or maybe even happy, when the BIA reversed Judge Geisse's decision more than a year later on January 14, 2010.<sup>196</sup> Although the government appealed Judge Geisse's decision in part, on the grounds that Mr. Martinez was not deserving of favorable discretion because of the prior use of false documents, the BIA reversed the decision on the grounds that the "Immigration Judge erred in concluding the respondent met his burden in establishing the requisite hardship."<sup>197</sup> The BIA felt that neither Lorena nor Oscar Jr. "suffer[ed] from any health issues," or "show[ed] compelling educational needs."<sup>198</sup> Regarding Lorena, the BIA held the possibility that she "may not be able to complete her college education" due to Mr. Martinez's removal did not constitute an "exceptional and extremely unusual hardship."<sup>199</sup> Nor did the evidence regarding [Oscar] Jr. establish for the BIA that he would "suffer hardship which is substantially beyond what would ordinarily be expected as a result of the respondent's removal."<sup>200</sup> As such, the BIA ordered that Mr. Martinez be removed.<sup>201</sup>

As unjust as I may regard the ICE appeal of Mr. Martinez's cancellation case, or as insensitive as the BIA's treatment of the case may feel to me subjectively, the actions taken by Mr. LeFevre and the BIA find support in the BIA's reported opinions on cancellation relief. In Mr. Martinez's case, the BIA made this clear:

We repeat here what we have previously said in precedent decisions—the exceptional and extremely unusual hardship standard for cancellation of removal applicants constitutes a significantly high threshold that is in keeping with Congress' intent to substantially narrow the class of aliens who would qualify for relief. *Matter of Recinas*, 23 I&N Dec. 467, 470 (BIA 2002). Congress intentionally limited relief to 'exceptional and extremely unusual hardship' to qualifying relatives, a substantially higher standard than had previously been required by Congress for the Attorney General to be able to grant suspension of deportation under Section 244(a) of the Act, 8 U.S.C. § 224(a) (1994). In this regard, we consider *Matter of Recinas* to be on the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met.

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196. See *id.* at 2 (sustaining DHS's appeal, vacating the immigration judge's decision, and ordering Mr. Martinez removed).

197. *Id.* at 1.

198. *Id.* at 2.

199. *Id.*

200. *Id.*

201. *Id.*



In this case, neither the respondent's qualifying relatives suffers from any health issues nor have they shown compelling educational needs. *See Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001). Further, the possibility that the respondent's stepdaughter may not be able to complete her college education if he is removed does not constitute exception and extremely unusual hardship as found by the Immigration Judge . . . . In addition, the evidence in the record does not establish that the respondent's 10-year-old [U.S.] citizen son will suffer hardship which is substantially beyond what would ordinarily be expected as a result of the respondent's removal.

In light of the foregoing, we agree with the DHS that the evidence in this case, which shows more differences than similarities with *Matter of Recinas*, does not establish that any hardship the respondent's qualifying relatives will suffer if he is removed to Mexico, when considered cumulatively, rises to the level of exceptional and extremely unusual hardship required under Section 240A(b) of the Act.<sup>202</sup>

Thus, presumably, the BIA considered all the relevant facts in the case and decided that the hardship that Lorena and Oscar Jr. would suffer was simply not "exceptional and extremely unusual" as required by the statute.<sup>203</sup>

Even though Angie Bean sought review of the BIA's decision at the Ninth Circuit Court of Appeals, the effect of the BIA's decision on Mr. Martinez and his family was immediate. His job at the Hilton was terminated, and termination was accompanied with the loss of health care benefits for everyone in his family.<sup>204</sup> The family could no longer make payments on the house where they were living, and they were forced to move to a more dangerous, low-income neighborhood.<sup>205</sup> More than an-

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202. *Id.* at 1-2.

[T]he factors considered in assessing the hardship to the respondent's children include the heavy burden imposed on her to provide the sole financial and family support for her six children if she is deported, the lack of any family in her native country, the children's unfamiliarity with the Spanish language, and the unavailability of an alternative means of immigrating to this country.

*Id.* *See Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002) (loss of educational opportunities insufficient to show necessary hardship); *see also Matter of Portillo-Gutierrez*, 25 I&N Dec. 148 (BIA 2009) (stepchild who meets definition of "child" under Act is qualifying relative for purposes of cancellation of removal under Section 240A(b) of the Act).

203. 8 U.S.C. § 1229b(b)(1)(D) (2006).

204. Letter from author to Timothy S. Aitken, *supra* note 44.

205. *Id.* "The family lost their home to foreclosure because of the drop in income and had to move to a 'rough' neighborhood, where Mr. [Martinez] sees that [Oscar] Jr. 'is exposed to gangs, drugs, violence, and countless other negative influences that were not present in our old neighborhood.'" *Id.*

anything else, the family became demoralized. Their success on September 12, 2008, turned to tragedy on January 14, 2010.<sup>206</sup> Review by the Court of Appeals would not be forthcoming, as the Court ruled that since no “constitutional or legal claim” was raised, the question was purely a matter of administrative discretion over which the Court had no jurisdiction.<sup>207</sup> Hope for a future together was lost, and Mr. Martinez awaited news of when he would be deported.

Mr. Martinez and Angie Bean did not hear from ICE authorities for more than a year after the BIA decision.<sup>208</sup> Mr. Martinez was informed in early July 2011 that he had to depart in August, and later the date was pushed back to September 24, 2011.<sup>209</sup> If he failed to heed the order, he would be subject to arrest and forcibly removed, in addition to violating the terms of his bond conditions that were set when he was released on bond in 2007.<sup>210</sup> That was the background when Lorena and the R.I.S.E. students came to see me in late August 2011.

### B. *Invoking the Morton Memo*

I suppose it is human nature to dislike someone looking over your shoulder or second-guessing your professional efforts and judgment. Without any empirical basis for this belief, I surmise that most lawyers hate being second-guessed about their strategy or advocacy. When Lorena told me that Jesse Lloyd at Angie Bean’s office had gone in with an application for a stay of deportation on August 12th,<sup>211</sup> I was curious whether and how Jesse may have incorporated the elements of the June 17th Morton Memo in the request.

When I called Jesse, I was relieved to find that, at least over the phone, he did not seem the least bit defensive about my call and the fact that Lorena had asked me to make an inquiry. He seemed open to my questions and answered them forthrightly. He easily put himself in Lorena’s shoes and understood why she might talk to me about the case. Jesse immediately shared copies of the stay of deportation request and most of the case file with me. Indeed, Jesse, and later Angie herself, welcomed

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206. See BIA Decision at 1-2, *In re* [Martinez], No. A-xx-xxx-xxx (2010) (on file with *The Scholar: St. Mary’s Law Review on Race and Social Justice*) (overturning Mr. Martinez’s stay on deportation).

207. [Martinez] v. Holder, No. xx-xxxxx (9th Cir. 2010) (on file with *The Scholar: St. Mary’s Law Review on Race and Social Justice*).

208. See Interview with Angela Bean, *supra* note 31 (discussing how long ICE waited before proceeding with Mr. Martinez’s deportation).

209. Interview of Jesse Lloyd, Angela M. Bean & Assoc., Attorney for Oscar Martinez (Aug. 30, 2011).

210. *Id.*

211. *Id.*

my participation. In reviewing Jesse's work, I noted that he had indeed argued that the Morton Memo should guide the local ICE director's actions on the stay request.<sup>212</sup> Jesse and Angie agreed that having a new attorney—me—enter at this point might strategically help—and certainly not hurt—the chances for getting the local ICE Field Office Director to rethink the case.

I also turned to Zach Nightingale.<sup>213</sup> I decided to call Zach to ask him what he knew about the effect of the Morton Memo on the folks at the San Francisco ICE office that would be handling my request on behalf of Mr. Martinez. Turns out he had a great sense of what was going on because he had several requests for stays of deportation and deferred action pending with ICE.<sup>214</sup> He agreed that since Mr. Martinez's case had already gone through the immigration court and the BIA, I would have to deal with the ICE Field Officer Director, Timothy S. Aitken, rather than ICE attorneys. In other words, because there was a final removal order and appeals had been exhausted, the case was in the hands of the deportation officers who were responsible for enforcing the removal order. Aitken was the officers' commander. In contrast, the plastic pellet gun case with which I assisted Abigail Trillin at Legal Services for Children, had been in the hands of local ICE attorneys who prosecute removal cases.<sup>215</sup> Their supervisor was Leslie Ungerman, the Chief Counsel, who could call her own shots about whether to terminate removal charges that were before the immigration courts; she acted autonomously from the ICE Field Director as long as the removal hearing was still pending.

Zach's advice was to update all the information on the family before approaching Mr. Aitken and to contact anyone and everyone I knew at DHS in Washington, D.C. who might have some influence over the implementation of the Morton Memo. I easily managed to recruit several law students to help update the information on Mr. Martinez's case. They worked tirelessly over a few short days with Mr. Martinez, his children, and his wife, in preparing new statements on their behalf supporting the request that deferred action be granted to Mr. Martinez in the exer-

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212. *Id.*

213. Zachary Nightingale is a partner in one of the preeminent immigration law firms in California, Van Der Hout, Brigagliano & Nightingale. The firm is known for taking on challenging cases involving political issues, first amendment claims, and clients with a criminal history. Zach is an easy-going, brilliant attorney, who has made a name for himself handling some very difficult cases involving deportation clients with criminal histories. He also happens to be one of my former research assistants.

214. See E-mail from Zachary Nightingale, Law Partner, Van Der Hout, Brigagliano & Nightingale, to author (Sept. 9, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (including examples of Zach's prosecutorial discretion cases).

215. McKinley, *supra* note 115; Interview with Abigail Trillin, *supra* note 11.

cise of prosecutorial discretion. The statements of Lorena and Omar Jr. were quite moving and impassioned.

After the one hundred-plus page prosecutorial discretion packet was prepared and filed with Mr. Aitken's office, I took Zach Nightingale's advice and emailed the packet to a number of individuals at DHS who I knew or who were recommended by Zach. The list included Ivan Fong, the General Counsel for DHS, Traci Hong of the DHS Office of Civil Rights and Civil Liberties, and Kelly Ryan of the DHS Office of Immigration and Border Security. About a year earlier, Sin Yen Ling, a staff attorney with the Asian Law Caucus, obtained a stay of deportation for a DREAMer, Steve Li, with the assistance of Senator Dianne Feinstein.<sup>216</sup> Ling encouraged me to contact Martha Flores, Director of Constituent Services, of Feinstein's office, and I did so. All of those individuals responded positively and offered support and suggestions. I attempted, unsuccessfully, to pique the interests of others whom I knew might have influence, including Natalia Merluzz, an assistant to Tony West, the Assistant Attorney General of the Department of Justice Civil Division, and Cecilia Muñoz, the White House Director of Intergovernmental Affairs.

Although most of these individuals responded to my entreaties, Kelly Ryan was the most positive, taking notes, asking me to keep her informed, and cc'ing others at DHS each time she returned my emails. At one point she asked me to contact Paul Gleason, of the Office of the Principal Legal Advisor of DHS. Mr. Gleason also returned my calls, took interest in the case, and led me to believe that he was in contact with Mr. Aitken's office. At no point did any of these contacts in Washington, D.C. express criticism of the merits of Mr. Martinez's case. In fact, their comments to me were positive, and the conversations with them always left me feeling hopeful. Additionally, Martha Flores of Senator Feinstein's office also was engaged and quite interested in Mr. Martinez's case. She promised to file an official inquiry about Mr. Martinez's case with the DHS legislative liaison office in Washington, D.C., and I am sure that she followed through on that promise. I also arranged to have Mr. Martinez's daughter Lorena speak with Ms. Flores about the case.

In short, I was involved in a flurry of intense, serious conversations and email exchanges about the case over an intensive, three-week period. I truly felt that something positive was about to happen for Mr. Martinez, in large part because of the interest that had been expressed in the case from Washington, D.C.

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216. See Jessica Kwong, *Steve 'Shing Ma' Li Freed as Feinstein Intervenes*, S.F. CHRONICLE, Nov. 20, 2010, <http://www.sfgate.com/education/article/Steve-Shing-Ma-Li-freed-as-Feinstein-intervenes-3165628.php> (describing Mr. Li's incarceration and Sen. Feinstein's involvement).

### C. *The Final Decision and Humanitarian Parole*

In spite of these efforts, the result was not favorable for Mr. Martinez. A week before he was scheduled to depart, Mr. Aitken made his decision and faxed me this letter:

Dear Mr. Hing:

Reference is made to your request for Deferred Action filed on behalf of your client, [Oscar Martinez].

As you are undoubtedly aware, deferred action status is an action of administrative choice, and in no way can it be construed as giving an alien unlawfully in the United States an entitlement to such relief. The deferred action program has always been, and continues to be, an internal procedure of the Agency, which, the Field Office Director can initiate as soon as he perceives an alien's expulsion would be inappropriate. After a careful review of your client's case, I decline to grant such action.

Sincerely,

Timothy S. Aitken

Field Office Director[sic]<sup>217</sup>

With several days remaining before Mr. Martinez had to leave, I renewed my attempts to get DHS officials in Washington, D.C. to intervene. I also attempted to convince Leslie Ungerman, the ICE Chief Counsel, to support a motion to reopen the removal proceedings; if proceedings were reopened, she could take over jurisdiction of the case and terminate proceedings under the Morton Memo. She declined. Martha Flores of Senator Feinstein's office reported that, to her surprise, she could not get the DHS congressional liaison office to intervene.<sup>218</sup> Yet, from the DHS in Washington, D.C., Paul Gleason informed me that I should contact Mr. Aitken again.<sup>219</sup> The implication was that someone from the ICE Ombudsman's office in D.C. had contacted Mr. Aitken and asked him to reconsider his decision.

When I finally reached Mr. Aitken by phone, I asked if he would reconsider his decision, especially given the favorable tone of the Morton Memo for cases involving individuals like Mr. Martinez. Unfortunately, Mr. Aitken was intransigent:

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217. Letter from Timothy S. Aitken, Field Office Dir., ICE, to author (2011) (on file with *The Scholar: St Mary's Law Review on Race and Social Justice*).

218. Telephone Interview with Martha Flores, Dir. of Constituent Servs., Office of Sen. Dianne Feinstein (Sept. 21, 2011).

219. Telephone Interview with Paul Gleason, Office of the Principal Legal Advisor, Dep't of Homeland Sec. (Sept. 20, 2011).

I've always exercised discretion. The June 17 and August 18 memos and announcements from D.C. didn't say anything new that I have not already been doing; they didn't change anything; they didn't change my marching orders; 25 years residence doesn't mean anything; Martinez just happened to be under the radar. The public expects us to enforce immigration laws. No one has told me the Martinez case is a low priority case; resources have always been expended on these kinds of cases. I also won't consider an extension of time for him to attend [Lorena]'s graduation. If I did that, then what about the next kid?<sup>220</sup>

The answer was "no." The Martinez family was devastated. I was surprised and extremely disappointed by the outcome. The sense I had from my conversations with the officials in Washington, D.C. was that they were sympathetic about the case. Yet whatever methods of intervention they engaged in did not help. So, Mr. Martinez sadly, but dutifully, left the country on the evening of September 23, 2011.

The nightmare of Mr. Martinez's forced departure has a postscript. A few days before the departure, a college scholarship mentor with whom Lorena had been in contact attempted to reach DHS Secretary Janet Napolitano on Mr. Martinez's behalf. It seems that he had met the Secretary a couple of years earlier at an American Law Institute gathering where he spoke and thought she might remember him. The mentor also encouraged Lorena to draft a personal letter to Secretary Napolitano, mentioning the mentor by name. The mentor was able to obtain a fax number for Secretary Napolitano and the email address of her assistant.<sup>221</sup>

On September 20, 2011, the mentor emailed Lorena's letter to Napolitano's secretary with the following message:

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220. Telephone Interview with Timothy S. Aitken, Field Officer Dir., ICE, DHS (Sept. 21, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*). Aitken's statement that the Morton Memo "didn't change anything" was troubling, of course. On November 10, 2011, at a liaison meeting between immigration lawyers in San Francisco and ICE officials, Leslie Ungerman (ICE Chief Counsel) and Craig Meyer (Assistant Field Office Director) "rejected the idea that the [Morton Memo] reflected any change in policy. They said that they had always looked at the factors enumerated in that memo, and would continue to do so as they did before." E-mail from Avantika Shastri, Esq., Van Der Hout, Brigagliano & Nightingale, to author (Nov. 10, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*). Ungerman was the person who agreed to terminate the case of Roberto a few months earlier. Interview with Leslie Ungerman, Chief Counsel, ICE, DHS (Sept. 1, 2011).

221. Telephone Interview with M.T., College Scholarship Mentor to Lorena Cintron (Sept. 19, 2011).

Dear Janet [Napolitano], please look at this urgent letter from [Lorena Cintron] and hold off the imminent departure of her father on Friday . . . . The disruption and hardship to her and her family are severe and the determination [by the] San Francisco [ICE office] seems incompatible with the President's recent policies. [Lorena] is a U.S. citizen, scholarship student at [college], and young leader who wants to become a lawyer and who [sic] we admire and want to help.<sup>222</sup>

Unfortunately, while Secretary Napolitano may have had some interest in the case, the interest was not manifested until after Mr. Martinez departed. Days after the departure, January Contreras and Carrie Anderson of the U.S. Department of Homeland Security's Citizenship and Immigration Services division (USCIS) ombudsman's office contacted the mentor who in turn put them in touch with me. They expressed surprise that Mr. Martinez was not granted prosecutorial discretion in accordance with the Morton Memo. They encouraged me to file an application for humanitarian parole on behalf of Mr. Martinez—which would allow him to return to the United States—largely based on the psychological trauma Oscar Jr. would suffer. Both Contreras and Anderson offered a hopeful, supportive tone.<sup>223</sup>

Based on the support and hope that Ombudsman Contreras and Anderson conveyed, within weeks, an application for humanitarian parole was prepared.<sup>224</sup> The section of the application that focused on Oscar Jr. contained a school history from his counselors that was supplemented by two separate psychological evaluations:

[Oscar] Jr. is suffering grave hardship because of his father's departure and his mental health is likely to deteriorate even more with continued separation.

Prior to Mr. [Martinez]'s forced departure from the United States, [Oscar] Jr. began suffering emotionally from the prospects of separation from his father. Soon after Mr. [Martinez]'s arrest and the institution of removal proceedings, [Oscar] Jr.'s health steadily declined.

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222. E-mail from M.T., College Scholarship Mentor to Lorena Cintron, to Secretary Janet Napolitano, DHS (Sept. 20, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

223. Telephone Interview with January Contreras (Ombudsman) & Carrie Anderson, Office of the Citizenship & Immigration Servs. Ombudsman, DHS. (Sept. 29, 2011).

224. See Application for Humanitarian Parole from author to USCIS (Nov. 30, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (requesting that Mr. Martinez be permitted to return to the United States due to the "tremendous trauma and psychological effect that the forced departure" is having on Oscar Jr. and Lorena).

The individuals closest to [Oscar] Jr.—his parents and sister—saw the effects first hand. [Oscar] began getting migraine headaches that disrupted his daily routine. His sister [Lorena] could see that [Oscar] Jr.'s migraines were 'severely painful and often lead him to feel nauseous, forcing him to vomit.' The emotional and physical effects on [Oscar] Jr. became 'more frequent and extremely' frightening. Without employment authorization after the BIA reversed the Immigration Judge's decision, Mr. [Martinez] lost his job and employment benefits. The family lost their home to foreclosure because of the drop in income and had to move to a 'rough' neighborhood, where the family saw that [Oscar] Jr. became 'exposed to gangs, drugs, violence, and countless other negative influences that were not present in [their] old neighborhood.' [Oscar] Jr. himself was 'constantly worried about my family being destroyed if my father is deported.'<sup>225</sup>

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225. *Id.* A footnote in the Application for Humanitarian Parole explained in further detail the toll that his father's forced departure was taking on Oscar Jr.:

The severe effects of the impending removal of Mr. [Martinez] on [Oscar] Jr. were quite apparent to counseling and mental health professionals who had the opportunity to interact with Oscar Jr. prior to Mr. Martinez's forced departure. Ms. [A.B.], the director of an at-risk youth program in Berkeley and a Native youth drumming group, is in a unique position to assess [Oscar] Jr. She has known him for twelve years (practically his entire life), because [Lorena] and others in the family were involved in these groups as youngsters, and Ms. [A.B.] got to know the family well. She often visited them in their own home, when [Oscar] Jr. was just a toddler. Over time, Ms. [A.B.] and [Oscar] Jr. engaged in years of conversations and shared enthusiasm for a number of activities, including rock collecting and her rescue animals. [Oscar] Jr. eventually became an important participant in the Native drumming group. However, when his father's deportation nightmare began, a noticeable change in [Oscar] Jr.'s demeanor and enthusiasm for life occurred. Now, Ms. [A.B.] finds it difficult 'to engage him in a conversation' and finds it 'hard to keep him involved . . . He appears limp and tired.' To Ms. [A.B.], this conversion is the result of the stress of fear over the deportation of his father. Given her years of counseling and work with youth, she is concerned that [Oscar] Jr. 'will cease to respond' to her if Mr. [Martinez] is deported because 'the education and mental well-being of [Oscar] Jr. is dependent on his father.'

R.K., LCSW, PPSC, has known Oscar Jr. for more than two years. She is a licensed clinical social worker, who also has a credential in pupil personnel services, and she runs the counseling program for middle schools in the school district. When he was in the sixth grade (shortly after the BIA reversed Mr. Martinez's cancellation approval), Oscar Jr. was already experiencing 'stress related features, and difficulty sleeping.' He was 'consumed by his fears of his father's deportation.' Although he took advantage of the school's therapist in the sixth grade, he would not accept counseling services in the seventh grade and has declined services this year as well. Ms. R.K. assessed Oscar Jr. in light of the stress and the severe migraines that are related to his fear and stress. Oscar Jr. is worried about the increase in 'pressure that would be placed on his mother and his sister' Lorena to provide for the family if deportation occurred and the fact that his father would not be able to transport Oscar Jr. 'to and from school and his soccer activities.' Ms. R.K. always has been impressed by Mr. Martinez's involvement



Also included in the Application for Humanitarian Parole was an analysis of Oscar Jr. and Zoila's psychological state based on a number of interviews and tests conducted by two separate and independent psychologists—Dr. Yvette Flores and Dr. Robert Kaufman.<sup>226</sup> The clear conclusion reached by both the counselors and the psychologists was that “the continued and escalating negative emotional and psychological toll on [Oscar] Jr. [was] being borne out.”<sup>227</sup> Indeed, the application stated that Dr. Yvette Flores interviewed Oscar Jr. and his mother in early October.<sup>228</sup> Based on these interviews Dr. Flores determined that that Oscar Jr. was “suffering from depression and anxiety.”<sup>229</sup> The severing of his relationship with his father provides the background for Dr. Flores' conclusion:

When the family lost their home in Rodeo, they moved to Richmond. Their neighborhood is not safe and [the mother] has to drive from there to Berkeley and back to take her son to school, then to her job in Emeryville and on the weekends, drive [Oscar] to soccer practice and games. Prior to his departure, Mr. [Martinez] spent a lot of time with [Oscar], taking and picking him up from school, going to his practices and games, and helping him with homework. Both [Oscar] and his mother indicated that Mr. Martinez tucked him in at night. [Oscar] indicated that he felt very secure with both of his parents. Now that security is gone.

[The mother] expressed worry that [Oscar] comes home from school and isolates in his room. He does not want to socialize with friends or acquaintances. He does not communicate much and appears sad and withdrawn. She worries that as he is an adolescent, he will be at risk for multiple problems without his father's loving presence and support.<sup>230</sup>

The doctor's study also determined that:

In the past [Oscar] was offered counseling at school but declined to continue. When asked if he would consider talking to a counselor again, he stated, ‘what good will that do? It is not going to bring my

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in his son's schooling, including helping him ‘stay on top of his academic and social situation.’ In Ms. R.K.'s professional opinion, a ‘disruption of this relationship will likely have tremendously detrimental emotional and academic impact on Oscar [Jr.'s] life.’

*Id.* at 4–5 n.1.

226. *Id.* at 4.

227. *Id.*

228. *Id.* at 5.

229. *Id.*

230. *Id.*

dad back to the [United States].’ [Oscar] indicated that he has trouble sleeping, he worries a lot, and lots of the time he does not feel like eating. When asked about . . . two incidents when he became aggressive [on the soccer field], he shrugged his shoulders and said he did not like to feel pushed around. [Oscar] indicated that he feels angry a lot of the time; he can manage it most of the time, but not always. [Oscar] presented with symptoms of depression.<sup>231</sup>

Besides the interview, the doctor conducted a number of tests to assess the psychological state of both Oscar Jr. and his mother. From those tests she concluded:

[Oscar Martinez] is an early adolescent who is suffering emotional hardship as a result of his father’s removal to Mexico. It is essential to note that a separation from their father can have traumatic effects with serious long-term sequelae—attachment problems, conduct difficulties in adolescence, including increased risk for substance abuse, depression in adolescence and adulthood. [Oscar] meets criteria for Major Depression. Both he and his mother are struggling to deal with the family separation. [Oscar] and his mother both try to present a strong front for the other and isolate without sharing their grief.

A continued separation from his father can promote a worsening of [Oscar]’s depression, which can interfere with his academic and social functioning. [Oscar] has lost faith in a just and predictable world. The secure foundation he experienced in early childhood has been shattered. He is clinically depressed and experiences symptoms of anxiety.

There is no evidence of lying or malingering in [Oscar]’s account. In fact, he tried to minimize his distress. The projective tests indicated the severity of his emotional pain. It is my professional opinion that it is in the best interests of this family for Mr. [Martinez] to be allowed to return to the United States. The mental health of Oscar is at stake. His mother is depressed; despite taking medication her symptoms are severe. She is emotionally overburdened and overtime, she may not able to provide the emotional support her son needs to negotiate the separation from his father. Oscar is suffering greatly. I strongly recommend mental health counseling to prevent the onset of serious behavioral problems.<sup>232</sup>

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231. *Id.*

232. *Id.* at 6.

Shortly after Dr. Flores's assessment, Oscar Jr. met with another clinical psychologist—Dr. Robert Kaufman—to participate in another round of psychological tests.<sup>233</sup> Dr. Kaufman highlights the following information about Oscar Jr.:

- obvious pride that a counselor at school has observed [his father] as being generous to other parents during open school night.
- an active and highly involved life with his father.
- 'help' with school assignments and 'how his father would be there for his bedtime routines every night, including routinely tucking him in even as an early adolescent.'
- no history of significant problems in the family, despite the tragedies noted in the history. Prior to the immigration problems, life at home was stable and happy, with his parents getting along well. [Oscar] [Jr.] himself was also doing well in elementary school, attaining solid grades, and establishing good friends.
- He misses the feeling of at least one of his parents being at home.
- [Oscar] [Jr.] experiences the added stress from all of this and says it's now hard to keep focus on his school work and hard to keep up with assignments.
- [Oscar] [Jr.] can report becoming impatient with himself, disappointed that he can't get things done, and sometimes he will just 'blank out,' not picking up on what's going on around him.
- [Oscar] Jr. has 'episodic headaches [and] developed migraines about two years ago [and] cannot predict when he will have a headache.'<sup>234</sup>

After conducting a series of tests and interviews with Oscar Jr., and the other key people in his life, like his school counselors and family, Dr. Kaufman determined that:

[Oscar Jr.] is reluctant to admit to emotional problems and is fearful of criticism. He would be more prone to blame himself for any difficulties going on and would not be expected to act out against other people or authority. Beneath this agreeable exterior, [Oscar] has insecurities and anxieties. He is fearful of making mistakes and taking risks and will restrict his behavior accordingly. What anger he has is likely to break through in abrupt episodes and he will typically refer to a cooperative and agreeable stance. His style can be quite passive and belies persistent underlying anxieties and worries.

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233. *Id.* at 5.

234. *Id.* at 6–7.

[Tests] further suggest that [Oscar] *is experiencing significant anxiety that is likely to come up at times via psychosomatic symptoms, fearfulness, indecisiveness, and apprehension.*

[Oscar Jr.] enjoyed a loving and very close relationship with his father . . . . [Oscar Jr.] was probably babied and protected to some extent, but [this] fundamentally afforded him a sense of security, acceptance, love and stability. These are qualities that lay the foundation for children's healthy psychological development, but are no longer accessible to [Oscar Jr.] on a day-to-day basis.

[Oscar Jr.] is highly dependent and reliant on family relations and has internalized considerable responsibility within the family. Thus, at this point, as his father is in Mexico, he feels a sense of obligation and responsibility towards his mother and is highly attuned to her emotional state. This is *too much emotional responsibility* for a youth his age. At the same time, [Oscar Jr.] is preoccupied with the welfare of his father, and appears to be making efforts to bolster his father's moods [during telephone calls] under these trying times. Again, this is the kind of internalized responsibility that can *hamper an early teenager's emotional growth.* This is the case with [Oscar Jr].

There is ample evidence to indicate that [Oscar Jr.] *has suffered greatly from the deportation of his father.* He has been showing *more and more signs of anxiety and depression that are interfering with his day-to-day life.* *He is worrying far too much, shows a lack of energy and enthusiasm for pleasurable activities, may be sleeping excessively, and is isolating himself more and more* and limiting the range of his daily activities . . . . [He] is at risk for developing an even *deeper internalizing disorder such as further debilitating depression and anxiety* based on the traumatic loss of first his [half-]brother and now his father . . . . [The] situation raises any number of risks that are highly worrisome . . . . It is worrisome to see and hear the extent of his emotional withdrawal and the degree to which he is now assuming far more responsibility than is healthy for an early adolescent.

. . . Should the situation not change, [Oscar Jr.]'s frustration and anger could increase, and find expression in maladaptive ways, including increased aggression and involvement with drugs or alcohol. In addition, [Oscar Jr.] is at an age when boys tend to seek out and want more from their relationships with their fathers. Those relationships are essential in terms of helping the youth establish a firm sexual identity and a sense of competency and autonomy. In the current situation, with Mr. Martinez absent, this creates a large hole in [Oscar Jr.]'s psychosexual development.

. . . Mr. Martinez's deportation and the prior loss of [Oscar Jr.]'s [half-]brother are traumatic events, and the symptoms that [Oscar Jr.] is evidencing are consistent with a teenager's reaction to such trauma. Should the situation go unchanged, [Oscar Jr.] is highly vulnerable to developing even more significantly disabling psychological problems, most likely in the form of deeper depression and anxiety punctuated by possible aggressive acting out. He is also at risk for school failure and coming under the influence of others who might take advantage of him. There is little doubt that if the situation goes unchanged, [Oscar Jr.] will require professional help. This will be problematic, given [Oscar Jr.]'s tendency to isolate himself and his deep discomfort talking about his inner life.<sup>235</sup>

In spite of the evidence of psychological trauma that had been suffered and anticipated by Oscar Jr., the request for humanitarian parole for Mr. Martinez also was denied.<sup>236</sup>

#### V. HISTORY OF PROSECUTORIAL DISCRETION IN DEPORTATION CASES

When I started practicing immigration law at San Francisco Neighborhood Legal Assistance Foundation as a young law graduate in 1974, experienced lawyers at boutique immigration law firms were happy to counsel and advise me. Donald Ungar, Milt Simmons, Robert Bixby, Byron Park, and Marilyn Patel were all helpful to me at one time or another. They taught me to be honest and to know the law. But they also pointed out that when the facts were good, I should not be afraid to march into the Immigration and Naturalization Service (INS) district director's office and ask that he do what is right, even if the law was not on my side. In other words, they were all well aware of the vast discretion held by the district director. It may not have been called "prosecutorial discretion" back then, but in those days when the district director had the power to issue an order to show cause in a deportation case, we knew he could stop the clock at any time.

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235. *Id.* at 7–8.

236. See *Humanitarian Parole*, USCIS, <http://www.uscis.gov/portal/site/uscis> (last visited Oct. 28, 2012) (follow "Humanitarian" hyperlink; then follow "Parole" hyperlink) (outlining process to apply for humanitarian parole); Angelo A. Paparelli, *Immigration Heart on ICE: Why Does ICE Decide All, and Deny Most, Humanitarian Parole Requests?*, NATION OF IMMIGRATORS (Oct. 16, 2005), <http://www.nationofimmigrants.com/enforcement/immigration-heart-on-ice-why-does-ice-decide-all-and-deny-most-humanitarian-parole-requests/> (inquiring why the police arm of the Department of Homeland Security adjudicates humanitarian parole cases instead of the Citizenship and Immigration Services arm).

I recall speaking with INS District Director David Ilchert about two sisters from the Philippines in the 1980s. This was during a time when the backlog in the sibling immigration category for Filipinos was already quite substantial. Corazon Ayalde became a U.S. citizen several years after she immigrated to the United States as a registered nurse to work in a public hospital devoted to caring for senior citizens. When her sister Cerissa, who had remained in the Philippines, became widowed without children, the pair longed to be reunited. Cerissa obtained a tourist visa to the United States to visit, and soon after arriving Corazon filed an immigration family petition for her sister. Cerissa was particularly concerned, because Corazon was slowly becoming ill, and Cerissa wanted her to remain in the United States so that she could care for her sister. They had heard that there was a backlog in the sibling category, but shortly after the petition was filed, immigration authorities mistakenly sent them a notice that Cerissa should come into the local office to complete the adjustment of status process to obtain lawful permanent resident status. They believed that God had answered their prayers, and Cerissa carefully completed the paper work, completed a fingerprint card, obtained photos, made an appointment for an interview, and appeared at the local INS office.

When they arrived at the interview however, the INS agent informed them that a mistake had been made; no visa was available, and that Cerissa would have to leave the country and wait in the Philippines until an immigrant visa became available. Disheartened, they came to my legal services office. I prepared an argument based on detrimental reliance on the government's own mistake—a logical argument but not one with great authority at the time. But before the immigration court hearing, I presented the facts of the case to Mr. Ilchert. After holding the case for several weeks, he called me in and told me that he would simply suspend going forward with the case until Cerissa's priority date for a visa was reached. Years later, Cerissa's permanent residence was granted. Corazon felt her "heart being lifted to heaven" as the sisters were permitted to remain together until Cerissa passed away a few years later.<sup>237</sup>

Another one of my sympathetic clients was not so fortunate. The case began with a call from a caseworker at a local community agency: "Do you have time to come to our next staff meeting to explain the visa preference system and grounds of deportation?" I was on the phone with Vera Haile of the International Institute. Vera was a veteran counselor at the institute, working with foreign students on English language skills and advising newcomers on life in the United States. We were discussing a

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237. Interview with Cerissa Ayalde, Client of the author, in San Francisco, Cal. (Apr. 4, 1978).

case that she was referring to me: a student from Eritrea who had come to her center for help with his student visa.

I was relatively new to the profession, only about six months into the job. I was no expert, but if the staff at International Institute wanted a summary of the immigration preference system and the grounds of deportation, I could certainly accommodate. I found out fairly early on the job that when you're a legal services attorney in a neighborhood law office, rightly or wrongly, you are considered an expert in your particular field by staff at community-based organizations and the neighborhood residents. In fact, a legal services attorney might be regarded as an expert on many subjects regarded as pertaining to "the law" in a community low on resources and service providers.<sup>238</sup>

About one week later, on a Tuesday afternoon, I walked from my San Francisco Neighborhood Legal Assistance Foundation office at the corner of Broadway and Columbus. I traveled up Broadway, past the Royal Pacific Motel, Yank Sing Restaurant, the Stockton Pharmacy, a news stand, a vegetable and fruit stand, a couple more small restaurants, a non-descript sewing factory, and through the Broadway tunnel. I had driven through the tunnel many times, but never walked it. The walk was a little unnerving; cars streamed by, some honking, many speeding, and the noise bouncing off the tiled walls of the tunnel. The exhaust-filled air was toxic. Even my clothes felt saturated by the fumes. I knew that I wouldn't walk back that way. When I emerged on the other side of the tunnel, it was another three blocks to the International Institute office on Van Ness Avenue. I timed it about right, arriving five minutes before 3:00 PM, the time that Vera had asked me to arrive. Besides Vera, six other paralegal counselors were there as well as two secretaries, all gathered around a beautiful, old oak meeting table in a grand former dining room, with beautiful mahogany walls. The building was an old Victorian that had been converted to offices; I was told that a benefactor—a former board member—had donated the place to the organization.<sup>239</sup>

The staff had varying degrees of experience. Monica Abello had been counselor for about two years (eighteen months longer than me). Vera had been around for more than five years, and the rest of the staff for less than a year. After introductions, I handed out an outline of the preference system and the grounds of deportation that I had prepared. Vera and Monica had familiarity with much of what was on the outline, and the

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238. *But see* Gerald P. López, *Shaping Community Problem Solving Around Community Knowledge*, 79 N.Y.U. L. REV. 59, 90 (2004) (noting that in many communities, residents sometimes rely on a range of "non-legal" problem solvers and counselors, such as priests and neighbors for assistance on legal-esqe conflicts).

239. Interview with Milton Simmons, Attorney with Simmons & Ungar, LLP, in San Francisco, Cal. (June 5, 1976).

others were somewhat familiar. However, soon into my presentation, it was clear that they wanted examples. And one example they wanted to discuss was the case that Vera had referred to me: Fethawit.

In 1975, Fethawit was one of my first clients. Fethawit was from Eritrea,<sup>240</sup> a foreign student who had been denied an application to change schools from Fresno State University (in the central valley of California) to San Francisco State University. He was suffering from a rare heart condition—Eisenmenger’s syndrome. It is an ailment rooted in a heart defect, impacting the blood flow from the heart into the lungs.<sup>241</sup> The interviewer took the application for change of status from Fethawit, listened to his story, took the doctor’s letters, jotted down some notes, then shook his head and said, “You’ll receive a decision by mail, but it doesn’t look good.”<sup>242</sup>

A few weeks later, the letter from the INS adjudicator arrived. It read, “if being at a high elevation is a problem, then take a boat back to Eritrea.”<sup>243</sup> My client’s application for permission to change schools from Fresno State University to San Francisco State University was denied. That administrative denial was part of my rude introduction to the world of agency discretion that I have encountered all too often over a thirty-five year span representing immigrants and citizens before the INS and the Department of Homeland Security (DHS). When Fethawit came to me with the letter, I could not believe its insensitivity. By then, I had met Mr. Ilchert at INS, and I thought that he would surely reconsider the denial if I presented the facts to him personally. After a twenty-minute conversation with him, he told me, “students have to learn to play by the rules. If you don’t like the opinion, you can appeal to D.C.”<sup>244</sup> The administrative appeal I filed on Fethawit’s behalf didn’t do much good. The dismissal was perfunctory, and eventually Fethawit had to depart. How-

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240. At the time, Eritrea was in the midst of a long struggle for independence from Ethiopia from 1961 until 1991. *Ethiopia/Eritrea War*, GLOBAL SECURITY, <http://www.globalsecurity.org/military/world/war/eritrea.htm> (last visited Nov. 15, 2012). Eritrea was engaged in a civil war of independence against Ethiopia, ultimately leading to a referendum and peaceful separation in 1993. See, e.g., Ubong E. Effeh, *Sub-Saharan Africa: A Case Study on How Not to Realize Economic, Social and Cultural Rights, and a Proposal for Change*, 3 NW. U. J. INT’L HUM. RTS. 2, 15, 18 (2005).

241. *Eisenmenger Syndrome*, PUBMED HEALTH, <http://www.ncbi.nlm.nih.gov/pubmed/health/PMH0004570/> (last reviewed Feb. 7, 2012). Mikhael F. El-Chami et al., *Eisenmenger Syndrome*, MEDSCAPE REFERENCE, <http://emedicine.medscape.com/article/154555-overview> (last updated Sept. 7, 2012). *Eisenmenger Syndrome*, MEDLINE PLUS, <http://www.nlm.nih.gov/medlineplus/ency/article/007317.htm> (last updated Oct. 23, 2012).

242. Interview with Fethawit, Client of the author, in San Francisco, Cal. (Dec. 1, 1975).

243. *Id.*

244. *Id.*



ever, his example, certainly served as a stark, early lesson in the vagaries of agency decision-making.

A few years after that incident, Leon Wildes, a noted New York immigration attorney reported on his formal findings of what practitioners had always suspected—INS actually had an official, albeit secret, process for keeping certain cases with sympathetic equities on hold indefinitely.<sup>245</sup> Although various INS regimes enforced deportation provisions fairly rigorously, at times the equities or political ramifications presented by certain cases would soften even the most hard-nosed INS enforcement agent. Until the 1970s, immigration officials maintained a low-profile, almost secret, “non-priority program” wherein deportable aliens were allowed to remain in the country because of special circumstances. This program was exposed in the midst of the government’s attempt to deport John Lennon, the legendary member of the Beatles.<sup>246</sup>

After the Beatles broke up, Lennon and his wife, artist Yoko Ono, traveled to New York in August 1971 to seek custody of Ono’s daughter by a former marriage to a U.S. citizen.<sup>247</sup> At the time of entry, INS authorities were aware that Lennon had pleaded guilty to possession of one half ounce of hashish in Great Britain in 1968.<sup>248</sup> Officials temporarily waived what was deemed to be a ground for exclusion, the prior conviction. Lennon’s temporary visa was eventually extended to February 29, 1972.<sup>249</sup> During his stay, he performed at rallies organized to protest the

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245. See 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) (reporting on the secret nonpriority program); BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* 226–27 (2004) (discussing the non-priority program). See also Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL OF RTS. J. (forthcoming 2012) (addressing John Lennon and Yoko Ono’s experience with deferred action after their struggles to remain in the United States “in the face of Lennon’s earlier drug conviction in the U.K.”); Shoba S. Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 246 (2010); Natalya Shatniy, *Economic Effects of Immigration: Avoiding Past Mistakes and Preparing For The Future*, 14 SCHOLAR 869 (2012) (discussing the many problems with the current immigration scheme and suggesting a way forward).

246. Wildes, *supra* note 245, at 44–45.

247. Shoba S. Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 247 (2010).

248. See *Lennon v. INS*, 527 F.2d 187, 188 (2d Cir. 1975) (“[T]he officers found one-half ounce of hashish . . . . Lennon pleaded guilty to possession of cannabis resin . . . .”).

249. Rian Lussier, *This Day in Music History: John Lennon’s Visa Expires*, POPSTACHE (Feb. 29, 2012), <http://popstache.com/news/this-day-in-music-history-john-lennons-visa-expires/>.

United States' involvement in the Vietnam War.<sup>250</sup> His activity caught the attention of President Richard Nixon, who ordered Lennon removed from the United States.<sup>251</sup> Soon after Lennon's visa expired in March 1972, deportation proceedings were instituted against Lennon and Ono.<sup>252</sup> Although they had filed applications for lawful permanent residence, INS officials did not act on the applications, choosing instead to seek deportation, based in part on the British conviction—which they had earlier ignored.<sup>253</sup> Lennon and Ono retained Leon Wildes for assistance.<sup>254</sup>

While the proceedings were pending, Wildes brought an action against the INS.<sup>255</sup> He argued that Lennon and Ono should not be deported, but rather be allowed to remain in a manner that Wildes and other immigration lawyers had heard was possible—in the officials' discretion.<sup>256</sup> As part of the lawsuit, Wildes filed a Freedom of Information Act request<sup>257</sup>

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250. John Lennon was regarded by some as the “last great anti-war activist,” whose anti-war protests helped galvanize a movement against the Vietnam War. John W. Whitehead, *John Lennon: The Last Great Anti-War Activist*, HUFFINGTON POST (Oct. 15, 2012), [http://www.huffingtonpost.com/john-w-whitehead/john-lennon-anti-war-activist\\_b\\_1948185.html](http://www.huffingtonpost.com/john-w-whitehead/john-lennon-anti-war-activist_b_1948185.html). Lennon's anti-war protests included “bed-ins for peace,” in which Lennon, and then new wife Yoko Ono, “sat in bed for two weeks straight, from nine in the morning to nine at night, engaging in discussions about world peace.” *Id.* His most renowned songs “Imagine” and “Give Peace a Chance” were birthed as a result of these “bed-ins.” *Id.* “Imagine there's no countries/It isn't hard to do/Nothing to kill or die for/ And no religion too/Imagine all the people/Living life in peace.” JOHN LENNON, *Imagine*, on IMAGINE (Apple Records/EMI Records 1971). “All we are saying is give peace a chance.” PLASTIC ONO BAND, *Give Peace a Chance*, on REMEMBER LOVE (Apple Records 1969). “For so many of my generation, growing up in the 1960s and 1970s, Lennon was a hero, not just for his music but for his fearless activism against the Vietnam War.” William Easterly, *John Lennon v. Bono: The Death of the Celebrity Activist*, WASH. POST, Dec. 10, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/09/AR2010120904262.html>. “Lennon's protests against the war in Vietnam so threatened the U.S. government that he was hounded by the FBI, police[,] and immigration authorities.” *Id.*

251. See *The Story of John Lennon, John Sinclair, and Richard Nixon: Immigration Laws Were Enforced Because Lennon Was “Dangerous”*, BUNGALOW BILL'S CONSERVATIVE WISDOM (Oct. 8, 2010), <http://bungalowbillscw.blogspot.com/2010/10/story-of-john-lennon-john-sinclair-and.html> (stating that “Nixon needed a plan to remove John Lennon from the United States,” because he feared Lennon's influence on youth might create a possible uprising).

252. *Lennon v. INS*, 527 F.2d 187, 189 (2d Cir. 1975).

253. *Id.*

254. See *id.* at 188 (listing Leon Wildes as one of the attorneys for petitioner).

255. See *The Story of John Lennon*, *supra* note 251 (discussing Nixon's desire to have John Lennon deported).

256. See *id.* (describing the secret program of prosecutorial discretion).

257. LEON WILDES, JOHN LENNON AND YOUNG DREAMERS, available at <http://dl.dropbox.com/u/27924754/John%20Lennon%20and%20Young%20DREAMers.pdf> (last visited Nov. 15, 2012).

and discovered the existence of the “nonpriority program.” *Nonpriority* status was essentially an administrative halt to deportation that effectively placed a deportable alien in a position where he or she was not removed simply because the case had the lowest possible priority for INS action.<sup>258</sup> Traditionally, the status was accorded to aliens whose departure from the United States would result in extreme hardship.<sup>259</sup>

On the other legal front, the custody efforts of Lennon and Ono were completely successful on the law, with family courts awarding them custody of the child.<sup>260</sup> However, the father absconded with the child and could not be found.<sup>261</sup> In the midst of the frantic search for her child, Lennon and Ono were subjected to expulsion proceedings. They felt, however, that the equities involved in their search for the child justified their application for the newly discovered nonpriority status.

What Wildes unearthed about the government’s nonpriority program was surprising to many. He was allowed to examine 1,843 cases and found that nonpriority status could apply in virtually any circumstance where a grave injustice might result from removal.<sup>262</sup> “Nonpriority had been granted to aliens who had committed serious crimes involving moral turpitude (including rape), drug convictions, fraud, or prostitution.”<sup>263</sup> Nonpriority had been given to “Communists, the insane, the feeble-minded, and the medically infirm.”<sup>264</sup> Often there were multiple grounds for deportation. Family separation, age (both elderly and young), health, and economic issues were important factors that officials considered.<sup>265</sup>

After the revelation of the existence of the secret non-priority program, INS formalized the process publicly, publishing guidelines for requesting “deferred action” from INS authorities. Local INS district directors had the authority to grant a deportable person deferred action, permitting him or her to remain in the country indefinitely. The primary considerations district directors would use in deciding whether to grant deferred action included:

- (1) the likelihood of ultimately removing the alien, including physical ability to travel, or availability of relief;

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258. Wildes, *supra* note 245, at 44–45.

259. *Id.*

260. Robert Fontenot, *Why Did John Lennon and Yoko Ono Originally Move to United States?*, ABOUT OLDIES MUSIC, <http://oldies.about.com/od/britishinvasion/f/lennonfbi.htm> (last visited Nov. 15, 2012).

261. *Id.*

262. Wildes, *supra* note 245, at 44–45.

263. *Id.*

264. *Id.*

265. *Id.* at 51–57.

- (2) the presence of sympathetic factors which might lead to protracted deportation proceedings or bad precedent from the INS perspective;
- (3) the likelihood that publicity adverse to the INS will be generated because of sympathetic facts; and
- (4) whether the person is a member of a class whose removal is given high priority, e.g., dangerous criminals, large-scale alien smugglers, narcotic drug traffickers, terrorists, war criminals, or habitual immigration violators.<sup>266</sup>

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266. Lennon ultimately won his deportation battle with INS even though authorities did not grant him deferred action or nonpriority status. *Lennon v. INS*, 527 F.2d 187, 195 (2d Cir. 1975). The issue in Lennon's case was whether his 1968 British conviction for possession of cannabis resin rendered him an excludable alien under an immigration law that applied to those convicted of illicit possession of marijuana. *Id.* at 188. The Court of Appeals held that Lennon's conviction did not fall within the ambit of this section:

The day after Lennon's visa expired, March 1, Sol Marks, the New York District Director of the INS, notified the Lennons by letter that, if they did not leave the country by March 15, deportation proceedings would be instituted. On March 3, Lennon and his wife filed third preference petitions.

*Id.* at 189. At the time, third preference, was given to "qualified immigrants who . . . because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States." *Id.* at 198. First and second preferences were reserved for certain relatives of U.S. citizens and lawful permanent residents. Visa Bulletin for August 2012, TRAVEL.STATE.GOV (July 9, 2012), [http://www.travel.state.gov/visa/bulletin/bulletin\\_5749.html](http://www.travel.state.gov/visa/bulletin/bulletin_5749.html).

In response to these applications, the INS instituted deportation proceedings three days later. The INS, for reasons best known to them, did not act on the applications, and the Lennons were therefore unable to apply for permanent residence. After waiting two months, they filed suit in the Southern District for an injunction compelling the INS to rule on their petitions. At oral argument in that case, Marks advised the judge that the INS would consider the applications; they were approved within the hour.

In March, April, and May, 1972, deportation hearings were held before Immigration Judge Fieldsteel. On May 12, 1972, ten days after the INS finally approved their petition for third preference status, the Lennons applied to the Immigration Judge for permanent residence. During the hearing, letters from many eminent writers, artists, and entertainers, as well as from John Lindsay, at that time the Mayor of New York, were submitted to show that, were the applications approved, the Lennons would make a unique and valuable contribution to this country's cultural heritage. The Government did not challenge Lennon's artistic standing, but instead contended that his 1968 guilty plea made him an excludable alien, thus mandating the denial of his application. Lennon countered by arguing that he was not excludable under [the law] since he had not been convicted of violating a law forbidding *illicit* possession. Under British law, Lennon urged, guilty knowledge was not an element of the offense . . . .

The Immigration Judge filed his decision on March 23, 1973. Since Yoko Ono had obtained permanent resident status in 1964, he granted her application. But, because

Deferred action in the deportation context today is thus manifested in the exercise of prosecutorial discretion by DHS officials.<sup>267</sup>

## VI. PROSECUTORIAL DISCRETION AND THE DREAM ACT STUDENTS

The DREAM Act (Development, Relief, and Education for Alien Minors) was first introduced in Congress in 2001 by a bi-partisan group of legislators that included Dick Durbin, Orrin Hatch, Luis Gutierrez, and Richard Lugar.<sup>268</sup> Various versions of the legislation would provide conditional lawful permanent residence status to certain undocumented individuals (up to age thirty or thirty-five, depending on the legislative version) of good moral character who graduate from U.S. high schools, arrived in the United States as minors, and lived in the country continuously for at least five years prior to the bill's enactment. If they completed two years in the military or two years at a four-year institution of higher learning,<sup>269</sup> they would obtain temporary residency for a six-year period. Eventually, the individuals could qualify for lawful permanent residence and ultimately U.S. citizenship. The subsequent Morton Memo was in large measure a result of lobbying efforts by DREAM Act students and their supporters (including members of Congress) to convince President Obama to grant deferred action to DREAM Act students after

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he believed that Lennon was an excludable alien, the Immigration Judge denied his application and ordered him deported.

*Lennon v. INS*, 527 F.2d 187, 189–90 (2d Cir. 1975). The Court of Appeals agreed with Lennon. The court argued that U.S. immigration laws related to marijuana possession required the individual to have knowledge that he or she was in possession of the substance. *Id.* at 193. The language of the British statute under which Lennon was convicted was deceptively simple: “A person shall not be in possession of a drug unless . . . authorized . . .” *Id.* at 191. The court concluded that “analysis of British law as it existed in 1968 [when] Lennon was convicted made guilty knowledge irrelevant.” *Id.* at 192. Therefore, a conviction under the British statute could not be used for marijuana exclusion under U.S. immigration laws.

267. Wadhia, *supra* note 247, at 245; Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL OF RTS. J. (forthcoming 2012); see Natalya Shatniy, *Economic Effects of Immigration: Avoiding Past Mistakes and Preparing For The Future*, 14 SCHOLAR 869, 894–95 (2012) (discussing the Dream Act as an amnesty proposal under recent legislation).

268. Elise Foley, *Obama Administration to Stop Deporting Younger Undocumented Immigrants and Grant Work Permits*, HUFFINGTON POST (June 15, 2012, 9:41 AM), [http://www.huffingtonpost.com/2012/06/15/obama-immigration-order-deportation-dream-act\\_n\\_1599658.html](http://www.huffingtonpost.com/2012/06/15/obama-immigration-order-deportation-dream-act_n_1599658.html).

269. The bill originally required students to attend college or complete two years of community service, but the latter option was replaced with a military service option with pressure from the Pentagon. Elise Foley, *The DREAM Act and National Security*, WASHINGTON INDEP. (Sept. 16, 2010, 8:50 AM), <http://washingtonindependent.com/97571/the-dream-act-and-national-security>.

a version of the DREAM Act failed to pass the U.S. Senate in December 2010.

The DREAM Act reached the Senate floor in mid-September 2010 with support from both parties and the White House. At a September 21st press conference, Secretary of Education Arne Duncan declared, “It is no surprise that a common-sense law like the DREAM Act has always been supported by both Democrats and Republicans. There is no reason it shouldn’t receive that same bipartisan support now.”<sup>270</sup> As Congress became hyper-politicized during the first two years of the Obama presidency, the DREAM Act suffered from an erosion of bipartisan support. When Senate Majority Leader Harry Reid (D-Nev.) included the DREAM Act in the defense authorization bill in September, the bill failed the cloture vote 56-43 without garnering a single Republican in favor of its passage.<sup>271</sup> Republican Senators Orrin Hatch and Bob Bennett, both of Utah, voted in favor of adding the DREAM Act to the defense authorization bill in 2007, but voted against the measure in 2010.<sup>272</sup> Likewise, Senator John McCain (R-Ariz.), who co-sponsored the DREAM Act in 2005, 2006, and 2007, voted against it in 2010.<sup>273</sup>

The DREAM Act faced a substantial political challenge. The legislation occupied a tenuous middle ground: liberals accused it of being too limited in scope and conservatives charged that it is too far-ranging. Kristen Williamson, a spokesperson for the Federation for American Immigration Reform, a conservative group, asserted that many Republicans viewed the DREAM Act as “amnesty disguised as an educational initiative.”<sup>274</sup> Critics of the DREAM Act alleged that the measure rewards lawbreaking and creates a greater incentive to defy immigration laws. With midterm elections on the horizon, Republicans also accused congressional Democrats of capitalizing on the DREAM Act “to motivate Hispanic voters in the upcoming elections.”<sup>275</sup>

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270. Kathy Lee & John He, *DREAM Deferred*, HARVARD POL. REV. (Oct. 30, 2010, 10:23 PM), <http://hpronline.org/covers/higher-education/dream-deferred/>.

271. Igor Volsky, *With Just 40 Votes, Republicans Block Debate Over Defense Authorization Bill*, THINKPROGRESS SECURITY (Sept. 21, 2010, 3:18 PM), <http://thinkprogress.org/politics/2010/09/21/120124/defense-cloture-dadt/>.

272. Elise Foley, *Hatch, Bennett Say They'll Vote 'No' On DREAM Act*, WASHINGTON INDEP. (Sept. 16, 2010), <http://washingtonindependent.com/97608/hatch-bennett-say-theyll-vote-no-on-dream-act>.

273. Andrea Nill Sanchez, *Former Sponsor of the DREAM Act John McCain Accuses Reid of 'Playing Politics' With Immigration*, THINKPROGRESS SECURITY (Sept. 16, 2010, 3:25 PM), <http://thinkprogress.org/security/2010/09/16/176276/mccain-dream-act/?mobile=nc>.

274. Lee, *supra* note 270.

275. *Id.*

On the other side of the aisle, many liberal Democrats believed that comprehensive immigration reform was still possible and opposed the DREAM Act's piecemeal approach to reform. Marshall Fitz, director of immigration policy at the Center for American Progress, explained, "The expectation that we will only get one shot at an immigration debate during a legislative session suggests that moving forward on a piece like DREAM means it is to the exclusion of other equally worthy pieces."<sup>276</sup>

However, after the November 2010 elections, the prospects for comprehensive immigration reform grew dimmer. Democrats lost their majority in the House of Representatives in the next Congress. In the lame duck Congressional session after the elections, the House passed the DREAM Act with a 216-198 vote on December 8th.<sup>277</sup> With Republicans (most of whom oppose the bill), taking over the House, and increasing their number of seats in the Senate from 42 to 47, the chances of the bill being passed were slim for at least the next two years.<sup>278</sup> The DREAM Act became a top priority of Senate Majority Leader Harry Reid, who won a tough re-election fight with the help of Nevada's large Latino community, which strongly supported the DREAM Act.<sup>279</sup> The bill garnered a majority of Senate votes, 55-41, but failed to advance because 60 votes were required to overcome a filibuster.<sup>280</sup>

Four months later, after the new Congress assembled and Republicans took control of the House of Representatives, twenty-two Senators sent a letter to President Obama asking for deferred action for undocumented immigrant youth who would have qualified for the bill.<sup>281</sup> Led by Senators Durbin and Reid, the Senate reminded the President that:

[T]he exercise of prosecutorial discretion in light of law enforcement priorities and limited resources has a long history in this nation and is fully consistent with our strong interest in the rule of law. Your Administration has a strong record of enforcement, having deported

276. *Id.*

277. Cesar Vargas, *Howard Berman: A Standard of Leadership on the DREAM Act*, HUFFINGTON POST (Nov. 11, 2012), [http://www.huffingtonpost.com/cesar-vargas/dream-act\\_b\\_2061565.html](http://www.huffingtonpost.com/cesar-vargas/dream-act_b_2061565.html).

278. Naftali Bendavid, *Dream Act Fails in Senate*, WALL ST. J., Dec. 19, 2010, <http://online.wsj.com/article/SB10001424052748704368004576027570843930428.html>.

279. See Pema Levy, *Living the DREAM: Dems Push To Get The Act in Party Platform*, TPM (Aug. 9, 2012, 3:31 PM), <http://2012.talkingpointsmemo.com/2012/08/dems-push-for-dream-act-plank-in-party-platform.php> (discussing how Senator Harry Reid made the DREAM Act the focal point of his re-election campaign, and "won with crucial help from the Latino community.").

280. Bendavid, *supra* note 278.

281. Julianne Hing, *Twenty-Two Senators Ask Obama to Stop Deporting DREAMers*, COLORLINES (Apr. 14, 2011, 4:04 PM), [http://colorlines.com/archives/2011/04/twenty-two-senators\\_ask\\_obama\\_to\\_stop\\_deporting\\_dreamers.html](http://colorlines.com/archives/2011/04/twenty-two-senators_ask_obama_to_stop_deporting_dreamers.html).

a record number of undocumented immigrants last year. At the same time, you have granted deferred action to a small number of DREAM Act students on a case-by-case basis, just as the Bush Administration did. Granting deferred action to DREAM Act students, who are not an enforcement priority for DHS, helps to conserve limited enforcement resources.<sup>282</sup>

Similarly, and ironically,<sup>283</sup> Congressman Gutierrez also protested that the President had the power to stop deporting immigrants with “deep roots” in the United States.<sup>284</sup>

The White House and DHS announcements that accompanied the Morton Memo in the summer of 2011 make clear that DREAM Act students were one of the primary, intended beneficiaries of the memo.<sup>285</sup> On August 18, 2011, DHS Secretary Janet Napolitano explained that “it makes no sense to expend enforcement resources” on young people who pose no threat to public safety.<sup>286</sup> Senator Durbin, a primary DREAM Act sponsor, praised the announcements:

The Obama Administration has made the right decision in changing the way they handle deportations of DREAM Act students . . . . These students are the future doctors, lawyers, teachers and, maybe, Senators, who will make America stronger. We need to be doing all we can to keep these talented, dedicated, American students here, not wasting increasingly precious resources sending them away to countries they barely remember. The Administration’s new process is a fair and just way to deal with an important group of immigrant

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282. Press Release, Senator Dick Durbin, Durbin, Reid, 20 Senate Democrats Write Obama on Current Situation of DREAM Act Students (Apr. 13, 2011), *available at* <http://durbin.senate.gov/public/index.cfm/pressreleases?ID=cc76d912-77db-45ca-99a9-624716d9299c>.

283. *See Rep. Gutierrez Talking Down to Youth and DREAM Act - Will CHC Support DREAM?*, YOUTUBE (July 24, 2010), <http://www.youtube.com/watch?v=GzW2IamxXlg> (chastising DREAM Act students for focusing on their own interests). On July 20, 2010, during a student “sit-in” at Senator Harry Reid’s office, Congressman Gutierrez admonished a group of DREAM Act “kids” by phone. *Id.* Gutierrez expressed disagreement with the student’s decision to engage in civil disobedience and warned that the students were further dividing the comprehensive immigration reform movement. *Id.*

284. *Illinois Rep. Luis Gutierrez Arrested During DREAM Act Protest*, CHICAGO SUN-TIMES (July 27, 2011, 12:30 AM), <http://www.suntimes.com/news/politics/6726733-418/illinois-rep-luis-gutierrez-arrested-during-dream-act-protest.html>.

285. Press Release, Senator Dick Durbin, *supra* note 282.

286. Susan Carroll, *U.S. to Review 300,000 Deportation Cases*, HOUSTON CHRON. (Aug. 18, 2011), <http://www.chron.com/news/houston-texas/article/U-S-to-review-300-000-deportation-cases-2122837.php>.



students and I will closely monitor DHS to ensure it is fully implemented.<sup>287</sup>

A Los Angeles Times headline blared: “Dream Act Students Won’t Be Deportation Targets, Officials Say.”<sup>288</sup> But the broad language of criteria set forth in the Morton Memo made clear that other aliens subject to removal, like Mr. Martinez, were intended to be covered as well. The design was well received by immigrant rights groups and immigration lawyers. “[G]overnment officials and advocates now have a new tool for doing the right thing,” according to some advocates.<sup>289</sup> Congressman Gutierrez applauded the announcement: “Focusing scarce resources on deporting serious criminals, gang bangers, and drug dealers and *setting aside non-criminals with deep roots in the U.S.* until Congress fixes our laws is the right thing to do and I am proud of the President and Secretary Napolitano for standing up for a more rational approach to enforcing our current immigration laws.”<sup>290</sup> The American Bar Association was pleased that ICE would “exercise its prosecutorial discretion to close low priority cases” not limited to DREAMers.<sup>291</sup>

287. Press Release, Senator Dick Durban, *supra* note 282.

288. Paloma Esquivel, *Dream Act Students Won’t Be Deportation Targets, Officials Say*, L.A. TIMES, Aug. 18, 2011, <http://www.nytimes.com/2011/08/19/us/19immig.html>.

289. Mary Giovagnoli, *What ICE’s Latest Memo on Prosecutorial Discretion Means for Future Immigration Cases*, IMMIGR. IMPACT (June 21, 2011), <http://immigrationimpact.com/2011/06/21/what-ice%E2%80%99s-latest-memo-on-prosecutorial-discretion-means-for-future-immigration-cases/>.

290. Lynn Sweet, *Immigration: Obama Eases Student Deportations with New Policy Applauded by Durbin, Gutierrez*, CHICAGO SUN-TIMES (Aug. 18, 2011), [http://blogs.suntimes.com/sweet/2011/08/immigration\\_obama\\_eases\\_studen.html](http://blogs.suntimes.com/sweet/2011/08/immigration_obama_eases_studen.html) (emphasis added).

291. Letter from Thomas M. Susman, Dir., Am. Bar Assoc. Gov’t Affairs Office, to John Morton, Dir., ICE (Dec. 15, 2011), *available at* <http://www.aila.org/content/default.aspx?docid=38021>. “The ABA is encouraged that in a conference call hosted by the White House senior administration officials stated that certain cases, including DREAM Act beneficiaries and same-sex partners or spouses, raise special equities and therefore are eligible for closure under this policy.” *Id.* This letter, essentially, endorses the series of policy documents authored by Director John Morton, commonly referred to as the “Morton Memos.” *Id.* Notably, while the letter from Director Susman refers to “same-sex partners or spouses,” at least one district court has questioned whether the Morton Memos reach situations involving same-sex couples. *See Revelis v. Napolitano*, 844 F. Supp. 2d 915, 921 (N.D. Ill. 2012) (“The Morton Memo does not address same-sex married couples, although the policies behind it have been used to extend relief from removal to same-sex couples in certain instances.”). The set of documents relied upon by Director Susman as the “Morton Memos” include two documents authored on June 17, 2011, and two other documents subsequently authored on November 17, 2011. *See* Letter from Thomas M. Susman, Dir., Am. Bar Assoc. Gov’t Affairs Office, to John Morton, Dir., U.S. Immigration & Customs Enforcement (Dec. 15, 2011), *available at* <http://www.aila.org/content/default.aspx?docid=38021> (identifying each memorandum by date and subject line: “Exercising Prosecutorial Discretion Consistent with Civil Immigration Enforcement Priorities of the Agency for the

The ACLU “tentatively praised” the announcement, waiting for “the details.”<sup>292</sup>

In the months that followed the Morton Memo and White House announcements of prosecutorial discretion on low priority cases, the practical reality of the implementation of the Morton Memo began to surface.<sup>293</sup> When I spoke with my contacts in Washington, D.C., about Mr. Martinez’s case, the message I received was that his really was a low priority case that should be covered by the memo. But it turns out that while his request was being rejected, other low priority cases were being denied as well.<sup>294</sup>

The available data reveals relatively few immigrants facing deportation have had their cases closed. On May 29, 2012, ICE officials announced they had considered 232,181 cases of immigrants not currently held in detention.<sup>295</sup> Authorities identified 20,608 possible cases for administrative closure (less than 10 percent), though about 12,000 of them have been held up awaiting criminal background checks.<sup>296</sup> Since closure itself does not give immigrants an avenue toward legal status, about half of those offered closure have rejected it, preferring to have their cases continue in immigration court perhaps to apply for cancellation of removal or asylum.<sup>297</sup> Authorities have also reviewed the cases of 56,180 immi-

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Apprehension, Detention, and Removal of Aliens” (June 17, 2011), “Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs” (June 17, 2011), “Case-by-Case Review of Incoming and Certain Pending Cases” (Nov. 17, 2011), and “Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review” (Nov. 17, 2011)).

292. McCarter, *supra* note 14 (quoting Judy Rabinovitz, deputy director of the ACLU Immigrants’ Rights Project, as saying, “[w]hile the announcement sounds like a step in the right direction, the devil is in the details.”). According to this article, the concern over the new policy voiced by deputy director Rabinovitz focused on a perception that “some criminal aliens also match much of the same criteria for people who truly pose no threat to [U.S.] communities.” *Id.*

293. See E-mail from author to Zachary Nightingale (Sept. 9, 2011) (on file with *The Scholar: St. Mary’s Law Review on Race and Social Justice*) (“From what I understand, [about] whatever process that’s being used for [a] [M]orton request[,] . . . I know that procedures are being developed/invented on the fly.”).

294. See E-mail from Avantika Shastri to author (Nov. 10, 2011) (on file with *The Scholar: St. Mary’s Law Review on Race and Social Justice*) (noting the view of certain government officials that the memos did not reflect a change in policy).

295. IMMIGRATION POLICY CTR., AM. IMMIGRATION COUNCIL, PROSECUTORIAL DISCRETION: A STATISTICAL ASSESSMENT 2 (2012), available at <http://www.immigrationpolicy.org/just-facts/prosecutorial-discretion-statistical-analysis> (click “Download File”).

296. *Id.*

297. *Id.* at 2–3.

grants currently held in detention.<sup>298</sup> They have offered administrative closure to only about forty of those detainees.<sup>299</sup>

The May 2012 update on its review of pending removal cases was DHS's third report on the process.<sup>300</sup> Each time, the percentage of cases found eligible for administrative closure in the prosecutorial discretion review fell.<sup>301</sup> In a March 5, 2012, report, 8 percent were eligible for closure, 6.2 percent of cases reviewed between March 5 and April 16 were eligible for closure, and just 6 percent of those reviewed from April 16 to May 29 were eligible.<sup>302</sup> In all, about 7 percent were found eligible for administrative closure—a rate that was disappointing to immigrant advocates.<sup>303</sup> The New York Immigration Coalition conducted its own analysis of case data and found that by January 2013 a dismal 2.7 percent of cases nationwide were granted relief.<sup>304</sup>

In a membership survey by the American Immigration Lawyers Association (AILA), those denied prosecutorial discretion included: a longtime resident with no criminal history, no prior removals, with U.S. citizen relatives (Detroit); a longtime resident with no criminal history, no fraud, with strong community ties, U.S. citizen relatives, including a spouse with a severe illness (San Francisco); and an elderly person who suffers with health problems, with no criminal history, no prior removals, with U.S. citizen relatives (New York).<sup>305</sup> On the other hand, those granted prosecutorial discretion included: a longtime resident with no criminal history, strong community ties, U.S. citizen relatives, and few ties to the home country (New York);<sup>306</sup> a person present in the United States since childhood with no criminal history, and U.S. citizen relatives (Detroit);<sup>307</sup> and a person present since childhood with no criminal history, no prior removals, a U.S. high school graduate, with few ties to the home

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298. *Id.* at 2.

299. *Id.*

300. *Id.* at 3.

301. *Id.*

302. *Id.*

303. *Id.* at 5.

304. NEW YORK IMMIGRATION COALITION, PROSECUTORIAL INDISCRETION: HOW THE PROSECUTORIAL DISCRETION POLICY FAILED TO KEEP ITS PROMISE (2013), available at <http://www.thenyc.org/node/1693>.

305. AM. IMMIGRATION LAWYERS ASS'N & AM. IMMIGRATION COUNCIL, HOLDING DHS ACCOUNTABLE ON PROSECUTORIAL DISCRETION 11, 15, 19 (2011), available at <http://www.aila.org/content/default.aspx?docid=37615>.

306. *Id.* at 14–15.

307. *Id.* at 12.

country (Seattle).<sup>308</sup> The lack of consistency across the country in the application of prosecutorial discretion is apparent from a close look at results of this survey.

Field Office Director Aitken's my-marching-orders-haven't-changed response to me was certainly disappointing. However, the AILA survey of attorneys in other parts of the country yielded similar disturbing reports. In the Arlington, Virginia, and Washington, D.C., area ICE officers stated that the June 17th memos "don't mean anything. If we can arrest you, we will arrest you."<sup>309</sup> In Atlanta, Georgia, ICE attorneys and officers stated that "they d[id] not intend to comply with the June 17[th] memos absent specific rules to do so."<sup>310</sup> In Boston, Massachusetts, two of the Congressional offices reportedly confirmed that "ICE is very reluctant to implement the memos and that their offices have been flooded with [prosecutorial discretion] requests."<sup>311</sup> The offices further asserted that "[a] stay of removal was granted only after congressional intervention at the [ICE Headquarters] level."<sup>312</sup> In Dallas, Texas, an ICE attorney recounted that the ICE Office of Chief Counsel had expressed that they were presently exercising prosecutorial discretion and thus did not have to make any changes to their protocol.<sup>313</sup>

In Detroit, Michigan, ICE refused prosecutorial discretion requests even in "very meritorious cases," and one attorney was informed, among other rationale, that prosecutorial discretion was not forthcoming because "resources have already been expended in litigating the case . . . ."<sup>314</sup> This reason may have been in the back of Mr. Aitken's mind when he denied Mr. Martinez's request. In Los Angeles, one attorney claimed that *less* discretion was being exercised after the June 17th memo.<sup>315</sup> In Orlando, Florida, an attorney declared that ICE was "not heeding the memo and does not consider it binding."<sup>316</sup> Finally, another attorney in Miami, Florida communicated that ICE Enforcement and Removal Operations has described their status as "business as usual."<sup>317</sup>

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308. *Id.* at 21; see also TRAC Immigration, *U.S. Deportation Proceedings in Immigration Courts*, SYR, [http://trac.syr.edu/phptools/immigration/charges/deport\\_filing\\_charge.php](http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php) (last visited November 15, 2012).

309. AM. IMMIGRATION LAWYERS ASS'N, *supra* note 305, at 6.

310. *Id.*

311. *Id.* at 7.

312. *Id.*

313. *Id.*

314. *Id.* at 8.

315. *Id.* at 9.

316. *Id.* at 10.

317. *Id.* at 9.

Clearly, part of the problem with the lack of consistency in the implementation of the Morton Memo has been resistance from ICE employees and the ICE union. In January 2012, the *New York Times* reported:

[W]hile virtually all of the agency's lawyers and supervisors have received training, the union representing about 7,000 field agents is refusing to let its members attend the sessions. . . . The union president, Chris Crane, says the strategy is preventing agents from enforcing the law. In October, he told Congress the policy was too confusing for agents to understand and would lead to 'victimization and death,' for reasons that were unclear.

Mr. Crane has taken his grievances to the hard-right media, complaining to Fox News and Lou Dobbs that his bosses are endangering lives and abdicating their law-enforcement duties.<sup>318</sup>

A few days after the Morton Memo was issued, the ICE union issued its own press release in which Crane warned:

Any American concerned about immigration needs to brace themselves for what's coming . . . . The desires of foreign nationals illegally in the United States were the framework from which these policies were developed . . . . [T]he result is a means for every person here illegally to avoid arrest or detention; as officers we will never know who we can or cannot arrest.<sup>319</sup>

One year later, in August 2012, ten ICE agents filed a lawsuit against DHS Secretary Napolitano alleging that the prosecutorial discretion policies announced in the Morton Memo prevented them from doing their job and "defending the Constitution."<sup>320</sup> The lawsuit was funded by the anti-immigrant organization Numbers USA, and the lead counsel was

318. *Good Immigration Policy, on Hold*, N.Y. TIMES, Jan. 14, 2012, [http://www.nytimes.com/2012/01/15/opinion/sunday/good-immigration-policy-on-hold.html?\\_r=0](http://www.nytimes.com/2012/01/15/opinion/sunday/good-immigration-policy-on-hold.html?_r=0).

319. Press Release, Nat'l Immigration & Customs Enforcement Council, ICE Agent's Union Speaks Out on Director's "Discretionary Memo" Calls on the Public to Take Action (June 23, 2011).

320. Elise Foley, *Kris Kobach Represents Immigration Agents In Lawsuit Against Obama Administration*, HUFFINGTON POST (Aug. 23, 2012, 2:47 PM), [http://www.huffingtonpost.com/2012/08/23/kris-kobach-immigration-lawsuit-obama\\_n\\_1825272.html](http://www.huffingtonpost.com/2012/08/23/kris-kobach-immigration-lawsuit-obama_n_1825272.html) (stating that the case will attack two key immigration policies, prosecutorial discretion and deferred action). Specifically the lawsuit challenged the deferred action program for DREAMers that was announced on June 15, 2012 by the Obama administration. *Id.* Most of the case has been dismissed, but the trial court allowed the case to proceed on the issue of whether agents may face impermissible adverse employment consequences if they fail to obey orders. See *Crane v. Napolitano*, Civil Action No. 3:12-cv-03247-O (N.D. Texas, Jan. 24, 2013) (dismissing plaintiffs' cause of action challenging the issuance of employment authorization and Mississippi's claim alleging injury), available at <http://lawprofessors.typepad.com/files/crane-v.-napolitano.pdf>.

Kris Kobach, the architect of several anti-immigrant state laws, such as Arizona's SB 1070.<sup>321</sup>

Although the Morton Memo of June 17, 2011, did result in the termination of some deportation proceedings involving DREAMers, the removal of many DREAMers with no criminal backgrounds continued.<sup>322</sup> For example, Ramon Aguirre, who had entered the United States at the age of seven and became a talented artist in high school, was deported even though he had a four-year-old son.<sup>323</sup> Cesar Montoya faced deportation after being stopped for driving without a license.<sup>324</sup> In Denver, a recent high school graduate who was brought to the United States as an undocumented minor by his mother when he was seven-years-old was first told that he would be granted prosecutorial discretion, but later the local ICE Chief Counsel said that there was a "mix-up" and the young man would not be receiving prosecutorial discretion.<sup>325</sup>

Also, DREAMers who had criminal records, but arguably not serious ones, were removed. For instance, twenty-two-year-old Yanelli Hernandez was removed to Mexico in January 2012 because she was undocumented and had convictions for driving under the influence and forgery.<sup>326</sup> Records indicate that Hernandez, a factory worker with mental problems, had attempted suicide twice.<sup>327</sup> When denying her request for prosecutorial discretion, the Detroit ICE Field Office Director wrote, "The removal of individuals with final orders of removal, as well as

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321. Foley, *Kris Kobach Represents Immigration Agents*, *supra* note 320 (qualifying Kris Kobach as the Kansas Secretary of State and immigration law author).

322. See AM. IMMIGRATION LAWYERS ASS'N, *supra* note 305, at 5–6, 19–21 (finding that most ICE offices—even after receiving the Morton Memo—have not made changes to their practices; offices in Atlanta, Georgia for example, have continued to deport those with no criminal history or minor charges only).

323. Ani Palacios Mc Bride, *Dream Activist Blames Senators Reid and Durbin for Deportations*, LA COLUMNNA (Oct. 12, 2011, 4:31 PM), <http://contacto-latino.com/ideas-latinas/la-columnna/2003/dream-activist-blames-senators-reid-and-durbin-for-deportations> (blaming, Senators Durbin and Reid, for their failure to help stop the deportation of Mr. Aguirre).

324. *Id.* (describing that Mr. Montoya, was originally stopped for a traffic violation, then arrested for failing to have a license).

325. Posting of Violeta Raquel Chapin, violeta.chapin@colorado.edu, to immprof@list.serv.unc.edu & crimimm@yahoogroups.com (Apr. 9, 2012).

326. Mark Curnette, *ICE Depots Former Reading Woman*, CINCINNATI (Jan. 31, 2012, 9:44 PM), <http://news.cincinnati.com/article/20120131/NEWS01/120131032/ICE-deports-former-Reading-woman>.

327. *Id.*

criminal aliens, is an ICE civil immigration enforcement priority. Ms. Hernandez was never lawfully present in the United States.”<sup>328</sup>

DREAMers and their supporters were disappointed in the Morton Memo results and called on the President to do more.<sup>329</sup> On June 15, 2012, to make his intent very clear to ICE officials in the field, President Obama specifically announced that DREAMers would be granted deferred action and employment authorization for at least two years.<sup>330</sup> Not coincidentally, his decision came after a week-long protest and sit-in at his campaign office in Denver, Colorado.<sup>331</sup> Under the directive, deferred action could be granted on a case-by-case basis to individuals who meet the following criteria: they came to the United States when they were younger than sixteen and are currently under age thirty-one, they have continuously resided in the United States for at least five years, and they are in school, have graduated from high school, have obtained a GED, or are honorably discharged veterans of the armed forces.<sup>332</sup> In addition, the individuals may qualify if they have not been convicted of a felony, significant misdemeanor, or multiple misdemeanor offenses; or they do not otherwise pose a threat to national security or public

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328. Jorge Rivas, *ICE Confirms DREAMer Yanelli Hernandez Deported to Mexico*, COLORLINES (Jan. 31, 2012, 2:12 PM), [http://colorlines.com/archives/2012/01/ice\\_confirms\\_dreamer\\_yanelli\\_hernandez\\_deported\\_to\\_mexico.html](http://colorlines.com/archives/2012/01/ice_confirms_dreamer_yanelli_hernandez_deported_to_mexico.html).

329. Ben Winograd, *President Obama to Halt Deportation of DREAMers*, IMMIGR. IMPACT (June 15, 2012), <http://immigrationimpact.com/2012/06/15/president-obama-to-halt-removal-of-dreamers/>.

330. *Id.* When the Morton Memo was issued, supporters of same-sex couples sought explicit assurances from DHS and the White House that the foreign-born partner of a U.S. citizen would be granted prosecutorial discretion. Chris Johnson, *Lawmakers Seek Added Protections for Bi-National Gay Couple*, WASHINGTON BLADE (Sept. 27, 2011), <http://www.washingtonblade.com/2011/09/27/lawmakers-seek-added-protections-for-bi-national-gay-couples/>. Administration officials stated that being in a same-sex relationship would be considered in the context of the “community contributions” and “family relationships” factors in the Morton Memo. *Id.* But activists and Democratic lawmakers sought additional assurances that bi-national same-sex couples would not be left out. *Id.* Finally, more than a year later, DHS Secretary Napolitano announced: “In an effort to make clear the definition of the phrase ‘family relationships,’ I have directed ICE to disseminate written guidance to the field that the interpretation of the phrase ‘family relationships’ includes long-term, same-sex partners.” Miranda Leitsinger, *US Immigration Chief: Same-Sex Ties are Family Ties*, NBC NEWS (Sept. 28, 2012), [http://usnews.nbcnews.com/\\_news/2012/09/28/14140024-us-immigration-chief-same-sex-ties-are-family-ties?lite](http://usnews.nbcnews.com/_news/2012/09/28/14140024-us-immigration-chief-same-sex-ties-are-family-ties?lite).

331. Julianne Hing, *DREAMers Stage Sit-Ins at Obama Office to Force Deportation Standoff*, COLORLINES (June 13, 2012), [http://colorlines.com/archives/2012/06/dreamers\\_planned\\_obama\\_campaign\\_office\\_sit-ins\\_force\\_deportation\\_standoff.html](http://colorlines.com/archives/2012/06/dreamers_planned_obama_campaign_office_sit-ins_force_deportation_standoff.html); Winograd, *supra* note 329.

332. *A Breakdown of DHS’s Deferred Action for DREAMers*, IMMIGR. IMPACT (June 18, 2012), <http://immigrationimpact.com/2012/06/18/a-breakdown-of-dhss-deferred-action-for-dreamers/>.

safety.<sup>333</sup> By January 22, 2013, more than 400,000 had applied under this Deferred Action for Childhood Arrivals (DACA) program.<sup>334</sup>

#### A. *Administrative Discretion “Standards”*

The decision to enforce Mr. Martinez’s departure was frustrating for his family and for me. The impression I received from my contacts and officials from DHS in Washington, D.C., was that Mr. Martinez fell within the prosecutorial discretion guidelines of the Morton Memo; in other words, he was worthy of having his removal halted. Yet, Mr. Aitken, the local ICE field office director, felt otherwise. The Morton Memo represented no new orders, as far as he was concerned. And he had the final say as the local decision maker.<sup>335</sup> Could the outcome have been different if Mr. Martinez resided in a different district and his case placed in the hands of different officials? Apparently yes, according to the data collected in the AILA survey.<sup>336</sup> That is a primary basis for the frustration with the decision in Mr. Martinez’s case. That outcome seems an unavoidable manifestation of the difficulties with administrative discretion as exercised in this setting.

The government—including the Department of Homeland Security—“cannot operate without agencies that exercise discretionary power.”<sup>337</sup> The President, as the head of the Executive Branch, oversees hundreds of federal agencies and tens of thousands of agency employees.<sup>338</sup> He certainly cannot make the decision on every individual case that comes before an agency that involves a discretionary decision. The President’s discretionary enforcement power, for example, must be delegated to bureaucratic chiefs, supervisors, and employees, including investigators, enforcement officers, and administrative law judges.<sup>339</sup> Thus, in his own hands, the President may not have personally decided to force Mr. Martinez to depart. However, his administrative discretion was delegated in a manner that eventually ended up in the hands of Mr. Aitken.<sup>340</sup> In turn,

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333. *Id.*

334. Doris Nhan, *Deferred-Action Counter: Number of Approved Applications Passes 150,000*, NATIONAL JOURNAL (Jan. 22, 2013), available at <http://www.nationaljournal.com/thenextamerica/immigration/deferred-action-counter-number-of-approved-applications-passes-150-000-20121023>.

335. Letter from Timothy S. Aitken to author, *supra* note 217.

336. See AM. IMMIGRATION LAWYERS ASS’N, *supra* note 305, at 4–6 (addressing the objectives and provisions of prosecutorial discretion and the history of its implementation).

337. RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 1227 (2002).

338. *Id.* at 1232–33.

339. *Id.*

340. *Id.* at 1227.



Mr. Aitken presumably considered all the relevant factors and exercised his discretion unfavorably toward Mr. Martinez.

The guidance provided in the Morton Memo is in essence, a framework for policy implementation—namely, enforcement policies that focus on serious criminals and clearing the immigration court docket.<sup>341</sup> While discretion in policy implementation can include everything from the basic “execution of the law” to “street-level encounters involving law enforcement,” the Morton Memo falls more in the categories of “discretionary power to do nothing at all,” e.g., deciding not to prosecute, and the decision on how to spend limited financial resources because DHS simply does not have the personnel, time, and funds to deport every deportable immigrant.<sup>342</sup>

A significant problem with administrative discretion is that “it may be used poorly.”<sup>343</sup> For example, some administrators may “shirk” their responsibility and be “inappropriately risk-averse.”<sup>344</sup> Their values may be “different from the population at large and have a different worldview and/or understanding of reality.”<sup>345</sup> In the context of the Morton Memo, that could mean that some administrators may be afraid of going too far in granting prosecutorial discretion, or they may not understand the pain that will likely be suffered by forced family separation. On the other hand, administrators may believe that policies by higher-level bureaucrats are a poor use of administrative discretion. Local officials may feel that “[d]ecision makers in an agency’s headquarters may be out of touch with conditions in the field.”<sup>346</sup> Again, in the context of the Morton Memo, we see this manifested by the resistance of the ICE union to the implementation of the Morton Memo.<sup>347</sup>

Similarly, some Republican members of Congress with different enforcement values attacked the Morton Memo by introducing the “Hinder the Administration’s Legalization Temptation Act” (HALT Act), a bill

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341. See *Understanding Prosecutorial Discretion in Immigration Law*, IMMIGR. POL’Y CENTER (Sept. 9, 2011), <http://www.immigrationpolicy.org/just-facts/understanding-prosecutorial-discretion-immigration-law> (“In order to clear the seriously backlogged immigration court dockets and to better focus resources on high priority cases, all low priority cases will be administratively closed following this review—that is, they will be removed from the active docket of the immigration courts.”).

342. DAVID H. ROSENBLUM ET AL., *PUBLIC ADMINISTRATION AND LAW* 32 (2010).

343. *Id.*

344. *Id.* at 33.

345. *Id.*

346. *Id.*

347. Press Release, Nat’l Immigration & Customs Enforcement Council, *supra* note 319.

that would suspend discretionary forms of immigration relief until January 21, 2013—the day after the next Presidential inauguration.<sup>348</sup>

In evaluating the terse tone of Mr. Aitken's decision, he clearly epitomizes the problem with too much unreviewable administrative discretion.<sup>349</sup> However, the study of administrative law and operations suggests that “even the most junior inspector or investigator must have some latitude to exercise discretion in choosing among alternative means of responding to the widely varying circumstances she encounters in the day-to-day performance of her responsibilities.”<sup>350</sup> Yes, unlimited administrative discretion gives rise to potential for abuse, but a successful challenge to such a decision requires a showing of “impermissible motives” or “political or personal favoritism.”<sup>351</sup>

Thus, while the Morton Memo does create an administrative rule endorsing the exercise of prosecutorial discretion, the local field office director is not obliged to cease deportation in any particular low priority case.<sup>352</sup> Memoranda can be used to create rules that are binding on agency employees and that affect members of the public. The power of federal agencies to make rules via memoranda is granted generally in an exemption to the Administrative Procedures Act: “[G]eneral statements of policy, or rules of agency organization, procedure, or practice” are exempt from notice and comment requirements that govern most other agency rulemaking.<sup>353</sup> The Morton Memo is authoritative as long as it does not contradict the Immigration and Nationality Act.<sup>354</sup> However, the memo specifies that ICE employees *may* exercise prosecutorial discretion, thereby rendering the guidelines loose and not guaranteeing that any particular ICE employee will choose to exercise discretion in a given

348. Hinder the Administration's Legalization Temptation Act, S. 1380, 112th Cong. (1st Sess. 2011); *Dissecting the HALT Act*, IMMIGR. POLICY CENTER (July 25, 2011), available at <http://www.immigrationpolicy.org/newsroom/release/dissecting-halt-act-last-safety-valves-immigration-system-under-attack>.

349. Letter from Timothy S. Aitken to author, *supra* note 217.

350. PIERCE, *supra* note 337, at 1233.

351. *Id.* at 1232.

352. See Letter from Timothy S. Aitken to author, *supra* note 217 (demonstrating the broad standards available in applying discretion).

353. 5 U.S.C. § 553(b)(3)(A) (2012); see RONALD A. CASS ET AL., ADMINISTRATIVE LAW CASES AND MATERIALS 384 (2011) (“A great deal of agency action, including decisions to allocate resources, cancel or initiate programs, or provide regulatory guidance . . . is essentially informal, with no process prescribed by either the APA or the enabling act involved.”).

354. *Cf. Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 98 (1995) (“The Secretary of Health and Human Services was justified in relying on her own rules with respect to Medicare reimbursements. The rules were valid and authoritative as long as they were consistent with the Medicare statute.”).

case.<sup>355</sup> Courts are very deferential to federal agencies regarding the freedom to exercise or decline to exercise prosecutorial discretion.<sup>356</sup>

In the deportation context, efforts to challenge the discretionary refusal to terminate proceedings on behalf of specific aliens generally requires a showing of “selective prosecution in violation of equal protection or due process, such as improper reliance on political considerations, on racial, religious, or nationality discriminations, [or] on arbitrary or unconstitutional criteria . . . .”<sup>357</sup> For example, in *Nicholas v. Immigration and Naturalization Service*,<sup>358</sup> the Ninth Circuit declined to intervene, emphasizing the “great burden” of showing that refusal to terminate “so departs from an established pattern of treatment of others similarly situated without reason, as to be arbitrary and capricious, and an abuse of discretion.”<sup>359</sup> Nicholas was a longtime lawful resident of the United States with a U.S. citizen wife and two U.S. citizen children.<sup>360</sup> However, he was convicted of possession of a controlled substance.<sup>361</sup> In *Loera v. Nutis*,<sup>362</sup> the district court noted that “deferred action is a matter of administrative discretion . . . the decision of the INS district director, however harsh, was not made arbitrarily or capriciously.”<sup>363</sup> Loera had resided in the United States for over twenty years.<sup>364</sup> The INS District Director denied Loera’s application for deferred action mostly based upon Loera’s admitted problem with alcohol.<sup>365</sup> In contrast, in *Fuentes v. Immigration and Naturalization Services*,<sup>366</sup> the Ninth Circuit did remand to the INS for consideration of placing the case in deferred action status, in light of the fact that deportation proceeding resulted from the em-

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355. Memorandum from John Morton, Dir., ICE, on Exercising Prosecutorial Discretion, *supra* note 10.

356. *See, e.g.*, *Moog Indus. v. Fed. Trade Comm’n*, 355 U.S. 411, 413 (1958) (regarding two companies that asked for review of the cease and desist orders they received from the FTC, arguing that the Commission misused its prosecutorial discretion and created an unfair imbalance in going after them and not their competitors). The Supreme Court denied relief, stating that the FTC “alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy[.]” *Id.*

357. CHARLES GORDON ET AL., IMMIGRATION LAW & PROCEDURE § 72.03[2][a] (Matthew Bender Rev. Ed. 2012).

358. 590 F.2d 802 (9th Cir. 1979).

359. *Id.* at 808.

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

366. 765 F.2d 886 (9th Cir. 1985).

ployer's reporting to INS undocumented alien employees who were lawfully challenging unfair labor practices.<sup>367</sup>

Assuming that some administrators in Washington, D.C. would have decided to grant prosecutorial discretion in cases such as Mr. Martinez's, could anything be done? The final part of the Morton Memo made clear that there was no right to prosecutorial discretion being conveyed in the document:

As there is no right to the favorable exercise of discretion by the agency, nothing in this memorandum should be construed to prohibit the apprehension, detention, or removal of any alien unlawfully in the United States or to limit the legal authority of ICE or any of its personnel to enforce federal immigration law. Similarly, this memorandum, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.<sup>368</sup>

Also, no right of administrative appeal was provided for in the memo, so that reversals of lower level decisions by headquarters as a means of providing guidance was not available. As noted, going to court on an abuse of discretion claim by unsuccessful applicants is likely to be unsuccessful.

If Deputy Assistant Secretary of ICE, John Morton, wants to effectively implement the Obama administration's plan for ICE, the memo would have to create detailed policies to adequately train ICE officers on what "discretion" means in a real-life context.<sup>369</sup> For ICE to refocus its efforts on the main goal of the agency—ensuring the security of the nation by prioritizing time to the nation's most serious offenders—requires transformation of "organizational design, culture, management, and internal procedures . . . to structure discretion and militate against mis-

367. *Id.* at 889–90.

368. Wadhia, *Reading the Morton Memo*, *supra* note 15, at 4.

369. The Morton Memo lacks the specificity required to create a uniformly implemented program of prosecutorial discretion. Wadhia, *Reading the Morton Memo*, *supra* note 15, at 5.

[T]his advisal is reduced to the form of a footnote and is likely to lead to confusion. For example, what constitutes 'particular discretion' as opposed to the exercise of discretion promoted in the text of the Morton Memo? If an officer confronts an individual with a misdemeanor conviction that is 'more' serious than a traffic stop but 'less' serious than a violent crime, is the officer to exercise 'less' particular discretion?

*Id.* at 6.

use.”<sup>370</sup> However, changing the culture of an agency is easier said than done.<sup>371</sup>

## VII. CHANGE IN ICE CULTURE

The inconsistencies in the application of prosecutorial discretion and resistance to the application expressed by ICE union officials suggest that changes need to be implemented in order to attain more consistent results and to reflect the general outcome contemplated by ICE Director Morton.<sup>372</sup>

In explaining his decision to deny deferred action to Mr. Martinez, local ICE Field Office Director Aitken explained that the Morton Memo “didn’t change anything” and no one designated the case as “low priority.”<sup>373</sup> As noted above, ICE Union Chief Chris Crane charged that the

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370. ROSENBLUM ET AL., *supra* note 342, at 34; *see also* Micevhill, *Obama Dream Act Prosecutorial Discretion Remarks*, YOUTUBE (June 15, 2012), <https://www.youtube.com/watch?v=-HrdqBSaVz8> (featuring a speech given by U.S. President Barack Obama and originally airing on WH.gov discussing Dream Act changes that will provide protections for immigrants). *See generally* *Summary of Policy Reforms*, U.S. DEP’T OF HOMELAND SEC., <http://www.ice.gov/detention-reform/policy-reform.htm> (last visited Nov. 15, 2012) (outlining the transitions ICE has gone through over the past three years).

371. Ken Miller, *Frustrated by an Unchangeable Agency? Change Anyway*, GOVERNING THE STATES & LOCALITIES (Sept. 10, 2009), <http://www.governing.com/blogs/public-great/Frustrated-by-an-Unchangeable.html> (revealing the embittered hesitation from people when it comes to trust in government agency change saying “[c]ustomers in government are often hostages with no choice.”). *But see* CATO INST., *Can Government Change?*, INDIVIDUAL LIBERTY, FREE MKTS., & PEACE (Mar./Apr. 1997), [http://www.cato.org/pubs/policy\\_report/cpr-19n2-6.html](http://www.cato.org/pubs/policy_report/cpr-19n2-6.html) (outlining how individuals with a defeatist attitude towards government echo sentiments that government cannot change and if proved to be true then true change will continue to be in flux). For strategies on how individual citizens can spur change in the government, *see* Ken Miller, *Were Change Really Happens in Government: Who Can Save Us?*, GOVERNING THE STATES & LOCALITIES (June 11, 2010), <http://www.governing.com/blogs/public-great/Where-Change-Really-Happens-in-Government.html>.

372. *See* Wadhia, *Reading the Morton Memo*, *supra* note 15, at 4 (explaining that the Morton Memo lacks the specificity required to create a uniformly implemented program of prosecutorial discretion); *see also* Laura Donohue, *The Potential For a Rise in Wrongful Removals and Detention Under the United States Immigration and Customs Enforcement’s Secure Communities Strategy*, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 125–28 (defending the need for government to share and communicate data across the agencies to clear up inconsistencies); Wadhia, *supra* note 247, at 292 (marking the blatant discrepancies between the post-2011 National Security Entry and Exit Registration Program which would cause deportation of detainees that would be freed if following the tactics of the Morton Memo).

373. In exercising prosecutorial discretion in furtherance of ICE’s enforcement priorities, the following negative factors should also prompt particular care and consideration by ICE officers, agents, and attorneys:

- individuals who pose a clear risk to national security;

Morton Memo was encouraging ICE agents to abdicate their duties.<sup>374</sup> In testimony to Congress, Crane charged that the Morton Memo on prosecutorial discretion was “intended to satisfy [immigrant] advocacy groups” that could “result in the indiscriminate and large scale release of aliens encountered in all ICE law enforcement operations . . . .”<sup>375</sup> He complained:

The prosecutorial discretion memorandum sets forth approximately nineteen criteria for ICE agents and officers in the field to use in determining whether an alien can be detained or arrested. Important to note, Director John Morton will determine which aliens are to be arrested and that guidance will be passed down to ICE supervisors in the field. ICE agents and officers in the field will be under orders to release and avoid arresting certain groups of aliens altogether. ICE agents and officers will follow orders, not exercise any true discretion.<sup>376</sup>

Crane’s major complaint about the Morton Memo is that ICE officers are being discouraged from doing their jobs.<sup>377</sup> In one case that is a twist on Mr. Martinez’s experience, a local ICE field office director in Delaware (not a Washington, D.C. official) purportedly ordered that an un-

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- 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.

Memorandum from John Morton, Dir., ICE, on Exercising Prosecutorial Discretion, *supra* note 10; see also John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, REENTRY.NET (June 17, 2011), [www.reentry.net/ny/search/download.221217](http://www.reentry.net/ny/search/download.221217) (*itemizing operating a vehicle while under the influence of alcohol as a negative factor that can be taken into consideration under prosecutorial discretion*); Frequently Asked Questions, ICE.GOV, available at <http://www.ice.gov/doclib/about/offices/ero/pdf/faq-deferred-action-process.pdf> (last visited Nov. 15, 2012) (driving under the influence falls under the significant misdemeanor category).

374. *Good Immigration Policy on Hold*, *supra* note 318.

375. *Hearing Before the Judiciary Subcommittee on Immigration and Policy Enforcement* 3 (2011) (statement of Chris Crane, President, National Immigration and Customs Enforcement Council 118 of the American Federation of Government Employees), available at <http://judiciary.house.gov/hearings/pdf/Crane07262011.pdf>.

376. *Id.*

377. See Foley, *Kris Kobach Represents Immigration Agents*, *supra* note 320 (explaining that ICE agents feel that the Morton Memo interferes with their job duties).

documented immigrant be released because he was not a high priority.<sup>378</sup> According to Crane, even though the immigrant had several traffic violations, he was ordered released over the objections of the arresting ICE officer.<sup>379</sup> The ICE officer was placed on a three-day suspension for disobeying orders.<sup>380</sup> Crane complained that the officer was simply “trying to uphold U.S. law” and that “[the Obama administration] is standing in the way of us enforcing the law [because] President Obama [has] loosened restrictions on illegal immigrants.”<sup>381</sup>

Aitken and Crane’s statements, as well as the ICE agent lawsuit against DHS Secretary Napolitano challenging prosecutorial discretion,<sup>382</sup> reflect an enforcement attitude that does not coincide with the policies announced by ICE Director Morton and President Obama.<sup>383</sup> The Morton Memo reflects a value judgment that is about law and equity, not solely about hard-edged law.<sup>384</sup> In other words, Aitken and Crane are relying only on basic statutory language,<sup>385</sup> while the Morton Memo speaks in terms of priorities, equity, justice, and even mercy.<sup>386</sup> The values Aitken and Crane expressed are likely derived from a culture of enforcement

378. Todd Starnes, *ICE Agents: Obama Won't Let Us Arrest Illegals*, FOX NEWS (Aug. 2, 2012), <http://radio.foxnews.com/toddstarnes/top-stories/exclusive-ice-agent-faces-suspension-for-arresting-illegal-alien.html>.

379. *Id.*

380. *Id.*

381. *Id.*

382. See Foley, *Kris Kobach Represents Immigration Agents*, *supra* note 320 (detailing ICE Agents’ lawsuit filed against U.S. Department of Homeland Security Secretary Janet Napolitano and describing concerns related to prosecutorial discretion in immigration cases).

383. See, e.g., Jason Buch, *Immigration Agents Sue Over New Rules*, MYSANANTONIO (Aug. 24, 2012), [http://www.mysanantonio.com/news/local\\_news/article/Immigration-agents-sue-over-new-rules-3810200.php](http://www.mysanantonio.com/news/local_news/article/Immigration-agents-sue-over-new-rules-3810200.php) (describing from Crane’s perspective, the reasons for the ICE agent lawsuit and explaining perceived missteps in the Obama administration’s approach to immigration enforcement issues in the United States, especially deferred action for DREAM Act students).

384. See Memorandum from John Morton, Dir., ICE, on Exercising Prosecutorial Discretion, *supra* note 10 (outlining relevant factors that ICE staff members should consider, in addition to immigration statutes, when exercising prosecutorial discretion).

385. See R.M. Arrieta, *Here Come the Feds*, METROACTIVE (July 21, 2004), <http://www.metroactive.com/papers/metro/07.21.04/undocumented-0430.html> (affirming that ICE agents rely on basic statutory language rather than examining other factors).

386. See Memorandum from John Morton, Dir., ICE, on Exercising Prosecutorial Discretion, *supra* note 10 (encouraging ICE agents to examine the totality of each immigrant’s situation and listing factors to be considered in exercising prosecutorial discretion); see also *Good Immigration Policy on Hold*, *supra* note 318 (praising the new strategy for addressing undocumented immigration and identifying ICE agents who have embraced the new approach to prosecutorial discretion).

that is based on their backgrounds in ICE.<sup>387</sup> Aitken is an ICE field officer under the Department of Homeland Security.<sup>388</sup> Crane has been an ICE agent for almost a decade and has spent half of that time with the Criminal Alien Program.<sup>389</sup> To ask them to change their views or their approaches apparently takes more than a simple memo from D.C. with guidelines for exercising prosecutorial discretion.

Certainly, the values expressed in the Morton Memo have had effect in some, perhaps many, jurisdictions. The Delaware example is one, and there are others,<sup>390</sup> including my own experience with the young high school student who brought a pellet gun to school.<sup>391</sup> But Aitken and Crane teach us that getting these values across is not a simple task. Is this a matter of a cultural change within ICE? If so, what kind of cultural change? Cultural change in law enforcement agencies is not a new topic. For example, when an entire police department or a unit has been found guilty of regular use of excessive force or illegal or unethical behavior, efforts to change the culture of the department in hopes of reining in the behavior are often implemented.<sup>392</sup> In these circumstances, recommendations might include conducting in depth background investigations of aspiring officers, developing effective training programs that include ethics components, demanding consistent and fair accountability, providing positive leadership role models, and implementing effective employee intervention processes.<sup>393</sup> Adding more women on the force to combat a

387. See Starnes, *supra* note 378 (stating that the primary role of ICE is that of law enforcement and that officers are expected to enforce immigration laws by arresting illegal immigrants).

388. SAN FRANCISCO FIELD OFFICE, ENFORCEMENT & REMOVAL OPERATIONS, CORRECTIONS CORPORATION OF AMERICA, CALIFORNIA CITY CORRECTIONAL CENTER 1, available at <http://www.ice.gov/doclib/dro/facilities/pdf/cactyca.pdf> (last visited Nov. 15, 2012).

389. *Hearing Before the Judiciary Subcommittee on Immigration and Policy Enforcement*, *supra* note 375.

390. See Starnes, *supra* note 378 (describing an incident in which an ICE agent was ordered to release an illegal immigrant who had been arrested because he was not considered a priority).

391. See Letter from Abigail Trillin, *supra* note 33 (describing an incident in which a high school student accidentally brought a toy gun to his school campus, and requesting that ICE consider his ignorance of the rules and his success as a student as mitigating factors in his deportation case).

392. See Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545, 578, 642 (2001) (recommending the implementation of an outside monitor or auditor with enforcement authority, and then offering as example the decision of a City Attorney's Office to suspend and indict on civil rights violations a city police officer for lying).

393. See generally *Law Enforcement Cultures & Anti-Corruption*, THE NAT'L INST. OF ETHICS, <http://www.ethicsinstitute.com/pdf/Law%20Enforcement%20Cultures.pdf> (last visited Nov. 15, 2012) (outlining the development of corruptive behavior among enforcers



“machismo” value system is another recommendation.<sup>394</sup> In extreme cases, such as the Rampart scandal in the Los Angeles Police Department, recommendations include:

- establishing an independent commission to investigate corruption and lawlessness,
- appointing an outside monitor or auditor to submit semi-annual reports, developing an aggressive plan to change the culture of the department,
- evaluating and promoting criteria to include community-based policing activities (in other words, officers should be rewarded for their community and crime prevention activities, not only for their arrests and citations),
- providing training for officers on community policing activities,
- facilitate meetings with communities to be required at least once each quarter of a calendar year (an important aspect of community policing is greater communication with the community being served),
- mandate training as to supervisor responsibilities and duties, and
- establish a policy protecting officers who expose wrongdoing from retaliation, improve the system for receiving complaints against officers.<sup>395</sup>

Of course in the context of ICE and the failure to follow guidelines on enforcement priorities, we are not dealing with excessive force or unethical behavior. However, given the intransigence of Aitken and Crane, we definitely face a cultural difference in enforcement philosophies between them and the DHS command. In those circumstances, even conventional law enforcement agencies understand that a foundation of changing culture entails “changing shared understandings and value throughout the organization.”<sup>396</sup> This is upheld beyond any legal obligations that may be

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of the law). Implement these solutions only when certain that the existing integrity needs are pervasive enough as to not make the administration appear hypocritical. If these solutions are deemed necessary, be sure they are implemented with straightforwardness and honesty.

394. See Robert W. Benson, *Changing Police Culture: The Sine Qua Non of Reform*, 34 *LOY. L.A. L. REV.* 681, 682–87 (2001) (discussing how “machismo” plays an integral role in the policing of communities, defining it as the “value system that celebrates male physical strength, aggression, violence, competition, and dominance.”).

395. See Chemerinsky, *supra* note 392, at 578–81, 583, 600 (setting forth recommendations to avoid complication and controversy among the Los Angeles Police Department in times of crisis).

396. See *INST. ON RACE & JUSTICE, CREATING CULTURES OF INTEGRITY IN LAW ENFORCEMENT* 9 (2006), available at <http://www.cops.usdoj.gov/Publications/farrellmcdevitt.pdf> (expressing the need for understanding among law enforcement agencies as to what exactly a changing culture entails).

mandated by law in abusive settings, but also by the code of ethics that applies to law enforcement officers to “never act officiously or permit personal feelings, prejudices . . . animosities or friendships to influence decisions.”<sup>397</sup>

Thus, some of the recommendations, related to changing culture in law enforcement agencies where illegal or unethical behavior is targeted, resonate with the hopes of changing the culture related to ICE prosecutorial discretion. For example:

- In hiring decisions, conduct in-depth background investigations of aspiring officers, and hire those who have a balanced background and view of life. Compassion and patience are important qualities to seek in addition to integrity, reliability, and confidence.<sup>398</sup>
- The fact that conventional law enforcement officials recognize compassion as an important quality is, of course, relevant to ICE prosecutorial discretion implementation. Although the Morton Memo may be couched in terms of establishing priorities to help clear the backlogs in the immigration courts and to focus on aliens who have committed serious criminal offenses or who pose a danger to national security, the corollary point is that there is an element of compassion in designating others as low priority.
- Demanding consistent and fair accountability. In exercising his discretion, ICE Field Office Director Aitken did not appear to be accountable to anyone. If he was, the process was not transparent.
- ICE agents need positive leadership and positive role models. While some current ICE employees may believe that Director Morton is a positive role model, the ICE union gave Director Morton a vote of no confidence, a point which union President Crane went out of his way to point out in front of the Judiciary Subcommittee on Immigration and Policy Enforcement.<sup>399</sup> In order to be a better leader and improve the culture of the agency, Morton needs to be cognizant of the need to reach out, explain himself and his philosophy clearly, and follow through with ICE officials in the field while getting others in the chain of command to do the same as well.

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397. *Law Enforcement Code of Ethics*, INT’L ASS’N OF CHIEFS OF POLICE (Oct. 16, 2001), <http://www.theiacp.org/PublicationsGuides/ResearchCenter/Publications/tabid/299/Default.aspx?id=82&v=1>. The *Law Enforcement Code of Ethics* lists and describes all the fundamental duties a law enforcement officer owes in his or her service to the community.

398. See Renee Winship, *What Makes a Good Police Officer?*, eHow, [http://www.ehow.com/about\\_5340785\\_good-police-officer.html](http://www.ehow.com/about_5340785_good-police-officer.html) (last visited Nov. 15, 2012) (reflecting the qualities necessarily possessed by a value law enforcement officer).

399. *Hearing Before the Judiciary Subcommittee on Immigration and Policy Enforcement*, *supra* note 375.

- By hiring more women in the field, ICE can combat the “machismo” value system. Research shows that female police officers are as effective in dangerous situations as men; however, women are less authoritarian, less aggressive, and have better communication skills.<sup>400</sup> Adding more women would be a big step in chipping away at the hyper-masculine value system at ICE.
- Officers should be evaluated, promoted, and rewarded for their community activities and nuanced understanding of enforcement priorities and goals, not only for their arrests and deportations. Maintaining a force of well-rounded officers will improve the overall culture of the agency and community at large.
- Supervisors and officers should receive training on the purpose and goals of enforcement priorities and immigrant communities on a regular basis. By receiving additional training, the agency can be more consistent in applying the standards set forth by DHS.<sup>401</sup>

#### A. *Framing Guidance from ICE Headquarters*

If ICE officials in Washington, D.C. want cases like Mr. Martinez’s to be granted or desire more consistency in the application of prosecutorial discretion, they need to frame the decision making parameters better for the officials in the field.<sup>402</sup> The Morton Memo began by listing nineteen factors for ICE agents to consider:

- 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;

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400. See generally Benson, *supra* note 394, at 683–84 (discussing the positive impact of women police officers on the machismo culture of law enforcement).

401. Julia Preston, *Agent’s Union Stalls Training on Deportation Rules*, N.Y. TIMES, Jan. 7, 2012, <http://www.nytimes.com/2012/01/08/us/illegal-immigrants-who-commit-crimes-focus-of-deportation.html>. The training will:

push immigration enforcement officers and prosecutors nationwide to focus their efforts on removing immigrants convicted of crimes . . . . [A]dministration officials want to transform the way immigration officers work, asking them to make nuanced decisions to speed deportations of high-risk offenders while halting those of illegal immigrants with clean records and strong ties to the country.

*Id.*

402. Framing aids deliberations by focusing attention on certain facts, encouraging certain interpretations, and exerting important influence on decision-making. See Julianne Hing, *As SB 1070 Heads to Court, a Father’s Case Reveals the Larger Problem*, COLORLINES (Apr. 24, 2012, 10:29 AM), [http://colorlines.com/archives/2012/04/new\\_york\\_fathers\\_case\\_tests\\_obamas\\_deportation\\_policies.html](http://colorlines.com/archives/2012/04/new_york_fathers_case_tests_obamas_deportation_policies.html) (addressing the inconsistencies in officials’ use of prosecutorial discretion, how ICE’s stated goals are not being met through the current program, and the utility of more substantial federal guidelines).

- the circumstances of the person's arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child;
- the person's pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States;
- whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat;
- 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 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.<sup>403</sup>

The memo points out that, “[t]his 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.”<sup>404</sup> These “enforcement priorities” entail, foremost, “the promotion of national security, border security, public safety, and the integrity of the immigration system.”<sup>405</sup>

These instructions may be sufficient to get the message across to many district officials, as illustrated in the Delaware example,<sup>406</sup> but better framing is needed for others. For example, categorizing the factors that should be given more consideration than others would be helpful. Factors encompassing those individuals who do not pose a danger to “public safety,” who have insignificant “criminal history,” who have a U.S. citizen or lawful permanent resident child or spouse, and who have resided in the United States for a lengthy period should be categorized as definitive factors or at least given great weight, thus providing better guidance to ICE agents in the field.

The Morton Memo arguably attempted to provide such guidance through implementing strict framing for certain cases by stating:

[T]here are certain classes of individuals that warrant particular care . . . . [T]here are factors that can help ICE officers, agents, and attorneys identify these cases so that they can be reviewed as early as possible in the process. The following positive factors should prompt particular care and consideration:

- 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

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403. Memorandum from John Morton, Dir., ICE, on Exercising Prosecutorial Discretion, *supra* note 10.

404. *Id.*

405. *Id.*

406. See Starnes, *supra* note 378 (discussing how a Delaware ICE officer was disciplined by his superior for disobeying an order to release an illegal immigrant qualified as “low priority”).

- individuals with serious health conditions.<sup>407</sup>

In exercising prosecutorial discretion in furtherance of ICE's enforcement priorities, the following negative factors should also prompt particular care and consideration by ICE officers, agents, and attorneys:

- 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.<sup>408</sup>

However, even though this framing list instructs that great weight must be given to some factors, even clearer framing needs to be set forth. For example, the Obama administration needed to be more explicit about deferring the deportation of DREAMers one year after the Morton Memo. In her memo on deferred action for DREAMers issued on June 15, 2012, DHS Secretary Napolitano was more definite than Director Morton, recognizing that "additional measures are necessary to ensure that our enforcement resources are not expended on these low priority [young people who were brought to this country as children and know only this country as home] cases but are instead appropriately focused on people who meet our enforcement priorities."<sup>409</sup> Napolitano then framed the criteria that have to be satisfied for considering the exercise of prosecutorial discretion:

- came to the United States under the age of sixteen;
- has continuously resided in the United States for at least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum;
- is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;

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407. Memorandum from John Morton, Dir., ICE, on Exercising Prosecutorial Discretion, *supra* note 10.

408. *Id.*

409. Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship and Immigration Serv., and John Morton, Dir., ICE (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

- has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
- is not above the age of thirty.<sup>410</sup>

Thus, if the intent was that someone like Mr. Martinez be granted favorable prosecutorial discretion under the Morton Memo, then more explicit instructions need to be expressed. For instance, informing the field officers that favorable prosecutorial discretion is intended for those who have U.S. citizen children or a U.S. spouse who have resided here for a lengthy period, who have substantial community support, or who have no criminal history, would be helpful.<sup>411</sup>

### B. *Establishing a Right of Appeal*

Another option for establishing consistency across the country is to provide a right of review when prosecutorial discretion cases are denied. This could be done regionally or at the central office. In that manner, ICE field office directors and district counsel would have the benefit of learning from the regional or central office how specific cases should be handled.

The model for this type of review already exists for DHS.<sup>412</sup> For example, the Board of Immigration Appeals (an entity part of the Executive Office for Immigration Review under the Department of Justice) already reviews and writes precedent decisions in removal cases involving such matters as asylum, cancellation of removal, and voluntary departure.<sup>413</sup> In the visa context, if a visa petition or application is denied or revoked by U.S. Citizenship and Immigration Services (USCIS), in most cases, the decision can be appealed.<sup>414</sup> The USCIS Administrative Appeals Office (hereinafter “AAO”) has jurisdiction over forty petitions and applications, including visa petitions for professionals, skilled and unskilled

410. *Id.*

411. See generally Ben Winograd, *ICE Numbers on Prosecutorial Discretion Keep Sliding Downward*, IMMIGR. IMPACT (July 30, 2012), <http://immigrationimpact.com/2012/07/30/ice-numbers-on-prosecutorial-discretion-sliding-downward/> (detailing the trend of prosecutorial discretion in administrative closures).

412. See 8 C.F.R. § 1003.1 (2012) (outlining how the Board of Immigration manages appeals).

413. See *id.* (describing the “organization, jurisdiction, and powers of the Board of Immigration Appeals”); see also *Board of Immigration Appeals*, U.S. DEP’T OF JUST., <http://www.justice.gov/eoir/biainfo.htm> (last visited Nov. 15, 2012) (providing an overview of the Board of Immigration Appeals).

414. *Questions and Answers: Appeals and Motions*, U.S. CITIZEN & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem> (follow “Forms” hyperlink; then “Questions and Answers” hyperlink) (last visited Nov. 15, 2012).

workers, and trafficking and criminal victims.<sup>415</sup> As a result, because of the BIA and AAO decisions, local decision makers have the opportunity to read the opinions of central office adjudicators and get a sense of the values and rationale that are embodied in the evaluation process.<sup>416</sup>

In the implementation of DACA, the deferred action program for DREAM Act students, one strategy adopted to achieve greater consistency and fairness is to place the decision making in the hands of the four regional service centers, as opposed to being adjudicated by the various field service office directors across the country.<sup>417</sup> In addition, USCIS announced, “USCIS will implement a supervisory review process in all four Service Centers to ensure a consistent process for considering requests for deferred action for childhood arrivals. USCIS will require officers to elevate for supervisory review those cases that involve certain factors.”<sup>418</sup>

Furthermore, rather than outright denials of applications in the first instance, applications that are regarded as lacking in some respect will first be sent back to the applicant with an opportunity to supplement the application.<sup>419</sup> If the re-submitted application is still lacking, then a notice of proposed denial decision will be sent to the applicant with yet another opportunity to provide more documentation or information.<sup>420</sup>

### C. *History of Suspension/Cancellation*

As noted above, in reversing the Immigration Judge’s grant of cancellation of removal to Mr. Martinez, the BIA reiterated that the “exceptional and extremely unusual hardship” standard for cancellation is a very high

415. See *The Administrative Appeals Office (AAO)*, U.S. CITIZEN & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem> (follow “About Us” hyperlink; then “Admin. Appeals Office” hyperlink) (last visited Nov. 15, 2012) (outlining the mission, duties, and organization of the USCIS Administrative Appeals Office).

416. See generally *Administrative Decisions*, USCIS, <http://www.uscis.gov/portal/site/uscis/menuitem> (follow “Administrative Decisions” hyperlink) (last visited Nov. 15, 2012) (detailing administrative decisions reached by the Administrative Appeals Office).

417. See generally *Consideration of Deferred Action for Childhood Arrivals Process*, USCIS, <http://www.uscis.gov/portal/site/uscis/menuitem> (follow “Humanitarian” hyperlink; then “Consideration of Deferred Action for Childhood Arrivals Process” hyperlink) (last visited Nov. 15, 2012) (outlining the process for deferred action for childhood arrivals).

418. *Frequently Asked Questions*, USCIS, <http://www.uscis.gov/portal/site/uscis/menuitem> (follow “FAQ’s” hyperlink) (last visited Nov. 15, 2012).

419. See generally *id.* (stating that applications will be rejected, rather than denied if incomplete).

420. See generally *USCIS Issues New Guidance on Deferred Action – 10 Things You Must Know Before Applying*, DREAM ACTIVIST, <http://www.dreamactivist.org/dhs-hosts-deferred-action-stakeholder-call-today-live-blog/> (last visited Nov. 15, 2012) (describing the new requirements for deferred action).



threshold.<sup>421</sup> This was not always the case. Prior to 1996, “suspension of deportation” could be granted in the discretion of the immigration court if deportation would result in “extreme hardship” to the respondent or his or her lawful resident or citizen children or spouse.<sup>422</sup> As the BIA stated in its decision, the “exceptional and extremely unusual hardship” is a “substantially higher standard than had previously been required by Congress for the Attorney General to be able to grant suspension of deportation” prior to 1996.<sup>423</sup> The BIA cited its decision in *Matter of Recinas*<sup>424</sup> as “on the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met.”<sup>425</sup> In this case, sufficient hardship on the children was demonstrated because of several factors that included: the heavy burden imposed on the respondent to provide the sole financial and family support for her six children if she were to be deported, the lack of any family in her native country, the children’s unfamiliarity with the Spanish language, and the unavailability of an alternative means of immigrating to this country.<sup>426</sup>

Suspension of deportation cases prior to April 1, 1997 (the effective date of IIRIRA) reveal that the extreme hardship requirement was more easily met than the current exceptional and extremely unusual hardship requirement.<sup>427</sup> Certainly, the mere fact that a suspension client had a

421. Application for Cancellation, *supra* note 25.

422. 8 U.S.C. § 1254(a) (1994). Prior to April 1, 1997, the effective date of IIRIRA, the suspension of deportation form of relief was available. *Id.* Although functionally similar to cancellation relief, suspension had a lower eligibility standard and did not distinguish between lawful and non-lawful resident applicants. In order to qualify for suspension relief, an applicant under the pre-IIRIRA standard was required to demonstrate the following:

1. Continuous physical presence in the United States for a period of seven years;
2. “Good moral character” during this period; and
3. That the applicant’s removal would result in “extreme hardship” to the applicant or any qualifying [U.S.] citizen or LPR relatives, including an applicant’s spouse, parents, and/or children.

BILL ONG HING, 1 HANDLING IMMIGRATION CASES 372–79 (1995).

423. *See* BILL ONG HING, 1 HANDLING IMMIGRATION CASES 380–81 (1995) (explaining that Congress borrowed the stricter “exceptional and extremely unusual hardship” language from a different pre-1996 form of suspension relief that applied to individuals convicted of criminal offenses, and incorporated across the board the requirement that an individual have ten years of continuous physical presence to qualify for relief).

424. *In re Recinas*, 23 I&N Dec. 467, 470 (B.I.A. 2002).

425. *Id.*

426. *Id.* at 469-70.

427. *See* HING, *supra* note 423 (explaining that Congress borrowed the stricter “exceptional and extremely unusual hardship” language from a different pre-1996 form of suspension relief that applied to individuals convicted of criminal offenses, and incorporated across the board the requirement that an individual have ten years of continuous physical presence to qualify for relief).

U.S. citizen child was not decisive on the extreme hardship issue in the pre-1997 cases.<sup>428</sup> However, in many cases, the U.S. citizen child would be forced to return with deportable parents to their country of birth, so the possible effects of uprooting a citizen child who is assimilated into U.S. society was important.<sup>429</sup> The older the child and the more assimilated, the greater the possibility of satisfying the extreme hardship requirement.<sup>430</sup> For example, in *Ramos v. INS*<sup>431</sup> the Fifth Circuit noted:

[T]here is ample authority for the proposition that imposing on grade school age citizen children who have lived their entire lives in the United States, the alternatives of either prolonged and geographically extensive separation from both parents or removal to a country of a vastly different culture where they do not speak the language is a matter which must normally be considered by the INS in its determination of whether extreme hardship has been shown.<sup>432</sup>

Similarly, in *Ravancho v. INS*,<sup>433</sup> the Third Circuit required that the BIA reopen deportation proceedings to consider the effect of deportation on the alien's eight-year-old citizen child.<sup>434</sup> Evidence had been submitted showing that the child knew no other life than that in the United States, that she was unable to speak Tagalog (the applicant was from the Philippines), that she was a straight "A" student, and that her life would

428. See, e.g., *Hernandez-Patino v. INS*, 831 F.2d 750, 752 (7th Cir. 1987) (holding that the BIA did not abuse its discretion in concluding that Hernandez-Patino failed to satisfy the extreme hardship requirement for suspension of deportation.); *Lopez-Rayas v. INS*, 825 F.2d 827, 827 (5th Cir. 1987) (holding that BIA did not abuse its discretion in finding that the deportation of husband, wife and their five children—two U.S. citizens and three non-citizens—would occasion them no extreme hardship, and as such they were not eligible for suspension of deportation); *Braithwaite v. INS*, 633 F.2d 657, 658 (2d Cir. 1980) (stating that Braithwaite did not meet the requirements for suspension of deportation because she "failed to establish that either she or her [U.S. born] son would suffer anything more than 'ordinary' hardship"); *Choe v. INS*, 597 F.2d 168, 170 (9th Cir. 1979) (stating that Choe "failed to make a prima facie showing of eligibility for suspension [of deportation proceedings]").

429. *C.f.* *INS v. Jong Ha Want*, 450 U.S. 139, 142–43 (1981) (stating that the BIA's decision that deportation of "young children of relatively affluent, educated Korean parents did not constitute extreme hardship . . .").

430. See *Ramos v. INS*, 695 F.2d 181, 186 (5th Cir. 1983) (stating there is ample authority that supports an extreme hardship for imposing on grade school aged children either having to move to a strange country or losing their parents for prolonged periods of time).

431. *Id.*

432. *Id.*

433. 658 F.2d 169, 176–77 (3d Cir. 1981).

434. See generally *id.* at 169 (discussing the Third Circuit's opinion on allowing petitioners to reopen a suspension of deportation case after trying to establish hardship to their then eight-year-old child).

be dramatically upset by being uprooted from her home, friends, and the only life she knew.<sup>435</sup>

Thus, hardship to school-age citizen children was generally more commonly recognized as extreme by the courts.<sup>436</sup> The Ninth Circuit pointed out that by the age of seven, the child will have attended U.S. schools for at least two or three years; learned to read and speak English; been exposed to U.S. culture through school, television, and media; and started to think, dress, and act more American than a three-year-old.<sup>437</sup>

In the suspension of deportation era, courts realized that sometimes a citizen child might not accompany the deportable parent back to the native country and the hardship due to separation also could be severe.<sup>438</sup> For example, in *Babai v. INS*,<sup>439</sup> the Sixth Circuit held that the BIA had abused its discretion in failing to consider the impact of the aliens' citizen son if he remained in the United States without his parents.<sup>440</sup> Thus, the separation that would result from the deportation of a parent if the citizen child has the option of staying in the United States became a good basis for satisfying the extreme hardship requirement.

In *Bastidas v. INS*,<sup>441</sup> the issue at hand was whether the separation of a child from his or her parent constituted "extreme hardship."<sup>442</sup> The petitioner—who had supported and loved his children—would be separated from them if deported; the Third Circuit presumed extreme hardship would result from the separation.<sup>443</sup> Similarly, the Ninth Circuit recognized in *Mejia-Carrillo v. INS*<sup>444</sup> that separation of the alien from a family member may be the "most important single factor" in determining extreme hardship.<sup>445</sup> In that case, in facts not unlike Mr. Martinez's case, the applicant's deportation would have resulted in separation from her

435. *Id.* at 171.

436. *See id.* at 174 (stating that the "hardship requirement of [§] 244 is satisfied if an alien produces sufficient evidence to suggest that the 'hardship from deportation would be different and more severe than that suffered by the ordinary alien who is deported'"); *see also* *Jara-Navarrete v. INS*, 800 F.2d 1530, 1532 (9th Cir. 1986) (citing several other Ninth Circuit opinions that have looked closely at the hardship deportation has on U.S. citizen children of aliens).

437. *Jara-Navarrete*, 800 F.2d at 1532.

438. *See Babai v. INS*, 985 F.2d 252, 254–55 (6th Cir. 1993) (citing cases that discuss the rights of a citizen child and the hardships he would encounter due to the fact that his parents were deported).

439. *Id.* at 252.

440. *Id.* at 254–55.

441. 609 F.2d 101, 104 (3d Cir. 1979).

442. *Id.*

443. *See id.* at 106 (showing that the Third Circuit vacated an order denying suspension of deportation proceedings).

444. 656 F.2d 520 (9th Cir. 1981).

445. *Id.* at 522.

seventeen-year-old permanent resident son.<sup>446</sup> The emphasis on preventing family separation comported with the “importance and centrality of the family in American life,” as well as fundamental rights recognized internationally.<sup>447</sup>

The history of suspension of deportation strikes an interesting ring of familiarity with the prosecutorial discretion era in which we are currently living. The Immigration Act of 1924 required the Secretary of Labor to deport any alien who entered or remained in the United States unlawfully.<sup>448</sup> The only means by which a deportable alien could lawfully remain in the United States was to have his status altered by a private bill enacted by both Houses of Congress and presented to the President pursuant to the procedures set out in Article I, § 7, of the Constitution or, presumably, by convincing administrative officials to refrain from deporting an individual as a matter of discretion.<sup>449</sup> By 1937, the ineffectiveness of these private bills pushed some in Congress to take action.<sup>450</sup> In a congressional debate over what would become known as the Dies’ Bill, which would permit the Secretary of Labor to grant permanent residency in “meritorious” cases, Congressman Martin Dies explained:

It was my original thought that the way to handle all these meritorious cases was through special bills. I am absolutely convinced as a result of what has occurred in this House that it is impossible to deal with this situation through special bills. We had a demonstration of that fact not long ago when 15 special bills were before this House. The House consumed 5 1/2 hours considering four bills, and made no disposition of any of the bills.<sup>451</sup>

The Dies’ Bill passed the House with a vote of 163–46, but never came to a vote in the Senate.<sup>452</sup>

Relief from the inadequacy of private bills finally came when Congress authorized the Attorney General to suspend the deportation of certain aliens in the Alien Registration Act of 1940, also known as the Smith Act

446. *Id.* at 521.

447. *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1423 (9th Cir. 1987).

448. Immigration Act of 1924, ch. 190, § 14, 43 Stat. 153, 162.

449. *Cf. Wildes, supra* note 245 (listing the methods for avoiding deportation in the early twentieth century).

450. *See INS v. Chadha*, 462 U.S. 919, 933 (1983) (stating that the “private bills were found intolerable by Congress.”).

451. *Id.*

452. *Id.*; *see generally* 83 CONG. REC. 8992–96 (1938) (relating the Senate debate on the Dies’ Bill; no vote was taken on the Bill); *see also Deportation Bill Passed by House*, N.Y. TIMES, June 11, 1937, <http://query.nytimes.com/mem/archive/pdf?res=F30711F8355E177A93C3A8178DD85F438385F9> (reporting that the Dies’ Bill passed the House, and moved on for a vote in the Senate).

of 1940.<sup>453</sup> In 1948, Congress amended the Act to broaden the category of aliens eligible for suspension of deportation.<sup>454</sup> The basic suspension requirements as to length of residence, character, and extreme hardship remained in force until 1996.<sup>455</sup> However, in 1996, the hardship requirement was heightened to “exceptional and extremely unusual,” paving the way of doom for applicants like Mr. Martinez.<sup>456</sup>

### VIII. CONCLUSION

During the Republican primaries, my ears perked up when Newt Gingrich espoused the view that we should “be humane” and find “a way to create legality so that [longtime undocumented parents and grandparents] are not separated from their families.”<sup>457</sup> Another remark by President Obama during his October 16, 2012 town hall-style debate with Mitt Romney caught my attention:

What I’ve also said is if we’re going to go after folks who are here illegally, we should do it smartly and go after folks who are criminals, gang bangers, people who are hurting the community, not after students, not after folks who are here just because they’re trying to figure out how to feed their families. *And that’s what we’ve done.*<sup>458</sup>

President Obama’s comments made on the eve of Election Day—made more than a year after Oscar Martinez was denied prosecutorial discre-

453. Smith Act of 1940, ch. 439, § 20, 54 Stat. 671, *amended by* Act of June 25, 1948, ch. 645, §21, 62 Stat. 862; *see Alien Registration Act Lauded by Lehman*, N.Y. TIMES, Aug. 26, 1940, *available at* <http://query.nytimes.com/mem/archive/pdf?res=F20E1EFC3D5C10728DDDAF0A94D0405B8088F1D3> (reporting on the intended purpose of, and hope for the Act, and quoting Governor Lehman of New York as saying he hoped the new Act would “be the basis for a broad program of Americanization—a program designed to win and keep the loyalty of the three and a half million aliens in this country and eventually make them good American citizens”).

454. Act of July 1, 1948, ch. 783, 62 Stat. 1206 (1948) (amended 1950).

455. *But see Chadha*, 462 U.S. at 959 (holding that a provision of the suspension law that permitted one house of Congress to veto the Attorney General’s suspension of an alien’s deportation was unconstitutional).

456. *See* Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104–208, 110 Stat 3009 (codified by 8 U.S.C.A. §1229(b) (2008)) (stating that an otherwise deportable immigrant could suspend deportation by establishing that “removal would result in exception and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence”).

457. *Newt Gingrich on Immigration: Policy Should be ‘Humane’*, WASH. POST, Nov. 23, 2011, [http://www.washingtonpost.com/politics/newt-gingrich-on-immigration-policy-should-be-humane/2011/11/23/gIQRzeGpN\\_story.html](http://www.washingtonpost.com/politics/newt-gingrich-on-immigration-policy-should-be-humane/2011/11/23/gIQRzeGpN_story.html).

458. *Second Presidential Debate Full Transcript*, ABC NEWS (Oct. 17, 2012), <http://abcnews.go.com/Politics/OTUS/2012-presidential-debate-full-transcript-oct-16/story?id=17493848#.UILgCcXoQmo> (emphasis added).

tion—are a clear reference to the Morton Memo.<sup>459</sup> If his words are to be taken seriously, the President did not intend that Oscar Martinez be deported. Yet, Oscar Martinez was forced to leave. Indeed, if the President’s intent was only to remove “criminals, gang bangers, [and] people who are hurting the community,” ICE has failed miserably in carrying out that mandate. While ICE carries out its record-breaking deportations under the Obama administration, only 14 percent of those deported have any criminal record and roughly 4 percent are classified as “aggravated felons.”<sup>460</sup>

Based on the interactions that I had with DHS officials in Washington, D.C., and Senator Feinstein’s office, as well as some results in similar cases in other parts of the country, granting Mr. Martinez prosecutorial discretion relief under the Morton Memo was contemplated and would not have been extraordinary. The denial of favorable discretion to Mr. Martinez was not what many officials had in mind—nor apparently what President Obama had in mind. Yet because of the structure of DHS and

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459. See Memorandum from John Morton, Dir., ICE, on Exercising Prosecutorial Discretion, *supra* note 10 (outlining the factors that the Agency may consider when exercising prosecutorial discretion). As part of the memorandum, Morton writes,

When weighing whether an exercise of prosecutorial discretion may be warranted for a given alien, ICE officers, agents, and attorneys should consider all relevant factors, including but not limited to . . . the person’s criminal history, including arrests, prior convictions, or outstanding arrest warrants . . . [and] the person’s ties and contributions to the community, including family relationship[.]

*Id.* See also Mahwish Khan, *ICE Director Morton’s Prosecutorial Discretion Memo Offered Hope, Yet to be Realized*, AMERICA’S VOICE: THE POWER TO WIN COMMON SENSE IMMIGR. REFORM (Apr. 17, 2012, 10:26 AM), <http://americasvoiceonline.org/blog/ice-director-mortons-prosecutorial-discretion-memo-offered-hope-yet-to-be-realized/> (recognizing that while the Morton Memo requested that agents evaluate a number of substantial factors before deporting noncitizens, the actual implementation of the memo’s directives has been “slow and bureaucratic”).

460. See Julianne Hing, *Who Are Those ‘Gangbangers’ Obama’s So Proud of Deporting?*, COLORLINES (Oct. 17, 2012, 10:11 AM), [http://colorlines.com/archives/2012/10/who\\_are\\_those\\_gangbangers\\_obamas\\_so\\_proud\\_of\\_deporting.html](http://colorlines.com/archives/2012/10/who_are_those_gangbangers_obamas_so_proud_of_deporting.html) (noting that with over 400,000 noncitizens being deported every year, the deportation record of the Obama administration has exceeded that of all prior presidents). Julianne Hing states that many of those who are deported are not criminals or aggravated felons. *Id.* “[J]ust [four] percent of those deported had a so-called ‘aggravated felon.’ on their record, an immigration court-specific designation of crimes that can include crimes as serious as rape and murder, but has also been expanded to include violations like theft or non-violent drug offenses.” *Id.* On the contrary, they are the very same individuals that the administration claims to protect, including those who would otherwise be eligible for the federal DREAM Act, parents with U.S. citizen kids in the country who have lived quiet lives, students and fathers who have communities and dreams in the [United States]—people who are hardly the ‘gangbangers’ Obama wants you to think he’s kicking out of the country.

*Id.*

ICE, administrative decisions are not officially reviewable. Inconsistent decisions are inevitable due to the separation and autonomy of district decision makers across the country.

Since Mr. Martinez's departure, I continue to communicate with his daughter Lorena. Her words and her family's experience continue to fuel my efforts to combat the injustice of deportation and removal, especially when the well being of other family members also is at stake. When we were assembling the materials to support the application for humanitarian parole after Mr. Martinez left, Lorena offered this letter:

Growing up, I'd always sympathize in seeing my parents' struggle to provide for their children. I would wonder where they would find the extra energy to cook, clean, and take care of all of our family responsibilities, on top of working long hours at their jobs. Consequently, I would bury my head into my books to distract myself from the pain and confusion of seeing my parents' fatigue. Most importantly, I turned to books to earn the highest grades possible to obtain a degree and make enough money so that my parents could one day stop working. Today, my childhood fantasy seems virtually impossible. My father has been torn away from our family and his home in the United States. My mother is forced to work longer hours to support two American-born children, plus my father and brother who live in Mexico. After my birthfather's death at the age of 2, I learned to understand how difficult it is for a single mother to raise two children on her own. My father's deportation, however, is something I will never learn to accept.

It's been approximately two months since my father was deported to Mexico. Since then, my family's financial security and emotional well-being has profoundly diminished. I will speak on my experience as the daughter of a father who was deported. I also plan to speak on behalf of my mother, younger brother, and father. I am in a legitimate position to share my family's situation because I am an immediate family member of a person who was deported as well as an outsider: a student and an active advocate for immigrant rights who understands immigration policies.

This semester, in particular, has been a painful blur. I am two weeks away from completing my last semester [of college]. I come in and out of my house; commuting from school, work, internships, and soccer, to tend to my family's needs. I often rush to meet with professors to explain that I have to miss class to tend to my brother's sudden migraines and my mother's mental collapses. Although I've managed to maintain my courses, I've been behind in all of my classes, and as my worst critic, this is incredibly disappointing. I've really had no other choice but to prioritize my schedule around what is best

for my family. Working more hours meant that my family had a bit more money for groceries and rent. I recently quit one of my internships and although I know it was the right thing to do, I cannot understand why I must continue sacrificing my educational endeavors.

When I am absent from home, my mother is forced to handle everything on her own. Driving my brother to school, cleaning the house, paying bills, cooking, taking out the trash, watering the grass, and feeding our dog, are just a few things that my mother has to do once she gets home from work. My mother has taken over my father's responsibilities. During dinner, I often joke around with my brother by telling him that he is getting taller because he has now successfully transformed into the "man of the house." He nods his head in agreement and blushes with a shy grin. I know my brother understands the severity of our family's circumstances which is why I no longer have to remind him to help my mother carry heavy things around the house.

Now that my father is gone, I've been forced to boost my hours at work. I currently work a total of 12 hours on top of being a full-time student and balancing an internship, soccer, and family responsibilities. I try my best to squeeze soccer into my schedule to distract myself from the chaos. I try my best to devote my free-time to studying but I am often reminded that I must check in with my family and spend more time with my mother and brother. I wish I could return to Freshman year when things seemed a whole lot easier. I rarely have time to think about my plans after college. I no longer talk about my graduation anymore and even have nightmares about walking across the stage and tripping because I am desperately scanning the crowd for my father. When I wake up, I am thankful for the few months I have left to practice walking in heels but I continue to mourn the loss of my father.

My family's well-being is my major concern. Every day I worry about my family's health. Is my father staying away from soda? Is my mother finding enough time to eat a good meal? Did my brother have a migraine today? My mother is emotionally unstable and my brother continues to suffer from migraines. Just a week ago, my brother left school because his migraine pain was too painful. Luckily, my mother was able to call her friend to pick up my brother from school. The other day, I missed a class to care for my brother who spent the morning throwing up because of the immense pain. My brother's migraines are becoming more frequent and severe since my father's deportation. For example, just recently he mentioned that one of his hands goes numb as well as his nose and lips when he experiences a migraine. He is obviously unable to study or play soc-



cer whenever he falls into a migraine phase. This affects his performance in school because there is less time devoted to his studies. This is very frightening because whenever I am not around him and my mother is working, I have to wonder who would take care of my brother when he experiences such uncontrollable pain.

Apart from my brother's frequent migraines, there have been several changes in him that concern me. Prior to my father's deportation, I noticed that my brother never cried. For instance, my mother would often breakdown during dinner and within seconds my father and I would join her. However, my brother never cried nor said a word. He would instead continue eating his food or simply leave the table and go to his room. I cry because it is very hurtful to me to see my parents in such desperation. My brother, however, walks into his room and shuts the door. He doesn't play music nor touch his guitar like he used to when he was younger. Instead, he lays in silence and is emotionless. Whenever I creep into his room to see how he is doing, I can really sense his discomfort in sharing his feelings with me. I ask him, "how are you?" and his responses are always short and plain. "Fine," he says then I usually reply, "well, if you want to talk about anything, I'm here" and I walk away.

My father is the most kind, sincere, diligent, and hard-working man I know. My father is never afraid to share his emotions with my family which is why he broke down in tears the night he left. He always taught my brother and me to reach for the sky and strive for our dreams. My father believed in our potential to become outstanding students, athletes and active members of our community. The most valuable lesson my father has taught me is to discover my potential as a young woman of color that begins by developing the courage to believe in myself. My father envisioned sports as the perfect environment to learn to trust others and retain life skills such as discipline that may be applied to other aspects in our lives. This is the reason why he signed me up for soccer at the age of seven. Without my father's persistent support and physical presence, we would not be the students we are today.

Currently, I'm only able to speak to my father three times a week for a few minutes because of my schedule. Our phone conversations continue to be a little gloomy and heart wrenching. When I ask my father how he is doing his response is always a happy one, even though I know he's very sad from the tone of his voice. I ask him about his diet and advise him to continue exercising as much as he can. My father no longer eats fruits and vegetables like he used to when he lived in the United States. When I ask him why he doesn't just buy good fruit, he says that it's expensive to eat healthy in Mex-

ico. My father, being the kind man he is, reasons that it's best to buy plenty of oranges for everyone instead of buying a handful of grapes for two people. My family in Mexico is very poor and my dad must live the same way. It breaks my heart to know that my father has not had one salad since his departure. His health is at risk and this is extremely alarming to me. The only thing I can do is continue telling my father to refrain from drinking soda and to try his best to eat healthy. I cry to my father quite often and as always his soft words console me, and his positive encouragement reminds me to stay strong for my mother. He says that I must stay strong for my mother, brother, and my own sanity's sake because I have the power to do "big things" with my college degree. I tell him that he is right and I laugh a bit. But as soon as I hang up the phone the stress of not knowing what's next takes over my mind and body.

If my father is allowed to come home soon, we'd have the chance for a normal life again. We'd truly be the happiest family in the world if my father is granted the opportunity to return home. Our life is incomplete without my father. My mother will continue to jeopardize her health by overworking her body to provide for my family. In addition, my brother's health has become a huge concern for us as well as my ability to maintain my schedule. I don't know how much longer my family can sustain this lifestyle without my father's physical presence, love, and support.<sup>461</sup>

Almost seven months after her father's departure, Lorena sent me this email:

April 17, 2012, 7:07 PM: Email from Lorena Cintron

Dear Professor Hing,

Hope all is well. I write to you for two reasons. The first is about my interest in law school and internships/work opportunities. The second is to provide you with a brief update on my family.

I am wondering if you're aware of any internship/work opportunities for recent graduates that are closely linked to immigration law? I am very interested in applying to law school in the near future.

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461. See Letter from Lorena Cintron to Janet Napolitano, U.S. Sec'y of Homeland Sec. (Nov. 27, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (explaining the drastic changes that her family has been forced to face, Lorena's letter to then U.S. Secretary of Homeland Security Janet Napolitano is a heart-wrenching glimpse into the plight of families faced with deportation).

I am currently in the process of expanding my work/internship options. I graduate in May from [college]—just a few weeks away. I think we've spoken about my interest in immigration law school during a meeting with my family.

Also, I plan to invest in an LSAT prep course this upcoming summer. [My scholarship mentor] has spoken to me about the possibility [of] helping me pay for a course. I'm very lucky and appreciative for all that he's done. Do you have any suggestions on what prep course I should look into?

I'd appreciate any additional advice/thoughts about law school and the application-process.

On another note—I'd like to share a bit about what's been going on with my family.

These past months without my father have been a blur. Again, I cannot help but thank you for your support throughout my dad's case. I know you tried your best, we all did, nonetheless, my dad often brings you up and reminds me that there are good people in this world that want to help families like mine.

Father:

I try to speak to my dad as much as possible. Lately, we've fallen off mainly due to his unreliable phone service. This can be very daunting for my mother and I who assume the worst at times. We've gone through periods of about a week or so without speaking to my father. Sometimes we don't even know where he is, what he's doing, if he's eaten, or if he's home safe. This is extremely heart-wrenching.

According to my aunt, my dad has lost a lot of weight and has been getting ill often. I want to assume that his weight loss is due to poor nutrition and depression. When my dad is sad he tends to sleep for long periods of time. I continue to encourage him to eat healthy and exercise . . . daily. He's very responsive but we all understand that it's nearly impossible for my entire family in Mexico to eat healthy on a regular basis. If my family in Mexico is not eating healthy, neither is my dad.

Overall, my father appears to be doing worse than he was when he first left. This is very concerning to me and I try my best to lift his spirits whenever I speak to him on the phone.

Mother:

My mom is struggling. I've never seen her so low. She's recently been very upset at everything and everyone, including myself. She

often withdraws from me for a few days and comes back whenever she feels ready to talk a bit. She's exhausted—both on a mental and physical level. My mom has taken over my dad's responsibilities and let me tell you—she's doing an amazing job. I have yet to figure out how she's managing to work and take care of our home responsibilities on top of caring for my younger brother. She's a true soldier and I admire her in every way possible.

I help her in the best way I can but I realize that everything I do is not enough because she is missing her husband, her soulmate. I cannot imagine what she is feeling as a mother and wife.

Younger brother:

I'm happy to report that my brother is doing very well in school, soccer, and his music. He's matured a lot since my dad's been gone but seems to be a bit more reserved and quiet. He's gotten a lot more moody lately as well but helps out after complaining for a bit about how he just wants to finish his homework.

He's a talented boy. A math genius and soccer star. He doesn't cry at all nor does he ever speak about my dad unless I ask him what my dad talked to him about over the phone. His answers are simply a "yes" or "no." He NEVER mentions my dad about anything and I'm almost certain that he doesn't speak about our situation to any of his friends/teachers.

I try my best to communicate with him despite the awkward big sister-younger brother dynamic. I've recently demanded him to inform me about my mom's well-being. See—just recently my mother has lashed out about how she just wants to disappear from the world. My brother spends the most time with my mom and although he never asks how she's doing, he lies in bed with my mom and watches movies with her. He won't ask her why she's sad all the time but he sits with her and listens to her cry without ever saying a word.

[Oscar] Jr. will be a Freshman [in high school] and hopes to play for the soccer team. He plays the guitar in his room for hours and often speaks about becoming an architect so that he could build a home for my parents.

As for me, I am doing okay. I find myself with little time for my studies/law school preparation since I've boosted my hours at work and at home helping my mom with our family duties. My grades are fine. I've been receiving A's on almost all of my papers and exams, minus a few quizzes. My attendance has dropped since

I've been carless and on-call whenever my mom is dealing with a mental breakdown.

I attended my first psych appointment just yesterday. I was referred to a psychiatrist but cancelled my appointment because I'd rather focus on a huge project that I have due this Friday. For the first time in my life, I feel that I am in serious need of medical/psychological support.

I don't play much soccer but I try to run whenever I feel the need to clear my mind. I never expected things to get worse, but they are, and lately things seem to just continue to fall apart. Our cars are no longer insured and now unregistered. We are able to pay our rent but have little time to breathe and rest since we all have boosted our work hours. I just get really sad and cry now. I am anxious to see my dad and I can't seem to control my emotions lately.

I often flip through my dad's case documents in search of an answer. What did we do wrong? What did we miss?! Can we still get him to come back? If so, how? I just cannot comprehend what's happened and what is currently happening to my family. I am happy that graduation is less than four weeks away but I cannot help but feel sad because I know that my dad will not be there to watch me walk the stage. I owe this moment to my dad and it's just frustrating to know that he is just not going to be there.

Well, Professor Hing, I think this is it for now. Very sappy update, sorry about that but we are okay. Still alive and breathing and I know good things are in store for us.

Again, I'd appreciate any law school, LSAT, work/internship advice. I hope this semester is going well with you. Every time I come across one of your readings I get the jitters! I heard your interview on the morning station—1010. My mom and I got so jumpy and smiley when we heard your voice.

Thank you for your time and I hope to hear from you soon.

Kindest Regards,

[Lorena]<sup>462</sup>

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462. Email from Lorena Cintron to author, Professor of Law, Univ. of San Francisco (April 17, 2012, 7:07 PM) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (offering an update on the status of Lorena's family.) Although Lorena was in her last semester of college, she mentioned that her family has struggled significantly since her father returned to Mexico. *Id.* The email further explained that her father was suffering from depression, her mother was suffering from mental breakdowns, and her

I did my best in replying:

Dear [Lorena],

I think about your father and your family often. I continue to be very disappointed and sorry that I wasn't successful for all of you. As I monitor what's happening in other prosecutorial discretion cases across the country, inconsistency continues. In Denver and Baltimore where a task force reviewed pending cases, about [ten percent] of the cases were granted. As I think through your father's case (and continue to be upset at the local ICE director's decision), the main negative point was that your father had already lost his deportation case. If we could turn back the clock to before his hearing or before the case was appealed to the BIA, the timing for prosecutorial discretion would have been better.

I'm concerned about your family's health. I hope you can encourage your father to eat and exercise. I hope you, your mother, and brother can take advantage of whatever resources you may have available to you. [Your scholarship mentor] seemed open to helping, and you should take advantage of that.

Tell me what type of internship you want, and when you want to do it. It could be at a place like Centro Legal de la Raza (east bay or SF) that represents all types of individual immigration cases (visas, deportation, naturalization), or more policy-oriented places like the ILRC (with some community outreach) or ACLU, or even organizations that might be working with domestic workers on legislation. Or maybe even a private immigration firm that does a range of things. I can get you into any place like those if you are willing to volunteer. Getting paid might be possible, but it would take more leg work. Let me know, and I'll push to get you into to good place you want.

On the LSAT front, I spoke with my daughter [who is in law school], and she has some views on prep classes. Feel free to call, text or email her. . . .

Bill Hing

I don't know if there's much more I could have done to prevent Mr. Martinez's deportation. Administrative options were exhausted. Going to the media was off the table, because the family feared that Mrs. Martinez's employer would learn that she was undocumented and terminate

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brother was struggling to cope with his father's absence. *Id.* Despite their setbacks, Lorena and her family refuse to give up their fight to bring Mr. Martinez back to the United States. *Id.*

her employment.<sup>463</sup> Based on the case law,<sup>464</sup> Mr. Martinez's family and I were relying on the good faith of ICE to implement the Morton Memo policies. I continue to learn after years of handling cases, observing the agency, and talking with other practitioners, that relying on administrative good faith is a mistake, given the range of factors that can affect the exercise of discretion including the likely enforcement backgrounds of various decision makers.

Oscar Martinez was forced to leave the country after living in the United States in undocumented status for twenty-five years. He had two U.S. citizen children: one age twenty-one, the other thirteen, and a loving wife. He had no criminal history. He held two jobs. He made sure his children got to school on time. He made sure they did their homework. He drove them to soccer practice. He was active in the PTA and at church. He was a good friend and neighbor. He was an exemplary member of the community. He should not have been deported. That fact that

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463. Media attention could very well have made a difference. In general, deferred action guidelines advise local decision makers to consider any adverse publicity that might result from removal. See NAT'L IMMIGRATION LAW CTR., "LAWFULLY PRESENT": INDIVIDUALS ELIGIBLE UNDER THE AFFORDABLE CARE ACT 4 (2012), available at [www.nilc.org/document.html?id=809](http://www.nilc.org/document.html?id=809) (explaining that immigration officials have the ability to exercise prosecutorial discretion in favor of individuals who would otherwise be deported.) These deferments may be administered for a limited number of reasons including age, physical condition of the person, and the presence of "sympathetic factors" that may create adverse publicity from the individual's removal from the United States. *Id.* Relief is commonly extended to women who have suffered domestic violence, children, and individuals with urgent medical needs. *Id.*; see also *Immigration Authorities Say They Won't Move Against Journalist Who's in the US Illegally*, FOX NEWS (Oct. 8, 2012), <http://www.foxnews.com/us/2012/10/08/immigration-authorities-say-wont-move-against-journalist-who-in-us-illegally/> (explaining that a renowned journalist—who is in United States illegally—did not have to undergo deportation as he was not viewed as a "high priority"). Jose Antonio Vargas, a Pulitzer Prize-winning journalist was arrested for driving with headphones on. *Id.* Although he is undocumented, ICE declined to institute removal proceedings against him because he is not a public safety threat, and his notoriety—having attracted national attention by writing about his status in the New York Times and Time Magazine—no doubt was taken into account. *Id.* In early January, the undocumented mother and brother of DREAM Act activist Erika Andiola were arrested. Robert Bowen, *ICE Releases Dream Activist's Mother and Brother; Why The Arrest to Begin With?* THE EXAMINER, Jan. 11, 2013, <http://www.examiner.com/article/ice-releases-dream-activist-s-mother-and-brother-why-the-arrest-to-begin-with>. However, after a media blitz orchestrated by Erika and her supporters, ICE released her relatives and explained that prosecutorial discretion was being considered. *Id.* Unfortunately, many individuals such as Mr. Martinez do not have the benefit of seeking such notoriety out of fear that other undocumented family members may lose employment or be exposed to ICE enforcement.

464. Aitken's decision was not based on an error of law or a violation of DHS regulations, nor based on impermissible considerations such as race or nationality. See Telephone Interview with Timothy S. Aitken, *supra* note 220 (indicating the considerations behind his decision).

others with solid equities face deportation as well is not a salve.<sup>465</sup> Officials in Washington, D.C. also thought Mr. Martinez should not have

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465. Consider the following cases: Enrique Candia lives a quiet life in Oakland. When he's not working, he takes care of his ailing wife and his three grandchildren and makes sure his son is on track to finish college. Now, although he has no criminal record, the fifty-six-year-old is facing a court battle that could take him away from his family for years. In June 2010, federal agents arrested Candia for working in the United States without proper authorization. A Mexican national who has lived in this country for almost 20 years, Candia was sent to an Immigrations and Customs Enforcement detention center. Shoshana Walter, *Few Deportation Cases Dismissed, Despite Policy to Ease Courts' Backlog: Many Detainees Lack Adequate Legal Representation, Immigration Rights Advocates Say*, THE BAY CITIZEN (July 30, 2012, 12:01 AM), <http://www.baycitizen.org/courts/story/immigration-deportation-prosecutorial/>. On July 27, 2012, Antonio Martinez Lara was arrested in Georgia for driving without a license and transferred to ICE because he was undocumented. *Dreamer's Father Detained With An ICE Hold*, DREAM ACTIVIST.ORG, <http://action.dreamactivist.org/georgia/antonio> (last visited Nov. 15, 2012). He was a fifty-year-old, Mexican national who lived in the United States for twenty-four years, and had three U.S. citizen grandchildren. *Id.* Agapito Hernandez entered into the country with his family when he was fourteen. Mike Aldax, *Dad Exonerated of Reckless Driving Charges After Bay Plunge Facing Deportation*, SFEXAMINER (Apr. 18, 2012, 7:57 PM), <http://www.sfexaminer.com/local/crime/2012/04/illegal-immigrant-accused-recklessness-after-plunge-bay>. Eventually, he got married and became known in his community as a "sweet" family man. *Id.* However, the thirty-eight-year-old Agapito—who has no other criminal record—was arrested after he accidentally drove his sport utility vehicle into the bay when his brakes malfunctioned. *Id.* Although he was found not guilty of reckless driving, he was taken into ICE custody to face deportation. *Id.* Immigration agents arrested forty-five members of Buen Pastor Church of Raleigh, North Carolina, when their church vans were pulled over in Louisiana after attending a religious retreat. Twenty-two faced deportation; eventually eighteen were granted prosecutorial discretion, one member was denied, and three sought relief in deportation hearings. *Buen Pastor Church Case*, S. COALITION FOR SOC. JUST. (Mar. 28, 2012), <http://www.southerncoalition.org/taxonomy/term/8?page=2>. After dropping off his wife and son at a Wal-Mart, Claudio Molina stayed in the parking lot but went into a diabetic shock in reaction to medication he was taking for his diabetes. Julianne Hing, *As SB 1070 Heads to Court, A Father's Case Reveals the Larger Problem*, COLORLINES (Apr. 18, 2012, 7:57 PM), [http://colorlines.com/archives/2012/04/new\\_york\\_fathers\\_case\\_tests\\_obamas\\_deportation\\_policies.html](http://colorlines.com/archives/2012/04/new_york_fathers_case_tests_obamas_deportation_policies.html). Police responded to a call from a concerned bystander, but the police arrested Molina on suspicion of driving while intoxicated. *Id.* But even after things were cleared up, Molina, a native of Argentina, was turned over to ICE for deportation. *Id.* In February 2012, the U.S. Ninth Circuit Court of Appeals placed five deportation cases on hold and asked federal attorneys how the immigrants, mostly longtime residents with U.S. citizen children, fit into the Morton Memo plan to focus on removing the most dangerous deportable aliens. Bob Egelko, *Appeals Court Puts Five Deportation Cases on Hold*, S.F. CHRON. (Feb. 7, 2012, 4:00 AM), <http://www.sfgate.com/nation/article/Appeals-court-puts-5-deportation-cases-on-hold-3090138.php>. But after it became clear that the implementation of the Morton Memo was not producing consistent results, the court proceeded with the cases. *See also* L. Darnell Weeden, *The Supremacy Clause Preemption Rationale Reasonably Restrains An Individual State Pursuing Its Own Separate But Unequal Immigration Policy*, 14 SCHOLAR 679 (2012) (explaining why federal immigration law preempts state law).



been removed, and other immigrants with similar equities were granted prosecutorial discretion.<sup>466</sup>

ICE and White House officials, with great fanfare, announced enforcement priorities that led Mr. Martinez and me to believe that he would not be forced to leave the country. He was a great fit for the factors outlined in the Morton Memo. However, the hard lesson learned in Mr. Martinez's case is that what seems clear on paper from ICE headquarters does not necessarily get translated to what gets implemented on the ground. The inconsistencies manifested in decisions made under fair-sounding, broad-based principles in prosecutorial discretion documents like the Morton Memo are disheartening. Administrative law provides no legal recourse. Disappointed officials in Washington, D.C. can do little about an isolated case. If they wish for better treatment of a particular group, then they must issue clearer guidelines, as in the case of the deferred action program for DREAM Act students,<sup>467</sup> as well as the specific guidance that was provided on "family relationships" to include same-sex partners.<sup>468</sup>

If implemented, some of the suggestions I have offered could reduce inconsistencies. Better framing of the issues for the local decision makers, demanding more clarity in the decisions, addressing the enforcement culture at ICE through thoughtful long range approaches, and establishing a right of appeal could all help. However, as administrations come and go, the impetus and commitment to maintaining these changes are likely to ebb and flow. Thus, well-intentioned instructions on prosecutorial discretion within the agency in the long run may prove to be a poor substitute for needed statutory reform, including a broad legalization program for undocumented immigrants.<sup>469</sup>

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466. See Robert Pear, *Fewer Youths to be Deported in New Policy*, N.Y. TIMES, Aug. 18, 2011, [http://www.nytimes.com/2011/08/19/us/19immig.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/08/19/us/19immig.html?pagewanted=all&_r=0) (discussing the new policy of limiting the deportation of noncitizens who were not threats to the community); Natalya Shatniy, *Economic Effects of Immigration: Avoiding Past Mistakes and Preparing For The Future*, 14 SCHOLAR 869, 894–95 (2012) (analyzing the Dream Act).

467. *Id.*

468. Chris Johnson, *Lawmakers Seek Added Protections For Bi-national Gay Couple*, WASHINGTON BLADE (Sept. 27, 2011), <http://www.washingtonblade.com/2011/09/27/lawmakers-seek-added-protections-for-bi-national-gay-couples/>.

469. In an interview on the Spanish-language television station, Univision, during the 2012 Presidential campaign, President Obama acknowledged the failures of prosecutorial discretion. He pointed out that his

instructions to DHS has been we have to focus our enforcement on people who pose a genuine threat to our communities, [and] not to focus attention on hard working families who are minding their own business, and who often have members who are U.S. citizens. [B]ut Congress has provided more resources for enforcement, so deporta-

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tions increase, and [there's a limit to what I can do . . . . [U]ltimately, we have to change the laws in order to avoid some of the heart breaking stories that you see coming up occasionally . . . . [U]ntil we have a law that provides a pathway to citizenship [for undocumented parents] we will continue to be bound by the law. And that's the challenge.

*Encuentro con Barack Obama: President Barack Obama Debates On Univision The Issues That Are Most Important to The U.S. Hispanic Community*, UNIVISION (Sept. 21, 2012), <http://noticias.univision.com/destino-2012/videos/encuentro-barack-obama-english/>.