

DEFERRED ACTION FOR CHILDHOOD ARRIVALS AND PROSECUTORIAL DISCRETION: LEGALITY, POLICY, AND FOREIGN COMPARISON

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I. INTRODUCTION

Imagine you've done everything right your entire life, studied hard, worked hard, maybe even graduated at the top of your class, only to suddenly face the threat of deportation to a country that you know nothing about, with a language that you may not even speak.¹

On June 15, 2012, President Barack Obama and the Department of Homeland Security Secretary Janet Napolitano announced a new immigration policy, which allows young people who are undocumented to request temporary relief from deportation proceedings and work authorizations for a period of two years if they meet certain criteria.² U.S. Immigration and Customs Enforcement (ICE) Director John Morton also later announced this policy to all of the employees at ICE.³ This policy later became known as Deferred Action for Childhood Arrivals (DACA).⁴

DACA mimics some provisions in the proposed Development, Relief, and Education for Alien Minors ("DREAM") Act,⁵ which was first introduced in 2001

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1. President Barack Obama, Remarks by the President on Immigration at the Rose Garden (June 15, 2012), <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>.

2. *Id.*; Memorandum from Janet Napolitano, Secretary of Homeland Security, to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection, Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services, and John Morton, Director, U.S. Immigration and Customs Enforcement, on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [hereinafter 2012 Napolitano Memo].

3. Memorandum from Director John Morton to All Employees on Secretary Napolitano's Memorandum Concerning the Exercise of Prosecutorial Discretion for Certain Removable Individuals Who Entered the United States as a Child (June 15, 2012), <http://www.ice.gov/doclib/about/offices/ero/pdf/s1-certain-young-people-morton.pdf> [hereinafter 2012 Morton Memo].

4. *See, e.g. Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (July 2, 2013), <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process>.

5. Tom Cohen, *Obama Administration to Stop Deporting Some Young Illegal Immigrants*, CNN (June 16, 2012, 1:17 PM), <http://www.cnn.com/2012/06/15/politics/immigration/index.html>; *see also infra* Section III.

and has been reintroduced in numerous subsequent congressional sessions.⁶ During a June 15, 2012 speech from the Rose Garden, President Obama described the kind of individuals that DACA is intended to assist:

[T]hese are young people who study in our schools, they play in our neighborhoods, they're friends with our kids, they pledge allegiance to our flag. They are Americans in their heart, in their minds, in every single way but one: on paper. They were brought to this country by their parents, sometimes even as infants, and often have no idea that they're undocumented until they apply for a job or a driver's license or a college scholarship.⁷

DACA's announcement has sparked reactions from both Democrats and Republicans.⁸ Some congressmen, such as Senator Dick Durbin, D-Illinois, view DACA as a "historic humanitarian moment"⁹ because "[t]his action will give these young immigrants their chance to come out of the shadows and be part of the only country they've ever called home."¹⁰ Since "[t]hese young people did not make the decision to come to this country,"¹¹ "it is not the American way to punish children for their parents' actions."¹² Others, like Representative Allen West, R-Florida, consider DACA as an "executive branch overreach."¹³ On August 23, 2012, ten ICE agents even filed a lawsuit in federal court in Dallas against Secretary Napolitano and Director Morton contending that DACA puts ICE agents in a horrible position because it is asking federal law enforcement officers to break the law.¹⁴ So, who is right?

In Secretary Napolitano's memorandum on June 15, 2012, she announced the DACA program as an exercise of "prosecutorial discretion,"¹⁵ which is nothing

6. See Ashley Feasley, *The Dream Act and the Right to Equal Educational Opportunity: An Analysis of U.S. and International Human Rights Framework as They Relate to Education Rights*, 24 ST. THOMAS L. REV. 68, 70 (2011) (detailing the history of the proposed DREAM Act from its first introduction in 2001, as well as the relevant provisions that have appeared in each subsequent proposal).

7. Obama, *supra* note 1.

8. See CNN Political Unit, *Immigration Shift Sparks Reaction from Both Sides*, CNN (June 15, 2012, 11:01 AM), <http://politicalticker.blogs.cnn.com/2012/06/15/immigration-shift-sparks-reaction-from-both-sides/> (listing the different views on the DACA).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Carol Cratty, *Ten ICE Agents Target Obama Deportation Policy with Lawsuit*, CNN (Aug. 23, 2012, 10:53 PM), http://articles.cnn.com/2012-08-23/us/us_ice-agents-lawsuit_1_illegal-immigrants-immigration-law-numbersusa.

15. 2012 Napolitano Memo, *supra* note 2. "Prosecutorial discretion" is the authority of an agency charged with enforcing a law to decide whether to enforce, or not to enforce, the law against someone. Memorandum from Doris Meissner, Commissioner of Immigration and Naturalization Service, to Regional Directors, District Directors, Chief Patrol Agents, and Regional and District Counsel on Exercising Prosecutorial Discretion (Nov. 17, 2000), <http://iwip.legalmomentum.org/reference/additional-materials/immigration/enforcementdetention-and-criminal-justice/government-documents/22092970-INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00.pdf/view> [hereinafter 2000 Meissner Memo].

new to U.S. immigration law.¹⁶ The purpose of this Comment is to demonstrate that DACA is neither an executive branch overreach, nor a law breaking mechanism, because it is an exercise of prosecutorial discretion, a legal mechanism, which is very prevalent not only in domestic law, but also in foreign law. This Comment will discuss the exercise of prosecutorial discretion in the context of U.S. immigration law and foreign criminal law. In analyzing the exercise of prosecutorial discretion in foreign criminal law, this Comment will focus on England and Wales' Code for Crown Prosecutors, which "sets out the general principles Crown Prosecutors should follow when they make decisions on cases."¹⁷

The purpose of prosecutorial discretion in U.S. immigration law is to achieve "cost-effective law enforcement,"¹⁸ while granting "relief for individuals who present desirable qualities or humanitarian circumstances."¹⁹ The purpose of prosecutorial discretion in English criminal law is to allow Crown Prosecutors to prosecute cases when "there is enough evidence to provide a 'realistic prospect of conviction' against each defendant,"²⁰ while refraining from prosecuting when "the public interest factors tending against prosecution outweigh those tending in favour."²¹ Prosecutorial discretion is also exercised in U.S. criminal law,²² but an analysis of prosecutorial discretion in the context of foreign criminal law will demonstrate the prevalence of prosecutorial discretion not only in the United States, but also abroad.

Section II of this Comment will discuss the DACA program in detail. Section III will discuss the DREAM Act and its relationship to DACA. Section IV will discuss the history of prosecutorial discretion and its prevalence in U.S. immigration law. Section V will discuss England's Code for Crown Prosecutors and the prevalence of prosecutorial discretion in England's criminal law. Section VI will conclude.

This Comment will demonstrate that DACA is a legally valid and appropriate exercise of prosecutorial discretion because it furthers the monetary and humanitarian goals of prosecutorial discretion in U.S. immigration law consistent with previously issued memoranda regarding prosecutorial discretion, although DACA is the first exercise of prosecutorial discretion that allows aliens to directly apply for deferred action before they are subject to removal proceedings. DACA is

16. See, e.g., Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010) (discussing the role and history of prosecutorial discretion in U.S. immigration law).

17. *The Code for Crown Prosecutors*, THE CROWN PROSECUTION SERV., http://www.cps.gov.uk/publications/code_for_crown_prosecutors/ (last visited Mar. 1, 2014).

18. Wadhia, *supra* note 16, at 244.

19. *Id.*

20. *The Code for Crown Prosecutors*, *supra* note 17.

21. *Id.*

22. See Wadhia, *supra* note 16, at 265 (discussing prosecutorial discretion in the context of U.S. criminal law).

also an improvement in the administration of prosecutorial discretion for this specific group of individuals—undocumented young people who entered the United States as children—because unlike past exercises of prosecutorial discretion, DACA asks undocumented individuals to get involved in the process by filing an application with necessary documents to obtain this discretionary treatment before they are subject to removal proceedings. Furthermore, DACA provides more consistency and transparency to the exercise of prosecutorial discretion, which has been a historically secretive mechanism in U.S. immigration law.²³

This Comment also supports DACA and the general exercise of prosecutorial discretion under U.S. immigration law by comparing it to the exercise of prosecutorial discretion under the criminal law of England and Wales. The exercise of prosecutorial discretion under U.S. immigration law requires an immigration officer or agent to consider the “humanitarian” factors when deciding whether to prosecute a case or deport an alien. Similar to the exercise of prosecutorial discretion under U.S. immigration law, the exercise of prosecutorial discretion under criminal law practiced in England and Wales requires a Crown Prosecutor to consider the “public interest” factors when deciding whether to prosecute a case. This comparison will illustrate that under the Code for Crown Prosecutors, even when there is sufficient evidence to prosecute a defendant in a case, a Crown Prosecutor would choose not to prosecute the case if the public interest factors tending against prosecution outweigh those tending in favor of prosecution. Similarly, under DACA, the Department of Homeland Security can choose not to prosecute or deport an undocumented alien if the individual satisfies certain humanitarian criteria set out in DACA.

II. DEFERRED ACTION FOR CHILDHOOD ARRIVALS

A. *Napolitano Memorandum on June 15, 2012*

On June 15, 2012, the Department of Homeland Security (DHS) Secretary Janet Napolitano announced a policy change in a memorandum regarding how “the Department of Homeland Security should enforce the Nation’s immigration laws against certain young people who were brought to this country as children and know only this country as home.”²⁴ Secretary Napolitano announced this policy, later known as DACA, as an exercise of “prosecutorial discretion.”²⁵ Before an individual is considered for this exercise of prosecutorial discretion, the individual must first satisfy the following criteria:

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,

23. *See id.* at 246 (stating that prior to 1976, prosecutorial discretion, or the nonpriority program, was a secret operation by the then INS).

24. 2012 Napolitano Memo, *supra* note 2, at 1.

25. *Id.*

has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; 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.²⁶

The policy behind this exercise of prosecutorial discretion is to ensure that the DHS's "enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet [their] enforcement priorities."²⁷ Also, the DHS must enforce immigration laws in a "sensible manner"²⁸ because the laws "are not designed to be blindly enforced without consideration given to the individual circumstances of each case."²⁹ Many young people who qualify under DACA "have already contributed to our country in significant ways,"³⁰ so the exercise of prosecutorial discretion "is especially justified here."³¹

The Napolitano Memo instructs ICE, U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS) to exercise their discretion when they encounter individuals who meet the required criteria.³² If an individual, who meets the criteria, is in a removal proceeding but not yet subject to a final order of removal, then ICE should exercise prosecutorial discretion "by deferring action for a period of two years, subject to renewal, in order to prevent low priority individuals from being removed from the United States."³³ If an

26. *Id.*

27. *Id.*

28. *Id.* at 2.

29. *Id.*

30. 2012 Napolitano Memo, *supra* note 2, at 2.

31. *Id.* Daniela Pelaez, an 18-year-old valedictorian and aspiring molecular biologist is an example of one of these young people. She came to the United States from Colombia with her family at the age of four, but they overstayed their tourist visas. She founded the Model U.N. chapter at her high school and was a member of the debate team and the math honor society, Mu Alpha Theta. She is the valedictorian at North Miami High and has received a full scholarship to Dartmouth University. She has also helped draft the STARS Act, an alternative to the DREAM Act, with Rep. David Rivera, R-Fla. The STARS Act (Studying Towards Adjusted Residence Status) would allow undocumented students to stay for five years to complete college and an additional five years upon graduation. They could apply for full citizenship at the end of the ten years. Arlette Saenz, *Valedictorian Facing Deportation Cool to Rubio's DREAM Act Redo*, ABC NEWS (Apr. 23, 2012, 11:57 AM), <http://abcnews.go.com/blogs/politics/2012/04/valdictorian-facing-deportation-cool-to-rubios-dream-act-redo/>. Pelaez later joined Congressman Rivera on Capitol Hill as he introduced the bill for the STARS Act. Also, Pelaez and her sister can stay in the U.S. without fear for two years since the Obama administration decided to defer action on their case for that period. James Eng, *Almost-deported Valedictorian Daniela Pelaez Helps Introduce Immigration Reform Bill*, NBC NEWS (May 30, 2012, 2:58 PM), http://usnews.nbcnews.com/_news/2012/05/30/11959331-almost-deported-valdictorian-daniela-pelaez-helps-introduce-immigration-reform-bill?lite/.

32. 2012 Napolitano Memo, *supra* note 2, at 2.

33. *Id.*

individual meets the criteria, is not in removal proceeding, has passed a background check, and is at least fifteen years old, then they can apply for deferred action with the USCIS by providing them with the required forms and documentations and paying a fee of \$465.³⁴

The USCIS will exercise prosecutorial discretion in determining whether to defer action “for a period of two years, subject to renewal, in order to prevent low priority individuals from being placed into removal proceeding or removed from the United States.”³⁵ Individuals who are approved for deferred action would also be eligible for work authorizations.³⁶ The USCIS has listed a detailed filing process and guidelines on its website.³⁷ Individuals who meet the criteria can apply for deferred action by filing a form I-821D.³⁸ Individuals can also file a form I-765 to apply for employment authorization.³⁹ The USCIS has also stated that it will not waive the \$465 application fee.⁴⁰ After processing the application, if the USCIS, in exercising its prosecutorial discretion, decides to defer action in an individual’s case, then the individual will receive a notice of the decision in writing.⁴¹ The USCIS will not review its discretionary determinations, so, if it decides not to defer action in an individual’s case, then this individual can neither appeal the decision nor file a motion to reopen or reconsider the individual’s case.⁴²

The Napolitano Memo further states that deferred action “confers no substantive right, immigration status or pathway to citizenship.”⁴³ Deferred action is “not a permanent fix”⁴⁴ but “a temporary, stopgap measure”⁴⁵ that allows DHS to focus their “resources wisely while giving a degree of relief and hope to talented, driven, patriotic young people.”⁴⁶ Approximately 1.2 million people are eligible for relief under this program.⁴⁷

B. States’ Responses

After the announcement by Secretary Napolitano, Arizona Governor Jan

34. *Id.*; see also *Consideration of Deferred Action for Childhood Arrivals Process*, *supra* note 4 (explaining the process and fees for applying for deferred action).

35. 2012 Napolitano Memo, *supra* note 2, at 3.

36. *Id.*

37. See generally *Consideration of Deferred Action for Childhood Arrivals Process*, *supra* note 4.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Consideration of Deferred Action for Childhood Arrivals Process*, *supra* note 4.

43. 2012 Napolitano Memo, *supra* note 2, at 3.

44. Obama, *supra* note 1.

45. *Id.*

46. *Id.*

47. Ruben Navarrette, Jr., ‘Dreamers’ Deal a Roll of the Dice, CNN (Sept. 26, 2012, 10:23 AM), <http://www.cnn.com/2012/09/26/opinion/navarrette-dreamer-applications/index.html?iref=allsearch> (stating also that about 82,000 or 7% of 1.2 million who are eligible for relief have submitted applications).

Brewer responded by signing Executive Order 2012-06, which prohibits individuals who are granted deferred action from obtaining public benefits and a driver's license in Arizona.⁴⁸ Governor Brewer argues that DACA is an act of prosecutorial discretion and the program does not provide for any additional public benefits to individuals who qualify under the program beyond a delayed enforcement of immigration law and employment law.⁴⁹ Nebraska Governor Dave Heineman and Texas Governor Rick Perry joined Governor Brewer in her lead while California and Oregon are moving towards granting licenses to individuals who are granted deferred action.⁵⁰ There is a dearth of legal precedent to guide states in determining how to treat individuals who are in deferred action.⁵¹ Officials are still in the process of deciding “what this new limbo category means for states.”⁵²

III. THE DREAM ACT

DACA mimics some provisions of the proposed DREAM Act.⁵³ Despite the belief that the DREAM Act is based on Democratic agenda, the Act has a history of bipartisan support.⁵⁴ In 2001, two Republicans, Senator Orrin Hatch of Utah and Congressman Chris Cannon of Utah first introduced the bill during the 107th Congress.⁵⁵ Since its introduction in 2001, the DREAM Act has been reintroduced in numerous subsequent congressional sessions, but Congress has never passed it into law.⁵⁶ The purpose of the DREAM Act is to “allow children who have been brought to the United States through no volition of their own the opportunity to fulfill their dream, to secure a college degree and legal status.”⁵⁷ This purpose has remained consistent over the years.⁵⁸

Unlike DACA, which is only an exercise of prosecutorial discretion that grants deferred action for a period of two years to individuals who satisfy certain humanitarian criteria, the proposed DREAM Act provides a path to citizenship to

48. Ariz. Exec. Order No. 2012-06 (Aug. 15, 2012), http://www.azgovernor.gov/dms/upload/EO_081512_2012-06.pdf; see also Catherine E. Shoichet & Mariano Castillo, *Driver's License Rules Fuel New Immigration Debate*, CNN (Aug. 22, 2012, 12:11 PM), <http://www.cnn.com/2012/08/21/us/states-immigration-policy/index.html?iref=allsearch> (discussing how Arizona's driver's license rule is in tension with the federal deferral laws).

49. Ariz. Exec. Order No. 2012-06, *supra* note 48.

50. Shoichet & Castillo, *supra* note 48.

51. *Id.*

52. *Id.*

53. Cohen, *supra* note 5.

54. Elisha Barron, Comment, *The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 631 (2011).

55. Student Adjustment Act, H.R. 1918, 107th Cong. (2001); Development, Relief, and Education for Alien Minors Act, S. 1291, 107th Cong. (2001).

56. Feasley, *supra* note 6, at 70.

57. Barron, *supra* note 54, at 632 (quoting Senator Orrin Hatch).

58. *Id.*

individuals who illegally entered the United States as children.⁵⁹ The 2011 version of the DREAM Act grants legal permanent resident status on a conditional basis to individuals who can demonstrate by a preponderance of evidence that they satisfy certain requirements.⁶⁰ DACA adopted the following requirements from the DREAM Act: the alien has been continuously present physically in the United States for five years before the date of the enactment of the Act,⁶¹ the alien was fifteen years old or younger on the date the alien first entered the United States,⁶² the alien has earned a high school diploma or obtained a general education development certificate in the United States.⁶³

Also, DACA requires that the alien “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.”⁶⁴ The DREAM Act, similarly, requires that the alien has not been convicted of any offense under Federal or State law punishable by a maximum term of imprisonment of more than one year or three or more offenses under Federal or State law, for which the alien was convicted on different dates for each of the three offenses and imprisoned for an aggregate of ninety days or more.⁶⁵

Also, while DACA requires the alien to not be above the age of thirty,⁶⁶ the DREAM Act requires the alien to be thirty-five years of age or younger on the date of the enactment.⁶⁷ Similar to DACA, the DREAM Act also requires a background check.⁶⁸ The DREAM Act further requires the alien to be a person of good moral character since the date that the alien first entered the United States⁶⁹ and to have been admitted to an institution of higher education in the United States.⁷⁰ Furthermore, under the DREAM Act, for an alien to remove the conditional basis of permanent resident status to become legal permanent resident, the alien has to meet certain requirements. These requirements include having acquired a degree from an institution of higher education in the United States, have completed at least two years in a program for a bachelor’s degree⁷¹ or have served in the Uniformed Services for at least two years and received an honorable discharge if discharged from Service.⁷²

When President Obama announced DACA in the Rose Garden on June 15,

59. Development, Relief, and Education for Alien Minors Act of 2011, S. 952, 112th Cong. (2011).

60. S. 952 § 3(b)(1).

61. S. 952 § 3(b)(1)(A).

62. S. 952 § 3(b)(1)(B).

63. S. 952 § 3(b)(1)(E)(ii).

64. 2012 Napolitano Memo, *supra* note 2, at 1.

65. S. 952 §§ 3(b)(1)(D)(iii)(I)–(II).

66. 2012 Napolitano Memo, *supra* note 2, at 1.

67. S. 952 § 3(b)(1)(F).

68. S. 952 § 3(b)(4).

69. S. 952 § 3(b)(1)(C).

70. S. 952 § 3(b)(1)(E)(i).

71. S. 952 § 5(a)(1)(D)(i).

72. S. 952 § 5(a)(1)(D)(ii).

2012, there was still enough time to pass the DREAM Act.⁷³ Ultimately, however, the DREAM Act failed to pass in the 112th Congress.⁷⁴

IV. THE HISTORY OF PROSECUTORIAL DISCRETION AND ITS PREVALENCE IN U.S. IMMIGRATION LAW

A. *Revelation of Prosecutorial Discretion and the Nonpriority Program*

Prosecutorial discretion is a legal mechanism that is nothing new to U.S. immigration law. Immigration agencies have exercised prosecutorial discretion for more than sixty years.⁷⁵ Before 1975, the exercise of prosecutorial discretion was a secret operation of the former INS.⁷⁶ In 1975, a lawsuit involving John Lennon and his wife, Yoko Ono, revealed the use of prosecutorial discretion by the INS.⁷⁷ As described by Leon Wildes, who represented Lennon and Ono in the summer of 1971, Lennon came to the United States as a visitor but later the INS instituted a deportation proceeding against him because he overstayed his visa.⁷⁸ Lennon and Ono came to the United States to obtain custody of Ono's daughter, Kyoko, from Ono's previous marriage.⁷⁹ The court awarded Lennon and Ono custody of Kyoko, but Kyoko's father kidnapped her and absconded—leading to a frantic search for Kyoko.⁸⁰ During this search, Lennon and Ono were subject to deportation proceedings but they believed that because they were searching for their child, they should qualify for prosecutorial discretion, or more specifically, the “nonpriority status.”⁸¹

Before the Lennon case, the nonpriority program was “shrouded in secrecy.”⁸² The nonpriority status describes a situation where because a deportable alien's case has the lowest priority for INS to take action against the alien, the INS places the

73. Obama, *supra* note 1.

74. S. 952.

75. Wadhia, *supra* note 16, at 265.

76. *Id.* at 246. After the terrorist attacks on September 11, 2001, Congress passed the Homeland Security Act of 2002, which abolished the Immigration and Naturalization Service (INS) by statute and transferred its powers and services to the Department of Homeland Security (DHS). DHS has three units: United States Citizenship and Immigration Services (USCIS), Customs and Border Protection (CBP), and Immigration Customs Enforcement (ICE). USCIS is responsible for processing applications for immigration benefits such as applications for citizenship, legal permanent residency, and asylum. CBP is responsible for border enforcement and inspections at ports of entry. ICE is responsible for enforcing immigration laws within the country by investigating and arresting persons illegally in the country. *Id.* at 256–57.

77. *Id.* at 246–47.

78. *Id.* at 247.

79. *Id.*

80. 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, 45 (1976).

81. *Id.*; see also Wadhia, *supra* note 16, at 246–47 (discussing prosecutorial discretion and the nonpriority program in the Lennon case).

82. Wildes, *supra* note 80, at 42.

alien in a position where the alien is not removed from the United States.⁸³ After Lennon and Ono were subject to removal proceedings, Lennon and his attorney spent more than a year attempting to gather information about the procedures for the nonpriority program through correspondence with the INS, but the INS replied that the data regarding the nonpriority cases were “not compiled.”⁸⁴ Lennon even motioned for the immigration judge to depose a government witness who knew about the program but the motion was denied.⁸⁵ Lennon eventually obtained the information regarding the nonpriority program through using the Freedom of Information Act (FOIA) action.⁸⁶ FOIA action revealed that the guidelines for the nonpriority program were part of the INS “Operations Instructions” that were unpublished information kept private on the INS “Blue Sheets.”⁸⁷ After this revelation, the INS moved the “Operations Instructions” from the unpublished “Blue Sheets” to the published “White Sheets,” thus formally acknowledging the existence of the nonpriority program.⁸⁸

B. Cases Following the Revelation

In 1976, the Fifth Circuit discussed the nonpriority program in a deportation case involving a married female alien who is a citizen of the Republic of Korea.⁸⁹ *Soon Bok Yoon v. INS* held that the inquiry officer is not required to inform the alien of the availability of the “nonpriority status.”⁹⁰ The judge stated, among other things, that the nonpriority status is not a form of relief that an individual “may apply”⁹¹ but instead, it is a program for the “convenience of the INS.”⁹² However, defining the nonpriority program as a “convenience-only” program fails to take into account “the overriding humanitarian grounds upon which many of the cases were ultimately granted.”⁹³

During this time, the Eighth Circuit decided two cases that took into account the humanitarian considerations.⁹⁴ In *Vergel v. INS*, a Philippine citizen, Vergel,

83. *Id.* at 44.

84. *Id.* at 45.

85. *Id.* at 46.

86. *Id.*

87. *Id.*

88. Wildes, *supra* note 80, at 47. John Lennon ultimately obtained a green card which made him a lawful permanent resident, thus mooted the decision regarding the nonpriority status for him. But the Lennon case is significant because it led to the public acknowledgement of the program. Wadhia, *supra* note 16, at 248 (citing Lennon v. INS, 527 F.2d 187, 191 n.7 (2d Cir. 1975) and stating that it was the first case to discuss the nonpriority status, which the Second Circuit described as an “informal administrative stay of deportation”).

89. *Soon Bok Yoon v. INS*, 538 F.2d 1211, 1212 (5th Cir. 1976).

90. *Id.* at 1211.

91. *Id.* at 1213.

92. *Id.*

93. Wadhia, *supra* note 16, at 249.

94. *See generally* David v. INS, 548 F.2d 219 (8th Cir. 1977); Vergel v. INS, 536 F.2d 755 (8th Cir. 1976).

entered the United States in 1970 as a nonimmigrant visitor for pleasure.⁹⁵ Vergel looked after Maria, the four-year-old daughter of two doctors, prior to her entry into the United States because the child had cerebral palsy.⁹⁶ Maria's parents had immigrated to the United States in 1966.⁹⁷ Vergel nursed their daughter Maria until she was strong enough for Vergel to take her to the United States and join her parents in 1970.⁹⁸ Ultimately, Vergel faced a deportation proceeding.⁹⁹ After an immigration judge deemed her deportable, Vergel filed a motion to reopen the deportation arguing that her continued presence was necessary to protect the health of the daughter because the girl's cerebral palsy made her completely dependent on Vergel's constant nursing care.¹⁰⁰ The Eighth Circuit held that deportation would cause severe hardship not only to Vergel, but also to the child, so there was "a substantial basis upon which the District Director could place petitioner in a 'deferred action category' allowing her to remain in this country on humanitarian grounds."¹⁰¹

C. Memoranda Regarding Prosecutorial Discretion Since 2000

On November 17, 2000, Doris Meissner, commissioner of the former INS, issued a memorandum entitled "Exercising Prosecutorial Discretion" (2000 Meissner Memo).¹⁰² Prosecutorial discretion in immigration law is nothing new. Similar to other law enforcement agencies, the former INS exercised prosecutorial discretion on a daily basis.¹⁰³ The memo states that "service officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process."¹⁰⁴ The memo defines the "favorable exercise of prosecutorial discretion"¹⁰⁵ as "a discretionary decision not to assert the full scope of the INS' enforcement authority as permitted under the law,"¹⁰⁶ which includes "approving deferred action."¹⁰⁷ However, prosecutorial discretion does not include affirmative acts of benefit approval under a statute that sets out

95. *Vergel*, 536 F.2d at 756.

96. *Id.*

97. *Id.*

98. *Id.*

99. *See id.* at 756–57 (stating that Vergel was originally asked to depart voluntarily on August 12, 1971, but when she failed to do so, an immigration judge found her deportable after a hearing and authorized her to depart voluntarily by May 17, 1972).

100. *Id.* at 757.

101. *Vergel*, 536 F.2d at 757–58; *see also* Wadhia, *supra* note 16, at 249 (quoting *David v. INS*, 548 F.2d 219, 223 (8th Cir. 1977)). *David* is the other case where the Eighth Circuit held that there was a substantial humanitarian basis upon which a District Director could place petitioner in a deferred action category.

102. 2000 Meissner Memo, *supra* note 15.

103. *Id.* at 2.

104. *Id.* at 1.

105. *Id.* at 2.

106. *Id.*

107. *Id.*

requirements for determining the approval; so, as an example, if the alien is ineligible to naturalize under the statute, then the INS does not have power of prosecutorial discretion to approve a naturalization application.¹⁰⁸ Prosecutorial discretion is also not subject to judicial review or reversal.¹⁰⁹

The 2000 Meissner Memo also sets out the principles of prosecutorial discretion.¹¹⁰ The memo states that “like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations.”¹¹¹ Exercising favorable prosecutorial discretion early in the process is important because it can conserve government resources and help aliens avoid unnecessary legal proceedings.¹¹² The memo provides a non-exhaustive list of factors that INS should consider in deciding whether to exercise prosecutorial discretion.¹¹³ One of the factors listed is “humanitarian concerns,” which includes “the fact that an alien entered the United States at a very young age.”¹¹⁴ Another humanitarian concern includes “ties to one’s home country,”¹¹⁵ which the memo listed “whether the alien speaks the language or has relatives in the home country”¹¹⁶ as examples. The memo further states that any “decision should be based on the totality of the circumstances, not on any one factor considered in isolation.”¹¹⁷ Also, “there is no legal right to the exercise of prosecutorial discretion.”¹¹⁸

On June 30, 2010, former ICE Assistant Secretary, John Morton—now Director of ICE—issued a memorandum titled “Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens.”¹¹⁹ This memo again emphasized the monetary concern of prosecutorial discretion by stating that ICE “only has resources to remove approximately 400,000 aliens per year, less than 4 percent of the estimated illegal alien population in the United States.”¹²⁰ As a result, ICE has to prioritize the use of its resources for enforcement, detention, and removal.¹²¹ ICE wants to ensure that if it chooses to conduct a particular

108. 2000 Meissner Memo, *supra* note 15, at 3.

109. *Id.*

110. *Id.* at 4 (providing the INS’s policies with respect to prosecution).

111. *Id.*

112. *Id.* at 6 (noting that as a general matter, it is better to exercise favorable discretion as early as possible, so as to save time and resources).

113. *Id.* at 7–8.

114. 2000 Meissner Memo, *supra* note 15, at 7.

115. *Id.*

116. *Id.*

117. *Id.* at 8.

118. *Id.* at 10.

119. Memorandum from John Morton, Assistant Sec’y of U.S. Immigration and Customs Enforcement, to All ICE Employees on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (June 30, 2010), <http://www.ice.gov/doclib/news/releases/2010/civil-enforcement-priorities.pdf> [hereinafter 2010 Morton Memo].

120. *Id.* at 1.

121. *See id.* (stating that the agency is limited in enforcement personnel, detention space, and removal resources).

removal, it will “promote the agency’s highest enforcement priorities.”¹²² This memo sets out three priorities with the first constituting the highest priority and second and third constituting equal but lower priorities: (1) aliens who pose a danger to national security or a risk to public safety; (2) recent illegal entrants; (3) aliens who are fugitives or otherwise obstruct immigration controls.¹²³

For priority one, Director Morton lists examples, such as aliens engaged in or suspected of terrorist or espionage, aliens convicted of violent crimes, and aliens who have participated in organized criminal gangs.¹²⁴ Priority two involves aliens who have recently violated immigration control at the border or at ports of entry or through abuse of the visa and visa waiver programs.¹²⁵ Priority three includes aliens who are subject to final order of removal but do not depart.¹²⁶ The memo further states that ICE agents may choose to pursue the removal of any alien unlawfully in the United States but the pursuit cannot disrupt the resources needed to remove aliens who are higher priority.¹²⁷ ICE should use resources primarily to further the priorities that “best protect national security and public safety and to secure the border.”¹²⁸

On June 17, 2011, Director Morton issued another memorandum titled “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens” (2011 Morton Memo).¹²⁹ The Supreme Court has supported this memo plus the policy and guidelines for prosecutorial discretion in its decision in *Arizona v. United States*.¹³⁰ The 2011 Morton Memo once again emphasized the fact that ICE confronts more violations than its limited resources can address so it must “regularly exercise ‘prosecutorial discretion’” to prioritize its enforcement efforts.¹³¹ Director Morton provided a more comprehensive list of factors for ICE

122. *Id.*

123. *Id.* at 1–2.

124. *Id.* at 2.

125. 2010 Morton Memo, *supra* note 119, at 2–3 (including fugitives, aliens who reenter the country illegally, and aliens who obtain admission through fraud).

126. *Id.* at 2.

127. *See id.* at 3 (“Nothing in this memorandum should be construed to prohibit or discourage the apprehension, detention, or removal of other aliens unlawfully in the United States.”).

128. *Id.*

129. Memorandum from John Morton, Dir. of U.S. Immigration and Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [hereinafter 2011 Morton Memo].

130. *See Arizona v. United States*, 132 S. Ct. 2492, 2527 (2012) (citing 2011 Morton Memo, *supra* note 129, at 4) (stating that ICE does not set out inflexible rules for its officers to follow but, to the contrary, provides a list of factors to guide its officers' enforcement discretion on a case-by-case basis).

131. 2011 Morton Memo, *supra* note 129, at 2.

personnel to consider in deciding whether to exercise prosecutorial discretion.¹³² This list includes, among other things, the following:

[T]he 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 . . . 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 ties and contributions to the community.¹³³

Many of these humanitarian factors and those listed in other previously issued memoranda are consistent with the factors considered for DACA listed in the Napolitano Memo issued on June 15, 2012.¹³⁴ The 2011 Morton Memo also emphasized that there are a number of positive factors present in certain "classes of individuals that warrant particular care."¹³⁵ Director Morton listed "individuals present in the United States since childhood" as one of the positive factors that should prompt particular care and consideration by ICE personnel.¹³⁶

Also, the 2011 Morton Memo reiterated that although ICE agents may exercise prosecutorial discretion at any stage of an enforcement proceeding, it is better to do so as early as possible to preserve government resources that would be spent in pursuing the enforcement proceeding.¹³⁷ Consistent with this policy, DACA allows an undocumented alien to apply for deferred action with the USCIS before the individual is even subject to an enforcement proceeding with ICE.¹³⁸

Generally, "the deferred action program is still an internal administrative arrangement, with no provision for an application or participation by the alien."¹³⁹ Also, generally, if the alien's counsel believes that the alien qualifies for deferred action, then their counsel may bring the circumstances of the case to the district director's attention by providing the director with appropriate documentation.¹⁴⁰ DACA is different from the general way of administering prosecutorial discretion

132. *Id.* at 4–5.

133. *Id.* at 4.

134. *See* 2012 Napolitano Memo, *supra* note 2, at 1 (listing factors similar to those of the 2011 Morton Memo, such as: came to the U.S. under the age of sixteen, continuously resided in the U.S., currently attending school or has graduated from high school, honorably discharged veteran, has not been convicted of a felony, etc.).

135. 2011 Morton Memo, *supra* note 129, at 5.

136. *Id.*

137. *See id.* (allowing the government to consider prosecutorial discretion before the alien requests favorable prosecutorial discretion).

138. *See Consideration of Deferred Action for Childhood Arrivals Process, supra* note 4 (allowing individuals to apply for DACA).

139. Wadhia, *supra* note 16, at 251 (quoting CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 72.03(2)(h) (2009)).

140. *Id.* at 251–52.

because it asks undocumented aliens to get involved in the process by filing an application form—specifically, Form I-821D—to obtain this discretionary treatment before they are even subject to removal proceedings.¹⁴¹ Applicants must also pay a mandatory \$465 application fee,¹⁴² furthering the goal of achieving cost-effective law enforcement. DACA implements a different, improved, form of prosecutorial discretion, specially tailored for a specific group of people.

Furthermore, DACA does not provide any immigration benefit other than a work permit.¹⁴³ Since DACA does not create a path to citizenship but only a potential grant of deferred action—with a limited time frame of two years—subject to renewal,¹⁴⁴ it has not encroached upon Congress’ plenary power in immigration law.¹⁴⁵ Therefore, the Obama Administration acted within the authority of the executive branch.

V. PREVALENCE OF PROSECUTORIAL DISCRETION IN ENGLISH CRIMINAL LAW

Similar to the prosecutorial discretion in U.S. immigration law, prosecutorial discretion in English criminal law also has a long history.¹⁴⁶ The purpose of prosecutorial discretion in U.S. immigration law is to achieve “cost-effective law enforcement”¹⁴⁷ while granting “relief for individuals who present desirable qualities or humanitarian circumstances.”¹⁴⁸ The purpose of prosecutorial discretion in criminal law practiced in England and Wales is to allow Crown Prosecutors to prosecute cases when “there is enough evidence to provide a realistic prospect of conviction against each suspect on each charge”¹⁴⁹ while refraining from prosecuting when the “public interest factors tending against prosecution...outweigh those tending in favour.”¹⁵⁰

Prosecutorial discretion in criminal law practiced in England and Wales is based on the “expediency” principle, which is based on the idea that just because a prosecutor has sufficient evidence to prosecute a case does not mean that they

141. See *Consideration of Deferred Action for Childhood Arrivals Process*, *supra* note 4 (requiring aliens to also submit an I-765, Application for Employment Authorization, and an I-765WS, Worksheet).

142. *Id.* (“\$380 fee plus \$85 fee for biometric services”).

143. See *id.* (putting aside the benefit of receiving deferred action, subject to renewal).

144. *Id.*

145. See generally *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893); *Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889).

146. See Roger Daw & Alex Solomon, *Assisted Suicide and Identifying the Public Interest in the Decision to Prosecute*, 10 CRIM. L. REV. 737, 738–39 (2010) (stating that, as early as 1886, the second set of Regulations made pursuant to the Prosecution of Offences Act of 1884 declared that the Director of Public Prosecution should consider prosecuting an offence if prosecution is required in the public interest).

147. Wadhia, *supra* note 16, at 244.

148. *Id.*

149. *The Code for Crown Prosecutors*, *supra* note 17, ¶ 4.4.

150. *Id.* ¶ 4.8.

should or need to prosecute the case.¹⁵¹ Many reasons such as national interest or the characteristics of the victim or those of the suspect may render prosecution inappropriate.¹⁵² Similarly, the Supreme Court of the United States stated that one of the principal features of removal under U.S. immigration law “is the broad discretion exercised by immigration officials . . . [who] must decide whether it makes sense to pursue removal at all.”¹⁵³ Although an individual may be an undocumented foreign national, ICE may refrain from prosecuting or pursuing a removal proceeding against the individual because of humanitarian concerns.¹⁵⁴ The process of prosecutorial discretion in English criminal law and the factors that a Crown Prosecutor must consider when deciding whether to proceed with prosecution has been laid out in the Code for Crown Prosecutors.

A. *The Code for Crown Prosecutors*

The Code for Crown Prosecutors is a public document issued by the Director of Public Prosecution of the Crown Prosecution Service, “which is the principal public prosecution service in England and Wales.”¹⁵⁵ Pursuant to Section 10 of the Prosecution of Offences Act of 1985,¹⁵⁶ the Director of Public Prosecution codified prosecutorial discretion by building on the previously compiled Attorney General’s Guidelines, which set out the factors that a prosecutor should consider in deciding whether to prosecute a case.¹⁵⁷ Unlike U.S. immigration law, which has its guidelines for prosecutorial discretion in the form of loose memoranda, the Code for Crown Prosecutors is a single detailed public document.¹⁵⁸ However, similar to the prosecutorial discretion in U.S. immigration law, which has a history of secrecy,¹⁵⁹ Crown Prosecutors—in addition to relying on the Code—also rely on Policy Manuals that are concealed from the public.¹⁶⁰

The Code is currently in its seventh edition¹⁶¹ and has been “laid before Parliament every year” since it was created.¹⁶² The Code sets forth general principles that Crown Prosecutors should follow when they make decisions on cases.¹⁶³ The Code has a Full Code Test, which guides a Crown Prosecutor in

151. Daw & Solomon, *supra* note 146, at 738.

152. *Id.*

153. *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

154. 2000 Meissner Memo, *supra* note 15, at 7.

155. The Code for Crown Prosecutors ¶¶ 1.1, 1.2 (2013) (Eng. & Wales), *available at* http://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf [hereinafter 2013 Code for Crown Prosecutors].

156. *Id.* ¶ 1.1.

157. Daw & Solomon, *supra* note 146, at 740.

158. *See generally* 2013 The Code for Crown Prosecutors, *supra* note 155.

159. Wildes, *supra* note 80, at 63.

160. Glenys Williams, *Assisting Suicide, the Code for Crown Prosecutors and the DPP’s Discretion*, 39 COMMON L. WORLD REV. 181, 182 (2010).

161. 2013 Code for Crown Prosecutors, *supra* note 155, ¶ 1.1.

162. Daw & Solomon, *supra* note 146, at 741.

163. 2013 Code for Crown Prosecutors, *supra* note 155, ¶¶ 2.1–2.6.

determining whether to prosecute a case.¹⁶⁴ The Full Code Test has two stages: (1) the evidential stage and (2) the public interest stage.¹⁶⁵

A case cannot proceed unless it first passes the evidential stage.¹⁶⁶ During this stage, a Crown Prosecutor must decide if “there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge.”¹⁶⁷ A Crown Prosecutor determines whether there is “a realistic prospect of conviction”¹⁶⁸ by using a test “based on the prosecutor’s objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which he or she might rely.”¹⁶⁹ In determining whether a case passes the evidential stage, a Crown Prosecutor must also consider whether they can use the evidence in court and whether the evidence is reliable and credible.¹⁷⁰

Once a case passes the evidential stage, it will proceed to the public interest stage.¹⁷¹ This approach is derived from a speech made in 1951 by Sir Hartley Shawcross, who was the Attorney General at that time.¹⁷² Sir Hartley stated: “it has never been the rule in this country—I hope it never will be—that suspected criminal offences must automatically be the subject of prosecution.”¹⁷³ He further stated that a prosecution should take place “wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest.”¹⁷⁴ A Crown Prosecutor should choose to prosecute unless “there are public interest factors tending against prosecution which outweigh those tending in favour.”¹⁷⁵ Analogous to the prosecutorial discretion in U.S. immigration law, which sets out enforcement “priorities” to prioritize the use of ICE’s resources for enforcement,¹⁷⁶ the Code for Crown Prosecutors looks at the “seriousness” of the offense—the more serious the offense, the more likely that prosecution will be required in the public interest.¹⁷⁷ A Crown Prosecutor could also offer the offender “an out-of-court disposal” if the prosecutor believes it is the proper way to serve the public interest.¹⁷⁸

164. *Id.* ¶ 4.1.

165. *Id.*

166. *Id.* ¶ 4.4.

167. *Id.*

168. *Id.*

169. 2013 Code for Crown Prosecutors, *supra* note 155, ¶ 4.5.

170. *Id.* ¶ 4.6.

171. *Id.* ¶ 4.1.

172. The Code for Crown Prosecutors ¶ 4.10 (2010) (Eng. & Wales) (superseded), available at http://www.skadden.com/eimages/the_Code_for_Crown_Prosecutors.pdf [hereinafter 2010 Code for Crown Prosecutors]; see also 2013 Code for Crown Prosecutors, *supra* note 155, ¶ 4.8 (incorporating the speech of Shawcross into the current version of the Code).

173. 2010 Code for Crown Prosecutors, *supra* note 172, ¶ 4.10.

174. *Id.*

175. 2013 Code for Crown Prosecutors, *supra* note 155, ¶ 4.12.

176. See generally 2010 Morton Memo, *supra* note 119.

177. 2013 Code for Crown Prosecutors, *supra* note 155, ¶ 4.12.

178. *Id.* ¶ 4.8.

Paragraphs 4.12(a) to (g) of the Code for Crown Prosecutors contains a non-exhaustive list of public interest factors in the form of “questions” that prosecutors should consider in identifying and determining the relevant public interest factors tending in favor of and against prosecution.¹⁷⁹ These public interest factors tending in favor of and against prosecution include: the seriousness of the offense committed; the level of culpability of the suspect; circumstances of and harm caused to the victim; age of the suspect; and the impact on the community.¹⁸⁰ Likewise, the 2011 Morton Memo listed negative factors that should prompt attention by ICE officers such as: serious felons; repeat offenders; known gang members; individuals who pose a clear danger to public safety, etc.¹⁸¹ In addition to requiring ICE officers to examine negative factors, the 2011 Morton Memo also requires ICE officers to consider mitigating factors tending against prosecution such as the alien’s ties and contributions to the community and the alien’s pursuit of education in the United States.¹⁸² Furthermore, comparable to the decision to exercise prosecutorial discretion in U.S. immigration law, which bases the decision on the totality of circumstances and not on any one factor in isolation,¹⁸³ a Crown Prosecutor decides whether they should prosecute a case by weighing each of the factors listed in the Code for Crown Prosecutors according to the facts and merits of each case.¹⁸⁴ The factors listed in the Code for Crown Prosecutors are not exhaustive and not all the factors may be relevant in every case.¹⁸⁵

B. Closer Look at Public Interest

Sir Hartley believed that “there is no greater nonsense talked about the Attorney General’s duty than that suggestion that in all cases the Attorney General ought to decide to prosecute merely because he thinks there is what the lawyers call a ‘case’”¹⁸⁶ because it is not always in the public interest to proceed with prosecution.¹⁸⁷ Similarly, Secretary Napolitano, in the 2012 Napolitano Memo announcing the DACA, stated:

Our Nation’s immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Nor are they designed to remove productive young people to countries where they may not have lived or even speak the language.¹⁸⁸

The various memoranda issued by DHS over the years provide guidance on

179. *Id.* ¶ 4.9.

180. *Id.* ¶ 4.12.

181. 2011 Morton Memo, *supra* note 129, at 5.

182. *Id.* at 4.

183. 2000 Meissner Memo, *supra* note 15, at 8.

184. 2013 Code for Crown Prosecutors, *supra* note 155, ¶ 4.10.

185. *Id.*

186. Daw & Solomon, *supra* note 146, at 739.

187. *Id.*

188. 2012 Napolitano Memo, *supra* note 2, at 2.

the exercise of prosecutorial discretion in U.S. immigration law.¹⁸⁹ One of the ideas behind the DACA is to establish a clear and efficient process to facilitate the exercise of prosecutorial discretion by deferring action against individuals who meet the criteria under DACA.¹⁹⁰ Similarly, the public interest discretion is the most sensitive part of prosecutorial discretion in the Code for Crown Prosecutors because it relies less on the legal skills of a Crown Prosecutor.¹⁹¹ This part of the Full Code Test also requires guidance because unrestricted, broad discretion can lead to inconsistent discretionary decisions, thus leading to the generation of public mistrust.¹⁹²

The Daniel James Case and *R (On the Application of Pretty) v. DPP* illustrate the application of prosecutorial discretion and the role of the Director of Public Prosecution in English criminal law.¹⁹³ These two cases involve the very controversial topic of assisted suicide. This topic is beyond the scope of this Comment, but examining these cases gives good insight into how Crown Prosecutors apply the Full Code Test and the Director of Public Prosecution's power in publishing new prosecuting policy statements. The following compares these applications and power to those of prosecutorial discretion in U.S. immigration law, more specifically, to those of DACA.

The Daniel James Case provides a good example where, although there was enough evidence to prosecute a defendant, the prosecutor chose not to prosecute the case because the public interest factors tending against prosecution outweighed those tending in favor of prosecution.¹⁹⁴ Daniel injured his spinal cord in a Rugby training session, which paralyzed him from the chest down.¹⁹⁵ He became suicidal and made several failed attempts to end his life.¹⁹⁶ He then contacted Dignitas in Switzerland to make arrangements for a procedure of assisted suicide.¹⁹⁷ During this time when Daniel was making these arrangements, his parents and friends were very upset by his wish and pleaded with him to change his mind but he refused to do so.¹⁹⁸ In the end, his parents accepted his wish and assisted him by making and paying for his travel arrangements, accompanying him to Switzerland, attending consultations, and being with him when he died.¹⁹⁹

189. 2011 Morton Memo, *supra* note 129.

190. 2012 Napolitano Memo, *supra* note 2, at 2.

191. Daw & Solomon, *supra* note 146, at 741.

192. *Id.*

193. *Decision on Prosecution—The Death by Suicide of Daniel James*, THE CROWN PROSECUTION SERV. (Sept. 12, 2009), http://www.cps.gov.uk/news/articles/death_by_suicide_of_daniel_james/index.html [hereinafter Daniel James Case]; *R (On the Application of Dianne Pretty) v. DPP*, [2001] UKHL 61, [2002] 1 A.C. 800 (appeal taken from Eng).

194. *See Williams*, *supra* note 160, at 186 (stating that this case demonstrated the way in which the Director of Public Prosecution balanced the factors in favor and against prosecution).

195. Daniel James Case, *supra* note 193, ¶¶ 3–4.

196. *Id.* ¶¶ 5–6.

197. *Id.* ¶ 7.

198. *Id.* ¶¶ 9–11.

199. *Id.* ¶¶ 12–15.

Here, in applying the Full Code Test in the Code for Crown Prosecutors, the Director of Public Prosecution concluded that the case passed the evidential stage because there was enough evidence to provide a realistic prospect of conviction against Daniel's parents for aiding and abetting Daniel's suicide under section 2(1) of the Suicide Act 1961.²⁰⁰ Although the case passed the evidential stage, prosecution does not take place unless it also passes the public interest stage.²⁰¹ Under the Code for Crown Prosecutors, "a prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favor."²⁰²

The Director first examined the public interest factors tending in favor of prosecution and determined that under paragraph 5.9(a) of the Code for Crown Prosecutors, it is unlikely a conviction here would result in a significant sentence.²⁰³ Although Daniel's parents made the arrangements, they were not "ringleaders" or "organizers" as meant by paragraph 5.9(f) of the Code, the offense was not premeditated as meant by paragraph 5.9(g), and it was not a "group" offence as meant by paragraph 5.9(h).²⁰⁴ The Director also determined it was not likely that the offense would be repeated as meant by paragraph 5.9(o).²⁰⁵ Furthermore, although Daniel's parents were in a position of trust as described under paragraph 5.9(e) of the Code and much older than Daniel as described under paragraph 5.9(l), Daniel was a mature, independent, and intelligent young man who made his own decision to receive the procedure for assisted suicide, which was not a decision influenced by his parents.²⁰⁶ The Director also determined that under paragraph 5.9(q), "a prosecution would not be likely to have a significant positive impact on community confidence."²⁰⁷

In examining the public interest factors tending against prosecution, the Director determined that although an offense under section 2(1) of the Suicide Act 1961 is a serious offense carrying a maximum penalty of fourteen years imprisonment, the penalty in this case is likely to be nominal under paragraph 5.10(a) of the Code for Crown Prosecutors.²⁰⁸ Daniel's parents did not stand to gain any advantage from his death; instead, the death "caused them profound distress."²⁰⁹ Although this case passed the evidential stage of the Full Code Test, the conduct of Daniel's parents were "towards the less culpable end of the spectrum."²¹⁰ Therefore, the Director concluded that because "the factors against prosecution clearly outweigh those in favour . . . a prosecution is not needed in

200. *Id.* ¶ 26.

201. Daniel James Case, *supra* note 193, ¶ 28.

202. *Id.*

203. *Id.* This case references paragraph numbers of a previous version of the Code for Crown Prosecutors that was in place at time of this decision.

204. *Id.*

205. *Id.*

206. *Id.*

207. Daniel James Case, *supra* note 193, ¶ 32.

208. *Id.* ¶ 34.

209. *Id.* ¶ 35.

210. *Id.*

the public interest.”²¹¹

Similarly, in U.S. immigration law, exercising prosecutorial discretion for individuals who satisfy the criteria under DACA is “especially justified”²¹² because “these individuals lacked the intent to violate the law.”²¹³ These young people are undocumented aliens because their parents brought them to the United States as children—“sometimes even as infants.”²¹⁴ Many of them do not realize that they are undocumented aliens until they apply for a job or a driver’s license.²¹⁵ In addition to requiring the individual to have come to the United States under the age of sixteen, DACA requires the individual to currently be in school, have graduated from high school, have obtained a general education development certificate, or have served in the U.S. Coast Guard or Armed Forces.²¹⁶ In other words, although these individuals are undocumented aliens, their conduct after they entered the United States plus the reason behind their undocumented status put their undocumented status at the less culpable end of the spectrum thus justifying the DACA program.

C. Power to Issue New Policy Statements of Prosecutorial Discretion

R (On the Application of Pretty) v. DPP, another case involving the very controversial topic of assisted suicide, illustrates the Director of Public Prosecution’s power in publishing new prosecuting policy statements. In this case, Dianne Pretty suffered from motor neurone disease, which is a progressive degenerative disease with no hope of recovery.²¹⁷ She not only had a short time to live but also faced a potential distressing death.²¹⁸ With the support of her family, she wished to enlist the help of her husband to peacefully end her life because she was incapacitated and thus could no longer take her own life without help.²¹⁹ The husband was willing to assist but only if he could know for sure that he would not be prosecuted under section 2(1) of the Suicide Act 1961 for aiding and abetting her suicide. So, Mrs. Diane Pretty requested an undertaking from the Director of Public Prosecution that he would not prosecute her husband under the Act if he

211. *Id.* ¶ 36.

212. 2012 Napolitano Memo, *supra* note 2, at 2.

213. *Id.* at 1.

214. Obama, *supra* note 1.

215. *Id.*

216. 2012 Napolitano Memo, *supra* note 2, at 1–3. It should be noted that although DACA can grant deferred action to individuals who are honorably discharged veterans of the U.S. Coast Guard or Armed Forces, they are already eligible to become U.S. citizens under the current immigration statutes. Jan Ting, *Obama’s Dream Act Lite: Useful Politically, Sustainable Legally but Flawed as Policy*, NEWSWORKS (June 15, 2012), <http://www.newsworks.org/index.php/blogs/brandywine-to-broad/item/40134-obamas-dream-act-lite-useful-politically-sustainable-legally-but-flawed-as-policy>.

217. *R (On the Application of Dianne Pretty) v. DPP*, [2001] UKHL 61, [2002] 1 AC 800 [1] (appeal taken from Eng.).

218. *Id.*

219. *Id.*

assisted her suicide, but the Director refused to grant this request.²²⁰

Lord Bingham held, among other things, that because Mrs. Pretty was not asking the Director to publish a statement of prosecuting policy but to grant her husband immunity from prosecution before he assists her suicide, the Director had no power to grant such a request because the director had no power to suspend the execution of laws without the consent of the parliament.²²¹ Later in the opinion, Lord Hope further stated that the Director does, however, have the power to form a policy stating the criteria that he will apply when he is exercising his discretion under the Suicide Act.²²²

Similarly, DACA does not suspend the enforcement of immigration laws or grant immunity to aliens before they violate immigration laws but instead is a policy announcement that provides a process for undocumented aliens, who were brought to the United States as children and know only this country as their home, to obtain deferred action.²²³ DACA requires aliens to have resided in the United States for at least five years preceding the date of the announcement of the DACA²²⁴ so they must have continuously resided in the United States since June 15, 2007.²²⁵ Thus, an alien who is not currently in the United States cannot attempt to abuse this policy.

D. Consistency in Exercising Prosecutorial Discretion

Under the Code for Crown Prosecutors, a Crown Prosecutor does not proceed to prosecute a case unless it passes the evidential and public interest stages of the Full Code Test.²²⁶ Crown Prosecutors only decide whether to prosecute a case after they have reviewed all of the available evidence and after all investigations have been completed.²²⁷ Crown Prosecutors also must follow any guidance issued by the Director of Public Prosecution to ensure that their decision to prosecute a case is appropriate and correct.²²⁸ Under the Code for Crown Prosecutors, the public interest discretion is the most sensitive part of prosecutorial discretion because it relies less on the legal skills of a Crown Prosecutor.²²⁹ This part of the Full Code Test requires guidance because unrestricted broad discretion can lead to inconsistent decision-making, thus leading to the generation of public mistrust.²³⁰

Similarly, in U.S. immigration law, ICE personnel are supposed to follow guidance issued by the Director of ICE when exercising prosecutorial discretion.²³¹

220. *Id.*

221. *Id.* ¶ 39.

222. *Id.* ¶ 80.

223. 2012 Napolitano Memo, *supra* note 2, at 1–3.

224. *Id.* at 1.

225. *Consideration of Deferred Action for Childhood Arrivals Process*, *supra* note 4.

226. 2013 Code for Crown Prosecutors, *supra* note 155, ¶¶ 3.4, 4.1.

227. *Id.* ¶ 4.2.

228. *Id.* ¶¶ 3.1, 4.9.

229. Daw & Solomon, *supra* note 146, at 741.

230. *Id.*

231. *See generally* 2011 Morton Memo, *supra* note 129.

Prior to the announcing of DACA in 2012, Director John Morton of ICE issued a policy memorandum in 2011 regarding the exercise of prosecutorial discretion.²³² The 2011 Morton Memo, discussed in Section IV of this Comment, detailed factors that immigration officials should consider when deciding whether to exercise discretion such as the immigrant's ties to the community, the length of presence in the United States, and the circumstances of his or her arrival to the United States.²³³ The purpose of these detailed guidelines is to ensure that individuals who are low priority would have their cases closed.²³⁴ Under the 2011 policy, ICE reviewed 411,000 pending deportation cases to determine whether each case was low priority. If considered low priority, ICE then exercised prosecutorial discretion by closing them.²³⁵

About one year later, only 10,998 cases—2.7% of the 411,000 total cases—were closed.²³⁶ These low rates of favorable grants of prosecutorial discretion are partially because of “the agency’s inconsistent application of the guidelines and narrow interpretation of the policy.”²³⁷ Based on research conducted by the American Immigration Lawyers Association and the American Immigration Council, “the majority of offices admitted that they were not following the guidelines outlined in the memoranda.”²³⁸

To further study the impact of the 2011 policy, the New York Immigration Coalition (NYIC) and the New York County Lawyers’ Association (NYCLA) conducted a survey by examining sixty-two cases in New York involving prosecutorial discretion to learn about the impact that the 2011 prosecutorial discretion policy has had in New York.²³⁹ Of the sixty-two cases surveyed, fifty-three cases were under proactive review by ICE.²⁴⁰ Their research showed that in

232. *See generally id.*

233. *Id.* at 4.

234. N.Y. IMMIGRATION COAL. & N.Y. CNTY. LAWYERS’ ASS’N, PROSECUTORIAL INDISCRETION: HOW THE PROSECUTORIAL DISCRETION POLICY FAILED TO KEEP ITS PROMISE 10 (2013), *available at* <http://www.thenyic.org/sites/default/files/Prosecutorial%20Indiscretion%201-10-Final.pdf> [hereinafter PROSECUTORIAL INDISCRETION REPORT].

235. *Id.* at 10; *see also* Memorandum from Peter S. Vincent, Principal Legal Advisor of U.S. Immigration and Customs Enforcement, to All Chief Counsel, Office of the Principal Legal Advisor on Case-by-Case Review of Incoming and Certain Pending Cases (Nov. 17, 2011), <http://www.ice.gov/doclib/foia/prosecutorial-discretion/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf> (discussing the case-by-case review by the Office of the Principal Legal Advisor of the EOIR immigration court docket in each Office of Chief Counsel to ensure that the cases conform to the priorities described in the 2011 Morton Memo).

236. PROSECUTORIAL INDISCRETION REPORT, *supra* note 234, at 11.

237. *Id.*

238. *Id.*; *see also* AM. IMMIGRATION LAWYERS’ ASS’N & AM. IMMIGRATION COUNCIL, HOLDING DHS ACCOUNTABLE ON PROSECUTORIAL DISCRETION 6–11 (2011), *available at* <http://www.aila.org/content/default.aspx?docid=37615> (discussing survey responses regarding general implementation of the policies at each of the local district offices of ICE, Enforcement and Removal Operations, or Offices of Chief Counsel).

239. PROSECUTORIAL INDISCRETION REPORT, *supra* note 234, at 12.

240. *Id.*

83% of the cases, “ICE did not initiate a grant of prosecutorial discretion.”²⁴¹ Although DHS instructed “ICE to proactively review these cases to determine whether they were a high enforcement priority or warranted discretion,” the immigrants’ attorneys had to request ICE to exercise prosecutorial discretion in forty-four of the fifty-three cases surveyed, and ICE initiated a grant of prosecutorial discretion, without the immigrants’ attorneys’ request for it, in only nine of the fifty-three cases.²⁴² Of the forty-four cases where the immigrants’ attorneys requested ICE to exercise prosecutorial discretion, ICE granted the request in twenty of the forty-four cases.²⁴³ Had the immigrants’ attorneys not requested prosecutorial discretion, ICE would have deported the individuals in these cases.²⁴⁴

Under U.S. immigration law, although the alien has the privilege of being represented by counsel, the government is not required to provide the alien with counsel.²⁴⁵ In 2011, about 50% of immigrants in removal proceedings did not have legal counsel.²⁴⁶ As a result, they may not have known about the 2011 prosecutorial discretion policy,²⁴⁷ which the Supreme Court of the United States endorsed.²⁴⁸ Even if some knew about this policy, they most likely did not know how to submit a request.²⁴⁹ Furthermore, the research conducted by the NYIC and NYCLA showed that whether an immigrant is represented by counsel was a major factor in getting prosecutorial discretion thus raising “concerns that ICE is less likely to adhere to the prosecutorial discretion guidelines in cases where individuals do not have lawyers.”²⁵⁰

DACA, on the other hand, provides more consistency and transparency to the exercise of prosecutorial discretion for a specific group of individuals—undocumented young people who entered the United States as children. The USCIS has listed a detailed filing process and guidelines on its website including the type of documents that it will consider adequate, such as school records, utility bills, and national identity documents from the individual’s country of origin.²⁵¹ DACA allows an undocumented alien to get involved in the process by applying

241. *Id.* at 13.

242. *Id.*

243. *Id.* at 14.

244. *Id.*

245. See Immigration and Nationality Act (INA) § 240(b)(4)(A), 8 U.S.C.A. § 1362 (stating that the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings); see also INA § 239(b)(2) (stating that noncitizens who cannot afford an attorney must be informed of free legal services in the area).

246. Prosecutorial Indiscretion Report, *supra* note 234, at 11.

247. *Id.*

248. See *Arizona v. United States*, 132 S. Ct. 2492, 2495 (2012) (citing 2011 Morton Memo).

249. Prosecutorial Indiscretion Report, *supra* note 234, at 11.

250. *Id.* at 14.

251. See *Consideration of Deferred Action for Childhood Arrivals Process*, *supra* note 4 (setting forth the guidelines for requesting consideration of deferral action for childhood arrivals).

for deferred action with the USCIS before the alien is subject to an enforcement proceeding with ICE.²⁵² Individuals who meet the criteria can apply for deferred action by filing a form I-821D.²⁵³ As of September 2013, USCIS has accepted 567,563 DACA applications for processing and so far has approved 455,455 applications.²⁵⁴

In a poll conducted in October 2012 asking 446 registered voters whether they thought Obama's DACA policy goes too far, 64% answered that it was "about right," while 15% answered that the policy did not go "far enough."²⁵⁵ In the 2012 presidential election, "a record-breaking 71% of Latino voters and 73% of Asians voters re-elected President Obama" demonstrating the growing influence of Latino, Asian, and immigrant voters.²⁵⁶ At an event for the Congressional Hispanic Caucus Institute in Washington, Vice President Joe Biden stated; "Have you ever seen a time when Republicans have had a more rapid epiphany about immigration than they have this last election?"²⁵⁷

VI. CONCLUSION

Prosecutorial discretion is a legal mechanism that has had a long history of utilization in both U.S. immigration law and English criminal law. Although DACA is the first exercise of prosecutorial discretion under U.S. immigration law, DACA is a legally valid and appropriate exercise of prosecutorial discretion. It furthers the monetary and humanitarian goals of prosecutorial discretion in U.S. immigration law consistent with policies—supported by the Supreme Court—stated in previously issued memoranda regarding prosecutorial discretion. DACA is also an improvement in administering prosecutorial discretion for this specific group of individuals because unlike past exercises of prosecutorial discretion, DACA asks undocumented aliens to get involved in the process by filing an application with necessary documents to obtain this discretionary treatment before they are subject to removal proceedings. In addition to providing more consistency and transparency to the exercise of prosecutorial discretion, a historically secretive mechanism in U.S. immigration law, DACA has garnered public support.

Similar to the exercise of prosecutorial discretion under criminal law practiced in England and Wales requiring a Crown Prosecutor to consider the "public interest" factors when deciding whether or not to prosecute a case, the

252. *Id.*

253. *Id.*

254. *Deferred Action for Childhood Arrivals Process (January 2013)*, U.S. CITIZENSHIP AND IMMIGRATION SERV. (Jan. 18, 2013), <http://www.uscis.gov/tools/reportsstudies/immigration-forms-data/individual-applications-and-petitions/data-individual-applications-and-petitions>.

255. *POLL: Does Obama's Policy on Illegal Immigration Go Too Far?*, CNN (October 30, 2012), <http://www.cnn.com/POLITICS/pollingcenter/polls/3216>.

256. Prosecutorial Indiscretion Report, *supra* note 234, at 18.

257. Ashley Killough, *Biden: Republicans Had 'Epiphany' on Immigration*, CNN (Jan. 3, 2013), <http://politicalticker.blogs.cnn.com/2013/01/03/biden-republicans-had-epiphany-on-immigration/>.

exercise of prosecutorial discretion under U.S. immigration law requires an immigration officer or agent to consider the “humanitarian” factors when deciding whether or not to prosecute a case or deport an alien. Under the Code for Crown Prosecutors, even when there is sufficient evidence to prosecute a defendant in a case, a Crown Prosecutor would choose not to prosecute the case if the public interest factors tending against prosecution outweigh those tending in favor of prosecution. Similarly, under DACA, the Department of Homeland Security can choose not to prosecute or deport an undocumented alien if the individual satisfies certain humanitarian criteria set out in DACA.

Unlike criminal law prosecutorial discretion, which concludes the case for the defendant, DACA only defers action for an undocumented individual for a period of two years. Although individuals who have been approved for prosecutorial discretion under DACA can live in the United States without fear for two years, DACA does not create a path to citizenship so these individuals still live under a limbo category, which creates uncertainty for both the individuals and the states. Democrats and Republicans should work together and come to a compromise for comprehensive immigration reform because, as of right now, the only status that these undocumented young people have is prosecutorial discretion.