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### The Status of Nonstatus

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## ARTICLES

### THE STATUS OF NONSTATUS

GEOFFREY HEEREN\*

*Millions of unauthorized immigrants in the United States have no legal immigration status and live in constant fear of deportation. There are millions more who do have some sort of status, like lawful permanent residency, asylum, or a nonimmigrant visa. In between is the netherworld of nonstatus. Here live noncitizens who possess government documentation but few rights. They have no pathway to lawful permanent residence or citizenship and cannot receive most public benefits. If nonstatus is denied or revoked by a prosecutor or bureaucrat, there is no right to a hearing or an appeal. If the Executive Branch discriminates in how it allocates nonstatus, there may not be a legal right to challenge it.*

*The Obama Administration's Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parental Accountability (DAPA) programs are the most recent and largest categories of nonstatus, but there are many others: parole, administrative closure, supervision, Deferred Enforced Departure (DED), and stays of removal, to name just a few. What these categories have in common is that they are discretionary, unreviewable, weakly described by positive law, and officially temporary, although individuals often live for years or even lifetimes in the purgatory of nonstatus. They occupy a paradoxical middle ground between legality and illegality, loosely tethered to this country by humanitarian concern or prosecutorial discretion. Those with nonstatus have fewer rights and*

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\* Associate Professor, Valparaiso University Law School. I am grateful to Ingrid Eagly, Shoba Sivaprasad Wadhia, Juliet Stumpf, Peter Margulies, Alina Das, Stuart Ford, Nadia Nasser-Ghods and participants at a Valparaiso University Law School faculty workshop and at the 2014 Immigration Law Professors Workshop at the University of California at Irvine School of Law for their helpful comments and conversations as well as to the editors of the *American University Law Review* for their excellent edits.

*remedies than those with immigration status. At the same time, they must register, disclose biographic data, be fingerprinted, and regularly update their address. Yet nonstatus is not just a government surveillance program: it is the only way for many individuals to claim some measure of dignity and legitimacy from a society that places a strong stigma on unauthorized immigrants.*

*This Article will provide the first description of immigration nonstatus and its impact on the individuals who have it. It will describe the growth of nonstatus over time and the acceleration of that growth following late-1990s immigration reforms that restricted the means to acquire immigration status. The Article will contend that nonstatus is growing in part because it offers a means to authorize the presence of undocumented immigrants without offering them rights and benefits that have become controversial for immigrants with full status.*

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## INTRODUCTION

Sergio and his brother were taking trash to the dump in their Honduran town when they saw a local police officer grab a woman by the hair and shoot her in the head.<sup>1</sup> When the officer and his accomplices saw Sergio and his brother watching, they tried to shoot them too. Sergio and his brother went into hiding, but the police found and killed Sergio's brother a month later. Sergio fled immediately after identifying his brother's mangled body, washed up on a trash and sewage soaked riverbank. He left his daughter behind with her mother, crossed deserts, and exhausted his financial resources to come to the United States.

Once in the United States, Sergio applied for asylum. During the years he waited for his final hearing, he struggled to obtain corroboration from his friends and family of what he had seen. His two law clinic representatives worked countless hours to find evidence. They retained a psychologist to evaluate Sergio for post-traumatic stress disorder, hired an expert on police corruption in Honduras to testify, had voluminous documents translated from Spanish to English, found supporting articles and reports, and presented all of this evidence in a lengthy memorandum of law.

The work took its toll on Sergio. It was painful for him to recall the shooting and his brother's death in excruciating detail as he needed to in order for his representatives to draft an affidavit and prepare him to testify. The hours Sergio spent describing what he saw gave him nightmares. He and his representatives sacrificed much to get to the day of the final asylum hearing. When that day came, they approached it with confidence that they had done everything they could to get ready.

Before they entered the courtroom, the lawyer for the U.S. Department of Homeland Security (DHS) approached them.<sup>2</sup> "I have

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1. The facts of Sergio's case come from an asylum claim handled by the Valparaiso University Law School's Immigration Clinic. Although the client has agreed to a recitation of certain facts from his case, his name has been changed to protect his confidentiality.

2. In 2002, Congress passed the Homeland Security Act, which abolished the Immigration and Naturalization Service and created the new Department of Homeland Security (DHS), along with its various sub-agencies, including Immigration and Customs Enforcement (ICE), the primary enforcer of immigration law, and U.S. Citizenship and Immigration Services (USCIS), the primary adjudicator of immigration applications. This Article will refer to INS when describing pre-2002 events, and to DHS or its various subagencies for events occurring after 2002.

a one-time deal,” she offered.<sup>3</sup> “The respondent has U.S.-citizen children and has been here for three years, so he meets our office’s criteria for prosecutorial discretion.”<sup>4</sup> She went on to explain that her office had been instructed to assess its docket for cases that could be “administratively closed.”<sup>5</sup> Sergio’s representatives had ten minutes to explain the offer to Sergio. If he refused the deal, DHS would not renew the offer if he lost his asylum case. Therefore, he would be deported.

The representatives explained DHS’s offer to Sergio as well as they could in the short time they had. The removal case would not go away: it would just be taken off of the court’s docket. Sergio could probably renew his work permit every year because of his asylum application’s pending status. But, as long as the case was administratively closed, he would not receive asylum. He could not petition for his daughter in Honduras to join him in the United States, meaning he would probably never see her again. If DHS’s prosecutorial discretion priorities changed in the future, perhaps as a result of the election of a different U.S. President, DHS might renew its effort to deport Sergio.

Sergio rejected the offer. He wanted to bring his daughter to the United States where she would be safe, and without asylum, he would have no clear way to do so.<sup>6</sup> The decision ended up being a good one for him: he went on to eventually win his asylum case.

However, an increasing number of people subject to removal proceedings are agreeing to the type of deal that Sergio rejected. The Obama Administration’s 2011 prosecutorial discretion initiative has resulted in about 29,000 removal cases being administratively closed.<sup>7</sup> The program was originally intended as a means to drop cases against noncitizens with close family, educational, or other ties in the United States to spend the DHS’s limited resources on individuals who pose a serious threat to public safety or national

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3. Summary of Hearing, Valparaiso University Law School Immigration Clinic Case No. 14-0000051, March 20, 2014.

4. *Id.*

5. *Id.*

6. *Id.*

7. *See Once Intended to Reduce Immigration Court Backlog, Prosecutorial Discretion Closures Continue Unabated*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Jan. 15, 2014), <http://trac.syr.edu/immigration/reports/339> [hereinafter TRAC] (reporting that prosecutorial discretion is used to administratively close Immigration Court cases in an effort to reduce court backlog).

security.<sup>8</sup> However, Sergio's case and other anecdotal evidence suggest that many administratively closed cases involve individuals who could have qualified for a more secure immigration status, such as asylum.<sup>9</sup> To avoid the risk of deportation, these applicants take administrative closure, which forces them into an immigration purgatory that might allow work but not a pathway to legal permanent residency or citizenship. They lack the ability to naturalize and the rights to vote and to participate in civil society that go with it, the privilege to seek government benefits like social security retirement enjoyed by lawful permanent residents (LPRs), and even the ability to freely travel afforded temporary visa holders. As far as the government is concerned, their presence in the United States is by virtue of prosecutorial discretion only, and they lack any actual "lawful status."

These tens of thousands of individuals may not be "in status," but they are not at risk of deportation either. They are in an in-between state, a limbo that this Article will call "nonstatus." The first goal of this Article is to define nonstatus. This Article will strive to offer a clear definition, description, and taxonomy of this newly identified category. It will define nonstatus as possessing three principal attributes. First, nonstatus is officially temporary and does not offer a pathway to citizenship. Second, nonstatus is tentative: its holders have few rights—substantive or procedural—and as a result, they live in a state of perpetual uncertainty. Relatedly, the positive law that circumscribes nonstatus is often hazy: there are few statutes that describe how to obtain it.

There are a host of immigration categories that meet all or most of the elements of this definition: deferred action, deferred enforced departure (DED), extended voluntary departure (EVD), temporary protected status (TPS), withholding of removal, deferral of removal,

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8. See Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge, All Chief Counsel 1, 4 (June 17, 2011) [hereinafter June 2011 Morton Memo], *available at* <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> (describing factors to be considered for when exercising prosecutorial discretion).

9. The author surveyed other clinical professors of immigration law concerning this issue and received several responses stating that DHS commonly offers prosecutorial discretion in cases where noncitizens are eligible for other relief. One New York-based clinician noted that DHS commonly offers prosecutorial discretion in strong asylum cases. See [iclinic@list.msu.edu](mailto:iclinic@list.msu.edu) Listserv Exchange (Apr. 1, 2014–Apr. 3, 2014) (on file with author).

and stays of removal.<sup>10</sup> The many names for nonstatus all emphasize its transitory nature, but people can and do live for years or even lifetimes in the United States within these categories without the rights afforded to lawful residents. These individuals occupy a paradoxical middle ground between legality and illegality, loosely tethered to this country by humanitarian concern or prosecutorial discretion.

The United States has offered nonstatus since at least the 1920s and has categorically doled it out to thousands of persons at a time since the 1950s.<sup>11</sup> But, in recent years, the United States has expanded the number of persons placed in nonstatus.<sup>12</sup> Beginning in the late 1990s, the nonstatus of “deferred action” began to evolve from an esoteric benefit offered on a very limited case-by-case basis to a means for granting lawful presence and work permits to thousands of undocumented immigrants at a time.<sup>13</sup> The government has recently released more and more deported persons with “orders of supervision” allowing them to stay in the United States, resulting in a population that now numbers well over 600,000 individuals.<sup>14</sup> This increase in nonstatus culminated with the Obama Administration’s controversial DACA and DAPA programs that could benefit as many as four million immigrants if they survive litigation challenges and congressional hostility.<sup>15</sup>

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10. See 8 C.F.R. § 241.6 (2014) (setting out the requirements for an administrative stay of removal); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 264–65 (2010) (explaining the development of and distinctions between Deferred Enforced Departure (DED), Extended Voluntary Departure (EVD), and Temporary Protected Status).

11. See *infra* Part II.

12. See *infra* Part II.

13. See *infra* Part II.F.

14. The author filed a Freedom of Information Act Request with ICE on April 1, 2014 for data from 2002 to the present “about the number and types of cases in which ICE has granted removable non-citizens some form of relief, broadly construed, from removal.” Letter from Geoffrey Heeren, Assistant Professor, Valparaiso Univ. Law Sch., to U.S. Immigration & Customs Enforcement (Apr. 1, 2014) (on file with author). In response, ICE disclosed statistics concerning persons released on orders of supervision, stays of removal, extended voluntary departure, and deferred action from Fiscal Year (FY) 2010 through FY 2014. The data reveals that there were 613,578 individuals under ICE supervision in FY 2014. Enforcement & Removal Office LESA Statistical Tracking Unit, FOIA 14-15328 Relief from Removal (response to Freedom of Information Act Request filed by Geoffrey Heeren) [hereinafter ICE FOIA Response] (on file with author).

15. David Nakamura, *Obama Acts on Immigration, Announcing Decision to Defer Deportations of 4 Million*, WASH. POST (Nov. 21, 2014), [http://www.washingtonpost.com/politics/obama-acts-on-immigration-announcing-decision-to-defer-deportations-of-4-million/2014/11/20/9a5c3856-70f6-11e4-8808-afaa1e3a33ef\\_story.html](http://www.washingtonpost.com/politics/obama-acts-on-immigration-announcing-decision-to-defer-deportations-of-4-million/2014/11/20/9a5c3856-70f6-11e4-8808-afaa1e3a33ef_story.html). As of this

There are several reasons for the growth of nonstatus. Many unauthorized immigrants have strong moral claims to full status but are cut off from it by legal standards that have become increasingly strict since the late-1990s immigration reforms.<sup>16</sup> There is a bipartisan consensus that the immigration system is “broken,” but Congress has repeatedly failed in its efforts to reform immigration law,<sup>17</sup> leaving even unauthorized immigrants with very sympathetic claims ineligible for status. One reason why reform is so difficult is that the provision of rights and benefits to immigrants is controversial.<sup>18</sup> Thus, nonstatus, which comes with few real rights and benefits, offers a way to authorize the presence of undocumented immigrants without undertaking the politically hazardous task of incorporating them into the mainstream of American rights and privileges.

Part I of this Article develops definitions for status, the lack of status, and nonstatus and suggests that the three make up a fluid continuum. Part II provides a more complete portrait of nonstatus; including the types of nonstatus and numbers of individuals with it and the different actors and interest groups involved in nonstatus: bureaucrats, politicians, judges, and private corporations. Part III discusses the meaning of nonstatus for those who have it and society at large. Without stating definite conclusions, this Article offers a warning. If nonstatus is limbo, it cannot last forever, and the pathway the United States takes from it will, to a large extent, determine whether the United States is an egalitarian society.

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writing, DAPA is subject to a federal court injunction that has prevented it from going forward. *See generally* Texas v. United States, No. B-14-254, 2015 WL 648579 (S.D. Tex. Feb. 16, 2015), *appeal filed*, No. 15-40238 (5th Cir. Feb. 23, 2015).

16. *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 517 (2009) (“In recent years, Congress has made the system of deportation more categorical, eliminating many avenues of relief from removal that in earlier periods were available to noncitizens who engaged in deportable conduct.”).

17. RUTH ELLEN WASEM, CONG. RESEARCH SERV., R42980, BRIEF HISTORY OF COMPREHENSIVE IMMIGRATION REFORM EFFORTS IN THE 109TH AND 110TH CONGRESSES TO INFORM POLICY DISCUSSIONS IN THE 113TH CONGRESS I (2013), available at <http://fas.org/sgp/crs/homesec/R42980.pdf>; Jaime Fuller, *Americans Are Ready for Immigration Reform. They Are Just Not Ready Enough*, WASH. POST (July 14, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/07/14/americans-are-ready-for-immigration-reform-they-are-just-not-ready-enough>.

18. *See infra* Part III.A.



## I. DEFINITIONS

Ceci n'est pas une pipe.

- René Magritte<sup>19</sup>

According to U.S. Citizenship and Immigration Services (USCIS), a grant of deferred action means that a person is not unlawfully present but does not mean that the person has lawful status.<sup>20</sup> Indeed, USCIS insists that deferred action is not an “immigration status” at all.<sup>21</sup> A status that is neither lawful nor unlawful and that is not even a status at all may make some sense to attorneys who have been deeply immersed in the illogic of immigration law.<sup>22</sup> However, to everyone else, it may sound like a riddle. This Part will address USCIS’s unintentional riddle head-on: what is it that is not status and not no status?

### A. *Status*

To answer this riddle, one must first know what immigration status is. In English, the word means both a rank or classification and a high rank.<sup>23</sup> If one has status, in other words, one enjoys a high standing. In immigration law, status means that, too. Short of citizenship, the best status is “lawful permanent resident,” a category

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19. From the painting by René Magritte, *La trahison des images* (The Treachery of Images) (depicting a pipe).

20. *Consideration of Deferred Action for Childhood Arrivals Process: Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions> (last updated Oct. 23, 2014) [hereinafter DACA FAQ].

21. Adjustment of Status; Certain Nationals of the People’s Republic of China, 62 Fed. Reg. 63,249, 63,253 (Nov. 28, 1997) (codified at 8 C.F.R. pt. 245) (“Deferred action recognizes that the Service has limited enforcement resources and that every attempt should be made administratively to use these resources in a manner which will achieve the greatest impact under the immigration laws. Deferred action does not confer any immigration status on an alien, nor is it in any way a reflection of an alien’s lawful immigration status. . . . Since deferred action is not an immigration status, no alien has the right to deferred action. It is used solely for the administrative convenience of, and in the discretion of, the Service and confers no protection or benefit on an alien. Deferred action does not preclude the Service from commencing removal proceedings at any time against an alien.”).

22. There is a distinction in immigration law between “unlawful presence” and “unlawful status.” The former is a term of art that is relevant to the ground of inadmissibility for individuals who have accrued 180 days or more of unlawful presence. See 8 U.S.C. § 1182(a)(9)(B) (2012) (defining the term unlawful presence and stating that those individuals are inadmissible).

23. *Status*, AM. HERITAGE DICTIONARY, <https://www.ahdictionary.com/word/search.html?q=status> (last visited May 11, 2015).

first codified into law in 1952.<sup>24</sup> LPRs can legally work, travel into and out of the United States, access various government benefits, and eventually become citizens.<sup>25</sup> For those who do not wish to apply for citizenship, the status does not expire.<sup>26</sup> Courts have held that LPRs are also entitled to Fifth Amendment and other constitutional protections.<sup>27</sup>

However, status does not end with LPRs. There is a headache-inducing excess of immigration categories. Just below LPRs on the immigration hierarchy, one might place refugees and asylees, who have established that they have a “well-founded fear” of future persecution in their country of origin.<sup>28</sup> Refugees and asylees are entitled to work, to receive a variety of public benefits, and to “adjust status” after a year to become LPRs.<sup>29</sup> In 2012, there were about 20,790,000 LPRs, refugees, and asylees in the United States.<sup>30</sup>

Another large immigration category consists of temporary “nonimmigrant” visas for tourists, businesspersons, students, temporary workers, athletes, and many others.<sup>31</sup> In 2012 there were about 1,870,000 nonimmigrants in the United States.<sup>32</sup> Most nonimmigrants remain for short periods and have few rights, putting them close to the bottom of the hierarchy of immigration statuses.<sup>33</sup>

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24. 8 U.S.C. § 1101(a)(20) (1952) (“The term ‘lawfully admitted for permanent residence’ means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.”).

25. David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 93–94 (2002).

26. 8 U.S.C. § 1101(a)(20) (2012).

27. See *Landon v. Plasencia*, 459 U.S. 21, 33, 35 (1982) (instructing courts to grant LPRs procedures that satisfy the minimum requirements of due process upon reentering the U.S.); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (noting that LPRs who are physically present in the United States may not be deprived of life, liberty, or property without due process of law).

28. See generally DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 6–7 (2014) (internal quotation marks omitted) (providing the UN Convention Relating to the Status of Refugees definition of “refugee”).

29. 8 C.F.R. §§ 209.1–209.2 (2014).

30. BRYAN BAKER & NANCY RYTINA, U.S. DEP’T OF HOMELAND SEC., *ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2012* 4 tbl.2 (2013), available at [http://www.dhs.gov/sites/default/files/publications/ois\\_ill\\_pe\\_2012\\_2.pdf](http://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf).

31. See generally 2 CHARLES GORDON ET AL., *IMMIGRATION LAW AND PROCEDURE* § 12.01[1] (2014).

32. BAKER & RYTINA, *supra* note 30, at 4 tbl.2.

33. 2 GORDON ET AL., *supra* note 31, § 12.01[1] (explaining that individuals with nonimmigrant visas are permitted to remain in the United States for the duration of

For example, the government famously revoked the nonimmigrant visas of all Iranian Americans in the United States after the Iran Hostage crisis in 1980.<sup>34</sup>

Status is malleable. It is possible to enter the United States with a status—for example, a nonimmigrant visa—and to overstay its period of authorized stay, meaning that one would begin with status but become unauthorized.<sup>35</sup> It is also possible to enter the United States without inspection,<sup>36</sup> meaning that one would be an unauthorized immigrant upon entering the country. Yet, that person might later obtain status through one of various routes. Even an unauthorized immigrant who has been ordered deported can sometimes obtain status through one of these processes.<sup>37</sup>

The means to acquire immigration status can be opaque and sometimes even seemingly arbitrary. There are innumerable bureaucratic and ministerial requirements, a host of niggling distinctions, and often ridiculously long wait times. For example, one of the most common routes by which immigrants obtain LPR status is through a relationship to a U.S.-citizen family member. The U.S.-citizen family member can file a petition to have her familial relationship legally recognized by DHS.<sup>38</sup> Once the relationship is recognized, the noncitizen must wait for a visa to become available.<sup>39</sup> After the visa becomes available, she can file a lengthy and burdensome application for it.<sup>40</sup>

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an authorized stay and to engage in activities that are compatible with their nonimmigrant statuses).

34. PUB. AFFAIRS ALLIANCE OF IRANIAN AMs., *IRANIAN AMERICANS: IMMIGRATION AND ASSIMILATION* 6 (2014), available at <http://www.paaia.org/CMS/Data/Sites/1/pdfs/iranian-americans—immigration-and-assimilation.pdf>.

35. See *infra* Part I.B (explaining how individuals become unauthorized).

36. See 8 U.S.C. § 1182(a)(6)(A) (2012) (stating that noncitizens present in the United States without having been inspected are inadmissible); 8 C.F.R. § 235.1 (2014) (setting out procedures for inspection of applicants for admission to the United States).

37. See *In re Velarde-Pacheco*, 23 I. & N. Dec. 253, 256 (BIA 2002) (holding that a properly filed motion to reopen a removal case may be granted to allow a noncitizen to apply for adjustment of status in certain situations).

38. See 8 U.S.C. §§ 1151(b)(2)(A)(i), 1154(a)(1)(A)(i).

39. See *Visa Bulletin: Immigrant Numbers for September 2014*, U.S. DEP'T STATE 1 (Aug. 12, 2014), [http://travel.state.gov/content/dam/visas/Bulletins/visabulletin\\_september2014.pdf](http://travel.state.gov/content/dam/visas/Bulletins/visabulletin_september2014.pdf) (explaining that visas are allocated in chronological order of priority date and that certain categories are oversubscribed because not all demand can be met).

40. See 8 U.S.C. § 1255(a); *I-485, Application to Register Permanent Residence or Adjust Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/i-485> (last visited May 11, 2015).

The average wait for a visa ranges from a couple months to a couple decades, depending on the nature of the relationship and the family member's country of origin. Long wait times are common because visas are allocated based on a formula that allots the same number of visas to every country in the world, regardless of how many people want to come to the United States from that country.<sup>41</sup> The result is lengthy wait times—often decades long—for individuals from certain countries.<sup>42</sup> The longest wait times are reserved for those countries that have the most nationals looking to immigrate to the United States, such as Mexico.<sup>43</sup>

While the beneficiaries of these visa petitions are waiting for their visas to become current, do they have status? In a way, they do because they can obtain work permission if they are in the United States. Yet, there is no official name for the status they enjoy.<sup>44</sup> Prior to obtaining a green card, many will have to leave the United States to return to their home countries, where they may face additional legal hurdles and wait times.<sup>45</sup> Many will eventually have their applications denied because they will be found inadmissible on the basis of criminal convictions, financial instability, health issues, or past immigration violations, further clarifying that whatever status they thought they had was at best a chimera.<sup>46</sup> Professor David Martin has described this group of long-suffering applicants, which numbers in the hundreds of thousands, as having a kind of “twilight status.”<sup>47</sup>

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41. “[N]o more than seven percent of the worldwide allotments for visas or adjustments to permanent residence may be made available during any fiscal year to the natives of a single foreign state.” 3 GORDON ET AL., *supra* note 31, § 31.02[3][a].

42. See, e.g., *Visa Bulletin: Immigrant Numbers for September 2014*, *supra* note 39 (showing wait times of up to twenty-three years).

43. See *id.* (indicating that individuals seeking F4 visas from the Philippines wait up to twenty-three years for their visas).

44. See David A. Martin, *Twilight Statuses: A Closer Examination of the Unauthorized Population*, 2 MIGRATION POL'Y INST. 1, 4–5 (2005), available at <http://www.migrationpolicy.org/research/twilight-statuses-closer-examination-unauthorized-population>.

45. Marisa S. Cianciarulo, *Seventeen Years Since the Sunset: The Expiration of 245(i) and Its Effect on U.S. Citizens Married to Undocumented Immigrants*, 18 CHAP. L. REV. 451, 452 (2015).

46. *Id.* at 456; Martin, *supra* note 44, at 3.

47. See Martin, *supra* note 44, at 2. Professor Martin's term, “twilight status,” poetically captures the liminal status of the 1–1.5 million persons whom he estimated “have current or incipient claims to legal status in the United States because they are either relatives of lawful permanent residents or have been granted temporary protected status.” *Id.* It is important to note that this population differs from the

*B. No Status*

Presented with a Sisyphean process for legally immigrating, many immigrants enter the United States without inspection. Others enter legally but overstay their visas. These two groups comprise the approximately 11.5 million noncitizens in the United States without status who are often described as “illegal,” “undocumented,” or “unauthorized” noncitizens.<sup>48</sup>

The number of unauthorized immigrants in the United States today may be at an all-time high, yet there have always been more unauthorized immigrants in the United States than the government has the resources to deport. Indeed, for much of the twentieth century, the United States tolerated or even welcomed unauthorized immigrants, depending on the economic needs of the moment.<sup>49</sup> Many unauthorized immigrants live for years in the United States, building homes and families here. They do so because the government’s inability and seeming unwillingness to deport all deportable individuals means that the question of whether any given immigrant will be removed is indeterminate.

More precisely, the deportation of unauthorized immigrants is a matter of discretion. As Professor Hiroshi Motomura has noted, “[w]hether they are ultimately deported depends on countless decisions by government officials who exercise discretion, always aware of political and economic pressures, and often in ways that can be inconsistent, unpredictable, and sometimes, discriminatory.”<sup>50</sup> It is worth highlighting this last point about the sometimes arbitrary or even discriminatory quality of immigration enforcement. For unauthorized immigrants who live in a state of constant uncertainty, it is this uneven aspect of enforcement that must seem most disturbing.

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nonstatus holders that this Article discusses who are more permanently in limbo due to the lack of any legal claim to lawful status.

48. BAKER & RYTINA, *supra* note 30, at 4 tbl.2 (estimating that there are 11,430,000 undocumented individuals in the United States). For a discussion of the use of the modifiers “illegal,” “undocumented,” and “unauthorized” with respect to immigrants, see Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1786 n.2 (2010).

49. *E.g.*, MAE NGAE, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 265–66 (2004) (noting that throughout its history, the United States has welcomed illegal immigrants for a variety of reasons, including to meet demand for low wage workers and for work in domestic services and housing construction).

50. HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 22 (2014).

There are countless examples of arbitrary or discriminatory enforcement involving the internment, detention, or deportation of individuals based on their political leanings, religion, or country of origin.<sup>51</sup> The “Red Scare,” Japanese Internment during World War II, the Iranian Hostage crisis, and the post-September 11 era all involved dubious crackdowns on particular immigrant groups. Consider a recent example. After September 11, 2001, the government instituted a massive “special registration” program for male noncitizens over the age of sixteen who had entered the United States on nonimmigrant visas from twenty-five countries, all of which were predominately Muslim countries except for North Korea.<sup>52</sup> In other words, the scope of the registration program encompassed a substantial part of the Muslim noncitizen population in the United States. After one year of special registration under this National Security Entry/Exit Registration System (NSEERS), 83,519 individuals were registered domestically, 13,789 registrants were placed in removal proceedings, and 2,870 were detained in immigration custody.<sup>53</sup>

It appears that most of those who were placed in removal proceedings were charged with minor immigration offenses.<sup>54</sup> The government only claimed that it found eleven individuals with

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51. See DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 8–10 (2007) (suggesting that the Bush Administration’s post-September 11 deportation policy impacted many individuals who were not “terrorists”); David Cole, *Enemy Aliens*, 54 *STAN. L. REV.* 953, 989–1000 (2002) (discussing Japanese interment, the Palmer Raids, and efforts to deport noncitizens for their support of Palestinian liberation).

52. See *Rajah v. Mukasey*, 544 F.3d 427, 433–34, 448 (2d Cir. 2008) (holding that an NSEERS registrant who alleged the removal proceedings against him were tainted by NSEERS regulatory violations was not entitled to relief because he was not in the country legally, he did not qualify for any lawful status, and the regulatory violations were harmless). DHS terminated the NSEERS program in 2011. Removing Designated Countries from the National Security Entry-Exit Registration System (NSEERS), 76 *Fed. Reg.* 23,830, 23,831 (Apr. 28, 2011).

53. See DEP’T OF HOMELAND SEC., *FACT SHEET: CHANGES TO NATIONAL SECURITY ENTRY/EXIT REGISTRATION SYSTEM (NSEERS)* 4 (2003) (on file with author).

54. Muzaffar Chishti & Claire Bergeron, *DHS Announces End to Controversial Post-9/11 Immigrant Registration and Tracking Program*, *MIGRATION POL’Y INST.* (May 17, 2011), <http://www.migrationpolicy.org/article/dhs-announces-end-controversial-post-911-immigrant-registration-and-tracking-program>. The majority of NSEERS apprehensions involved individuals who were detained simply because they did not have lawful immigration status. See PETER MARGULIES ET AL., *NATIONAL SECURITY LAW: PRINCIPLES & POLICY* 33 (forthcoming 2015).

connections to terrorism as a result of the program,<sup>55</sup> and there is reason to suppose that those connections were attenuated.<sup>56</sup> One might draw this inference from the slipshod way the government often used terrorism allegations to justify detention of Muslim noncitizens in the years following September 11. During that period, the government commonly placed Muslim noncitizens in removal proceedings based on weak misrepresentation charges for failing to disclose tenuous ties to Islamic charitable organizations.<sup>57</sup> The government also detained Muslim noncitizens based on flimsy terrorism charges, relying on the excessively overbroad language of the terrorism definition in the INA.<sup>58</sup>

Widely criticized as discriminatory, NSEERS was nonetheless upheld as a rational exercise of the government's plenary power over alien exclusion and national security matters.<sup>59</sup> The available data lends support to the argument that the government used NSEERS and its other deportation powers after September 11 to try to deport every male Muslim noncitizen with a colorable immigration violation, including almost one out of every five individuals who registered through NSEERS.

By contrast, the government declined to exercise its deportation powers against many other types of noncitizens during the same period. For example, in 2007, President Bush decided to grant DED to Liberian nationals who had been living in the United States with tenuous legal status since that country's brutal civil war in the late-1980s and the 1990s.<sup>60</sup> As a result of the DED designation, Liberians

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55. Rachel L. Swarns, *Special Registration for Arab Immigrants Will Reportedly Stop*, N.Y. TIMES, Nov. 22, 2003, at A16 (reporting that the program ended amidst concerns from civil liberties groups and government officials that the program was not effective).

56. E.g., Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369, 1383–84 (2007) (asserting that the Bush Administration's discontinuation of the program suggests that it never resulted in any significant leads in the war on terror).

57. *Id.* at 1384.

58. See CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE ET AL., UNDER THE RADAR: MUSLIMS DEPORTED, DETAINED, AND DENIED ON UNSUBSTANTIATED TERRORISM ALLEGATIONS 3, 5–6 (2011), available at <http://aaldef.org/UndertheRadar.pdf> (noting that NSEERS and other similar programs have produced "wide-scale racial profiling").

59. See *Rajah v. Mukasey*, 544 F.3d 427, 439 (2d Cir. 2008) ("We therefore join every circuit that has considered the issue in concluding that the Program does not violate Equal Protection guarantees.").

60. See Automatic Extension of Employment Authorization and Related Documentation for Liberians Provided Deferred Enforced Departure, 72 Fed. Reg.

could remain in the United States and legally work, even though they did not technically have any immigration status.<sup>61</sup> The government passed over many other unauthorized groups and individuals during the same time period, leading some to contend that the government was engaged in a program of selective prosecution against noncitizen Muslim males.<sup>62</sup>

### C. *Nonstatus*

If the government exercises its discretion and does not deport an unauthorized immigrant, what is that individual's status? The government would likely answer that such individuals have no status or at least that they do not have lawful status. Consider the Liberians granted DED in 2007. According to USCIS, DED "is not considered an immigration 'status.'"<sup>63</sup> However, individuals with DED can obtain a federal work permit that they can use as an ID card. Obviously, then, they are not "undocumented" nor "unauthorized" or "illegal" because the government has recognized their presence and authorized them to remain in the country.

If DED is somewhere between status and no status, then it is the answer to our riddle: that which is not status and not no status. In other words, DED is "nonstatus." One way to illustrate the attributes of nonstatus is by considering those of DED. First, DED is temporary:

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53,596, 53,596 (Sept. 19, 2007) (extending automatically Employment Authorization Documents for Liberians for eighteen months).

61. *Id.* Many Liberian nationals have lived in the United States with TPS since the 1990s, when Liberia was engaged in a bloody civil war. LISA SEGHELLI ET AL., CONG. RESEARCH SERV., RS20844, TEMPORARY PROTECTED STATUS: CURRENT IMMIGRATION POLICY AND ISSUES 6–7 (2015), available at <http://fas.org/sgp/crs/homsec/RS20844.pdf>. In 2007, the Bush Administration ended TPS for the Liberians who had lived in the United States since the war but decided to instead offer them DED. *Id.* On November 21, 2014, DHS redesignated Liberia for TPS until May 20, 2015 because of the Ebola outbreak in Liberia. Press Release, Dep't of Homeland Sec., DHS Announces Temporary Protected Status Designations for Liberia, Guinea, and Sierra Leone (Nov. 20, 2014) [hereinafter Press Release, DHS DED], available at <http://www.uscis.gov/news/dhs-announces-temporary-protected-status-designations-liberia-guinea-and-sierra-leone>.

62. See Rashad Hussain, Note, *Preventing the New Internment: A Security-Sensitive Standard for Equal Protection Claims in the Post-9/11 Era*, 13 TEX. J. C.L. & C.R. 117, 147–48 (2007) (noting that the program seemed to target individuals of South Asian, Arab, or Muslim descent; that the policies never resulted in any terrorism-related arrests; and that the practice violated the government's own position on profiling).

63. U.S. CITIZENSHIP & IMMIGRATION SERVS., AFFIRMATIVE ASYLUM PROCEDURES MANUAL 39 (2013) [hereinafter AFFIRMATIVE ASYLUM MANUAL], available at [http://www.uscis.gov/sites/default/files/files/nativedocuments/Asylum\\_Procedures\\_Manual\\_2013.pdf](http://www.uscis.gov/sites/default/files/files/nativedocuments/Asylum_Procedures_Manual_2013.pdf).



it has been periodically renewed for Liberians since 2007 and was most recently authorized for Liberians for a twenty-four month period beginning on October 1, 2014.<sup>64</sup> The most recent announcement came just four days before the last round of DED was set to expire.<sup>65</sup> Individuals with DED live in a state of perpetual uncertainty. Thus, the first aspect of nonstatus is that it is officially temporary, although in practice some types of nonstatus can last for a long time.

Second, DED comes with few substantive or procedural rights. Substantively, its holders cannot vote,<sup>66</sup> receive public benefits,<sup>67</sup> obtain driver's licenses in some states,<sup>68</sup> and are probably unprotected from some employment discrimination.<sup>69</sup> Procedurally, there is not even any application process for DED status, let alone a formal hearing.<sup>70</sup> DED does not prevent DHS from obtaining a removal order: it only means that DHS will generally not enforce a removal order, although the limited guidance available on DED states that there are "exceptions" to nonenforcement of the removal order, including for persons "who have committed certain crimes, persons who are persecutors, and persons who have previously been deported, excluded or removed."<sup>71</sup> However, there does not seem to be any right to appeal a denial or revocation based on this vague

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64. Press Release, White House, Presidential Memorandum—Deferred Enforced Departure for Liberians (Sept. 26, 2014) [hereinafter Press Release, White House], available at <http://www.whitehouse.gov/the-press-office/2014/09/26/presidential-memorandum-deferred-enforced-departure-liberians>.

65. See *id.* On November 21, 2014, DHS also designated Liberia for TPS until May 20, 2015 as a result of the Ebola outbreak in that county. See Press Release, DHS DED, *supra* note 61 (citing the Ebola outbreak in West Africa as the reason for granting eighteen months TPS for eligible nationals of Liberia, Guinea, and Sierra Leone).

66. See U.S. CONST. amend. XV, § 1 (establishing a right to vote for citizens).

67. See 8 U.S.C. §§ 1611, 1613 (2012) (limiting receipt of most public benefits to "qualified aliens"); *id.* § 1641(b) (defining "qualified alien" so as to exclude persons with DED).

68. See *infra* note 286. Federal law requires "lawful status" for purposes of getting a driver's license and does not list DED as a lawful status. See 6 C.F.R. § 37.1, 37.3 (2014).

69. All individuals in the United States are protected by the prohibition against race and national origin discrimination in employment contained in Title VII of the Civil Rights Act, but they are not protected from discrimination based on immigration status. See 8 U.S.C. § 1324b(a)(1)–(3) (prohibiting discrimination based on citizenship status for "[p]rotected individual[s]" and defining "[p]rotected individual" to exclude persons with non-status); 42 U.S.C. § 2000e–2(a)(1) (prohibiting employers from discriminating, inter alia, based on national origin or race).

70. AFFIRMATIVE ASYLUM MANUAL, *supra* note 63, at 39.

71. *Id.*

standard,<sup>72</sup> and if the presidential administration in power discriminates as to how it allocates DED, there may not be a legal right to challenge it.<sup>73</sup> Therefore, the second characteristic of nonstatus, is that it is tentative: its holders have few rights and it is easily revocable.

Third, the legal contours of DED are ambiguous. DHS apparently relies on 8 U.S.C. § 1229a for legal support for this program, which is the provision of law conferring general immigration enforcement authority on the Attorney General (and the DHS Secretary), or 8 U.S.C. § 1229c, which gives DOJ and DHS authority to grant “voluntary departure.”<sup>74</sup> The provision neither explicitly mentions nor explains the requirements for DED. Typically, the President designates DED via fiat through an executive order or presidential memorandum.<sup>75</sup> Immigrants granted DED may apply for employment authorization, but that permission is the result of a regulation not a statute, making it subject to a greater possibility of change.<sup>76</sup> Thus, another characteristic of nonstatus is that the legal authority for it is tenuous and sometimes even secret. Whatever

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72. See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (explaining that 8 U.S.C. § 1252(g) allows judicial review of some of the Attorney General’s actions but not his decision to refuse reconsideration of an order); see also *Heckler v. Chaney*, 470 U.S. 821, 837 (1985) (declining to review the U.S. Food and Drug Administration’s (FDA) decision not to respond to a prison inmate’s request that the FDA take enforcement action to prevent the use of drugs used to administer the death penalty); *Hotel & Rest. Emps. Union, Local 25 v. Smith*, 846 F.2d 1499, 1519–20 (D.C. Cir. 1988) (en banc) (per curiam) (refusing review of an agency decision declining to extend voluntary departure to Salvadorans).

73. See *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 472–73, 492 (declining to review a claim that individuals were being targeted for deportation based on their affiliation with a politically unpopular group).

74. 8 U.S.C. § 1229c(a)(2)(A), (b)(1) (allowing the Attorney General to permit aliens to voluntarily leave the United States at their own expense as opposed to being subjected to removal proceedings as long as the alien leaves within 120 days, has been in the United States at least one year, has been an individual of good moral character for five years, has not committed a criminal offense invoking deportation proceedings, and has the means and intent to depart). See generally SEGHETTI ET AL., *supra* note 61, at 2–3.

75. See AFFIRMATIVE ASYLUM MANUAL, *supra* note 63, at 39 (explaining that because DED is not a statutory provision, the President can exercise his discretion to invoke it and can issue it on a country-by-country basis for serious issues in a country such as ongoing civil strife, environment disaster, or other extraordinary conditions).

76. 8 C.F.R. § 274a.1(a) (2014). The U.S. Code defines an “unauthorized alien” ineligible to work as an alien who is not a LPR or otherwise granted permission by the Attorney General, seemingly conveying broad authority on the Executive Branch to decide who should get work permission. See 8 U.S.C. § 1324a(h)(3).

statute authorizes nonstatus will rarely provide a detailed framework; DHS will fill in requirements, if at all, using regulations or more commonly with non-binding policy guidance or memoranda.

As mentioned above, individuals from DED-designated countries can obtain work permits. To do so, DED recipients have to complete an “I-765 application” containing basic biographic data, such as an individual’s address, telephone number, and time and manner of entry.<sup>77</sup> After submitting the application with a fee and photographs, DED recipients receive a notice for an appointment at an Application Support Center, where they are fingerprinted.<sup>78</sup> The work permit DED recipients receive is valid for a limited time, and if they want to continue working, they must submit renewal applications containing updated information.<sup>79</sup> Another characteristic of nonstatus, therefore, is that it offers the government a method of surveillance over the unauthorized population. One could argue that nonstatus is essentially a registration program.

Nonstatus is temporary, tenuous, and tentative. It comes at the price of registration and government surveillance. Yet, the ability to legally work, to get a driver’s license (for many types of nonstatus), to live without constant fear of deportation, and to simply have one’s presence recognized as legitimate is of enormous value to many people who would otherwise suffer a much more shadowy existence. Indeed, “coming out of the shadows” is how immigrant advocates and Dreamers often characterize obtaining nonstatus. It is a way to claim some measure of dignity in a society that stigmatizes those without status as “illegals.” In many cases, it is a brave act, too, because it sometimes involves substantial risk. Although this Article catalogues the dangers and inadequacies of nonstatus, it is important to recognize that the individuals who have it deserve the respect that they have risked so much to achieve.

Nonstatus should persuasively debunk the unenlightened notion that immigration is binary: legal immigrants and illegal immigrants. Rather, immigration law affords a continuum of rights and privileges, and where one falls on this spectrum depends on many factors other than manner of entry. The next Part will describe

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77. DEP’T OF HOMELAND SEC., I-765, APPLICATION FOR EMPLOYMENT AUTHORIZATION (Aug. 6, 2014), *available at* <http://www.uscis.gov/sites/default/files/files/form/i-765.pdf>.

78. DEP’T OF HOMELAND SEC., INSTRUCTIONS FOR I-765, APPLICATION FOR EMPLOYMENT AUTHORIZATION 9 (Aug. 6, 2014), *available at* <http://www.uscis.gov/sites/default/files/files/form/i-765instr.pdf>.

79. DACA FAQ, *supra* note 20.

those who fall in the nebulous middle of this spectrum. It will also trace the origins of modern-day nonstatus from the 1920s up to the contemporary DACA program.

## II. THE DEVELOPMENT OF NONSTATUS

Everybody's got something to hide except for me and my monkey.

-John Lennon<sup>80</sup>

In 1971, John Lennon and Yoko Ono came to the United States to fight for custody of Yoko Ono's daughter, Kyoko, by a prior marriage.<sup>81</sup> After Yoko Ono won the custody battle, her ex-husband absconded with Kyoko.<sup>82</sup> To try to find her, the couple overstayed their visas.<sup>83</sup> The Immigration and Naturalization Service (INS) wasted little time in commencing expulsion proceedings against the controversial Lennon and Ono.<sup>84</sup> Ostensibly, INS filed proceedings against Lennon because of his British cannabis conviction, although there is evidence that he was really targeted because of his political views.<sup>85</sup>

To defend themselves, Lennon and Ono hired an intrepid immigration lawyer named Leon Wildes.<sup>86</sup> Wildes pursued a sophisticated litigation strategy, including an effort to have Lennon selected for a program called "nonpriority status."<sup>87</sup> There was just one problem: there was no proof that non-priority status existed. The Operations Instruction containing information about it "was buried in the *Blue Sheets*, the INS internal regulations [that were]

80. THE BEATLES, *Everybody's Got Something to Hide Except for Me and My Monkey*, on THE BEATLES (Apple Records 1968).

81. Leon Wildes, *Not Just Any Immigration Case*, CARDOZO L. REV. ALUMNI REV. (1998), <http://www.cardozo.yu.edu/life/spring1998/john.lennon> [hereinafter Wildes, *Not Just Any Immigration Case*].

82. *Id.*

83. Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 SAN DIEGO L. REV. 42, 44 (1977) [hereinafter Wildes, *Nonpriority Program*].

84. *Id.* at 44–45.

85. See generally Wildes, *Not Just Any Immigration Case*, *supra* note 81 (indicating that Lennon was being selectively prosecuted by the Nixon Administration for political purposes on the ground that he was a "threat to the U.S. government and the reelection campaign of Richard Nixon because of [his] affiliations with members of the Radical Left").

86. *Id.* (reporting that Wildes was comfortable pursuing a political strategy to persuade the government to approve Lennon and Yoko's petitions to stay in the United States).

87. *Id.* at 53 (explaining that non-priority status was granted when there were humanitarian factors to consider after a deportation proceeding had begun).

never made available to the public.”<sup>88</sup> According to Wildes, “[t]he situation was a classic example of a secret law.”<sup>89</sup>

John Lennon spent five years fighting his deportation and eventually obtained a green card.<sup>90</sup> Along the way, Wildes filed four separate federal lawsuits, Lennon recorded three albums, and Lennon and Ono announced at a press conference that they had founded the state of “Nutopia,” “a state with no borders, no laws, no exclusionary proceedings, no deportation proceedings, and no immigration lawyers!”<sup>91</sup>

They also uncovered the existence of the non-priority program. Their Freedom of Information Act (FOIA) lawsuit confirmed that the rumored program existed and that the INS had granted non-priority status to a total of 1,843 individuals until 1974—mostly “the elderly, the young, the mentally incompetent, the infirm, and those who would be separated from their families.”<sup>92</sup> In his effort to prevent Lennon’s deportation, Wildes had uncovered a program for granting nonstatus on a case-by-case basis to individuals with no other legal defense to deportation. This program was one of many antecedents to the Obama Administration’s massive new deferred action programs. The following subparts will consider the others.

#### A. Parole

DACA has offered mass relief to hundreds of thousands of individuals, but the non-priority status program was designed to provide relief on a case-by-case basis to discrete individuals with sympathetic cases. There are, however, several older agency practices that sometimes mirror DACA and DAPA in that they have been categorically applied to large groups of individuals. One of the most flexible practices—used at times both for entire categories of persons and for individuals—is parole.

INS has used parole since at least the 1920s.<sup>93</sup> INS appears to have originally invented parole out of whole cloth, but it gained a statutory

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88. Wildes, *Nonpriority Program*, *supra* note 83, at 43.

89. *Id.*

90. Wildes, *Not Just Any Immigration Case*, *supra* note 81.

91. *Id.*

92. *See* Wildes, *Nonpriority Program*, *supra* note 83, at 53 (explaining that non-priority status was granted through a formal, internal procedure initiated by an INS District Director and conducted without input from the alien himself, although an attorney could request non-priority status on behalf of his client).

93. *See, e.g., In re R*, 3 I. & N. Dec. 45, 46 (BIA 1947) (“[T]he power to parole has been used to permit inadmissible aliens to adjust their immigration status where they

footing in 1952.<sup>94</sup> The government does not consider parole to be an immigration “status,” and parolees have few rights.<sup>95</sup> Courts have long accepted an “entry fiction” under which parolees are treated as though they have remained at the U.S. border even after they have lived in the country for years, acquired homes, and established families in the United States.<sup>96</sup>

Originally, the government used parole on a case-by-case basis to allow individuals into the United States who had either failed to meet the legal requirements for entry or who had been denied legal entry and the corresponding set of rights because of INS discretion.<sup>97</sup> However, beginning in 1956, the government began to use parole for mass admissions of refugees. That year, the government paroled in about 30,000 Hungarians fleeing the Soviet Union’s crackdown on the anti-communist revolution in Hungary.<sup>98</sup> Over the following years, the government regularly used parole to allow refugees into the United States.<sup>99</sup> One of the largest examples was during the Mariel Cuban boatlift, when the United States paroled in approximately 123,000 Cubans who had come based on President Carter’s statement that the United States would welcome them “with an open heart and open arms.”<sup>100</sup> Ultimately, most obtained green cards under the Cuban Adjustment Act, but those who were deemed ineligible for adjustment due to criminal convictions or for other

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entered without or with improper documents, to defend criminal prosecutions, to testify in criminal cases for the Government, to report for induction into the Armed Forces, to apply for registry and to apply for naturalization . . . [and] where the inadmissible alien has no right of appeal.”)

94. 5 GORDON ET AL., *supra* note 31, § 62.01[1] (citing Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(d)(5), 66 Stat. 163, 188 (1952)).

95. *Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958) (“The parole of aliens seeking admission . . . was never intended to affect an alien’s status . . .”); *In re Castellon*, 17 I. & N. Dec. 616, 620 (BIA 1981) (noting that the scope of the Board of Immigration Appeals’ review over a Cuban parolee’s case was limited because applicants for admission do not enjoy the same constitutional rights that are afforded to aliens who have entered the United States).

96. See *Kaplan v. Tod*, 267 U.S. 228, 229–31 (1925) (holding that a minor child had never entered the United States within the meaning of the law despite her nine-year stay in the custody of an immigrant aid organization and her father).

97. 5 GORDON ET AL., *supra* note 31, § 62.01 & n.3.

98. MOTOMURA, *supra* note 50, at 25.

99. 3 GORDON ET AL., *supra* note 31, § 33.03[3].

100. Mark D. Kemple, Note, *Legal Fictions Mask Human Suffering: The Detention of the Mariel Cubans Constitutional, Statutory, International Law, and Human Considerations*, 62 S. CAL. L. REV. 1733, 1735–36 (1989) (internal quotation marks omitted).

reasons were subjected to prolonged detention.<sup>101</sup> Many continue to live in the United States with parole or an even less secure form of nonstatus called supervision, which will be discussed in Part II.<sup>102</sup>

Parole has most of the attributes of nonstatus: it is a legal limbo that is officially not status at all, is entirely discretionary and comes with few rights, originally had no statutory basis, and remains legally nebulous although it now is mentioned in the INA.<sup>103</sup> For many years, INS granted parole en masse to deal with humanitarian crises abroad or to advance the United States's foreign policy interests, but in 1996, Congress amended the INA to allow parole "only on a case by case basis . . ."<sup>104</sup> As a result, the government has needed to find other ways to offer nonstatus to large groups of individuals.

*B. Voluntary Departure, Extended Voluntary Departure, and Deferred Enforced Departure*

Part I discussed deferred enforced departure, which has most recently been offered to Liberians in the United States. The first Bush Administration invented DED in the late 1980s, but for nearly thirty years the INS had been granting a similar benefit with the equally contradictory name, extended voluntary departure. The name alludes to a long-standing provision in the INA allowing immigration judges (IJs) or officers to grant "voluntary departure"<sup>105</sup> to deportable or excludable noncitizens in lieu of removal.<sup>106</sup> Although this provision seemed to contemplate short-term deportation reprieves and case-by-case adjudication, in 1960, the INS

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101. *Id.* at 1736; *see* *Clark v. Martinez*, 543 U.S. 371, 375, 377 (2005) (explaining that 8 U.S.C. § 1231(a)(6) provides that aliens who have been ordered for removal may remain in custody after the ninety-day removal period if the immigration judge found the alien inadmissible by reason of his prior criminal convictions, prior specific criminal offenses, lack of sufficient documentation, posing as a threat to national security, or if he has been determined by the Secretary of Homeland Security to be a risk to the community, unlikely to comply with the order, or a flight risk).

102. *See infra* Part II.E.

103. *See* 8 U.S.C. § 1182(d)(5)(A) (2012) (permitting the Attorney General broad discretion in granting parole on a case-by-case basis for humanitarian reasons but requiring aliens to return to custody once the purpose of parole has elapsed).

104. *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, § 602(a), 110 Stat. 3009, 3009-689 (internal quotation marks omitted).

105. 8 U.S.C. § 1229c(b)(1)(A)-(D) (setting out the legal requirements for a noncitizen to obtain voluntary departure in lieu of an order of removal at the conclusion of removal proceedings).

106. *See* 8 U.S.C. § 1252(b) (1964). In contrast to the earlier provision, the current one allows only for a maximum period of 120 days to voluntarily depart. 8 U.S.C. § 1229c(a)(2)(A) (2012).

began to use it to justify extended grants of nonstatus to all noncitizens from particular countries such as those in a state of strife, or countries that implicated United States foreign policy interests, like Cuba.<sup>107</sup> As authority for EVD, the agency pointed to the voluntary departure provision or the more general INA section giving the Attorney General discretion to enforce immigration law as she or he sees fit.<sup>108</sup>

EVD procedures were as vague as the statutory authority. Essentially, the Department of State would request that the Attorney General suspend deportation for a particular nationality.<sup>109</sup> Afterward, the INS would instruct field offices "not to enforce deportation and removal requirements for persons of a particular nationality group who arrived in the United States before a specified date."<sup>110</sup> Individuals who had "committed certain crimes" were not protected.<sup>111</sup> There was no requirement that EVD recipients register, but they were required to apply for employment authorization.<sup>112</sup>

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107. The INS granted EVD to Cubans on November 29, 1960 and terminated it on November 2, 1966 when the Cuban Adjustment Act was passed. See H.R. Rep. No. 100-627, at 6 (1988). From 1968-1977, the INS granted Czechoslovakians EVD in one-year increments. *Id.* Laotians, Vietnamese, and Cambodians received EVD for two years between 1975 and 1977, when Indochinese relief legislation providing for their adjustment of status was passed. *Id.* The INS gave EVD to Ethiopians from July 12, 1977 until August 26, 1981, and EVD is still in effect for those who arrived before July 1, 1980. *Id.* From June 8, 1978 to September 30, 1986, the INS granted Ugandan nationals EVD. *Id.* Afghans have been allowed to remain in the United States since the 1980s. *Id.* Nicaraguans were given voluntary departure for fifteen months after the fall of the Somoza government. *Id.* Polish nationals who entered the United States prior to July 22, 1984 were given EVD through December 31, 1987. *Id.*; see Lynda J. Oswald, Note, *Extended Voluntary Departure: Limiting the Attorney General's Discretion in Immigration Matters*, 85 MICH. L. REV. 152, 158-59 n.40 (1986) (providing a chart of EVD grants up to 1986).

108. See *Hotel & Rest. Emps. Union, Local 25 v. Smith*, 846 F.2d 1499, 1510 (D.C. Cir. 1988) (finding that EVD falls under the Attorney General's broad mandate in 8 U.S.C. § 1103(a) to enforce immigration laws); see also H.R. REP. NO. 100-627, at 7 (1988) (describing this "safe haven" for persons of certain nationalities experiencing unexpected crisis in their country). The Voluntary Departure provision was amended by IIRIRA to limit voluntary departure to 120 days, thereafter making that provision arguably unavailable as legal authority for EVD. See 8 U.S.C. § 1229c(a)(2)(A).

109. H.R. Rep. No. 100-627, at 7.

110. *Id.*

111. *Id.*

112. *Id.*



The Reagan Administration disfavored EVD and believed that it was unnecessary in light of the passage of the Refugee Act in 1980.<sup>113</sup> Thus, after 1980, grants of EVD became less frequent, despite the fact that violent civil wars were disrupting Central America.<sup>114</sup> Advocates and members of Congress criticized the Reagan Administration throughout the 1980s for failing to provide EVD to Salvadorans fleeing that country's brutal twelve-year civil war.<sup>115</sup>

The first Bush Administration was apparently more sympathetic to Chinese nationals after the Tiananmen Square crackdown than the Reagan Administration had been to Salvadorans.<sup>116</sup> Afterward, it granted temporary protection to Chinese students in the United States.<sup>117</sup> Perhaps because of the Administration's prior opposition to EVD, it came up with a new name, "deferral of enforced departure," for a status that in every other way resembled EVD.<sup>118</sup> DED has now mostly replaced EVD, although ICE continues to grant something it calls EVD to a small number of individuals each year.<sup>119</sup>

Not long afterward, the first Bush Administration granted a similar benefit to tens of thousands of undocumented spouses and children of formerly undocumented individuals who had been granted legalization through the Immigration Reform and Control Act (IRCA) of 1986.<sup>120</sup> The new program, known as Family Fairness, required that applicants meet certain residency and other requirements, and, in exchange, they received one year of "voluntary

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113. See Suzanne Seltzer, Note, *Temporary Protected Status: A Good Foundation for Building*, 6 GEO. IMMIGR. L.J. 773, 786 (1992) (reporting that the Reagan Administration disfavored the "blanket relief" that EVD provides because the Refugee Act of 1980 established asylum for those at risk of persecution in their country of origin).

114. *Id.*

115. Oswald, *supra* note 107, at 153 & n.8, 161-62 & n.49.

116. John D. Griffin, Comment, *The Chinese Student Protection Act and "Enhanced Consideration" for PRC Nationals: Legitimizing Foreign Policy While Averting False Positives in Asylum Law*, 66 U. COLO. L. REV. 1105, 1105-06 (1995).

117. *Id.* at 1106.

118. *More on Deferred Departure of PRC Nationals*, 66 INTERPRETER RELEASES 676 (June 26, 1989).

119. ICE granted EVD to 4,121 persons in FY 2010, 3,730 persons in FY 2011, 3,398 persons in FY 2012, 3,014 individuals in FY 2013, and 2,806 individuals in FY 2014. ICE FOIA Response, *supra* note 14.

120. See Pub. L. No. 99-603, § 312(b), 100 Stat. 3359, 3435; Memorandum from Gene McNary, Comm'r, Immigration & Naturalization Serv., to Reg'l Comm'rs 2 (Feb. 2, 1990) [hereinafter McNary Memorandum], available at <http://cdn.factcheck.org/UploadedFiles/2014/11/McNary-memo.pdf>.

departure” and a work permit.<sup>121</sup> The program replaced a more nebulous policy that had first been outlined in 1987 as a way to deal with situations in which only one member of a family had been granted legalization, raising the possibility that families could be torn apart by deportation.<sup>122</sup>

Newspapers at the time reported dramatically different accounts concerning the number of individuals who would benefit from the change.<sup>123</sup> It seems that about 50,000 individuals were probably granted voluntary departure under the program before the Family Unity program, later enacted by Congress, superseded it.<sup>124</sup>

### C. *Family Unity and Temporary Protected Status*

The Immigration Act of 1990 created two legislative forms of nonstatus to replace EVD/DVD and Family Fairness. Initially, Congress created the new “Family Unity” program to accomplish the same objective as the Family Fairness program:<sup>125</sup> to provide relief to the undocumented spouse or child of a person granted relief under IRCA. In time, INS promulgated regulations and created an

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121. See McNary Memorandum, *supra* note 120.

122. *Id.* The earlier policy only allowed automatic voluntary departure for minor children living with newly legalized parents. *Id.* Ineligible spouses of legalized individuals had to show “compelling or humanitarian factors beyond the marriage itself to warrant voluntary departure.” See *INS Reverses Family Fairness Policy*, 67 INTERPRETER RELEASES 153 (Feb. 16, 1990) (internal quotation marks omitted).

123. *Compare New Measure Opens the Door a Bit Wider to Aliens*, N.Y. TIMES, Feb. 3, 1990, at 28 (reporting that thousands of illegal aliens who were the spouses or the children of legalized aliens would be allowed to stay in the United States as a result of this policy change), with *Marvine Howe, New Policy Aids Families of Aliens*, N.Y. TIMES, Mar. 5, 1990, at B3 (stating that as many as 1.5 million illegal immigrants benefitted from the Family Fairness policy, which allows close family members of legalized immigrants to remain in the country under certain conditions).

124. Immigration Act of 1990, Pub. L. No. 101-649, § 301, 104 Stat. 4978, 5029 (codified as amended at 8 U.S.C. § 1255a (2012)) (creating the “Family Unity” program, which offers certain family members of individuals who are granted legalization work authorization and a temporary stay of deportation proceedings). According to a newspaper account published about a month before passage of the Immigration Act of 1990, “[i]n the eight months since McNary announced the family fairness program, INS received more than 250,000 inquiries about the program—but only 46,821 applications have been received nationwide.” David Hancock, *Few Immigrants Use Family Unity Program*, MIAMI HERALD, Oct. 1, 1990, at 1B.

125. Immigration Act of 1990 § 301; see 8 C.F.R. § 236.15 (1998) (stating that children of legalized aliens residing in the United States may be granted voluntary departure for two years and any alien granted benefits under the program is eligible for employment if he has applied for authorization through the I-765 form).

application form for Family Unity benefits.<sup>126</sup> While the form remains available today, it is unlikely that many individuals apply for what is now one of the more esoteric benefits in immigration law because most eligible individuals have probably already adjusted status, been deported, or have left the United States.

Subsequently, congressional disappointment with the Reagan Administration's failure to protect Salvadorans led to the creation of temporary protected status, which Congress specifically mandated be offered to Salvadorans.<sup>127</sup> After complying with the law and initially granting TPS to Salvadorans, the Bush Administration allowed TPS to lapse and instead granted them DED.<sup>128</sup>

In subsequent years, Salvadorans have commonly received TPS, as have representatives of sixteen other nationalities.<sup>129</sup> Some countries, like El Salvador and Liberia, have shifted between TPS and DED designations. TPS is similar to the EVD and DED programs after which it was modeled, but is a bit more formal. First, there is a specific standard for TPS set out in the statute. DHS may designate the nationals of any foreign state as temporarily protected if it finds that the foreign state is experiencing civil strife, environmental disaster, or other extraordinary conditions and that requiring individuals to return to that foreign state would pose a serious threat to their safety.<sup>130</sup> After designation, there is a formal application process for TPS—another distinction between TPS and EVD/DED.<sup>131</sup>

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126. 8 C.F.R. § 236.15. See generally U.S. DEP'T OF HOMELAND SEC., I-817 APPLICATION FOR FAMILY UNITY BENEFITS (June 26, 2013), <http://www.uscis.gov/sites/default/files/files/form/i-817.pdf> (constituting the application form, which seeks information about an applicant's family member(s)).

127. Immigration Act of 1990 §§ 302(b)-303.

128. SEGHETTI ET AL., *supra* note 61, at 4.

129. Salvadorans received TPS on and off throughout the provision's history, including from 1990-1992, in 1998, in 2000, and from 2001-2015. *Id.* at 3-4, 7; see *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/temporary-protected-status#Countries> (last updated Jan. 7, 2015). USCIS also currently grants TPS to Haitians, Hondurans, Nicaraguans, Somalians, Sudanese, South Sudanese, Syrians, and Liberians, Guineans, and Sierra Leoneans since 2011, 1999, 2001, 2012, 2013, 2014, 2015, and 2014, respectively. *Id.* Past countries include "Kuwait from March 1991 to March 1992; Rwanda from June 1995 to December 1997; Lebanon from March 1991 to March 1993; the Kosovo Province of Serbia from June 1998 to December 2000; Bosnia-Herzegovina from August 1992 to February 2001; Angola from March 29, 2000, to March 29, 2003; and Burundi from November 4, 1997, to May 2, 2009." SEGHETTI ET AL., *supra* note 61, at 3.

130. 8 U.S.C. § 1254a(b)(1)(A)-(C) (2012).

131. U.S. CITIZENSHIP & IMMIGR. SERVS., FORM I-821, APPLICATION FOR TEMPORARY PROTECTED STATUS (Feb. 2014), available at <http://www.uscis.gov/i-821>.

Applicants must meet various requirements, including that they timely register for TPS and that they have continuously resided in the United States since the designation date for their country.<sup>132</sup> Unlike DED and EVD, there are explicit and well-defined bars to TPS for individuals with particular types of convictions or other problematic immigration issues.<sup>133</sup>

Like EVD, DED, and other forms of nonstatus, TPS is temporary and tenuous since the protection periods range from six to eighteen months, and DHS can decide afterward not to renew it.<sup>134</sup> Moreover, the TPS statute does not create any pathway to LPR status or citizenship.<sup>135</sup> In fact, DHS has always taken the position that TPS does not constitute an “admission” for immigration purposes, meaning that TPS holders cannot easily adjust status even if they acquire some other route for doing so, such as by marrying an LPR or U.S. citizen.<sup>136</sup>

TPS meets most of the characteristics for nonstatus, although it is a close call. It is ostensibly temporary, but many Salvadorans now have held TPS for thirteen years. It is tenuous and easy for the government to revoke or substitute for a less secure nonstatus, like DED. TPS holders have few rights besides the right to work. However, unlike other forms of nonstatus, TPS’s contours are quite well described in a statute.

TPS is one of the more populous categories of nonstatus. In 2015, the Congressional Research Service identified a total of 320,300 TPS grants to nationals of El Salvador, Haiti, Honduras, Nicaragua, Somalia, Southern Sudan, and Sudan.<sup>137</sup> Since then, Syria, Liberia, Guinea, and Sierra Leone have been designated for TPS, allowing thousands more to receive the benefit.

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132. 8 U.S.C. § 1254a(c)(1)(A)(i)–(iv).

133. *Id.* § 1254a(c)(2)(B)(ii).

134. *Id.* § 1254a(b)(3)(B)–(C).

135. *Id.* § 1254a(f)(1).

136. *See Serrano v. U.S. Att’y Gen.*, 655 F.3d 1260, 1266 (11th Cir. 2011) (per curiam) (deferring to DHS’s position that TPS is not an “admission”). The U.S. Court of Appeals for the Sixth Circuit recently rejected DHS’s position, so some TPS holders now have a pathway to a more secure status. *Flores v. U.S. Citizenship & Immigration Servs.*, 718 F.3d 548, 554 (6th Cir. 2013) (noting that the plain language of 8 U.S.C. § 1182, which lists classes of aliens ineligible for visas or admissions, makes no mention of TPS beneficiaries being categorically barred from visa or admission entry and that Congress intended TPS beneficiaries to be part of a protected class due to extraordinary circumstances).

137. SEGHETTI ET AL., *supra* note 61, at 3. The most populous group was the Salvadorans, with 204,000 TPS grants. *Id.*

*D. Withholding and Deferral of Removal*

In 1980, Congress passed the Refugee Act, which created a process for noncitizens who fear persecution based on certain protected grounds to seek refuge in the United States.<sup>138</sup> The new asylum provisions in the INA set out a comprehensive legal standard and process for asylum, involving administrative interviews, immigration court hearings, and judicial review.<sup>139</sup> Asylum is full status, allowing for LPR status after a year and offering a long-term pathway to citizenship.<sup>140</sup> With passage of the Refugee Act, the United States could be said to be in substantial compliance with the international Refugee Convention and Protocol, to which the United States acceded in 1967.<sup>141</sup>

During the twenty-nine years between the United States's accession to the Refugee Protocol and the passage of the Refugee Act, its compliance with the Protocol was more ad hoc. As discussed above, the United States admitted many refugees through parole and EVD. The INA also contained a provision that tracked one of the central principles of the Refugee Convention—*non-refoulement*—which prohibits a signatory from returning a refugee to a country “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>142</sup> Since 1951, the INA contained a similar such provision called “Withholding of Deportation.”<sup>143</sup>

In sharp contrast to the asylum provision, the withholding statute provides little guidance on the legal standard or process for granting relief, or what benefits come with it.<sup>144</sup> Yet over the past decades, the

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138. United States Refugee Act of 1980, Pub. L. No 96-212, § 201, 94 Stat. 102, 102.

139. 8 U.S.C. § 1158(a)(3), -(d)(5)(A)(1).

140. *Id.* § 1159(b) (allowing for the adjustment of status of refugees and asylees present in the United States for a year).

141. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267–68.

142. Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.N.T.S. 137, 176.

143. 8 U.S.C. § 1253(h) (1952) (current version at 8 U.S.C. § 1231(b)(3)(A) (2012)). The provision is now entitled “Restriction on Removal” and is known colloquially as “withholding of removal.” 8 U.S.C. § 1231(b)(3)(A) (2012).

144. The original provision read as follows: “The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.” 8 U.S.C. § 1253(h) (1952). It now reads: “[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that

INS and the courts have filled in the gaps with a fairly comprehensive framework of regulations and case law.<sup>145</sup> Although the law for withholding may have started out vague, it is now relatively clear, meaning that it fails at least one of the criteria for nonstatus.

However, it mostly meets the other characteristics: it is temporary and tentative. Originally, the provision authorized the Attorney General to grant withholding in her or his discretion, “for such period of time as he [the Attorney General] deems necessary.” Now the provision is phrased in mandatory terms and requires a grant if the noncitizen can prove to an IJ that she meets the legal standard. However, DHS can reopen proceedings to try to terminate withholding of removal anytime conditions in the noncitizen’s country have improved or if new information shows that the noncitizen does not meet the eligibility requirements for withholding.<sup>146</sup>

Withholding of removal under the INA is also tentative because it comes without many rights. Like other forms of nonstatus, withholding grantees can work, but they cannot travel, seek LPR status or citizenship, petition for family members to obtain immigration status, or apply for most public benefits.<sup>147</sup> Thus, withholding of removal under the INA is like nonstatus, although it fails to satisfy one part of the definition in that the method for obtaining it is clear.

In addition to withholding of removal under the INA, there is another benefit under U.S. law that is similar to asylum but comes without the status and rights that accompany asylum. In 1984, the United Nations adopted the Convention Against Torture (CAT), and CAT entered into force in the United States in 1994.<sup>148</sup> Among other things, CAT prohibits signatories from sending individuals to countries where they are likely to be tortured.<sup>149</sup>

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country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1231(b)(3) (2012).

145. See 3 GORDON ET AL., *supra* note 31, § 34.03[2] (explaining the development of procedures for adjudicating withholding of removal cases).

146. 8 C.F.R. § 1208.24(f) (2014).

147. DAVID A. MARTIN ET AL., *FORCED MIGRATION: LAW AND POLICY* 92 (2d ed. 2007).

148. United Nations Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 113 [hereinafter *Convention Against Torture*]; see *In re H-M-V-*, 22 I. & N. Dec. 256, 257 (BIA 1998) (dismissing a defendant’s motion for appeal after he was found to be deportable for committing a felony because the Board rejected the argument that his deportation violated Article 3 of the CAT, which prohibits the return of an individual to a country when there are substantial grounds to believe he would be subject to torture).

149. *Convention Against Torture*, *supra* note 148, at 114.

In 1998, Congress incorporated CAT into U.S. law through the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA).<sup>150</sup> FARRA required the Department of Justice (DOJ) to promulgate regulations that, to the maximum extent possible, exclude from protection those noncitizens who are ineligible for withholding of removal under the INA because they are security risks, are subject to the persecutor bar, or have been convicted of particularly serious crimes.<sup>151</sup> DOJ promulgated regulations in 1999.<sup>152</sup> Its way of complying with Congress's exclusionary mandate was to set up a process by which an individual can be granted either CAT "withholding of removal" or CAT "deferral of removal."<sup>153</sup>

Under the regulations, individuals are excluded from CAT withholding of removal for essentially the same reasons that they are from excluded from withholding of removal under the INA.<sup>154</sup> In contrast, CAT deferral of removal is available to everyone, regardless of whether an applicant would be inadmissible for past criminal or terrorist activity.<sup>155</sup> However, life is not easy for a CAT deferral of removal grantee. DHS has historically taken the position that such individuals can be held in detention indefinitely while it pursues efforts to deport them to another country or while it seeks "diplomatic assurances" from the individual's country of origin that it will not torture the person.<sup>156</sup> As a matter of constitutional due process, the government must eventually release CAT grantees if there is no reasonably foreseeable possibility of deportation, but most CAT deferral of removal grantees sit in detention for at least three to six months before they are released.<sup>157</sup> When ICE does not release a person within that time frame, his or her only remedy is to file a

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150. Pub. L. No. 105-277, § 2242(b), 112 Stat. 2681-761, 2681-822 (codified as amended at 8 U.S.C. § 1231 (2012)).

151. *Id.* § 2242(c).

152. Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8678 (Feb. 19, 1999) (codified at 8 C.F.R. pts. 3, 103, 208, 235, 238, 240, 241, 253, 507).

153. 8 C.F.R. § 208.16 (2014) (explaining CAT withholding of removal); *id.* § 208.17 (explaining CAT deferral of removal).

154. *Id.* § 208.16(d)(2).

155. *Id.* § 208.17(a).

156. See *Hussain v. Mukasey*, 510 F.3d 739, 741–42 (7th Cir. 2007) (noting that the U.S. government could utilize diplomatic channels to purportedly confirm that a Pakistani national who met the INA's extremely broad terrorism provision would not be tortured if he were deported to Pakistan).

157. *Id.* at 742; 8 C.F.R. § 241.4(b)(4)(C)(1) (providing for custody reviews after the conclusion of a 90-day removal period and again within three months thereafter).

complex and time-consuming habeas petition—a project for which most detainees lack the resources.<sup>158</sup>

Like withholding of removal under the INA, CAT deferral and withholding meet some of the characteristics of nonstatus. Although FARRA provides a statutory basis for CAT, the framework for CAT adjudication is set out in the regulations. Those regulations offer a fairly robust framework for IJs to assess CAT claims.<sup>159</sup> However, there is no question that CAT is tentative and ostensibly temporary. In fact, DHS is more aggressive about enforcing the supposedly temporary quality of CAT than it is for INA withholding. Specifically, DHS is more likely to hold CAT grantees in detention for longer periods while it tries to find other places to send individuals with CAT or while it pursues efforts to obtain diplomatic assurances from the individual's country of origin that it will not in fact torture the CAT grantee. DHS stubbornly goes through the motions of searching for an alternative country of removal in almost every CAT case. Such individuals are typically released under an ICE "order of supervision," an overlapping form of nonstatus that will be addressed in the next subpart.

There are thousands of individuals living in the United States today with the nonstatus of withholding or deferral of removal. From 2000 to 2014, DOJ and DHS granted CAT deferral of removal to approximately 1,736 individuals and CAT withholding to approximately 6,305 individuals.<sup>160</sup> Statistics for INA withholding for 2000–2001 are missing or unreliable, but over the twelve-year period from 2002–2014, DOJ granted INA withholding of removal to approximately 22,929 individuals.<sup>161</sup>

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158. *E.g.*, *Reid v. Donelan*, 991 F. Supp. 2d 275, 281 (D. Mass. 2014).

159. *See* 8 C.F.R. §§ 208.16-18.

160. These numbers were compiled by adding yearly statistics from the U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, STATISTICAL YEAR BOOK for the years 2002–2014. *Statistical Yearbooks*, U.S. DEP'T JUST., <http://www.justice.gov/eoir/statspub/syb2000main.htm> (last updated Mar. 2015).

161. *See id.* EOIR often reports several years' worth of withholding statistics in the same table, and it often appears to revise prior years' statistics in subsequent yearbooks. Therefore, statistics were taken from the most recent yearbook that stated data for that year. 2002 data came from the 2006 yearbook. 2003 data came from the 2007 yearbook. 2004 data came from the 2008 yearbook. Years 2005–2009 were all supplied by the 2009 Yearbook. 2010–2014 data was taken from the 2014 Yearbook. Data for 2000 was not reported in any yearbook. Data for 2001, reported in the 2005 yearbook, was disregarded as unreliable because the 2056 reported grants seemed unusually high, and the statistics reported for subsequent years in that yearbook were radically higher than the numbers reported in following years' yearbooks for those years.



*Table 1: Grants of Withholding, CAT Withholding, and CAT Deferral for the Years 2002–2014*

<i>Year</i>	<i>Withholding</i>	<i>CAT Withholding</i>	<i>CAT Deferral</i>
2000		316	213
2001		443	101
2002	902	483	75
2003	1357	427	63
2004	1764	430	105
2005	2106	388	70
2006	2569	405	173
2007	2550	449	92
2008	2019	378	123
2009	1959	394	110
2010	1496	395	94
2011	1673	493	136
2012	1553	514	129
2013	1518	375	131
2014	1463	415	121
TOTAL	22,929	6305	1736

#### *E. ICE Supervision and Stays of Removal*

ICE has ninety days to remove a person with a removal order,<sup>162</sup> and if it fails to do so within this time frame it is supposed to undertake a “post-order custody review” to decide whether removal in the near future is likely or if the person should continue to be detained as a security risk.<sup>163</sup> Many individuals end up being released at this stage with an ICE “order of supervision.”<sup>164</sup> A person with an order of supervision must periodically report to ICE, has no pathway to LPR status or citizenship, and cannot travel but might be allowed to work.<sup>165</sup>

ICE also gives orders of supervision to deportable individuals it apprehends who are subject to a variety of forms of summary

162. 8 U.S.C. § 1231(a)(1) (2012).

163. 8 C.F.R. § 241.4(h).

164. Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 45 (2010); Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 129 n.108 (2012).

165. See 8 C.F.R. § 274a.12(c)(18) (providing that employment authorization is awarded at the discretion of the district director); U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FORM I-220B, ORDER OF SUPERVISION (2012) [hereinafter ICE, FORM I-220B] (on file with author) (restricting travel and requiring regular reporting to the ICE office).

removal, including persons subject to expedited removal or reinstatement of prior removal orders.<sup>166</sup> Sometimes ICE will also decide to “stay the removal” of a person with a removal order in response to either a formal request for a stay filed by an attorney<sup>167</sup> or as an exercise of its own discretion. In fiscal year 2013, it granted stays of removal to 10,584 individuals; in 2014 it granted stays of removal to 13,611 individuals.<sup>168</sup> ICE typically gives these individuals orders of supervision too, sometimes in conjunction with a decision to stay the removal for a particular period of time or indefinitely.<sup>169</sup>

An order of supervision is a multiple page document that spells out certain conditions of release and restrictions on the liberty of the supervisee. These conditions include prohibiting travel outside the jurisdiction of the local ICE office without permission, requiring that the individual appear for medical or psychiatric examinations at the request of ICE, and testifying under oath concerning any subject ICE wishes.<sup>170</sup> The document typically also contains a schedule for check-ins with the local ICE office.<sup>171</sup> Initially, the check-ins might be every few months, but over time ICE might revise the check-in schedule so that the individual needs to report in only once or twice a year.<sup>172</sup> Check-ins are sometimes pro forma, but there is always the possibility that a person will be re-detained by ICE at the check-in.<sup>173</sup> Some

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166. See Memorandum from Victor X. Cerda, Acting Dir., U.S. Immigration & Customs Enforcement, to Field Office Dirs. 1–2 (Nov. 12, 2004) [hereinafter Cerda Memorandum] (reiterating that field offices should continue to release individuals who qualify for orders of supervision and comply with the policy guidelines outlined in the memorandum); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 6–9, 24 (2014) (describing various procedural mechanisms for “speed deportation” and noting that ICE has prosecutorial discretion to issue supervision orders in lieu of enforcing an order of removal).

167. U.S. CUSTOMS & IMMIGR. ENFORCEMENT, APPLICATION FOR A STAY OF DEPORTATION OR REMOVAL (Dec. 2010), available at [http://www.ice.gov/sites/default/files/documents/Document/2014/ice\\_form\\_i\\_246.pdf](http://www.ice.gov/sites/default/files/documents/Document/2014/ice_form_i_246.pdf).

168. ICE FOIA Response, *supra* note 14.

169. See 8 U.S.C. 1231(a)(3) (2012) (noting that supervision regulations are prescribed by the Attorney General).

170. ICE, FORM I-220B, *supra* note 165.

171. *Id.*

172. See Cerda Memorandum, *supra* note 166, at 1–2 (providing supervision reporting guidelines but acknowledging that alternative requirements may be established based upon the needs of specific circumstances).

173. See *Nguyen v. B.I. Inc.*, 435 F. Supp. 2d 1109, 1114 (D. Or. 2006) (“ICE . . . can return aliens to detention or seek criminal penalties against aliens who violate their orders of supervision.”); 8 C.F.R. § 241.4(b)(4) (2014) (providing authority for

individuals released on an order of supervision are also required to wear an electronic bracelet that allows ICE to constantly monitor the person's whereabouts.<sup>174</sup> The devices cannot be removed, which makes simple things like getting dressed and showering difficult.

Supervision is essentially a kind of indefinite immigration probation involving surveillance, paternalistic hectoring, and the constant threat of deportation. There is a statutory basis for supervision, but it is awarded at the sole discretion of ICE officers, and supervision determinations are not appealable.<sup>175</sup> It is officially temporary but can last indefinitely. Individuals with supervision can seek work permission if they can prove that they need it, but their travel even inside the United States is restricted, and if they leave the country, they will probably never be able to come back.<sup>176</sup>

As reflected in the graph below, every year, ICE appears to grant supervision to more and more individuals. In fiscal year 2010, ICE granted supervision orders to 47,078 individuals; in 2014 it granted supervision to 81,085 individuals.<sup>177</sup> The growth of ICE supervision is consistent with the growth of other types of nonstatus throughout this same time period. At present, ICE reports that there are 613,578 individuals with ICE orders of supervision, making supervision one of the largest and fastest growing forms of nonstatus.<sup>178</sup>

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DHS to re-detain a person if it determines that changed conditions have created a reasonably foreseeable possibility of deportation).

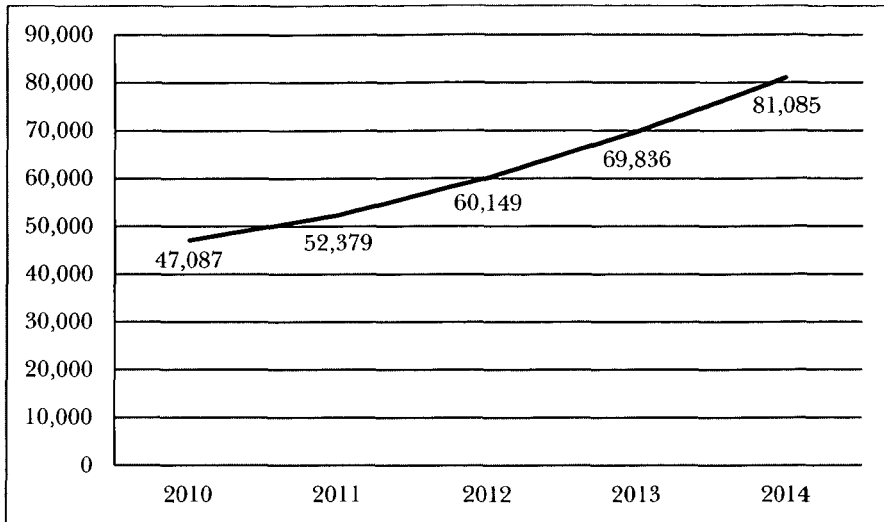
174. ICE, FORM I-220B, *supra* note 165.

175. The statutory basis for supervision is section 241 of the Immigration and Nationality Act, which requires DHS to promulgate regulations for the supervision of noncitizens ordered removed whom DHS has been unable to remove within a ninety-day removal period. *See* 8 U.S.C. § 1231(a)(3) (2012).

176. DHS's regulations allow for a work permit to be granted to a person on supervision. *See* 8 C.F.R. § 274a(12)(c)(18). Travel under an order of supervision is typically explicitly restricted by the terms of the order. ICE, FORM I-220B, *supra* note 165.

177. ICE FOIA Response, *supra* note 14.

178. *Id.*

*Figure 1: ICE Supervision Grants 2010–2014**F. Deferred Action, Part I*

In 2014, deferred action has gone from an obscure nonstatus to the center of the national debate as a result of President Obama's controversial immigration executive actions that expanded access to DACA and created DAPA. Some scholars have contended that President Obama's creation of a categorical process for conferring deferred action on thousands of persons has no precedent.<sup>179</sup> In fact, deferred action has been offered on *both* a case-by-case and categorical basis over the past few decades. This subpart describes the many types of deferred action and the gradual evolution of this form of nonstatus from an esoteric benefit offered on a case-by-case basis to a categorical one offered on a large scale to thousands of

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179. See Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105, 119 (2014); see also Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law* 18, 26 (Roger Williams Univ. Sch. of Law, Paper No. 156, 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2559836&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2559836&download=yes) (indicating that "Congress has never authorized or acquiesced in a blanket award of benefits to foreign nationals with no prospect for obtaining legal status in a reasonable time," contending that deferred action has until now been limited to the Family Fairness program, which was ancillary to a statutory benefit, and to "a relatively small number of hardship cases"). This section of the Article disputes this contention by documenting the increase in categorical grants of deferred action beginning in the late 1990s.

eligible individuals. Viewed in this context, DACA and DAPA are not radical departures but, rather, the culmination of a growing trend.

1. *Deferred action in the wake of the non-priority program*

As a result of John Lennon's FOIA battle, the INS released its previously secret Operating Instructions concerning non-priority status, which it retitled "deferred action."<sup>180</sup> The Operating Instructions reveals non-priority status and deferred action to have been an early example of nonstatus. First, deferred action was a temporary deferral of deportation, subject to periodic internal review.<sup>181</sup> Second, it came without a clear package of rights; the only evidence of the status was a notification from INS to the beneficiary "that no action will be taken by the [agency] to disturb his immigration status, or that his departure from the United States has been deferred indefinitely, whichever is appropriate."<sup>182</sup> Third, there was no statutory authority for deferred action other than the absence of anything in the INA prohibiting it.<sup>183</sup>

The INS then and DHS now have considered deferred action to be an unreviewable exercise of its prosecutorial discretion.<sup>184</sup> However, the immigration agency's discretion was not unfettered: the Operating Instructions set out a list of factors that the agency was required to consider in deciding whether or not to grant deferred action, and there were multiple levels of internal review.<sup>185</sup> Initially, the U.S. courts of appeals split on whether federal courts could review deferred action decisions.<sup>186</sup> In response to the circuit split,

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180. See Wildes, *Nonpriority Program*, *supra* note 83, at 43–46 (detailing John Lennon's Freedom of Information Act battle); see also Leon Wildes, *The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?*, 17 SAN DIEGO L. REV. 99, 102–06 (1979) [hereinafter Wildes, *Operations Instructions*] (discussing federal courts of appeals' use of the non-priority Operations Instruction during the 1970s).

181. Wildes, *Nonpriority Program*, *supra* note 83, at 50 n.32.

182. *Id.*

183. *Id.* at 49.

184. See 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 & Immigration Servs., John Morton, Dir., U.S. Immigration & Customs Enforcement 1, 3 (June 15, 2012) [hereinafter Napolitano Memorandum], available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> (stating the deferred action policy is an exercise of prosecutorial discretion and, therefore, unreviewable).

185. Wildes, *Nonpriority Program*, *supra* note 83, at 50 n.32.

186. Compare *Nichols v. INS*, 590 F.2d 802, 808 (9th Cir. 1979) (holding "that the decision of an INS District Director upon an application for non-priority status will stand unless it so departs from an established pattern of treatment of others similarly

the INS amended its Operating Instructions to clarify that deferred action was “in no way an entitlement.”<sup>187</sup>

In 1996, Congress undertook a major reform of the immigration laws, two principal aspects of which were to restrict the ability of IJs to grant discretionary relief from removal and the ability of federal courts to review agency decisions.<sup>188</sup> Not long afterward, the INS rescinded the Operating Instructions for deferred action as part of a “housekeeping” effort.<sup>189</sup> However, around the same time, INS Commissioner Doris Meissner issued a memo on prosecutorial discretion that reaffirmed the existence of deferred action as well as the INS’s general authority to prioritize deporting some noncitizens over others.<sup>190</sup>

Thus, advocates continued to seek deferred action for their clients.<sup>191</sup> Given Congress’s elimination of most judicial relief from removal in 1996,<sup>192</sup> prosecutorial discretion would seem to have become an even more important advocacy tool and perhaps also a safety valve for an agency overburdened by its enforcement obligations. Professors Adam Cox and Christina Rodríguez have

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situated without reason, as to be arbitrary and capricious, and an abuse of discretion”), *with* *Soon Bok Yoon v. INS*, 538 F.2d 1211, 1213 (5th Cir. 1976) (per curiam) (finding that deferred action decisions are within the sole discretion of the INS).

187. Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 SAN DIEGO L. REV. 819, 822 (2004) [hereinafter Wildes, *Deferred Action Program*].

188. See Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1624 (2000) (explaining that the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, eliminated jurisdiction to review removal orders “predicated on criminal convictions,” “discretionary remedies in compassionate circumstances,” and removal orders entered pursuant to an “expedited removal process” (internal quotation marks omitted)); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1952 (2000) (describing how the 1996 statute prohibited IJs from taking family integrity into consideration when a child adopted from Thailand was deported after turning eighteen because the family had not filed the proper paperwork).

189. Wadhia, *supra* note 10, at 251 (internal quotation marks omitted).

190. See Memorandum from Doris Meissner, Comm’r, Immigration & Naturalization Serv., to Reg’l Dirs., Dist. Dirs., Chief Patrol Agents, Reg’l & Dist. Counsel 2–6, 12 (Nov. 17, 2000) [hereinafter Meissner Memorandum] (explaining that investigations focused on identifying high priority aliens are preferable to investigations that identify a broader variety of removable aliens).

191. *Id.* at 12.

192. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

argued that the 1996 immigration reforms acted to increase the government's discretion over removal by shifting discretion from judges to ICE officers whose charging decisions were unreviewable.<sup>193</sup> To date, however, commentators have assumed that this authority was exercised during the period after the 1996 reforms on a case-by-case basis.<sup>194</sup> A closer look reveals that in the years following the 1996 reforms, the INS began to expand its use of deferred action to offer it to entire categories of individuals. Like the other types of nonstatus discussed above, deferred action became a vehicle for massive grants of relief to entire categories of unauthorized immigrants.<sup>195</sup>

## 2. VAWA *deferred action*

The first categorical application of deferred action was for certain abused spouses and children of LPRs and U.S. citizens. In 1994, Congress passed the Violence Against Women Act (VAWA), which included a new immigration benefit.<sup>196</sup> As described in Part I, a petition filed by a U.S.-citizen family member, such as a spouse, provides one means to obtain LPR status in the United States. Congress found that many abusive spouses were using this power to control their unauthorized partner.<sup>197</sup> Thus, VAWA created a process for abused spouses and children to file "self petitions."<sup>198</sup> If the petition met certain requirements, including a showing that the

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193. See Cox & Rodríguez, *supra* note 16, at 517–19 (arguing that the Executive Branch's authority has increased because discretionary relief is no longer guided by the INA's statutory framework and instead is consolidated in the hands of agency officials responsible for charging decisions).

194. See *id.* at 517 ("[T]he Executive still has de facto delegated authority to grant relief from removal on a case-by-case basis [using prosecutorial discretion]."); see also Margulies, *supra* note 179, at 119 ("Immigration authorities have historically decided on deferred action 'on a case-by-case basis.'" (quoting *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 n.8 (1999))).

195. In addition to the growth of categorical deferred action described in this subpart, ICE continues to also grant deferred action on a case-by-case basis to many individuals each year. In FY 2013, ICE granted deferred action to 6,392 individuals; in FY 2014, it granted deferred action to 9,705 individuals. ICE FOIA Response, *supra* note 14.

196. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

197. See H.R. REP. NO. 103-395, at 26 (1993) (suggesting that battered spouses are unlikely to report to authorities that they have been abused because they fear being deported).

198. 8 U.S.C. § 1154(a)(1)(A)(iii)–(v) (2012).

petitioner had suffered "battery or extreme cruelty," it would be approved, thus allowing the petitioner to then seek LPR status.<sup>199</sup>

After passage of VAWA, the INS had to work through a number of implementation issues. One important issue was what to do with VAWA self-petitioners during the interim period between approval of their petitions and when they adjusted status to obtain green cards. The abused spouses and children of U.S. citizens could adjust status immediately after the approval of their self-petitions because they were classified as "immediate relatives," a category that is not subject to annual caps on the number of visas.<sup>200</sup> However, those individuals filing petitions based on their relationship to an LPR were subject to the annual caps.<sup>201</sup> As discussed in Part I, there are lengthy wait times for most immigration categories depending on the nature of the relationship and the applicant's country of origin. This means that many VAWA petitioners would have to wait years before they could adjust status. The INS had to decide what to do with all these individuals with approved petitions. What was their status? Could they work?

Initially, the INS suggested that VAWA self-petitioners seek either voluntary departure or deferred action on a case-by-case basis and then seek work permission based on their receipt of those benefits.<sup>202</sup> However, by the end of 1999, the INS began to grant deferred action routinely to all VAWA self-petitioners residing in the United States with approved petitions who had not yet adjusted status and who were not in removal proceedings.<sup>203</sup> The INS acknowledged in its memorandum setting out this procedure that many VAWA self-petitioners were likely to remain in deferred action for ten years or longer while they waited for a visa to become available.<sup>204</sup>

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199. To be approved, a VAWA petition must document the existence of a relationship to a U.S. citizen or LPR, that the petitioner has resided in the United States with her spouse or parent, that she has suffered "battery or extreme cruelty" by her spouse or parent, and that she has good moral character. *Id.* §§ 1154(a)(1)(A)(iii)-(vi), -(B)(ii)-(iii). For petitioners seeking classification based on marriage, the petition must also establish that the marriage was entered into in good faith. *See id.*

200. *Id.* § 1151(b)(2)(A)(i).

201. *Id.* § 1151(c).

202. Petition to Classify Alien as Immediate Relative of a United States Citizen or as a Preference Immigrant; Self-Petitioning for Certain Battered or Abused Spouses and Children, 61 Fed. Reg. 13,061, 13,071-02 (Mar. 26, 1996) (codified at 8 C.F.R. pts. 103, 204-205, 216).

203. Memorandum from Michael D. Cronin, Acting Assoc. Comm'r, Office of Programs, U.S. Dep't of Justice, to All Reg'l Dirs. 2 (Dec. 22, 1998).

204. *Id.* at 4.



At first, the INS would not extend deferred action for more than twenty-seven months beyond the date in which a visa became available.<sup>205</sup> However, the INS soon realized that many VAWA self-petitioners were ineligible to adjust status because of past immigration infractions or other issues.<sup>206</sup> As a result, the INS eliminated the cap, allowing VAWA self-petitioners to remain in deferred action indefinitely.<sup>207</sup>

From 2000 to 2011, the INS and its successor, USCIS, approved over 67,000 VAWA self-petitions, likely granting deferred action to most of them.<sup>208</sup> It is difficult to say exactly how many of these self-petitioners have remained in deferred action instead of adjusting status, but it is likely that a relatively substantial number of them remained in deferred action given the strictness of certain provisions enacted as part of the 1996 immigration reforms. For example, one provision permanently bars individuals from being admitted to the United States as LPRs if they accrued one year or more of unlawful presence in the United States, left the United States, and later reentered the country.<sup>209</sup> As a result of this and other restrictions, many VAWA self-petitioners will remain indefinitely in the nonstatus of deferred action.

### 3. *Deferred action and U Visas*

During the same period, USCIS also granted deferred action to thousands of immigrants who are victims of crimes. In 2000, Congress created the U visa, a visa for immigrant victims of certain

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205. See Memorandum from Michael D. Cronin, Acting Exec. Assoc. Comm'r, Office of Programs, U.S. Dep't of Justice, to Vt. Serv. Ctr. 1 (Sep. 8, 2000). The twenty-seven month cap was for self-petitioners "for whom a visa number was immediately available." *Id.* There was a cap of twenty-four months after the date on which a visa became available for all other self-petitioners. *Id.*

206. *Id.*

207. *Id.*

208. WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42477, IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT (VAWA) 4–5 tbl.1 (2012), available at <http://fas.org/sgp/crs/misc/R42477.pdf>.

209. 8 U.S.C. § 1182(a)(9)(C) (2012). There are many other strict grounds of inadmissibility that prevent VAWA self-petitioners and others from adjusting status. One provision, 8 U.S.C. § 1182(a)(6)(C)(ii), makes persons inadmissible who have made false claims to citizenship, which is common for those who have provided false documentation in order to work. *Id.* §1182(a)(6)(C)(ii). Another common provision makes any person inadmissible "who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States . . ." *Id.* § 1182(a)(6)(E). This applies on its face to persons who have helped family members to illegally enter the United States.

crimes who are assisting or who have assisted law enforcement investigations.<sup>210</sup> For some reason, it took the INS and DHS an unusually long time—seven years—to promulgate regulations to implement the new U visa provision.<sup>211</sup> During the interim, the immigration agency granted deferred action to 7,500 U visa applicants.<sup>212</sup> Although most of the applicants were likely ultimately granted U visas, the interim grants are another example of the growth of categorical deferred action.<sup>213</sup>

Recently, USCIS has again begun granting deferred action to large numbers of U visa applicants. The number of annual U visa applicants now vastly exceeds the 10,000 U visas allotted by statute for each year.<sup>214</sup> After reaching the annual cap, USCIS now conditionally grants a U visa to eligible applicants and grants them deferred action in the interim, later substituting a U visa for the deferred action once more visas become available.<sup>215</sup>

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210. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513, 114 Stat. 1464, 1533–34 (codified as amended at 8 U.S.C. § 1101(a)) (creating a new nonimmigrant visa classification to encourage law enforcement “to better serve immigrant crime victims and to prosecute crimes committed against aliens”).

211. See generally Jessica Farb, *The U Visa Unveiled: Immigrant Crime Victims Freed from Limbo*, 15 HUM. RTS. BRIEF 26, 26–27 (2007) (examining how the seven-year delay and failure to promulgate proper regulations forced immigrant advocates to turn to litigation to expose problems and create pressure for a solution).

212. See Memorandum from William R. Yates, Assoc. Dir. of Operations, U.S. Citizenship & Immigrations Servs., to Dir., Vt. Serv. Ctr. 1–2 (Oct. 8, 2003) (outlining interim relief for U nonimmigrant status by centralizing the process at the Vermont Service Center where requests receive case-by-case scrutiny to determine if deferred action is appropriate); Farb, *supra* note 211, at 27 (providing an overview of the confusion to families, advocates, and law enforcement resulting from the deferred applications).

213. In 2008, Congress amended the deportation grounds of the INA to state that U visa applicants with a final removal order can seek a stay of removal. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 204, 122 Stat. 5044. It also clarified that “[t]he denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for a stay of removal, deferred action, or a continuance or abeyance of removal proceedings under any other provision of the immigration laws of the United States.” *Id.* This reference to “deferred action” could signal congressional acquiescence to the Executive Branch’s practice of granting the benefit.

214. ASISTA, U CAP UPDATE FROM USCIS & ADDITIONAL UPDATES FROM VSC STAKEHOLDER TELECONFERENCE 1 (Dec. 11, 2013) (on file with author).

215. *Id.*

#### 4. *Deferred action after Hurricane Katrina*

In 2005, Hurricane Katrina caused many academic institutions to shut down, making it impossible for foreign students to meet a primary condition of their visas—namely, that they be actively engaged in study. As a result, USCIS granted deferred action to about 5,500 foreign students.<sup>216</sup>

#### 5. *Deferred action for widows and widowers*

The next group to receive deferred action was spouses of deceased U.S. citizens who had been married for less than two years before the death of their spouses. USCIS had interpreted the INA to require it to deny spousal visa petitions filed by U.S. citizens who had been married for less than two years and who died before USCIS could adjudicate their petitions.<sup>217</sup> Several U.S. courts of appeals split over whether USCIS's interpretation was correct, meaning that surviving spouses were treated differently in different parts of the country.<sup>218</sup> In 2009, USCIS attempted to ameliorate the problem by offering deferred action to surviving spouses living in the circuits where they could not adjust status.<sup>219</sup> However, the benefit was short-lived because Congress amended the INA at the end of 2009 to eliminate the requirement that the surviving spouse of a U.S. citizen be married for two years prior to the death of the U.S. citizen in order to self-petition for LPR status.<sup>220</sup>

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216. Shoba Sivaprasad Wadhia, *In Defense of DACA, Deferred Action, and the Dream Act*, 91 TEX. L. REV. SEE ALSO 59, 67 (2013).

217. See *Lockhart v. Napolitano*, 573 F.3d 251, 255, 263 (6th Cir. 2009) (finding that a surviving alien-spouse whose citizen-spouse filed a Form I-130 prior to his or her death qualifies as a 'spouse' under the "immediate relative" provision of the INA).

218. Compare *Robinson v. Napolitano*, 554 F.3d 358, 367 (3d Cir. 2009) (upholding USCIS's interpretation that a surviving alien spouse who was not married to his or her deceased citizen-spouse for two years does not qualify as an immediate relative under the INA), with *Lockhart*, 573 F.3d at 255 (rejecting USCIS's interpretation and finding that Congress intended for an alien widow to qualify as an immediate relative even though the widow's citizen spouse died within two years of the marriage), *Taing v. Napolitano*, 567 F.3d 19, 23 (1st Cir. 2009) (same), and *Freeman v. Gonzales*, 444 F.3d 1031, 1039 (9th Cir. 2006) (same).

219. Press Release, U.S. Dep't of Homeland Sec., DHS Establishes Interim Relief for Widows of U.S. Citizens (June 9, 2009), available at <https://www.dhs.gov/news/2009/06/09/dhs-establishes-interim-relief-widows-us-citizens>.

220. Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 568(c), 123 Stat 2142, 2186 (2009).

6. *Deferred action for military family members*

In 2010, DHS announced a deferred action program that would apply to military families. DHS Secretary Janet Napolitano responded to an inquiry from U.S. Representative Zoe Lofgren about “the immigration needs of soldiers and their families” by noting that “a new DHS policy” promoted the use of “several discretionary authorities,” including deferred action, “to minimize periods of family separation” for “immigrants who are the spouses, parents and children of military members.”<sup>221</sup> As a result, immigrants who lacked status but were related to a military member could reap the benefits of deferred action.

G. *Administrative Closure*

In June 2011, ICE Director John Morton issued a memo reiterating the agency’s intention to focus its prosecutorial resources on high priority cases.<sup>222</sup> Commonly known as the Morton Memo, the memo established various ways ICE could exercise prosecutorial discretion, such as by not filing a case, agreeing to close a case, conceding to relief, or not pursuing an appeal.<sup>223</sup> The memo emphasized that ICE would exercise its discretion to not pursue removal cases against lower priority cases, such as those involving veterans, long-time LPRs, minors and the elderly, individuals present in the United States since childhood, pregnant or nursing women, crime victims, the mentally ill, and individuals with serious health conditions.<sup>224</sup> Furthermore, the memo set out a series of factors for ICE officials to consider in deciding whether or not to favorably exercise prosecutorial discretion.<sup>225</sup>

Not long afterward, the Obama Administration announced that it would be “reviewing the current deportation caseload to clear out low-priority cases on a case-by-case basis and make more room to deport people who have been convicted of crimes or pose a security

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221. Letter from Janet Napolitano, Sec’y, Dep’t. of Homeland Sec., to Zoe Lofgren, Representative, U.S. House of Representatives (Aug. 30, 2010) (on file with author).

222. See June 2011 Morton Memo, *supra* note 8, at 4–5. The June 2011 Morton memo built on the Meissner Memorandum, *supra* note 190, at 6, as well as a series of other memos the agency issued over the years. June 2011 Morton Memo, *supra* note 8, at 1.

223. June 2011 Morton Memo, *supra* note 8, at 2–3.

224. *Id.* at 5.

225. *Id.* at 4.

risk.<sup>226</sup> Over the following months, immigration court hearings were rescheduled to make time for ICE trial attorneys to review their entire dockets for cases that met ICE's guidelines for case closure.<sup>227</sup> Although the initial docket review has concluded, attorneys who have clients with sympathetic cases continue to make a "PD request" to the local office of the ICE Chief Counsel.<sup>228</sup>

As a result of the Morton Memo, about 29,000 removal cases have been administratively closed.<sup>229</sup> However, there seem to be wide disparities in the rates at which different offices are closing cases. For example, nearly one-third of the cases closed in the Seattle Immigration Court were closed due to ICE recommending closure as an exercise of its prosecutorial discretion, while only 1.7 percent of the cases closed in Houston were closed due to prosecutorial discretion.<sup>230</sup>

When a case is administratively closed, it is removed from the court's calendar but not from its docket.<sup>231</sup> It remains indefinitely pending in inactive status.<sup>232</sup> As a result, noncitizens with administratively closed cases technically remain in removal proceedings, although as long as the case is closed, there is no possibility that they will be removed. Many of these individuals will have filed applications for relief from removal, and these applications will remain pending, too, without ever being adjudicated.<sup>233</sup> Because some applications come with a right to seek work permission while the application is pending, many individuals

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226. Cecilia Muñoz, *Immigration Update: Maximizing Public Safety and Better Focusing Resources*, WHITE HOUSE BLOG (Aug. 18, 2011, 2:00 PM), <http://www.whitehouse.gov/blog/2011/08/18/immigration-update-maximizing-public-safety-and-better-focusing-resources>.

227. AM. IMMIGRATION LAWYERS ASS'N COL., IMPLEMENTATION OF THE PROSECUTORIAL DISCRETION REVIEW PILOT PROGRAM IN DENVER, COLORADO 6-7 (2011), *available at* <http://www.aila.org/infonet/co-chapter-practice-advisory-implement-pd-denver>.

228. *Id.* at 4-5.

229. TRAC, *supra* note 7, at tbl.2.

230. *Id.*

231. *See In re Avetisyan*, 25 I. & N. Dec. 688, 692, 695 (BIA 2012) (discussing how administrative closure is a tool to temporarily remove a case from an IJ's active calendar or from the Board's docket and acknowledging that administrative closures are not final orders because the appeal may be reinstated by the Board or recalendared by DHS).

232. *See Vahora v. Holder*, 626 F.3d 907, 915 (7th Cir. 2010) (comparing administrative closures to indefinite continuances).

233. *Questions and Answers: USCIS-American Immigration Lawyers Association (AILA) Meeting*, U.S. CITIZENSHIP & IMMIGR. SERVS. 11 (Oct. 9, 2012) [hereinafter *Questions and Answers: USCIS-AILA*], *available at* <http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2012/October%202012/AILA-Liaison-Committee-meetingQA.pdf>.

with administratively closed cases can seek work permission as long as they pay a fee and file an application to renew their work permit annually.<sup>234</sup> However, it would be risky and unwise in most cases for a person with an administratively closed removal case to travel outside of the United States.<sup>235</sup>

Some individuals with administratively closed removal cases may have had status going into proceedings. For example, sometimes LPRs are put in proceedings based on criminal convictions. When LPRs' cases are administratively closed, they remain, essentially, LPRs and can access most of the rights that LPRs enjoy.<sup>236</sup> However, many individuals with administratively closed proceedings have no status before proceedings begin. In these cases, their status is converted to

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234. Applications such as those for asylum, lawful permanent residency, and cancellation of removal come with a contingent right to seek work permission while the case is being adjudicated. See 8 C.F.R. § 274a(c)(8)–(10) (2014). USCIS does not always grant these applications: it considers itself to have discretion to deny them. See *Questions and Answers: USCIS-AILA*, *supra* note 233, at 11.

235. Travel outside of the United States will not deprive the Immigration Court of jurisdiction over the administratively closed but technically still pending removal proceeding. See *In re Sanchez-Herbert*, 26 I. & N. Dec. 43, 44 (BIA 2012). Thus, to the extent that a person with an administratively closed case is relying on the technical pendency of some application for relief in the removal case as a basis for seeking work permission, travel should not impact the person's eligibility for work permission. Moreover, because removal proceedings are already pending, a traveler with an administratively closed case arguably should not be subject to expedited removal procedures that might otherwise cause her to be removed summarily at the border upon her return without access to a court hearing. Compare 8 U.S.C. § 1225 (2012) (expedited removal), with 8 U.S.C. § 1229a (removal before an IJ). However, it is difficult to predict precisely how DHS would deal with such a case. It might take the position that it can deny reentry, and it is extraordinarily difficult to challenge DHS's actions at the border. See Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 635 (2006). Alternatively, DHS might allow reentry but use the new entry as a basis to reopen the closed removal proceeding. Persons with administratively closed cases who had a pending application for adjustment of status might be able to obtain some sense of security about traveling by filing an application for advance parole, but it is difficult, again, to predict how DHS would deal with an application filed by a person who is technically in removal proceedings. See U.S. CITIZENSHIP & IMMIGRATION SERVS., FORM I-131, INSTRUCTIONS FOR APPLICATION FOR TRAVEL DOCUMENT 1 (2013), available at <http://www.uscis.gov/sites/default/files/files/form/i-131instr.pdf> (noting that Advance Parole is available to persons with a pending application for adjustment of status).

236. USCIS might also be suspicious of petitions filed by LPRs in removal proceedings for their family members to obtain green cards. In addition, the status of LPRs with administratively closed proceedings is less secure than other LPRs, since their proceedings could be recalendared and they could be deported at that time. It would be risky for an LPR with an administratively closed removal proceeding to travel outside the United States. See *supra* note 235 and accompanying text.

nonstatus. They might be able to work, but they have few other rights. Their nonstatus is not due to the operation of a statute but is purely a function of prosecutorial discretion. Should ICE's priorities change, their cases can be recalendared and they might be deported.

As the description of Sergio's case in the Introduction demonstrates, it is now common for ICE attorneys to begin merits hearings by offering prosecutorial discretion in cases where the applicant has a claim for status. Prosecutorial discretion seems to be partly morphing into a kind of plea bargaining process—a means for government attorneys to leverage noncitizens into agreeing to give up their right to a more secure benefit, like asylum.<sup>237</sup> Sergio ended up winning his asylum case. However, many noncitizens or their lawyers are more risk-averse than he was, and, as a result, there are a growing number of individuals with nonstatus who might have become asylees, LPRs, and eventually, citizens.

#### *H. Deferred Action, Part II*

Between 2000 and 2010, the INS and USCIS expanded deferred action from a case-by-case means of benefiting a small number of unauthorized immigrants with sympathetic cases to a benefit awarded categorically to groups of unauthorized immigrants: VAWA self-petitioners, U visa applicants, foreign students impacted by Hurricane Katrina, widows and widowers of U.S. citizens, and unauthorized immigrant family members of military servicemen. The numbers of grantees may have remained relatively modest, but they were almost certainly in the thousands. For example, nearly 67,000 VAWA self-petitioners received deferred action during this time period.<sup>238</sup> Although most of them might have ultimately adjusted status, a substantial number will likely always remain in deferred action because of stringent grounds of inadmissibility that disproportionately impact that demographic.<sup>239</sup> The next subpart will

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237. See *supra* note 9 (discussing the author's e-mail survey of other clinical professors of immigration clinics concerning this issue).

238. See KANDEL, *supra* note 208.

239. This analysis shows that past statistics concerning deferred action grants during this time period are radically inaccurate. In 2004, Leon Wildes summarized Freedom of Information Act data he had obtained from USCIS for "records of all cases where deferred action status has been granted." Wildes, *Deferred Action Program*, *supra* note 187, at 825–27. In response, he received records of 499 deferred action grants from two of the three USCIS offices—a figure that obviously cannot be correct in light of the thousands of VAWA and U visa deferred action grants made up to 2004. *Id.* In 2010, Professor Shoba Wadhia obtained data from USCIS on deferred action requests from 2003 through 2010, which purported to show an even more

show that after 2010, the number of deferred action grants began to grow even more rapidly.

### 1. *Deferred Action for Childhood Arrivals*

Congress has repeatedly tried and failed to undertake reform on behalf of Dreamers—undocumented youths who came to the United States as children.<sup>240</sup> Although a broad bipartisan coalition agrees that these youth are not to blame for being without status and are in fact important to the future of this country, Congress has not been able to pass the DREAM Act, the piece of legislation after which they are named.<sup>241</sup> Frustrated by congressional inertia, these courageous youth mobilized to convince the Obama Administration to unilaterally order a deportation reprieve for them.<sup>242</sup> In June 2012, the Administration implemented a new program for the “Dreamers,” with the far less inspiring name, Deferred Action for Childhood Arrivals (DACA).<sup>243</sup>

The new program was designed to track the DREAM Act. Accordingly, DACA contains a series of requirements related to the applicant’s age, residence, physical presence, immigration status, schooling, and criminal record.<sup>244</sup> USCIS created an application

woefully inaccurate figure: forty-eight deferred action grants. Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. REV. 1, 42 (2012). As Professor Wadhia observed in her article, USCIS’s failure to provide coherent statistics reveals that its implementation of the program lacks transparency. *Id.* at 48–49.

240. The term “Dreamer” comes from the Development, Relief, and Education for Alien Minors Act first introduced in the Senate on August 1, 2001 by Senators Richard Durbin and Orrin Hatch. S. 1291, 107th Cong. (2001). Members of both houses of Congress have reintroduced the bill several times, but Congress has never passed it. *See generally* S. 2205, 110th Cong. (2007); H.R. 1275, 110th Cong. (2007); S. 774, 110th Cong. (2007); H.R. 5131, 109th Cong. (2006); S. 2075, 109th Cong. (2005); S. 1545, 108th Cong. (2003); H.R. 1684, 108th Cong. (2003).

241. *See* sources cited *supra* note 240.

242. *See* Julia Preston & John H. Cushman, Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES (June 15, 2012), <http://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html>.

243. *See* Napolitano Memorandum, *supra* note 184, at 1 (describing DACA).

244. *See* DACA FAQ, *supra* note 20. Essentially, USCIS requires that a DACA applicant show that she age was under the age of thirty-one as of June 15, 2012, that she arrived in the United States before her sixteenth birthday, and that she has maintained a current and continuous residence in the United States since June 15, 2007. *Id.* Further, USCIS requires that a DACA applicant make her request for consideration of deferred action by demonstrating that she entered the country without inspection or that her immigration status expired before June 15, 2012. *Id.* A DACA applicant must also show that she is either in school or has graduated from



form, filing fee, and set of pro se materials to help applicants.<sup>245</sup> By September 2014, USCIS had granted 632,855 DACA applications<sup>246</sup>—an explosion of nonstatus that has unleashed a fierce debate concerning executive power.<sup>247</sup>

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high school (or obtained a General Education Development certificate) or that she is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States. *Id.* Finally, she must not have been convicted of a felony, significant misdemeanor, or three or more misdemeanors and she must not otherwise pose a threat to national security or public safety. *Id.*

245. *See id.* (providing an in-depth explanations of eligibility requirements, outlining the DACA application guidelines, and providing a link to the DACA application itself). *See generally* U.S. CITIZENSHIP & IMMIGRATION SERVS., FORM I-821D, CONSIDERATION FOR DEFERRED ACTION OF CHILDHOOD ARRIVALS (2014), available at <http://www.uscis.gov/sites/default/files/files/form/i-821d.pdf> (constituting the DACA application form).

246. *Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status: 2012–2014*, U.S. CITIZENSHIP & IMMIGR. SERVS., [http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA\\_fy2014\\_qtr4.pdf](http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA_fy2014_qtr4.pdf) (last visited May 11, 2015).

247. *See* Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 856–57 (2013) (arguing that there is no general presidential nonenforcement power because the Constitution's Take Care Clause imposes a duty on the President to enforce all constitutionally valid acts of Congress in all situations); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 768–69 (2014) (arguing that the President's nonenforcement authority does not extend to prospective licensing of prohibited conduct or to policy-based nonenforcement of federal laws for entire categories of offenders unless Congress affirmatively expands Executive discretion). For a response to Delahunty and Yoo, see Wadhia, *supra* note 216, at 60, 70–71 (attacking Delahunty and Yoo's Take Care Clause arguments on the following three grounds: (1) the Obama Administration has faithfully and forcefully executed the immigration laws, (2) prosecutorial discretion actions do not undercut statutory law because such actions have been pursued by other U.S. presidents and a part of the immigration system for at least three decades, and (3) the act of equating DACA's limbo status to the secure status offered by the DREAM Act is an unfair and inaccurate comparison). For a critique of the prosecutorial discretion rationale for DACA but defense of it on other grounds, see Margulies, *supra* note 194, at 122–26 (contending that before DACA, deferred action was only offered on a case-by-case basis and the lack of precedent for categorical deferred action means that the use of prosecutorial discretion as a rationale runs afoul of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), where the U.S. Supreme Court held that the U.S. President could not seize private property absent express authorization from Congress or an authority enumerated under Article II of the Constitution). This Article's discussion of VAWA deferred action and other types of categorical deferred conflicts with this analysis.

## 2. *Deferred Action for Parental Accountability*

On November 20, 2014, President Obama announced a series of new administrative immigration initiatives.<sup>248</sup> Through DHS, the President expanded DACA to include more individuals and increased the duration of DACA work permits to three years instead of two.<sup>249</sup> The initiatives also created a new nonstatus for the parents of LPRs and U.S. citizens entitled DAPA.<sup>250</sup> An estimated four million immigrants may qualify for nonstatus under the changes, dramatically raising the stakes in the constitutional debate over executive power.<sup>251</sup>

Anticipating legal conflict, DOJ took the unusual step of releasing its internal memo concluding that the government has authority for the new programs. DOJ concluded that the President had prosecutorial discretion to defer some deportations given his limited resources and the vast population of unauthorized immigrants.<sup>252</sup> DOJ also found that the President had prosecutorial discretion to defer removal of the parents of LPRs and U.S. citizens but not the parents of DACA recipients.<sup>253</sup> DOJ thus suggested that deferring deportation for the parents of citizens and LPRs was consistent with past executive actions and compatible with other preferential treatment given to these groups by immigration law.<sup>254</sup> By contrast,

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248. See generally Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., to León Rodriguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot. 1–5 (Nov. 20, 2014), available at [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) (discussing the use of deferred action for individuals who came to the United States as children and the parents of U.S. citizens or permanent residents).

249. See *id.* at 3–4 (outlining the policy changes to expand DACA, including removing the then-existing age cap, extending DACA's employment authorization to three-year increments, and expanding the eligibility cut-off date from 2007–2010).

250. See *id.* at 4 (stating that to be eligible for prosecutorial discretion under DAPA, individuals must (1) have a child that is a citizen or LPR, (2) have continuously resided in the United States since January 1, 2010, (3) be physically present in the United States on the date of the memorandum as well as when applying for deferred action, (4) have no lawful status, and (5) not be an enforcement priority as of the date of the memorandum).

251. See Nakamura, *supra* note 15. (noting that some opponents have warned that Obama's action could trigger confrontation with Congress).

252. See Memorandum from Karl R. Thompson, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, to the Sec'y of Homeland Sec. 9 (Nov. 19, 2014) [hereinafter Thompson Memorandum], available at <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf>.

253. *Id.* at 33.

254. *Id.* at 31.

DOJ found no similar treatment in immigration law toward the undocumented parents of DACA recipients.<sup>255</sup>

The reaction to DAPA was immediate and highly polarized. In Washington, D.C., immigrants rallied at the White House to thank the President.<sup>256</sup> Not long afterward, the U.S. House of Representatives passed a resolution to halt the executive actions.<sup>257</sup> Twenty-two states, four governors, and the Attorney General of Michigan sued DHS to enjoin DAPA, arguing that it violated the Administrative Procedure Act and the President's constitutional duty to "take care" to enforce the law.<sup>258</sup> On February 16, 2015, the U.S. District Court for the Southern District of Texas granted the plaintiffs' motion for injunctive relief, effectively putting DAPA and the expansion of DACA on hold until the litigation winds its way through the appeals process.<sup>259</sup>

This debate over the limits of executive power will continue to play out in the courts, Congress, academia and the media in the months and years ahead.<sup>260</sup> Missing in this debate is the impact of nonstatus on the affected individuals. Part III addresses this question.

255. See *id.* at 32–33 (reasoning that immigration laws are more concerned with uniting individuals who are legally entitled to live in the United States than they are with uniting individuals who lack lawful status).

256. Pamela Constable & Julie Zauzmer, *Illegal Immigrants to Rally at White House, Thank Obama for Deportation Reprieve*, WASH. POST (Nov. 21, 2014), [http://www.washingtonpost.com/local/illegal-immigrants-to-rally-at-white-house-thank-obama-for-deportation-reprieve/2014/11/21/145ccea0-71a0-11e4-893f-86bd390a3340\\_story.html](http://www.washingtonpost.com/local/illegal-immigrants-to-rally-at-white-house-thank-obama-for-deportation-reprieve/2014/11/21/145ccea0-71a0-11e4-893f-86bd390a3340_story.html).

257. See Jeremy W. Peters & Ashley Parker, *On War and Immigration, Obama Faces Tests of Authority from Congress*, N.Y. TIMES, Dec. 4, 2014 at A21 (noting that the vote for the resolution was largely symbolic).

258. See Complaint at 25–27, *Texas v. United States*, No. 1:14-CV-254 (S.D. Tex. Dec. 3, 2014) (reasoning that because Congress has already addressed when the parent of a U.S. citizen may change their status, DAPA represents a departure from the President's duty to faithfully execute the laws and stands in contradiction to the laws enacted by Congress). The Take Care Clause prevents the President from discarding laws he disfavors by requiring the President to faithfully execute the laws in place. U.S. CONST. art. II, § 3 (“[H]e shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.”). The complaint originally included only fourteen plaintiffs; additional plaintiffs joined the suit after its filing. See *Texas v. United States*, No. 1:14-CV-254, 2015 WL 648579, at \*1 n.1 (S.D. Tex. Feb. 16, 2015), *appeal filed*, No. 15-40238 (5th Cir. Feb. 23, 2015).

259. *Texas*, 2015 WL 648579, at \*62.

260. For a sampling of the different views concerning President Obama's immigration executive actions, compare Delahunty & Yoo, *supra* note 247, at 856 (arguing that the Take Care Clause mandates, with limited exceptions, that the President enforces congressional enactments and that DACA constitutes a violation of this requirement), with Cox & Rodriguez, *supra* note 193, at 483–519 (noting

### III. THE IMPACT OF NONSTATUS

Venerable Gon'yô asked Jôshû, "How is it when a person does not have a single thing?" Jôshû said, "Throw it away." Gon'yô said, "I say I don't have a single thing. What could I ever throw away?" Jôshû said, "If so, carry it around with you."

- Hongzhi Zhengjue<sup>261</sup>

Nonstatus challenges us with a paradox: nonstatus is neither status nor its absence, and those who have it are neither lawfully nor unlawfully present. As we saw in Part II, it is a growing enigma. Hundreds of thousands of individuals with no status are now being offered nonstatus through mass prosecutorial discretion programs like DACA, and millions more may soon receive nonstatus through DAPA.<sup>262</sup> Some who would have previously won status in immigration court hearings are now taking nonstatus through a quasi-plea bargaining process in order to avoid the risk of deportation. Nonstatus is bleeding into the margins of status and no status and occupying a greater percentage of the immigrant population. The growth of this category raises important questions: why is nonstatus growing, and what does the future hold for individuals in nonstatus?

#### A. *Benefits*

Congressional and public opposition to granting immigrants social and economic benefits is one reason for the expansion of the nonstatus category over time. One of the most virulent political narratives relates to the "welfare magnet"—the notion that this or that group of individuals will move to a particular jurisdiction to collect welfare benefits.<sup>263</sup> In the 1990s, the Gingrich Congress

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doctrinal confusion concerning whether the Executive or Congress possess inherent authority over immigration and noting various examples in practice of the Executive exercising inherent authority over immigration), and Price, *supra* note 247, at 674–75 (asserting that notwithstanding the Take Care Clause, the President may decline to enforce civil and criminal prohibitions in particular cases but not with respect to entire categories of persons).

261. GERRY SHISHIN WICK, *THE BOOK OF EQUANIMITY: ILLUMINATING CLASSIC ZEN KOANS* 178 (2005) (quoting Case 57: Gon'yô's One "Thing").

262. See David Nakamura, *Obama Readies Executive Action on Immigration*, WASH. POST (Aug. 2, 2014), [http://www.washingtonpost.com/politics/obama-readies-executive-action-to-legalize-millions-of-undocumented-immigrants/2014/08/01/222ae2e8-18f8-11e4-85b6-c1451e622637\\_story.html](http://www.washingtonpost.com/politics/obama-readies-executive-action-to-legalize-millions-of-undocumented-immigrants/2014/08/01/222ae2e8-18f8-11e4-85b6-c1451e622637_story.html) (reporting that in framing DACA, legislators sought to define a broader category of immigrants that could receive similar benefits as the 2012 Dreamers).

263. See, e.g., Elizabeth Shogren & Melissa Healy, *Gingrich Backs Wilson on Illegal Immigrant Costs*, L.A. TIMES (Feb. 9, 1995), <http://articles.latimes.com/1995-02->

passed reforms that dramatically restricted the receipt of welfare benefits for immigrants, based in part on the misguided belief that noncitizens collect welfare benefits at a disproportionately high rate.<sup>264</sup> One reason it is so difficult to pass immigration reform today is no doubt the continued prevalence of the notion that individuals who are legalized as a result of reform will drain coffers by collecting public benefits.<sup>265</sup> Immigrant rights—particularly those closely associated with citizenship, such as voting—are embattled, too. Nonstatus comes with far fewer benefits, rights, and privileges than status, although even these benefits can be controversial. This Part offers a sketch of the limited benefits that come with nonstatus and contends that nonstatus is growing in part because it offers a means to authorize the presence of undocumented immigrants without providing them the panoply of benefits and rights that go with full status.

Until 1996, individuals with nonstatus were eligible for some public benefits under the theory that they were “persons residing under color of law” (PRUCOL).<sup>266</sup> Individuals with nonstatus like deferred action and EVD were considered PRUCOL because the INS was aware of their presence and was not actively pursuing their deportation.<sup>267</sup> However, in 1996, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) banned noncitizens from receiving most federal public benefits unless they could show that they met a narrow definition of “qualified alien” and

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09/news/mn-30042\_1\_illegal-immigrants (quoting U.S. Representative David Cook, who sought to justify Congress’s move to restrict benefits to immigrants when he said that “[w]e don’t want to be a welfare magnet for the world”).

264. Bill Ong Hing, *Don’t Give Me Your Tired, Your Poor: Conflicted Immigrant Stories and Welfare Reform*, 33 HARV. C.R.-C.L. L. REV. 159, 167–68, 170 (1998) (describing the unsupported rhetoric and mistaken economic analysis concerning immigrant welfare use).

265. For a rebuttal of the dubious notion that immigrants move to the United States to collect benefits or that they receive welfare benefits at a disproportionately high rate, see *id.* at 170–78.

266. See *Holley v. Lavine*, 553 F.2d 845, 847, 851 (2d Cir. 1977) (interpreting a provision of the Social Security Act and its implementing regulation authorizing payments to an alien “permanently residing in the United States under color of law” to include a noncitizen whom the INS had decided not to deport for humanitarian reasons (internal quotation marks omitted)).

267. See, e.g., *id.* at 849–51 (holding that where a “responsible official” of the INS, aware that an individual was unlawfully residing in the United States, chooses not to institute deportation proceedings for humanitarian reasons, that individual can be said to be living “under the color of law” (internal quotation marks omitted)).

had held that status for five years.<sup>268</sup> Individuals with nonstatus were excluded, with the exception of those with withholding of removal and grants of parole for more than one year.<sup>269</sup>

Today, those with nonstatus largely remain ineligible for public benefits like food stamps, cash assistance, public housing, social security benefits such as Supplemental Security Income and Social Security Disability Insurance, and federally guaranteed student loans, despite the fact that they typically pay taxes to support this social welfare system.<sup>270</sup> There are some notable exceptions to the fact that those with nonstatus are ineligible for public benefits. Nonetheless, even with these exceptions, access to benefits is restricted. For example, individuals are eligible for Medicare if they are at least sixty-five years old and eligible for social security retirement benefits.<sup>271</sup> To be eligible for social security retirement benefits, a person must be “lawfully present.”<sup>272</sup> A regulation defines “lawfully present” for retirement benefits and includes noncitizens with a variety of forms of nonstatus, including deferred action.<sup>273</sup> However, the regulation’s definition of lawfully present omits some important forms of

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268. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 401, 403, 110 Stat. 2105, 2261, 2265 (codified as amended at 8 U.S.C. §§ 1611, 1613 (2012)) (making exceptions for emergency medical assistance, emergency disaster relief, public health assistance, programs for community development assistance, and programs or services specified by the Attorney General that deliver community services necessary for protection of life and safety).

269. See 8 U.S.C. § 1641(b) (defining “qualified alien” to include LPRs, asylees, refugees, persons paroled for a period of at least one year, persons granted withholding of removal, persons granted conditional entry, and Cuban and Haitian entrants).

270. See TANYA BRODER & JONATHAN BLAZER, NAT’L IMMIGRATION LAW CTR., OVERVIEW OF IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS 2–3 & n.11 (2011), available at <http://www.nilc.org/overview-immeligfedprograms.html> (observing that the welfare reform does not clarify what specific programs are covered under the term “federal public benefit” but rather defines federal public benefit as “any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit”).

271. See 8 U.S.C. § 1611(b)(3) (excepting “lawfully present” individuals from the general prohibition of federal benefits for aliens); 42 U.S.C. § 1395c (stating that the title protects hospital and health services for those who are sixty-five years of age and over).

272. Congress exempted retirement benefits under Social Security from the list of federal public benefits for which a noncitizen must be a “qualified alien” and wait five years for eligibility pursuant to PRWORA. See 8 U.S.C. § 1611(b)(2). Instead the SSA only requires that aliens be “lawfully present.” *Id.*; see 42 U.S.C. § 402(y) (affirming that an alien may not collect any benefit during any month in which he or she is not lawfully present in the United States).

273. 8 C.F.R. § 1.3(a)(3)–(4) (2014).

nonstatus, such as individuals granted work permits pursuant to ICE supervision.<sup>274</sup> Individuals whose cases have been administratively closed as a result of ICE prosecutorial discretion will likely not qualify for social security retirement benefits unless they can show that they have a pending asylum, withholding of removal, CAT, or adjustment of status application.<sup>275</sup> Therefore, under the current system, hundreds of thousands of individuals with administratively closed cases and ICE supervision orders will spend the rest of their lives paying into a social security system without ever seeing any benefits for themselves.

It is striking how inconsistent the public benefit eligibility rules are. For example, there is a difference between the categories of nonstatus holders ineligible for medical benefits under the Affordable Care Act (ACA) and those who qualify for retirement benefits and Medicare. Like the Social Security Act, the ACA considers people who are “lawfully present” in the United States to be eligible for care under the legislation.<sup>276</sup> However, its regulations have a distinct definition of “lawfully present.” As is the case in the Social Security Act, individuals with deferred action are eligible for

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274. *Id.* § 1.3(a)(1)–(4) (limiting the category of “lawfully present” aliens to individuals who are “qualified alien[s]” and have been inspected and admitted to the United States, paroled into the United States, or permitted to remain in the United States for humanitarian or other policy reasons or who applied for asylum or withholding of removal); 45 C.F.R. § 152.2(4)(iii) (2013) (defining as lawfully present aliens granted work permission pursuant to 8 C.F.R. § 274a.12(c)(18) for persons released on an order of supervision).

275. *See* 8 C.F.R. §§ 1.3(a)(3)(vii)–(a)(5) (limiting “lawfully present” for the purposes of applying for Social Security as a qualified alien, an alien who has been inspected and admitted to the United States, an alien who has been paroled into the United States, or an alien who has been permitted to stay in the United States for certain delineated humanitarian or policy purposes (internal quotation marks omitted)).

276. *See* 42 U.S.C. § 18032(f)(3) (stating that individuals who are not citizens, nationals, or lawfully present aliens may not be covered under a qualified health plan). The Department of Health and Human Services (HHS) has not included the Affordable Care Act (ACA) in the definition of either “federal public benefit” or “federal means-tested public benefit” in the only notices that it has published on the issue, which predate the ACA but appear to constitute the agency’s final say on the matter. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PROWRA); Interpretation of “Federal Means-Tested Public Benefit”, 62 Fed. Reg. 45,256, 45,256 (Aug. 26, 1997) (defining “federal means-tested public benefits to be “only mandatory spending programs of the Federal Government” where eligibility is determined by income or resources); Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PROWRA); Interpretation of “Federal Public Benefit”, 63 Fed. Reg. 41,658, 41,658 (Aug. 4, 1998) (providing a list of federal public benefits, including Medicaid and Medicare). As a result, the ACA is not subject to the restrictions on alien access to benefits contained in the PROWRA.

ACA benefits.<sup>277</sup> However, individuals with DACA are explicitly excluded, and the Obama administration has announced that it will also bar DAPA recipients from receiving benefits under the ACA.<sup>278</sup> Some states have stepped in to bridge the gap and cover DACA recipients and possibly individuals with DAPA, creating an inconsistent patchwork of medical benefits across the country.<sup>279</sup> In some states, nonstatus holders can only obtain emergency medical care; in others, some individuals with nonstatus are eligible for some state-funded medical care.<sup>280</sup>

Other privileges of nonstatus holders also vary from state to state. For example, at least some nonstatus holders may be eligible under federal law for unemployment benefits because they are considered “lawfully present.”<sup>281</sup> However, states typically administer these programs, and some have banned DACA recipients from obtaining benefits.<sup>282</sup> Likewise, some states offer in-state tuition to holders of some types of nonstatus, but others do not.<sup>283</sup> Nonstatus holders’

277. See 45 C.F.R. § 152.2 (defining “lawfully present” to include “qualified aliens” and a wide range of other types of status and non-status, including deferred action); *id.* § 155.20 (defining “lawfully present” for purposes of the ACA by referencing 45 C.F.R. § 152.2, the pre-existing condition insurance plan regulations); see also 26 C.F.R. § 1.36B-1(g) (2014) (defining “lawfully present” by reference to 45 C.F.R. § 155.20).

278. See 45 C.F.R. § 152.2(8) (2013) (excluding DACA from the ACA); Michael D. Shear & Robert Pear, *Obama’s Immigration Plan Could Shield Four Million*, N.Y. TIMES, Nov. 20, 2014, at A1 (reporting that the Administration will promulgate regulations to exclude DACA holders from the ACA).

279. Cindy Y. Rodriguez & Jaqueline Hurtado, *States Work Around Obamacare to Help Undocumented Immigrants*, CNN, <http://www.cnn.com/2014/04/09/us/obamacare-undocumented-immigrants> (last updated Apr. 9, 2014, 1:30 PM) (noting that California, Washington, Massachusetts, Minnesota, New York, and Washington, D.C. offer health insurance to persons granted deferred status).

280. See TANYA BRODER, NAT’L IMMIGR. LAW CTR, TABLE: MEDICAL ASSISTANCE PROGRAMS FOR IMMIGRANTS IN VARIOUS STATES 1–5 (2014), available at <http://www.nilc.org/document.html?id=159> (discussing the availability of different medical assistance programs in thirty-seven states and the District of Columbia).

281. See 26 U.S.C. § 3304(a)(14)(A) (allowing payment to an alien provided she was “lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time such services were performed . . .”).

282. See, e.g., Daniel Gonzalez, *Governor Cautions ‘Dreamers’*, USA TODAY (Aug. 16, 2012), [http://usatoday30.usatoday.com/USCP/PNI/Front%20Page/2012-08-16-pni0816met-deferred-first-dayPNIBrd\\_ST\\_U.htm](http://usatoday30.usatoday.com/USCP/PNI/Front%20Page/2012-08-16-pni0816met-deferred-first-dayPNIBrd_ST_U.htm) (discussing Governor Jan Brewer’s efforts to resist implementation of DACA in Arizona, such as by denying unemployment benefits to DACA recipients).

283. See Raquel Aldana, *On Rights, Federal Citizenship, and the “Alien”*, 46 WASHBURN L.J. 263, 278–81 (2007) (describing federal and state laws concerning in-state tuition for undocumented students); Michael A. Olivas, *Dreams Deferred: Deferred Action*,



eligibility for professional memberships like law and medicine will also vary depending on the state.<sup>284</sup>

For many years, there was no question that those with nonstatus could apply for driver's licenses. However, the REAL ID Act of 2005 requires states to deny driver's licenses to individuals who do not meet certain immigration requirements.<sup>285</sup> Most individuals with deferred action and TPS can obtain driver's licenses because the federal REAL ID Act specifically lists deferred action and TPS as lawful immigration statuses. However, the Act does not authorize states to provide a driver's license to individuals with any other type of nonstatus, and several states have even tried to deny driver's licenses to individuals with deferred action.<sup>286</sup>

When it comes to many constitutional rights, nonstatus holders must contend with case law that has historically privileged LPRs over immigrants with lesser statuses.<sup>287</sup> With respect to some types of

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*Prosecutorial Discretion, and the Vexing Case(s) of Dream Act Students*, 21 WM. & MARY BILL RTS. J. 463, 464–67 (2012) (emphasizing that while some states, such as Rhode Island, have sought to incorporate undocumented students into the community by extending resident tuition, other states, such as New Jersey, have denied financial assistance to U.S. citizens with undocumented parents).

284. California has passed legislation that allows persons to be admitted to the bar regardless of their immigration status. Jennifer Medina, *Allowed to Join the Bar, but Not to Take a Job*, N.Y. TIMES (Jan. 2, 2014), [http://www.nytimes.com/2014/01/03/us/immigrant-in-us-illegally-may-practice-law-california-court-rules.html?\\_r=0](http://www.nytimes.com/2014/01/03/us/immigrant-in-us-illegally-may-practice-law-california-court-rules.html?_r=0). Florida allows DACA recipients to take the bar. Jan Pudlow, *Governor Signs Undocumented Attorney Bill*, FLA. BAR NEWS (June 1, 2014), <http://www.floridabar.org/DIVCOM/JN/JNNNews01.nsf/RSSFeed/52B54E465C469EE785257CDD0044AFD4>. It is unclear whether individuals with nonstatus can practice law in any other states.

285. REAL ID Act of 2005, Pub. L. No. 109-13, § 202(c)(2), 119 Stat. 302, 312–13; see 6 C.F.R. § 37.3 (2014) (defining a REAL ID driver's license to be an identification card certified to be in compliance with the requirements of the REAL ID Act).

286. See *Ariz. Dream Act Coal. v. Brewer*, 945 F. Supp. 2d 1049, 1052, 1079 (D. Ariz. 2013), *rev'd*, 757 F.3d 1053 (9th Cir. 2014) (finding that Arizona's efforts to deny driver's licenses to persons with DACA violated equal protection); *Saldana v. Lahm*, No. 4:13CV3108, 2013 WL 5658233, at \*1, \*7 (D. Neb. Oct. 11, 2013) (granting in part the defendant's motion to dismiss a challenge to Nebraska's refusal to grant a driver's license to a DACA grantee); 6 C.F.R. § 37.3 (defining "lawful status" for the purpose of the REAL ID Act).

287. For a discussion of the rights of unauthorized immigrants relative to lawful permanent residents and citizens, see David A. Martin, *supra* note 25, at 92–101 (ranking the hierarchy of immigrants in order of decreasing community membership as (1) citizens, (2) lawful permanent resident, (3) admitted nonimmigrant, (4) entrant without inspection, (5) parolee, and (6) applicant at the border); Maryam Kamali Miyamoto, *The First Amendment After Reno v. American-Arab Anti-Discrimination Committee: A Different Bill of Rights for Aliens?*, 35 HARV. C.R.-C.L. L. REV. 183, 193–95 (2000) (asserting that because deportation is not classified

nonstatus, like parole, the U.S. Supreme Court has bought into an “entry fiction” that has treated individuals as though they are outside the United States and are therefore afforded less due process even when they have been in the country for years.<sup>288</sup>

Individuals with nonstatus have few immigration law privileges and many burdens. Some cannot travel at all without being considered to have “self-deported”; others can travel with “advance parole,” but advance parole is difficult to obtain.<sup>289</sup> Many forms of non-status, like DACA and DAPA, must be regularly renewed and at considerable cost.<sup>290</sup> In addition to paying hundreds of dollars every few years to renew their work permission, nonstatus holders must also regularly update their address and appear at application support centers to be photographed and fingerprinted.<sup>291</sup> Nonstatus holders cannot

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as a “punishment,” the government has removed immigrants based on their political beliefs and associations); Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2075–76 (2008) (suggesting that despite a Supreme Court holding that supported the right of unauthorized immigrant children to attend elementary and secondary school, states’ ability to restrict immigrant access to colleges and universities results in exclusion from the community); Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1727 (2010) (examining efforts by states to address the arrival of undocumented immigrants, the workplace protections afforded to undocumented immigrants, the extent of Fourth Amendment protections for undocumented immigrants, and undocumented immigrants’ right to effective counsel in court); Allison Brownell Tirres, *Property Outliers: Noncitizens, Property Rights and State Power*, 27 GEO. IMMIGR. L.J. 77, 90–91 (2012) (demonstrating that when property is held by noncitizens, constitutional precepts only partially exist, and therefore states may use land laws to subordinate and exclude noncitizens).

288. Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 970 (1988) (reporting that some courts have asserted that excludable aliens are unprotected because by definition these aliens are “outside the United States” (though in fact they can be physically present in the United States) and constitutional protections only extend to the limits of the United States’s territory).

289. See, e.g., DACA FAQ, *supra* note 20 (explaining that DACA recipients must receive advance parole to travel and will only be granted advance parole if their travel is for humanitarian, educational, or employment purposes).

290. The current application fee for DACA is \$465. See I-821D, *Consideration of Deferred Action for Childhood Arrivals*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/i-821d> (last visited May 11, 2015).

291. DEP’T OF HOMELAND SEC., INSTRUCTIONS FOR I-765, APPLICATION FOR EMPLOYMENT AUTHORIZATION 8 (Aug. 6, 2014), *available at* <http://www.uscis.gov/sites/default/files/files/form/i-765instr.pdf>. (explaining that the application filing fee is \$380, that there is an additional \$85 fee for “biometrics,” and that applicants might be required to appear for an interview and the collection of biometric data).

petition for family members to obtain legal status in the United States.<sup>292</sup> No form of nonstatus comes with a pathway to citizenship.

The one immigration benefit that does typically come with nonstatus is work permission, although often it is not automatic.<sup>293</sup> Individuals with nonstatus have been offered work permits since May 1981, when the INS published its first ever regulation governing employment authorization.<sup>294</sup> By 1981, the government had concluded that “[e]mployment in the United States is not an inherent right” but, rather, “a matter of administrative discretion . . . .”<sup>295</sup> This philosophy marked a shift from the early twentieth century, when the Supreme Court held that the “right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.”<sup>296</sup>

Perhaps because work was once seen as a right, not a privilege, the INA had never addressed the issue of work permission for noncitizens.<sup>297</sup> Therefore, the INS had to strain to find statutory authority for its new regulation. It cited section 103 of the INA, a provision that set out the powers of the Attorney General, including the power to “establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter.”<sup>298</sup>

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292. 3 GORDON ET AL., *supra* note 31, § 31.03 (“Those who seek to immigrate as an ‘immediate relative’ or on the basis of a family-sponsored preference require approval of a petition by the U.S. citizen or lawful-resident sponsor filed with the DHS agency having jurisdiction over the petitioner’s residence.”).

293. *See, e.g.*, 8 C.F.R. § 274a.12(c)(14) (2014) (allowing work permission for a person granted deferred action if she can show economic necessity).

294. Employment Authorization to Aliens in the United States, 46 Fed. Reg. 25,079, 25,080–81 (May 5, 1981) (codified at 8 C.F.R. pt. 109) (distinguishing classes of aliens who receive work authorization as a condition of their admission from others which must apply for work authorization separately).

295. *Id.* at 25,080.

296. *See* *Truax v. Raich*, 239 U.S. 33, 35, 41 (1915) (discussing the validity of an Arizona statute requiring employers to employ no less than eighty percent “qualified electors or native-born citizens of the United States” (internal quotation marks omitted)); *see also* *Yick Wo v. Hopkins*, 118 U.S. 356, 357–59, 369–70 (1886) (discussing natural rights in the context of striking down a law regulating laundry businesses in San Francisco because unequal enforcement of the law violated equal protection).

297. *See* Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 198–99 (2007) (explaining that prior to the IRCA’s passage, there were no criminal penalties for employers who hired undocumented workers and no additional penalties for undocumented workers who worked).

298. 8 U.S.C. § 1103(a) (1982).

The new work permission regulation was relatively expansive and authorized a grant of work permission for two types of nonstatus: voluntary departure (presumably including EVD) and deferred action.<sup>299</sup> In November 1981, the INS added a work authorization category for individuals granted parole.<sup>300</sup> Although the regulation specified who could be granted authority to work, it said nothing about what would happen to individuals who worked without permission. In practice, there was no real regulation of unauthorized work until Congress passed IRCA in 1986.<sup>301</sup> IRCA contained a new provision defining an “unauthorized alien” not entitled to work in the United States as a noncitizen who is neither an LPR nor “authorized to be . . . employed by this chapter or by the Attorney General.”<sup>302</sup> The provision thus acknowledged the Attorney General’s (and INS’s) pre-existing practice of administratively deciding which categories of aliens could lawfully work.<sup>303</sup>

Despite the fact that non-status holders have previously been permitted to work in the United States, the provision of work permission to DACA and DAPA grantees has been one of the most controversial features of the new programs.<sup>304</sup> At one time, nonstatus holders could work without special permission and obtain driver’s licenses and apply for the same public benefits as citizens. However, now, privileges and benefits of these types vary depending on arcane eligibility rules and the politics of individual states. The one relatively durable and consistent benefit granted to most nonstatus holders seems to be work permission—a privilege that was once a right in American society.

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299. 8 C.F.R. § 109.1(b)(5)–(6) (1982).

300. *Id.* § 109.1(b)(4).

301. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §§ 115, 274A, 100 Stat. 3359, 3360, 3384 (making employment of unauthorized immigrants unlawful and increasing enforcement of existing immigration laws).

302. 8 U.S.C. § 1324a(h)(3) (1988).

303. *See* Employment Authorization; Classes of Aliens Eligible, 52 Fed. Reg. 46,092, 46,093 (Dec. 4, 1987) (to be codified 8 C.F.R. pt. 109) (rejecting a petition asking the INS to rescind its employment authorization regulation and rejecting an argument that “the phrase ‘authorized to be so employed by this Act or the Attorney General’ does not recognize the Attorney General’s authority to grant work authorization except to those aliens who have already been granted specific authorization by the Act”).

304. *See* The Repeal Executive Amnesty Act of 2015, H.R. 191, 114th Cong. § 104 (2015) (proposing to eliminate the Attorney General’s discretion to grant employment authorization to persons otherwise not entitled to work under the INA).

As nonstatus expands, it seems, the privileges of non-status holders narrow. When nonstatus was an arcane benefit available to only thousands of individuals, it flew far enough below the political radar that individuals with it could collect many benefits without risking public ire. But once it exploded, the rights and benefits of nonstatus holders burst, too. The Obama Administration's exclusion of DACA and DAPA from the ACA offers a portrait of what nonstatus will look like in the future, as politicians working to expand the boundaries of nonstatus need to water down its benefits in order to address the welfare magnet narrative.

### B. *The Future*

It is likely that legal challenges to DACA and DAPA will ultimately fail because prosecutorial discretion decisions are usually isolated from judicial review and the challengers lack much evidence of real injury.<sup>305</sup> However, the greater danger to nonstatus comes not from the courts but from the political branches. Nonstatus can be eliminated based on the shifting whims of the Executive Branch or by a Congress displeased with perceived executive overreaching.<sup>306</sup>

Nonstatus is rarely cabined by statutory language, notice and comment rulemaking, or judicial oversight. It is usually an exercise of sole executive prerogative and, therefore, can theoretically be undone as easily as it can be wrought. To repeal a statute, there must be hearings, majority votes in both houses of Congress, and a presidential signature.<sup>307</sup> To amend a regulation, an agency must publish notice and solicit and consider comments—sometimes hundreds of thousands of them.<sup>308</sup> Both congressional and executive

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305. See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (recognizing that “an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion”); Delahunty & Yoo, *supra* note 247, at 786, 796 (arguing that the President’s duty to faithfully execute the laws conflicts with the widely held understanding that executive power “includes the discretion to decline enforcement of federal laws at any time, place, or case”).

306. *E.g.*, The Repeal Executive Amnesty Act of 2015, H.R. 191, 114th Cong. §§ 401–402 (2015) (restricting the definition of “lawfully present in the United States,” thus reducing who is eligible for certain benefits (internal quotation marks omitted)).

307. See U.S. CONST. art. I, § 7 (announcing that for a bill to become law, it must pass both the House of Representatives and the Senate and receive the President’s signature).

308. See, *e.g.*, Preserving the Open Internet, 76 Fed. Reg. 59,192, 59,192 (Sept. 23, 2011) (to be codified at 47 C.F.R. pts. 0, 8) (noting that before adopting new Internet protections, the Federal Communications Commission (FCC) undertook a public inquiry and received over 100,000 comments); Elise Hu, *A Fascinating Look*

actions are subject to judicial review. By contrast, when an administration changes its prosecutorial priorities, it need not make even so much as an announcement and the changed priorities are likely insulated from judicial oversight.

Thus, over the years various nonstatus programs have come and gone. INS made up EVD, the Reagan Administration nearly abandoned it, and then the first Bush Administration resurrected it with a new name, DED. Every year or two, the individuals with DED and its statutory cousin, TPS, wait anxiously to learn whether their status will be extended for another period. The existence of their status is year-to-year—dependent on political whims.

In some ways, the executive creation of nonstatus does not resemble an act of lawmaking so much as it does a massive government registration program. In order to obtain work permits, individuals with nonstatus voluntarily disclose their whereabouts, work and family histories, and other biographic data. They are fingerprinted, photographed, and annually tracked. This is all the information that ICE would need to deport hundreds of thousands of individuals if its prosecutorial priorities ever shift again in the future. Mass deportation of nonstatus holders is unlikely because it would probably be too expensive and controversial. However, it is important to acknowledge the possibility that at least some nonstatus holders might be deported.

The fact that nonstatus can be eliminated does not mean that it will be, but its changeability will have an impact on the lives of individuals with nonstatus either way. Consider Liberians with DED: the most recent renewal of Liberian DED occurred just four days before it was set to expire.<sup>309</sup> Imagine how difficult it must have been for these individuals to plan for the future without knowing whether their presence in the United States would continue to be authorized or not.

Critics argue that DACA is more like lawmaking than prosecutorial discretion. But, one central feature of the law is that it provides stability.<sup>310</sup> For better or worse, established rules allow individuals to

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*Inside Those 1.1 Million Open-Internet Comments*, NAT'L PUB. RADIO (Aug. 12, 2014, 1:24 PM), <http://www.npr.org/blogs/alltechconsidered/2014/08/12/339710293/a-fascinating-look-inside-those-1-1-million-open-internet-comments> (reporting that the response to new Internet protections was so immense that the FCC's server crashed and the deadline for receiving public comments had to be extended).

309. See Press Release, White House, *supra* note 64 (extending deferral employment authorization for an additional twenty-four months).

310. See H. L. A. HART, *THE CONCEPT OF LAW* 2–3 (1961) (observing that while there may be many different opinions on what exactly law is, there is a general

govern their lives. Nonstatus does not provide this certainty. Although programs like DACA resemble lawmaking in many ways, a chief difference is that these programs are more ephemeral.

Another feature of the law is that it allows similarly situated individuals to be treated equally. But, the implementation of nonstatus has often been arbitrary or even discriminatory. For years, the INS offered EVD to Cubans but refused in the 1980s to grant it to Salvadorans whose lives were in great risk.<sup>311</sup> When ICE first began its 2011 review of pending cases for administrative closure, it did not consider same-sex relationships to be a positive factor weighing in favor of prosecutorial discretion to the same extent as opposite-sex relationships. It was not until a year later that the agency released a memo clarifying that it would not discriminate against same-sex partners.<sup>312</sup> Moreover, there are vast disparities in general in the operation of the prosecutorial discretion program. It appears that some ICE Chief Counsel offices have exercised their prosecutorial discretion to administratively close cases much more than others.<sup>313</sup>

It is difficult to challenge these sorts of arbitrary or discriminatory decisions concerning nonstatus because they are so discretionary and because there is no real process for doing so. Professor Shoba Sivaprasad Wadhia has urged that prosecutorial discretion programs should be subject to APA review.<sup>314</sup> This would be an improvement for those lucky or ambitious enough to find lawyers able to mount

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understanding that laws create a system in each country and that these legal systems are generally similar in structure).

311. See *supra* notes 115, 127, 129 and accompanying text (observing that the failure of the Reagan Administration to extend EVD to Salvadorans resulted in Salvadorans receiving TPS or DED instead).

312. See Memorandum from Gary Mead, Exec. Assoc. Dir., U.S. Immigr. & Customs Enforcement, et al., to All Field Office Dirs., All Chief Counsel, All Special Agents in Charge 1 (Oct. 5, 2012) (clarifying that long-term same-sex relationships are considered “family relationships” when the individuals are in monogamous relationships, intend to stay in those relationships, and maintain common residences and financial assets).

313. See TRAC, *supra* note 7 (finding that as of January 2014, prosecutorial discretion was used more frequently than in 2012 but less frequently than in 2013).

314. See Shoba Sivaprasad Wadhia, *The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions*, 16 HARV. LATINO L. REV. 39, 47 (2013) (reasoning that prosecutorial directives give judges considerable guidance in reviewing decisions and that courts favor interpretations of statutes allowing judicial review of agency action).

such challenges, but it would also represent a doctrinal sea change and is, therefore, probably not very likely in the short term.<sup>315</sup>

Furthermore, the potential benefits that come with nonstatus are also sometimes apportioned in a discriminatory or at least seemingly arbitrary way. For example, individuals with deferred action are generally eligible for medical coverage under the ACA, but DACA (and soon DAPA) recipients are excluded.<sup>316</sup> This type of discrimination is infectious because of the questionable “welfare magnet” notion that individuals will illegally migrate to the United States in the hope that they will be able to collect public benefits.<sup>317</sup> To address the argument that immigrants will be a drain on American society, policymakers will likely continuously water down the limited rights, privileges, and benefits that come with nonstatus. Courts will probably not protect nonstatus holders from such discrimination despite the fact that they are exactly the type of discrete and insular minority that benefit from heightened equal protection review in other contexts.<sup>318</sup> The Supreme Court often strikes down discrimination concerning immigrant benefits at the state level, but it has been unwilling to uphold equal protection challenges filed to challenge federal discrimination, no matter how irrational it may be.<sup>319</sup>

Nonstatus offers few rights and many risks. Why would anyone accept such a tenuous, tentative, and temporary benefit? In some cases, such as instances where removal proceedings have been administratively closed, accepting nonstatus is a rational calculation made to avoid possible deportation. However, many people, like DACA applicants, have affirmatively applied for nonstatus. For those individuals, the act of seeking nonstatus is one of tremendous courage.

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315. See *Hotel & Rest. Emps. Union, Local 25 v. Att’y Gen.*, 804 F.2d 1256, 1271 (1986) (holding that the APA does not authorize judicial review of the Attorney General’s decision not to grant EVD), *vacated*, 808 F.2d 847 (D.C. Cir. 1987).

316. See 45 C.F.R. § 152.2(8) (2013) (excluding DACA from the ACA).

317. See *supra* notes 262–64 and accompanying text.

318. For a discussion of the argument that the Equal Protection Clause should be used to protect “discrete and insular minorities” who are left vulnerable in a democracy, see JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75–76 (1980) (analyzing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

319. Compare *Plyler v. Doe*, 457 U.S. 202, 228–30 (1982) (striking down a state statute that prevented the use of state funding for the education of undocumented immigrant children), with *Mathews v. Diaz*, 426 U.S. 67, 84 (1976) (concluding that the judiciary does not have broad power to review decisions made by Congress and the President with respect to immigration).



While individual courage is admirable, collective courage is formidable. In order to obtain DACA, thousands of youths and their families mobilized and lobbied the Obama Administration. They created a political movement, as a result of which some of the most marginalized individuals in this society have achieved work permission, a chance at a higher education, and the ability to open bank accounts and legally drive. These are transformational rights for unauthorized immigrants. Thus, there is another way to see nonstatus—not as a massive government registration and surveillance program, but as a civil rights movement.

Through political mobilization, nonstatus may morph into something better for at least some of those who have it. The examples of past nonstatus leading to status include EVD for Cubans, which eventually led to congressional passage of the Cuban Adjustment Act; EVD for Southeast Asians, which led to similar legislation for Indochinese adjustment of status; DED for Chinese students after Tiananmen Square, which was soon supplanted by the Chinese Student Protection Act; and the Family Fairness program, which was replaced by Family Unity.<sup>320</sup> The most secure form of nonstatus—TPS—came about after years of unsuccessful lobbying for Salvadorans to be granted EVD.<sup>321</sup> Thus, there is reason behind the Dreamers' faith that they might someday get something better. Nonstatus can sometimes be a way station en route to status.

On the other hand, nonstatus could calcify. The ability of millions of undocumented individuals to obtain nonstatus might reduce the pressure to pass actual immigration reform. Business interests that have historically lobbied for reform might be appeased by the existence of a large new lawful work force.<sup>322</sup> The tenuous nature of nonstatus might prevent its holders from pushing too hard for something better for fear of losing what they have. Even if nonstatus becomes status for the most politically popular groups, like those with DACA, less visible and less politically connected groups will likely be left out.

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320. *Designations of Temporary Protected Status and Fraud in Prior Amnesty Programs: Hearing Before the Subcomm. on Immigration & Claims of the H. Comm. on the Judiciary, 106th Cong.* 27–31 (1999) (statement of Mark Krikorian, Executive Director, Center for Immigration Studies).

321. See *supra* notes 127–29 and accompanying text.

322. See Ngai, *supra* note 49, at 93–95 (explaining that business interests that benefited from the existence of a low-wage work force helped perpetuate the immigration policies that led to the existence of large numbers of undocumented immigrants in the United States).

The dangers of this situation need to be recognized. Those with nonstatus will contribute to the country's tax revenue without receiving their fair share of benefits, such as health care, and for some, social security retirement. They will be more likely to suffer discrimination and less likely to be protected by the courts. On the other hand, DHS will grow from nonstatus, gaining more and more officers to process millions of work permit renewal requests.<sup>323</sup> DHS has even claimed that it might be able to shift some of the fees from DAPA to fund ICE's and CBP's enforcement efforts—growing those agencies, too.<sup>324</sup>

Although the immigration enforcement agencies may be nourished by nonstatus, nonstatus may guarantee that the United States will never solve its problem of unauthorized immigration. The Executive Branch justifies most of its nonstatus programs as an exercise of prosecutorial discretion in the face of an unauthorized population that is larger than what the government is capable of deporting. In order for it to keep granting nonstatus, therefore, the government must always be faced with a massive undocumented population.<sup>325</sup> Those undocumented immigrants who do not qualify for nonstatus will likely be subject to a new regime of hyper-enforcement with ever-larger levels of resources directed against them.

#### CONCLUSION

The Executive Branch has offered nonstatus at least since the 1920s, when the INS granted parole to excludable individuals with sympathetic cases. By the 1950s, the Executive Branch was granting nonstatus to tens of thousands of individuals at a time as a type of *de facto* refugee admissions program. Even after the 1980 passage

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323. See *Joint Written Statement of Joseph Moore, Senior Financial Official, U.S. Citizenship and Immigration Services, Donald Neufeld, Associate Director, Service Center Operations, U.S. Citizenship and Immigration Services, Daniel Renaud, Associate Director, Field Operations, U.S. Citizenship and Immigration Services*, SENATE JUDICIARY COMMITTEE (Mar. 3, 2015), <http://www.judiciary.senate.gov/imo/media/doc/Moore-Renaud-Neufeld%20Testimony.pdf> (explaining that USCIS is funded through the fees it collects on applications and that it hires staff based on its projection of its adjudication workload).

324. "DHS has explained that, if anything, the proposed deferred action program might increase ICE's and CBP's efficiency by in effect using USCIS's fee-funded resources to enable those enforcement divisions to more easily identify non-priority aliens and focus their resources on pursuing aliens who are strong candidates for removal." Thompson Memorandum, *supra* note 252, at 26.

325. See *id.* at 31 (noting that DACA recipients constitute only a small percentage of the total undocumented population).

of the Refugee Act created the formal statuses of refugee and asylee, Presidents Reagan, Bush, and Clinton continued offering the nonstatus of EVD and DED to large numbers of individuals from countries in strife and to countries that implicated U.S. foreign policy interests.

Throughout the same period, the INS also granted the nonstatus of “deferred action” on a case-by-case basis to deportable individuals with sympathetic cases. After the 1996 restrictionist immigration reforms made more individuals deportable or inadmissible than ever before and eliminated many forms of immigration relief, INS and then DHS gradually expanded deferred action programs. Beginning with VAWA self-petitioners in the late 1990s, the Executive Branch continued to ramp up deferred action, categorically granting it to thousands of individuals. At the same time, it also issued more and more supervision orders every year, netting a population of well over 600,000 persons subject to this form of indefinite immigration probation.<sup>326</sup>

This expansion of nonstatus largely went uncontested until the Obama Administration inaugurated the DACA program, which drew considerable publicity and further polarized immigrant advocates and immigration restrictionists. President Obama has since expanded nonstatus even further, offering to grant it to the parents of LPRs and U.S. citizens. There is a fierce debate as to whether or not this move is legal.

The legal debate over nonstatus could be avoided by legislative immigration reform to create a pathway to residency and citizenship for some portion of the unauthorized immigrant population. However, such a measure would still be controversial precisely because it would grant status instead of nonstatus. During the 2013 congressional debate over immigration reform, the most contentious subject was whether unauthorized immigrants should be granted a pathway to citizenship.<sup>327</sup> Even when the pathway was lengthened to

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326. ICE FOIA Response, *supra* note 14.

327. See Sean Sullivan, *Rand Paul and Why the ‘Pathway to Citizenship’ Question is So Delicate for the GOP*, WASH. POST (Mar. 19, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/03/19/rand-paul-and-why-the-pathway-to-citizenship-question-is-so-delicate-for-the-gop> (internal quotation marks omitted) (pointing out the potential political and election ramifications members of Congress—particularly members of the Republican party—faced with respect to immigration reform).

more than a decade and strewn with obstacles, Congress still could not agree on such a measure.<sup>328</sup>

It is perhaps natural that citizenship is so contested because, according to one view, it is no less than the “right to have rights.”<sup>329</sup> The embattled state of immigrant rights and benefits is perhaps part of the reason why nonstatus has become the default answer to the immigration policy debate. Nonstatus comes with minimal rights and benefits, although even those have provoked an outcry.

Therefore, nonstatus will probably continue to grow—an expanding limbo that reflects the United States polity’s deep ambivalence for immigrants and immigration law. It is unfortunate that thus far, the nation has been unable to find a more satisfying answer to the policy and moral dilemmas posed by its large unauthorized immigrant population. Persons with nonstatus often work, pay taxes, and add to the social fabric of the United States. In some cases, such as that of the Dreamers, they have demonstrated tremendous courage and won the respect of a wide bipartisan coalition. Hopefully, in the future they will also receive the benefits that they have earned through their contributions.

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328. Jaime Fuller, *Americans Are Ready for Immigration Reform. They Are Just Not Ready Enough*, WASH. POST (July 14, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/07/14/americans-are-ready-for-immigration-reform-they-are-just-not-ready-enough>.

329. *Perez v. Brownell*, 356 U.S. 44, 64 (1958).