NOTE

A DREAM Turned Nightmare: The Unintended Consequences of the Obama Administration's Deferred Action for Childhood Arrivals Policy

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ABSTRACT

Although implemented with good intentions, the Obama Administration's Deferred Action for Childhood Arrivals policy puts its intended beneficiaries in a precarious position. Because the policy constitutes an agency policy statement outlining an exercise of prosecutorial discretion, administrative law precedent suggests that deferred action applicants are unable to seek enforcement of the policy's benefits. Thus, if a future administration chooses to rescind the policy, deferred action applicants could be placed in removal proceedings utilizing the information provided in the application, despite the government's assurance that the information would not be used for enforcement purposes. This Note analogizes this assurance to a promise of leniency in the criminal context, which courts have held may render a confession involuntary. Individuals placed in removal proceedings could argue, then, that the "confessions" of immigration law violations within their deferred action applications were involuntary. This Note also suggests that the doctrines of detrimental reliance and estoppel may provide other avenues for relief.

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Introduction

One could say Juan Gomez is living the American Dream. The son of immigrant parents, Juan graduated at the top of his high school class, earned a full scholarship to Georgetown University, and subse-

quently received an offer to join a leading financial services firm in New York City.[1] When asked about his future prospects, however, Juan's enthusiasm is restrained: "There is no certainty . . . . It still feels like it could be just a tease."[2] This is because Juan is undocumented.[3]

Juan came to the United States at the age of two, travelling with his family from Colombia on tourist visas.[4] The family overstayed their visas and subsequently applied for political asylum.[5] After seventeen years and numerous appeals of the denial of their asylum applications, Juan's parents and grandmother were deported.[6] Juan and his brother were spared by private bills introduced on their behalf in Congress, giving each a two-year reprieve from deportation.[7] After their congressional sponsor retired, the brothers obtained additional relief in the form of deferred action—a temporary stay of deportation that can be terminated at any time—extending their reprieve for another year.[8] Because deferred action is discretionary and does not preclude the commencement of removal proceedings,[9] Juan's future remains in limbo.[10]

Over one million young people in the United States find themselves in circumstances similar to Juan's.[11] As of March 2011, there were an estimated 11.1 million undocumented immigrants living in the United States,[12] approximately 1.7 million of whom were youth—age

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1 *See* Steve Hendrix, *Job in Hand, Future in Limbo*, WASH. POST, Apr. 10, 2011, at C1.

2 *Id.*

3 *Id.* Hereinafter "undocumented" and "undocumented immigrant" will be used interchangeably.

4 *See* Phuong Ly, *The Outsider*, WASH. POST MAG., Feb. 22, 2009, at 11, 12.

5 *Id.*

6 *Id.*

7 Hendrix, *supra* note 1.

8 *See id.*; *see also* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, PROTECTING THE HOMELAND: TOOL KIT FOR PROSECUTORS 5–6 (2011), *available at* http://www.icegov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutorspdf.

9 *See* Memorandum from Doris Meissner, Comm'r, Immigration & Naturalization Serv., to Reg'l Dirs., Dist. Dirs., Chief Patrol Agents, and Reg'l & Dist. Counsel 2, 12 (Nov. 17, 2000) [hereinafter "Meissner Memorandum"], *available at* http://www.scribd.com/doc/22092970/INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00.

10 *See* Hendrix, *supra* note 1.

11 *See* JEFFREY S. PASSEL & MARK HUGO LOPEZ, PEW HISPANIC CTR., UP TO 1.7 MILLION UNAUTHORIZED IMMIGRANT YOUTH MAY BENEFIT FROM NEW DEPORTATION RULES 2, 3–4 (2012), *available at* http://www.pewhispanic.org/files/2012/12/unauthroized_immigrant_youth_updatepdf.

12 Jeffrey S. Passel & D'Vera Cohn, *Unauthorized Immigrants: 11.1 Million in 2011*, PEW RESEARCH HISPANIC TRENDS PROJECT (Dec. 6, 2012), http://www.pewhispanic.org/2012/12/06/unauthorized-immigrants-11-1-million-in-2011/. The most recent study from Pew Research Hispanic Trends Project indicates that the total undocumented population had risen to 11.7 million as of March 2012. JEFFREY S. PASSEL, D'VERA COHN & ANA GONZALEZ-BARRERA, PEW RE-

thirty and younger—who came to the United States as children.[13] For many of them, the United States "is the only home they ever knew."[14] Some have no memory of their birth countries, nor do they even speak their native language.[15] Echoing the sentiments of many in her situation, Tapiwa Nkata, who came from Malawi at the age of four, explained in a letter to Senator Dick Durbin: "I can't imagine my life in Africa. I am an American, I know this culture and I speak this language. I pledge allegiance to this flag."[16]

The introduction of the Development, Relief, and Education for Alien Minors ("DREAM") Act,[17] which provides undocumented youth with a path to citizenship if they meet certain criteria, led to the Act's beneficiaries being called "DREAMers."[18] Although DREAMers grew up in the United States, they are unable to work legally or obtain driver's licenses due to their undocumented status.[19] Some graduate as valedictorians of their class but are unable to attend college because they are ineligible for financial aid without a Social Security number.[20]

The plight of the DREAMers has inspired a very organized and visible grassroots movement. Advocates include DREAMers them-

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search Ctr., Population Decline of Unauthorized Immigrants Stalls, May Have Reversed (2013), *available at* http://www.pewhispanic.org/files/2013/09/Unauthorized-Sept-2013-FINALpdf. This study did not give an updated estimate on the undocumented youth population. *See* Passel et al., *supra*.

13 *See* Passel & Lopez, *supra* note 11. "Children" is defined by the deferred action policy as young persons under the age of sixteen. *See* Memorandum from Janet Napolitano, Sec'y of Homeland Sec., U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot.; Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs.; and John Morton, Dir., U.S. Immigration & Customs Enforcement on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children 1 (June 15, 2012) [hereinafter "Napolitano Memorandum"], *available at* http://www.dhsgov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-childrenpdf.

14 156 Cong. Rec. S6747 (daily ed. Aug. 4, 2010) (statement of Sen. Dick Durbin).

15 *See DREAM Act Stories*, Durbin.Senategov, http://www.durbin.senategov/public/index.cfm/hot-topics?ContentRecord_id=d17ca59b-7420-441b-9ac2-2faf7549e9d0 (last visited Feb. 28, 2014) [hereinafter "*DREAM Act Stories*"] (recounting personal stories from students eligible for the DREAM Act).

16 *See id.* (search for "Dominique and Tapiwa Nkata").

17 Development, Relief, and Education for Alien Minors Act ("DREAM Act"), S. 1291, 107th Cong. (2001).

18 *See* 158 Cong. Rec. S5269 (daily ed. July 24, 2012) (statement of Sen. Durbin).

19 *See DREAM Act and Deferred Action*, U.S. Citizenship, http://www.uscitizenship.info/articles/dream-act-and-deferred-action/indexhtml (last visited Feb. 28, 2014).

20 *See* Vikki Vargas & Julie Brayton, *California Dream Act Now in Effect, Will Benefit Undocumented Students*, NBC S. Cal., Jan. 3, 2013, http://www.nbclosangeles.com/news/local/Californias-Dream-Act-185490482html; *see also DREAM Act Stories*, *supra* note 15 (search for "Jose Magana").

selves, their family and friends, scholars, labor unions, and even Senator Dick Durbin, who has shared the DREAMers' stories on the Senate floor fifty times.[21] Poignantly entitled the "Trail of Dreams," four DREAMers walked 1500 miles from Miami to Washington, D.C. to present a petition supporting passage of the DREAM Act to the President.[22]

Responding to persistent legislative inaction as well as pressure from the DREAMers,[23] on June 15, 2012, President Barack Obama directed agencies within the Department of Homeland Security ("DHS") to exercise prosecutorial discretion and allow undocumented immigrant youth to apply for a two-year shield from deportation and a work permit if they meet certain criteria.[24] In his speech announcing the policy shift, President Obama said of undocumented immigrant youth: "They are Americans in their hearts, in their minds, in every single way but one: on paper."[25] Approximately 1.7 million young undocumented immigrants potentially qualify for deferred action under the new policy, which, if granted, enables them to work and apply for college loans.[26] The discretionary nature of the deferred action policy poses a dilemma for applicants, however, because it can be revoked at any time, meaning that applicants may not rely on the policy to create any substantive rights.[27] Despite assurances from DHS that applicants' information will not be shared with the immigration enforcement agencies, a future administration with different views may choose to rescind the policy and such assurances,[28] leaving more

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21 *See* Ruxandra Guidi, *U.S. Sen. Dick Durbin Rallies for Obama and DREAM Act During LA Stop*, S. CAL. PUB. RADIO, Oct. 5, 2012, http://www.scpr.org/news/2012/10/05/34542/senator-dick-durbin-rallies-obama-and-dream-act-du/.

22 David Montgomery, *For Immigration, Students Take Toughest Course: Action*, WASH. POST, May 1, 2010, at C1.

23 Two weeks prior to the policy's announcement, a group of DREAMers met with White House officials to discuss the executive branch's authority to utilize deferred action in DREAMers' immigration cases. *See* Miriam Jordan, *Anatomy of a Deferred-Action Dream*, WALL ST. J., Oct. 15, 2012, at A2.

24 *See* Napolitano Memorandum, *supra* note 13.

25 *See* Elise Foley, *Obama Administration to Stop Deporting Younger Undocumented Immigrants and Grant Work Permits*, HUFFINGTON POST (June 15, 2012, 9:41 AM), http://www.huffingtonpost.com/2012/06/15/obama-immigration-order-deportation-dream-act_n_1599658html [hereinafter Foley, *Obama Administration to Stop Deporting*].

26 *See* PASSEL & LOPEZ, *supra* note 11.

27 *See infra* Part II.C.

28 For example, former Republican presidential candidate Mitt Romney vowed to rescind the deferred action policy if elected. Kasie Hunt, *Mitt Romney: Obama Immigration Policy Would End Under My Administration*, HUFFINGTON POST (Oct. 3, 2012, 6:20 PM), http://www.huffingtonpost.com/2012/10/03/mitt-romney-obama-immigration_n_1937486html.

than one million potential applicants—now in federal immigration databases—vulnerable to deportation proceedings.[29]

As the policy itself may not be relied upon, this Note explores alternative legal theories that deferred action applicants may advance should they find themselves in removal proceedings. One theory applicants may draw upon is the doctrine of detrimental reliance. Because the policy also implicates the Fifth Amendment—in that individuals must confess their violations of immigration law to federal officials in order to obtain the policy's benefits—applicants could argue that their removal would be fundamentally unfair, drawing analogies to criminal law precedent involving confessions and broken plea agreements.

Part I outlines the basic tenets of immigration law as well as Congress's failure to adequately address undocumented immigration. Part II provides a detailed history of deferred action—the administrative procedure that is the basis of the Obama Administration's new policy—with an overview of the caselaw interpreting it. This Part also addresses whether the policy is indeed a "policy statement" issued under the agency's general authority to exercise prosecutorial discretion, as DHS claims. Part III discusses criminal law precedent and draws analogies between confessions, broken plea agreements, and the policy, which requires deferred action applicants to confess their undocumented status to the immigration agencies to receive the policy's benefits. Part IV briefly summarizes the jurisprudence on estopping the government in the civil context. Part V offers criminal confession jurisprudence as an alternative legal argument that deferred action applicants may advance in removal proceedings. This Part also suggests that applicants could invoke the doctrines of detrimental reliance and estoppel to provide relief from deportation.

I. A Brief History of Congress's Failure to Address Large-Scale Undocumented Immigration

In the past thirty years, the United States has experienced rapid growth in the undocumented population.[30] Recent studies estimate that 11.7 million undocumented immigrants currently live in the

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29 *See* Meissner Memorandum, *supra* note 9, at 12 (stating that deferred action does not grant "immunity from future removal proceedings").

30 The number of undocumented immigrants living in the United States peaked at 12 million in 2007, up from 3.2 million in 1986. Passel & Cohn, *supra* note 12; Ruth Ellen Wasem, Cong. Research Serv., RS21938, Unauthorized Aliens in the United States: Estimates Since 1986, at 3 (2004).

United States.[31] Due to the immense unauthorized population and failed legislative efforts to address it, leaders from both political parties have described the nation's immigration system as "broken."[32]

A. Immigration Law Basics

Immigration law in the United States is governed by the Immigration and Nationality Act ("INA")[33]—an omnibus bill establishing categories of deportable aliens[34] as well as conditions for admission, exclusion, entry, and numerous other provisions.[35] An alien may be deported for many reasons under the current version of the INA, including if the alien: (1) was "[i]nadmissible at time of entry";[36] (2) is present beyond the authorized period;[37] or (3) is present in violation of any provision of the INA.[38] Most undocumented immigrants present in the United States classify as deportable aliens because they overstayed their visa or violated the INA by entering without inspection.[39] This common scenario arguably is due to the difficulty of obtaining a visa to immigrate permanently to the United States.

B. Visa Quotas Do Not Match the Demand for Labor

Generally, an individual must receive either a family-based or employment-based visa in order to legally immigrate to the United

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31 PASSEL ET AL, *supra* note 12. This figure includes approximately 1.7 million DREAMers. PASSEL & LOPEZ, *supra* note 11, at 3.

32 *See Creating an Immigration System for the 21st Century*, WHITE HOUSE, http://www.whitehousegov/issues/fixing-immigration-system-america-s-21st-century-economy (last visited Feb. 28, 2014); *2012 Platform and Statements*, ABOUTMITTROMNEY.COM, http://www.aboutmittromney.com/immigrationhtm (last visited Feb. 28, 2014); *see also Draft Standards for Step-by-Step Immigration Reform*, SPEAKER OF THE HOUSE JOHN BOEHNER (Feb. 3, 2014), http://www.speakergov/general/draft-standards-step-by-step-immigration-reform (stating "[o]ur nation's immigration system is broken and our laws are not being enforced").

33 Immigration & Nationality Act ("INA"), Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

34 As defined by the INA, an alien is "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (2012).

35 *See generally* INA, Pub. L. No. 82-414, 66 Stat. 163.

36 8 U.S.C. § 1227(a)(1)(A). Inadmissible aliens include those with communicable diseases of public health significance, those who have committed certain crimes, and those who have entered the country without being admitted, among many others. *See id.* § 1182(a)(1)–(2), (6).

37 *Id.* § 1227(a)(1)(C).

38 *Id.* § 1227(a)(1)(B). For instance, an alien may be present in violation of the INA by entering the country without having been admitted or inspected. *Id.* § 1225(a)(3).

39 *See* PEW HISPANIC CTR., MODES OF ENTRY FOR THE UNAUTHORIZED MIGRANT POPULATION 1 (2006), *available at* http://pewhispanic.org/files/factsheets/19pdf.

States.[40] Both visa systems have preference categories, establishing visa issuance quotas for each.[41] In spite of the high demand, the INA reserves only 10,000 visas annually for unskilled workers to immigrate permanently.[42] National origin quotas further restrict visa issuance by limiting the number of visas that may be issued to individuals of the same nationality per year.[43] To illustrate, an unskilled worker from India must wait approximately eleven years for a visa whereas the sibling of a U.S. citizen from the Philippines faces a twenty-four-year delay.[44] The unsurprising consequence of the quotas, which make it extremely difficult for low or moderately skilled workers to immigrate lawfully to the United States, is high levels of undocumented immigration.[45] Scholars have argued that the visa quotas do not comport with the demands of the U.S. economy.[46] For example, in California alone, farmers require 450,000 workers to harvest crops during the summer months;[47] yet, in 2011, the U.S. Citizenship and Immigration Services ("USCIS") issued only 188,411 nonimmigrant visas to seasonal agricultural workers.[48] The disparity has resulted in eight million undocumented immigrants working in the United States, accounting for 5.2% of the nation's labor force.[49]

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40 *See* 8 U.S.C. §§ 1151(d), 1154(a)(1)(A)(i). For a brief but thorough discussion of the dual visa system, see Marisa Silenzi Cianciarulo, *Can't Live with 'Em, Can't Deport 'Em: Why Recent Immigration Reform Efforts Have Failed*, 13 NEXUS 13, 15–20 (2008). This Note will not discuss the separate process of immigrating as a refugee.

41 8 U.S.C. § 1153(a)–(b). For example, the system allocates 114,200 visas annually for the spouses and unmarried children of legal permanent residents, whereas the married children of U.S. citizens are allocated 23,400 visas. *Id.* § 1153(a).

42 *Id.* § 1153(b)(3).

43 *Id.* § 1152(a)(2).

44 U.S. DEP'T OF STATE, PUB. NO. 9514, VISA BULLETIN: IMMIGRANT NUMBERS FOR APRIL 2013, at 2–3 (2013), *available at* http://travel.stategov/content/dam/visas/Bulletins/visabulletin_april2013pdf.

45 *See* Cianciarulo, *supra* note 40, at 21.

46 *See* Jimmy Gomez & Walter A. Ewing, *Learning from IRCA: Lessons for Comprehensive Immigration Reform*, IMMIG. POL'Y IN FOCUS, May 2006, at 1, *available at* http://www.immigrationpolicy.org/sites/default/files/docs/Learning%20from%20the%20IRCApdf (arguing that legislation passed in 1986 failed in part because "it did not expand avenues for legal immigration to match the U.S. economy's continuing demand for immigrant workers"); *see also* Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599, 1614–15 (2009).

47 *See* Katie E. Chachere, Comment, *Keeping America Competitive: A Multilateral Approach to Illegal Immigration Reform*, 49 S. TEX. L. REV. 659, 667 (2008).

48 RANDALL MONGER, U.S. DEP'T OF HOMELAND SEC., NONIMMIGRANT ADMISSIONS TO THE UNITED STATES: 2011, at 4 (2012), *available at* http://www.dhsgov/xlibrary/assets/statistics/publications/ni_fr_2011pdf.

49 *See* JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., UNAUTHORIZED IMMI-

Many employers across the country maintain that immigrant workers fill the jobs that native-born workers simply do not want to do.[50] U.S. workers are becoming increasingly skilled while the economy increasingly demands workers that are unskilled.[51] As a result, the demand for unskilled immigrant labor is particularly acute in the industries of agriculture, manufacturing, service, and construction.[52] Despite this high demand, there are less than 200,000 visas available for unskilled workers to migrate on a temporary basis.[53] Undocumented immigration has flourished because of this imbalance.[54]

Heightened border security, somewhat paradoxically, also contributes to the increased undocumented population. Instead of engaging in circular economic migration, undocumented individuals prolong their stay—by an average of seven years—due to the risks and costs associated with crossing the border.[55] This inevitably leads families to put down roots by bringing their foreign-born children to America or by giving birth to children here.[56] These foreign-born children, the DREAMers who "lacked the intent to violate the law,"[57] have inspired a highly organized grassroots movement and numerous legislative efforts aimed at providing them with the certainty that America is, and will continue to be, their home.

GRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 17 (2011), *available at* http://www.pewhispanic.org/files/reports/133pdf (providing figures for March 2010).

50 *See Comprehensive Immigration Reform: Business Community Perspectives*, *Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec. & Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. 2 (2007) (statement of Rep. Zoe Lofgren, Member, H. Comm. on the Judiciary). Other factors include the shrinking U.S. workforce due to the retirement of the baby boomers and the sharp decline in the birthrate. *See* Chachere, *supra* note 47, at 665–71; Cianciarulo, *supra* note 40, at 13–14.

51 *See* Chachere, *supra* note 47, at 668 (detailing how the National Restaurant Association foresees labor shortages as the industry expects to grow 1.5 times faster than the U.S. workforce). Due to the high demand for low-skilled labor, both the U.S. Chamber of Commerce and the National Restaurant Association have advocated for the creation of a functional guest worker program. *See* Emily B. White, Comment, *How We Treat Our Guests: Mobilizing Employment Discrimination Protections in a Guest Worker Program*, 28 BERKELEY J. EMP. & LAB. L. 269, 288 (2007).

52 *See* Cianciarulo, *supra* note 40, at 13–14.

53 *See id.* at 22.

54 *See id.* at 21–22.

55 *See* Chachere, *supra* note 47, at 664; *see also* Walter A. Ewing, *From Denial to Acceptance: Effectively Regulating Immigration to the United States*, 16 STAN. L. & POL'Y REV. 445, 454–55 (2005).

56 In 2010, of the 5.5 million children of undocumented immigrants, 4.5 million, or around eighty-two percent, were U.S. citizens by birth, with the remaining percentage being foreign born (and likely undocumented). PASSEL & COHN, *supra* note 49, at 13.

57 Napolitano Memorandum, *supra* note 13, at 1.

C. The Trail of Dreams: The Many Deaths of the DREAM Act

The DREAM Act aims to legalize certain undocumented immigrant youth who were brought to the United States as children, provided they complete two years of college or military service.[58] Studies estimate that approximately 1.7 million undocumented youth could potentially qualify for legalization under the DREAM Act.[59] Despite enjoying bipartisan support, however, the DREAM Act has languished in Congress since 2001.[60] Most recently, the Senate passed a bipartisan immigration reform bill, which included the DREAM Act, in June 2013.[61] The bill's prospects of passing the House, however, are slim.[62] Of the various immigration reform proposals that have cycled through Congress in recent years, legislators from both parties consider the DREAM Act to be the most palatable due to the sympathetic nature of its beneficiaries.[63] As such, the DREAM Act's multiple failures were likely politically, rather than ideologically, driven.[64] After a decade-long stalemate, and arguably in response to pressure from grassroots groups,[65] the Obama Administration ex-

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58 Development, Relief, and Education for Alien Minors ("DREAM") Act of 2010, S. 3992, 111th Cong.

59 *See* PASSEL & LOPEZ, *supra* note 11, at 1.

60 *See* Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757, 1793–98 (2009) (detailing the bill's history of bipartisan support and its multiple failures in Congress). Senator Orrin Hatch, one of the most conservative Republicans in Congress, initially introduced the bill. *See id.* at 1793; *see also* Development, Relief, and Education for Alien Minors Act ("DREAM Act"), S. 1291, 107th Cong. (2001).

61 Border Security, Economic Opportunity, and Immigration Modernization Act, S 744, 113th Cong. (2013); *see also* Ashley Parker & Jonathan Martin, *Senate, 68 to 32, Passes Overhaul for Immigration*, N.Y. TIMES, June 28, 2013, at A1.

62 Speaker of the House John Boehner has indicated on multiple occasions that he will not allow a vote on the Senate immigration reform bill. *See, e.g.*, Don Seymour, *Excerpts from Speaker Boehner's Interview on CBS News' Face the Nation*, SPEAKER OF THE HOUSE JOHN BOEHNER (July 21, 2013), http://www.speakergov/general/excerpts-speaker-boehner-s-interview-cbs-news-face-nation (explaining that the House will take a "common sense, step by step approach" to immigration reform instead of voting on the "big, massive [Senate] bill").

63 *See* Olivas, *supra* note 60, at 1793–99; *see also* Elise Foley, *Marco Rubio Reconsidering Dream Act–Style Bill*, HUFFINGTON POST (June 16, 2012, 1:44 PM), http://www.huffingtonpost.com/2012/06/16/marco-rubio-dream-act_n_1602582html (Republican Senator Marco Rubio argued that legislative action is needed to "help kids who are undocumented through no fault of their own").

64 *See* Olivas, *supra* note 60, at 1798–99 (arguing that Republicans did not want to be seen as supporting amnesty by their constituents, nor did they want to hand Democrats a legislative victory prior to a presidential election).

65 *See supra* note 23 and accompanying text.

panded a previously buried tool of prosecutorial discretion—deferred action—in an attempt to provide relief to the DREAMers.[66]

II. The Evolution of Deferred Action

Deferred action is a tool of prosecutorial discretion that allows a director of an immigration agency to grant an individual an informal administrative stay of deportation.[67] Although there is no explicit statutory or regulatory authority for deferred action, the power is implicit in both the Secretary of Homeland Security's general authority to administer and enforce immigration law,[68] and in sections of the U.S. Code that contemplate the availability of deferred action under certain circumstances.[69] Federal regulation describes deferred action as an "act of administrative convenience to the government which gives some cases lower priority."[70] Grants of deferred action are "usually valid for one to two years."[71] Since its debut in 1975, deferred action has undergone many procedural and substantive changes, culminating in the Obama Administration's Deferred Action for Childhood Arrivals policy.

A. The Operations Instruction

Prior to 1975, the former Immigration and Naturalization Service ("INS")[72] employed deferred action through a classified Operations Instruction.[73] Following a Freedom of Information Act request that revealed deferred action to the public,[74] the INS published the Operations Instruction, which provided as follows:

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66 Foley, *Obama Administration to Stop Deporting*, *supra* note 25.

67 *See* Matter of Quintero, 18 I. & N. Dec. 348, 348 (B.I.A. 1982).

68 *See* 8 U.S.C. § 1103(a) (2012).

69 *See id.* §§ 1154, 1227.

70 8 C.F.R. § 274a.12(c)(14) (2013). The rule provides that individuals granted deferred action status may apply for employment if they can establish economic necessity for employment. *See id.* § 274a.12(c). For an overview of the legal framework governing deferred action, see January Contreras, Citizenship & Immigration Servs., Deferred Action: Recommendations to Improve Transparency and Consistency in the USCIS Process 2–3 (2011), *available at* http://www.dhsgov/xlibrary/assets/cisomb-combined-darpdf.

71 Contreras, *supra* note , at 4.

72 Following the attacks on September 11, 2001, Congress abolished the INS and delegated immigration services and enforcement to the newly created Department of Homeland Security. *See generally* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

73 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, 46–47 (1976).

74 *Id.* at 45–47, 49.

> In every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he shall recommend consideration for [deferred action category].[75]

The Operations Instruction also outlined the factors that should be considered when recommending a case for deferred action: (1) age; (2) years of presence in the United States; (3) any physical or mental condition requiring treatment in the United States; (4) the effect of the alien's expulsion on his or her U.S. family; and (5) recent criminal, immoral, or subversive activities or affiliations.[76]

Following the emergence of deferred action in the public realm, courts differed as to whether the status conferred a "right" or merely represented an act of administrative convenience.[77] In *Nicholas v. INS*,[78] the Ninth Circuit determined that the Operations Instruction conferred a "substantive benefit upon the alien, rather than setting up an administrative convenience."[79] In reaching this conclusion, the court found three points compelling: (1) the instruction used commanding language;[80] (2) only humanitarian factors are considered for placement in the deferred action category; and (3) the relief, an indefinite stay of deportation, clearly benefitted the petitioner and not the INS.[81]

Perhaps to avoid interpretations similar to the Ninth Circuit's, the INS amended the instruction to clarify that placement in the deferred action category represented an "administrative choice" to assign some cases lower priority and in no way conferred an entitlement.[82] The revised instruction also removed all directive language, emphasizing instead that the decision is within the discretion of the district direc-

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75 INS Operations Instruction (Legacy), O.I. § 103.1(a)(1)(ii)(1975).

76 *Id.*

77 *Compare* Lennon v. INS, 527 F.2d 187, 191 n.7 (2d Cir. 1975) (describing nonpriority status as an "informal administrative stay of deportation"), *and* Soon Bok Yoon v. INS, 538 F.2d 1211, 1213 (5th Cir. 1976) (finding that nonpriority status exists for the administrative convenience of the INS), *with* David v. INS, 548 F.2d 219, 223 (8th Cir. 1977) (staying deportation order to allow petitioner to request placement in deferred action category for compelling humanitarian reasons).

78 Nicholas v. INS, 590 F.2d 802 (9th Cir. 1979).

79 *Id.* at 807.

80 "'In every case where the district director determines that adverse action would be *unconscionable because of the existence of humanitarian factors*, he shall recommend consideration for deferred action category . . . .'" *Id.* at 806 (quoting O.I. § 103.1(a)(1)(ii)).

81 *Id.* at 806–07.

82 *See* Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 250 (2010).

tor.[83] This change insulated the provision from judicial review.[84] Despite the categorization of deferred action as solely an administrative convenience, however, two studies found that agency grants of deferred action were based predominantly on humanitarian factors.[85]

B. Policy Memoranda on Prosecutorial Discretion

Although the INS formally rescinded the Operations Instruction in 1997,[86] the agency continued to utilize deferred action as an internal administrative tool detailed in policy memoranda.[87] An INS memorandum outlining the exercise of prosecutorial discretion stated that "the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations."[88] To this end, the memorandum listed deferred action as one of the many procedures that may be employed to preserve scarce agency resources.[89]

Due to its discretionary nature, a grant of deferred action, like its predecessor, does not guarantee any benefit to the alien. Although its purpose is to delay deportation or placement in removal proceedings for a specified time period, deferred action does not confer "immunity from future removal proceedings."[90] Similarly, in assessing deferred action as a form of interim relief for U visa applicants,[91] the Associate Director of Operations for USCIS issued a policy memorandum pro-

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83 *See* Romeiro de Silva v. Smith, 773 F.2d 1021, 1024–25 (9th Cir. 1985) (quoting O.I. § 103.1(a)(1)(ii) in effect as of May 6, 1981, which states that the director "may" consider deferred action).

84 *See* Wadhia, *supra* note 82, at 250–51; *cf.* Heckler v. Chaney, 470 U.S. 821, 831–33 (1985) (holding that the Food and Drug Administration's decision not to prosecute was within the agency's discretion and therefore was presumptively unreviewable under the Administrative Procedure Act).

85 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, 831–34 (2004) (finding separation from family and medical infirmity as the most influential factors in agency's grant of deferred action).

86 *See* 6 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 72.03(2)(h) n.119 (2013).

87 *See* GORDON ET AL., *supra* note 86§ 72.03(2)(h). *See also generally* Meissner Memorandum, *supra* note 9.

88 Meissner Memorandum, *supra* note 9, at 4.

89 *See id.* at 2, 10.

90 *Id.* at 12.

91 In 2000, Congress created the U visa, which confers lawful status to undocumented individuals who cooperate in criminal investigations or prosecutions for certain offenses. *See* Victims of Trafficking & Violence Protection Act of 2000, Pub. L. No. 106-386 § 1513(b), 114 Stat. 1464, 1534.

viding that "[d]eferred action does not preclude the [US]CIS from commencing removal proceedings at any time against an alien."[92]

Despite calls to create a transparent application process, deferred action remains a procedure "initiated at the discretion of the agency or at the request of the alien."[93] The processing of deferred action requests currently operates on informal standards formulated by the local USCIS office, rather than pursuant to a standard operating procedure created by the agency.[94] Typically, an individual submits a deferred action request to the local USCIS office.[95] An officer reviews the request and creates a summary sheet listing the positive and negative factors that affect a grant of deferred action.[96] After reviewing the summary sheet, the district director makes a recommendation, which is then "forwarded to the regional director."[97] The regional director then issues a final decision, which is communicated to the requestor via the district director.[98]

Although policy memoranda provide that requests for deferred action should be decided on an individual, case-by-case basis,[99] the status has recently been extended to categorical groups of aliens. Prior to the passage of a law removing the two-year marriage requirement for a widow(er) to qualify for permanent resident status, DHS extended deferred action to the widow(er)s of U.S. citizens who were married for less than two years prior to their spouse's death.[100] In a

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92 Memorandum from William R. Yates, Assoc. Dir. of Operations, to U.S. Citizenship & Immigration Servs. Dir., Vt. Service Ctr., on Centralization of Interim Relief for U Nonimmigrant Status Applicants 5 (Oct. 8, 2003), *available at* http://www.uscisgov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2003/ucntrl100803pdf.

93 Memorandum from Dr. Emilio Gonzalez, Dir., U.S. Citizenship & Immigration Servs., to Prakash Khatri, U.S. Citizenship & Immigration Servs. Ombudsman, on Response to Recommendation #32, Deferred Action 1 (Aug. 7, 2007), *available at* http://www.dhsgov/xlibrary/assets/cisombudsman_rr_32_o_deferred_action_uscis_response_08-07-07pdf.

94 *See* CONTRERAS, *supra* note 70, at 3–4.

95 *See id.*

96 *See id.* at 4.

97 *See id.*

98 *See id.*

99 *See, e.g.*, Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement ("ICE"), to Field Office Dirs., Special Agents in Charge, and Chief Counsel, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 4 (June 17, 2011), *available at* http://www.icegov/doclib/secure-communities/pdf/prosecutorial-discretion-memopdf (listing relevant factors to consider to decide whether prosecutorial discretion is appropriate "for a given alien").

100 *See* Press Release, Dep't of Homeland Sec., DHS Establishes Interim Relief for Widows of U.S. Citizens (June 9, 2009), *available at* http://www.dhsgov/ynews/releases/pr_1244578412501.shtm. The press release preceded the passage of the DHS Appropriations Act for Fiscal Year

similar vein, DHS utilizes deferred enforced departure to safeguard nationals from a country that is experiencing ongoing civil strife or environmental disaster, although other situations may also merit the designation.[101] These past exercises of prosecutorial discretion, wherein the President temporarily shields certain groups of individuals from removal for humanitarian purposes, paved the way for the Obama Administration's Deferred Action for Childhood Arrivals policy.

C. The Obama Administration's Deferred Action for Childhood Arrivals Policy

On June 15, 2012, President Obama directed then-Secretary of Homeland Security Janet Napolitano to issue a policy memorandum regarding the exercise of prosecutorial discretion for young undocumented immigrants who were brought to the United States as children.[102] In the memorandum, Secretary Napolitano instructed the directors of three agencies[103] within DHS to grant deferred action to undocumented immigrant youth who meet specific criteria.[104] Once approved, deferred action is valid for a period of two years, unless DHS terminates the deferral.[105] Applicants may apply to renew their status at the end of the two-year period.[106] Pursuant to federal regulation, applicants for deferred action may also apply for work authorization.[107] The memorandum stresses that a grant of deferred action does

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2010, signed into law by President Obama on October 28, 2009. *See Fact Sheet: USCIS to Process Applications of Widow(er)s of Deceased U.S. Citizens*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Mar. 3, 2010), http://www.uscisgov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=aA5febebf59d85210VgnVCM100000082ca60aRCRD&vgnextchannel=8a2f6d26d17df110VgnVCM1000004718190aRCRD.

101 U.S. CITIZENSHIP & IMMIGRATION SERVS., AFFIRMATIVE ASYLUM PROCEDURES MANUAL (AAPM) 56 (2013), *available at* http://www.uscisgov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/2007_AAPMpdf.

102 *See* Napolitano Memorandum, *supra* note 13, at 1.

103 These agencies include USCIS, Customs and Border Protection ("CBP"), and ICE. *Id.*

104 *Id.* at 1–3.

105 *See* Press Release, Dep't of Homeland Sec., Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities (June 15, 2012) [hereinafter Secretary Napolitano Announces Deferred Action Process], *available at* http://www.dhsgov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low; *see also* U.S. DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP AND IMMIGRATION SERVS., OMB NO. 1615-0124, INSTRUCTIONS FOR CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (2013), *available at* http://www.uscisgov/sites/default/files/files/form/i-821dinstrpdf.

106 *See* Secretary Napolitano Announces Deferred Action Process, *supra* note 105.

107 *See* 8 C.F.R. § 274a.12(c)(14) (2013).

not confer any "immigration status or pathway to citizenship."[108] Individuals who have been granted deferred action would therefore still lack legal immigration status. The memorandum directs U.S. Immigration and Customs Enforcement ("ICE") and U.S. Customs and Border Protection ("CBP") to immediately exercise their prosecutorial discretion to prevent eligible individuals from being removed or placed in removal proceedings after being encountered by either agency.[109] It also directs USCIS to implement a deferred action application process for those who are not currently in removal proceedings.[110]

To be eligible for deferred action under the new policy, an individual must: (1) have immigrated to the United States before the age of sixteen; (2) have continuously resided in the United States for at least five years prior to June 15, 2012 and have been present in the United States on the date the memorandum was issued; (3) currently be in school, have graduated from high school, have obtained a general education development certificate ("GED"), or have been honorably discharged from the United States Coast Guard or Armed Forces; (4) not have been convicted of a felony, significant misdemeanor, multiple misdemeanors, nor otherwise pose a threat to national security or public safety; (5) pass a background check; and (6) be under the age of thirty.[111] These factors mirror the eligibility criteria for the DREAM Act.[112]

Secretary Napolitano emphasized that requests for deferred action are to be decided on an individual, case-by-case basis, and that approval is not guaranteed.[113] Following her predecessors' lead, Secretary Napolitano framed the policy as a matter of administrative convenience, asserting that it is necessary to "ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities."[114] Perhaps in an effort to insulate the policy

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108 *See* Napolitano Memorandum, *supra* note 13, at 3.

109 *Id.* at 2.

110 *Id.* at 2–3.

111 *Id.* at 1–2.

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

113 Napolitano Memorandum, *supra* note 13.

114 *Id.* at 1; *see also* Meissner Memorandum, *supra* note 9; Memorandum from Bo Cooper, General Counsel, Immigration & Naturalization Servs., to Immigration & Naturalization Servs. Comm'r, on INS Exercise of Prosecutorial Discretion 2 (July 11, 2000), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-deten

from judicial review, the Secretary took care to avoid any rights-creating language, explicitly stating that the policy "confers no substantive right."[115] USCIS also warned applicants that the policy "may be modified, superseded, or rescinded at any time without notice, [and] is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable by law by any party in any administrative, civil, or criminal matter."[116]

According to USCIS, information provided in a deferred action application is protected from disclosure to ICE and CBP for the purpose of immigration enforcement proceedings "unless the requestor meets the criteria for the issuance of a Notice To Appear" as set forth in guidance released by USCIS.[117] Generally, if an applicant's "case does not involve a criminal offense, fraud, or a threat to national security or public safety, [it] will not be referred to ICE" except in "exceptional circumstances."[118] Correspondingly, applicants who are granted deferred action will not have their cases referred to ICE.[119]

Information related to family members or guardians contained in a deferred action request will also be protected from disclosure to ICE for purposes of immigration enforcement, even if the applicant is found eligible for a Notice to Appear[120] following the submission of a deferred action request.[121] Nonetheless, information pertaining to applicants and their family members or guardians may be shared with national security and law enforcement agencies, including ICE and CBP, for purposes other than removal, including "to identify or prevent fraudulent claims, for national security purposes, or for the investigation or prosecution of a criminal offense."[122]

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tion-and-criminal-justice/government-documents/Bo-Cooper-memo%20pros%20discretion7.11.2000pdf/view.

115 *See* Napolitano Memorandum, *supra* note 13 at 3.

116 *Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions#guidelines (last updated Jan. 18, 2013) [hereinafter USCIS FAQ].

117 *Id.*; *see also* U.S. DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP AND IMMIGRATION SERVS., PM-602-0050, POLICY MEMORANDUM: REVISED GUIDANCE FOR THE REFERRAL OF CASES AND ISSUANCE OF NOTICES TO APPEAR (NTAS) IN CASES INVOLVING INADMISSIBLE AND REMOVABLE ALIENS (2011), *available at* http://www.uscisgov/NTA [hereinafter NTA MEMORANDUM].

118 USCIS FAQ, *supra* note 116.

119 *See id.*

120 A Notice to Appear is a summons served upon an alien ordering the alien to appear for removal proceedings. *See* 8 U.S.C. § 1229 (2012).

121 *See* USCIS FAQ, *supra* note 116.

122 *Id.*

The guidance issued by USCIS lacks a specific recommendation that applicants seek legal advice prior to submitting their request. Instead, USCIS counsels applicants to seek information from "official government sources such as USCIS or the Department of Homeland Security."[123] Although the agency invites those seeking legal advice to visit their "Find Legal Services" page to learn how to choose a licensed attorney or accredited representative, it refrains from actually encouraging the pursuit of legal advice.[124] As a result, many individuals are likely to apply for benefits under the policy without fully understanding the legal consequences of their actions. This is particularly problematic because applicants will not be able to seek judicial enforcement of the policy due to its nonbinding discretionary nature and presumptive unreviewability.

1. The Deferred Action Policy Is a Nonbinding Policy Statement

If immigration authorities seek to remove individuals based on information submitted in their deferred action applications, the applicants will not be able to seek enforcement of the policy in court due to its nonbinding nature. In its memorandum, DHS characterizes the deferred action policy as a general statement of policy.[125] A policy statement is nonbinding and merely prescribes the "course which the agency intends to follow."[126] Consequently, an agency remains free to act inconsistently with the policy statement at its discretion.[127] The nonbinding nature of policy statements therefore prohibits applicants from relying upon the deferred action policy in court. Indeed, Secretary Napolitano stressed that the memorandum "confer[red] no substantive right."[128] This statement accords with previous agency memoranda as well as the courts' construction of the INS Operation Instruction on deferred action.[129] As a result, deferred action applicants are precluded from attempting to enforce any benefit available

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123 *Id.*

124 *Id.*

125 *See* Napolitano Memorandum, *supra* note 13, at 3 ("It remains for the executive branch . . . to set forth policy for the exercise of discretion within the framework of the existing law. I have done so here.").

126 *See* Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) (holding that an agency order announcing the pipeline curtailment plan it proposed to implement was a nonbinding general statement of policy).

127 *See* Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987) (noting that general statements of policy permit agency's discretion in its application).

128 Napolitano Memorandum, *supra* note 13, at 3.

129 *See, e.g.*, Soon Bok Yoon v. INS, 538 F.2d 1211, 1213 (5th Cir. 1976) (describing nonpriority status—the predecessor to deferred action—during which a deportation order "may be

under the policy.[130] If the applicants later find themselves in removal proceedings, DHS makes clear that the policy "may not be relied upon to create any right or benefit, substantive or procedural, enforceable by law by any party in any administrative, civil, or criminal matter."[131]

Applicants seeking to enforce benefits under the policy may argue that the policy is "practically binding" and thus rises to the level of a substantive, legislative rule.[132] DHS framed the policy, however, as a tool to best utilize limited agency resources.[133] It also stressed that decisions to grant deferred action are to be decided on a case-by-case basis and relief cannot be assured to any applicant.[134] By retaining this discretion, DHS makes it difficult for applicants to argue that the policy is something other than an agency policy statement on the exercise of prosecutorial discretion.[135]

2. *The Deferred Action Policy Is an Unreviewable Exercise of Prosecutorial Discretion*

Deferred action applicants will not be able to seek enforcement of the policy because, in addition to being nonbinding, the policy is an unreviewable exercise of prosecutorial discretion. The deferred action memorandum plainly states that the policy represents an exercise of prosecutorial discretion.[136] Prosecutorial discretion is essential to the everyday operations of DHS because the agency "has finite resources, and it is not possible to investigate and prosecute all immigration violations."[137] As a result, DHS must utilize its discretion to decide which individuals' cases constitute enforcement priorities.[138] Secretary Napolitano defended the policy on that basis, stating that

executed at any time"); *see also* Meissner Memorandum, *supra* note 9, at 10, 13. For additional discussion, see *supra*, Part II.A–B.

130 *See, e.g.*, *Soon Bok Yoon*, 538 F.2d at 1213; *see also* Meissner Memorandum, *supra* note 9, at 10, 13.

131 *See* USCIS FAQ, *supra* note 116.

132 *Cf.* Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020–25 (D.C. Cir. 2000) (holding that an EPA policy statement was a procedurally invalid legislative rule because the agency based "enforcement actions on the policies or interpretations formulated in the document" and the policy was for all practical purposes "binding").

133 Napolitano Memorandum, *supra* note 13, at 1.

134 *Id.* at 2.

135 *See id.* at 2; *cf.* Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 947–48 (D.C. Cir. 1987) (holding that FDA policy statement limiting enforcement to proscribed action levels gave it a binding effect and was therefore a procedurally invalid legislative rule).

136 Napolitano Memorandum, *supra* note 13, at 3.

137 Meissner Memorandum, *supra* note 9, at 4.

138 Napolitano Memorandum, *supra* note 13, at 1.

"young people who were brought to this country as children . . . . lacked the intent to violate the law" and are therefore considered low priority cases.[139]

The Supreme Court has noted that agency decisions *not* to prosecute are "generally committed to an agency's absolute discretion."[140] In the seminal case of *Heckler v. Chaney*,[141] prison inmates who had been sentenced to death challenged the Food and Drug Administration's refusal to prosecute the alleged unapproved use of lethal injection drugs in violation of the law.[142] The Court found that an agency's exercise of prosecutorial discretion is presumptively unreviewable under the Administrative Procedure Act,[143] which precludes judicial review of agency action "committed to agency discretion by law."[144] The Court justified a presumption of unreviewability for agency decisions not to enforce with the observation that "[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."[145]

The Court distinguished *Chaney* from previous cases where statutory language provided clearly defined standards for the agency to follow in the exercise of its enforcement powers.[146] The Court found that such justiciable standards, particularly when coupled with commanding language, may rebut the presumption of unreviewability because there is "law to apply" that limits an agency's normally unfettered exercise of prosecutorial discretion.[147] In *Chaney*, the Court held that the statute contained no justiciable standards to apply and therefore the agency's decision not to prosecute was committed to its discretion and thus unreviewable.[148]

Here, a court will likewise find that the deferred action policy is committed to DHS's prosecutorial discretion and is therefore presumptively unreviewable. Despite conferring significant benefits to

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139 *Id.* at 1.

140 Heckler v. Chaney, 470 U.S. 821, 831 (1985).

141 Heckler v. Chaney, 470 U.S. 821 (1985).

142 *See id.* at 823.

143 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2012).

144 *Chaney*, 470 U.S. at 828, 831–32 (quoting 5 U.S.C. § 701(a)(2)).

145 *Id.* at 831–32.

146 The Court contrasted this case, where the statute's enforcement provision only provided that the Secretary "is *authorized* to conduct examinations and investigations" with *Dunlop v. Bachowski*, 421 U.S. 560 (1975), where the statute required the Secretary to file suit ("[t]he Secretary shall . . . bring a civil action") if "clearly defined" factors were present. *Id.* at 833–35.

147 *Id.* at 830–34; *see also* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971).

148 *See Chaney*, 470 U.S. at 837–38.

DREAMers in the form of temporary relief from deportation, work permits, and possibly driver's licenses, the discretionary nature of the policy will thus lead courts to the same conclusion as prior precedent on deferred action—that it is an act of prosecutorial discretion precluded from judicial review. Because applicants may not rely upon the policy's assurances, which are nonbinding and isolated from judicial review, they must therefore look to alternative legal arguments to defend against their removal.

III. Analogies to Criminal Law

In certain circumstances, constitutional safeguards typically afforded criminal defendants have been extended to civil proceedings.[149] Due to the similarities between immigration enforcement proceedings and criminal prosecutions, some argue that constitutional protections should be afforded to aliens in deportation proceedings.[150] In the case of deferred action applicants, because the policy requires applicants to confess their immigration law violations, Fifth Amendment jurisprudence may be applicable.

A. Some Civil Proceedings May Require Constitutional Protections Typically Afforded Criminal Defendants

Like other civil proceedings where due process requires certain constitutional protections, deferred action applicants could invoke the Fifth Amendment privilege in removal proceedings. Although the Constitution provides some safeguards to criminal defendants specifically,[151] the Supreme Court has extended these protections to civil proceedings where the nature of the penalty is punitive or where fundamental fairness so requires.[152] One factor for determining whether a civil sanction is punitive is "whether the behavior to which it applies

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149 *See* Anita Ortiz Maddali, Padilla v. Kentucky*: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?*, 61 Am. U. L. Rev. 1, 7–8 (2011).

150 *See id.* at 5–6, 51–52 (arguing that, because deportation is punitive, the notion of fundamental fairness embodied in the Due Process Clause necessitates an alien's right to counsel, even one appointed by the government if the alien cannot afford one); *see also* Wadhia, *supra* note 82, at 268.

151 U.S. Const. amend. V ("[N]or shall [any person] be compelled in any criminal case to be a witness against himself . . . ."); U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.").

152 *See* Ortiz Maddali, *supra* note 149, at 5–6 (detailing precedent on whether a civil sanction is punitive); *see also* United States v. Ursery, 518 U.S. 267, 280 (1996) (noting that a civil penalty may be "so extreme and so divorced" from actual damages as to constitute punishment (quoting United States v. Halper, 490 U.S. 435, 442 (1989))).

is already a crime," among others.[153] For instance, civil forfeiture proceedings require constitutional protections where the penalty is based on criminal acts.[154] A civil fine may also be punitive if deemed excessive.[155] In a case where a juvenile made an inculpatory admission, the Court held that the juvenile was entitled to the privilege against self-incrimination because delinquency proceedings, although labeled as civil, entail the possible deprivation of liberty and therefore can be considered punitive.[156]

Despite past determinations that deportation does not constitute punishment and therefore does not require the constitutional safeguards afforded criminal defendants,[157] recent precedent and scholarship suggest otherwise.[158] The Supreme Court recently held that the Sixth Amendment requires counsel to notify criminal defendants of the immigration consequences of a guilty plea because "[t]he severity of deportation [is] 'the equivalent of banishment or exile.'"[159] Such commentary supports the notion that deportation is punitive and therefore individuals in deportation proceedings should be entitled to constitutional protections.[160]

Although individuals in removal proceedings are not entitled to many procedural safeguards found within the Constitution,[161] as in

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153 Other factors include "whether [the sanction's] operation will promote the traditional aims of punishment—retribution and deterrence . . . and whether it appears excessive in relation to the alternative purpose assigned." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963).

154 *See* Boyd v. United States, 116 U.S. 616, 633–34 (1886).

155 *See* Helwig v. United States, 188 U.S. 605, 613 (1903).

156 *See In re* Gault, 387 U.S. 1, 41–49 (1967).

157 *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 594–95 (1952) (stating that although severe, deportation is not punishment).

158 For a persuasive argument that deportation constitutes punishment based on application of relevant precedent, see Ortiz Maddali, *supra* note 149, at 4–5, 23–24; see also Padilla v. Kentucky, 559 U.S. 356, 365 (2010) (referring to deportation as a "particularly severe penalty" (internal quotation marks omitted)).

159 *Padilla*, 559 U.S. at 373 (quoting Delgadillo v. Carmichael, 332 U.S. 388, 390–391 (1947)); *see also* Bridges v. Wixon, 326 U.S. 135, 154 (1945) (stating that deportation potentially deprives an individual of liberty and "the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted."). *But see* Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999) (finding that deportation is a means of correcting ongoing immigration violations and, although the consequences are grave, is not punishment).

160 Ortiz Maddali, *supra* note 149, at 55–56 (arguing that lawful permanent residents in deportation proceedings should be afforded the right to counsel).

161 *See, e.g.*, INS. v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (holding that the exclusionary rule does not apply in removal proceedings); *Harisiades*, 342 U.S. at 594–95 (holding the ban on ex post facto laws inapplicable in removal proceedings).

other civil proceedings, they are entitled to due process.[162] Consequently, lower courts have held that the absence of traditional criminal protections may, in some circumstances, render civil proceedings fundamentally unfair in violation of the Due Process Clause of the Fifth Amendment.[163] For instance, in *In re Toro*[164] the respondent asserted that an inculpatory admission regarding her deportability was obtained through an unlawful search and seizure: she had been detained even though the arresting officers lacked reasonable suspicion of her alienage other than "her obvious Latin appearance."[165] Assuming *arguendo* that the officers' conduct violated the Fourth Amendment, the Board of Immigration Appeals held that the use of evidence in this case was not "so egregious that to rely on it would offend the [F]ifth [A]mendment's due process requirement of fundamental fairness."[166] The Supreme Court has supported this view in dicta, stating that particularly egregious violations of liberties that "transgress notions of fundamental fairness" could alter the Court's conclusion that the exclusionary rule does not apply in deportation proceedings.[167]

The Fifth Amendment privilege against self-incrimination does, however, apply to individuals in deportation proceedings.[168] Mirroring *Miranda v. Arizona*,[169] federal regulations require immigration officers to advise an individual under arrest "that any statement made may be used against him or her in a subsequent proceeding."[170] But the lower courts, emphasizing the criminal-civil distinction, have held that failure to give a *Miranda* warning does not render a statement inadmissible in deportation proceedings.[171] Moreover, due to the ad-

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162 *See* United States v. Mendoza-Lopez, 481 U.S. 828, 837–40 (1987).

163 *See, e.g.*, Hernandez v. Reno, 238 F.3d 50, 55 (1st Cir. 2001) (noting that incompetent counsel may render a removal proceeding fundamentally unfair in violation of the Due Process Clause of the Fifth Amendment).

164 *In Re* Toro, 17 I & N Dec. 340 (B.I.A. 1980).

165 *Id.* at 341.

166 *Id.* at 343–44.

167 INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984).

168 *See* Kastigar v. United States, 406 U.S. 441, 444 (1972) (noting that the Fifth Amendment privilege "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory").

169 Miranda v. Arizona, 384 U.S. 436, 478–79 (1966) (holding that the Fifth Amendment's Self-Incrimination Clause requires the procedural safeguard of giving suspects a warning of the right to remain silent).

170 8 C.F.R. § 287.3(c) (2013).

171 *See, e.g.*, United States v. Alderete-Deras, 743 F.2d 645, 648 (9th Cir. 1984) (holding that "a lack of *Miranda* warnings might render . . . statements inadmissible in a criminal prosecution for violation of the immigration laws, [but] the failure to give *Miranda* warnings did not render them inadmissible in deportation proceedings").

verse consequences to an individual in a removal proceeding of remaining silent, the Seventh Circuit found that a Miranda warning "would be not only inappropriate but could also serve to mislead the alien."[172] If a statement was involuntarily made or compelled despite an assertion of a Fifth Amendment privilege, however, it may be inadmissible.[173] For instance, the Ninth Circuit held that an admission was not voluntarily given where immigration officers obtained it after interrogating the individual for seven hours and threatening to prosecute him for perjury.[174]

The submission of an application for deferred action is arguably equivalent to the confession of a crime because it requires admission of the individual's unlawful immigration status,[175] which could result in the harsh penalty of deportation or even a criminal prosecution.[176] The bait-and-switch tactic of admitting evidence obtained with the assurance that it will be protected from disclosure to the immigration enforcement agencies surely "transgress[es] notions of fundamental fairness."[177] Because the deferred action application entails not just an admission of alienage but also a confession of an unlawful act, it necessarily implicates the Fifth Amendment and its jurisprudence should therefore apply.

B. Confessions Must Be Voluntary

An individual's confession of immigration law violations in the form of submitting a deferred action application could be considered involuntary because the representations made by DHS are coercive. In criminal law, a confession must be voluntary in order to be admissible.[178] This requirement is rooted in both the Fifth Amendment privilege against self-incrimination and the Due Process Clause of the Fifth

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172 Chavez-Raya v. INS, 519 F.2d 397, 402 (7th Cir. 1975).

173 *See* Valeros v. INS, 387 F.2d 921, 922 (7th Cir. 1967).

174 *See* Bong Youn Choy v. Barber, 279 F.2d 642, 647 (9th Cir. 1960).

175 The application requires the date of initial entry into the United States, status at entry, and date on which authorized stay expired (if applicable). U.S. CITIZENSHIP & IMMIGRATION SERVS., FORM I-821D, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (2013), *available at* http://www.uscisgov/files/form/i-821dpdf; *see also* 8 U.S.C. § 1325(a) (2012) (entry of alien without inspection).

176 In addition to making one deportable, entry without inspection entails criminal penalties, including possible imprisonment. 8 U.S.C. §§ 1325(a), 1326.

177 *Cf.* INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (finding the exclusionary rule inapplicable insofar as the case did not involve widespread Fourth Amendment violations by INS officers or "egregious violations . . . that might transgress notions of fundamental fairness").

178 *See* Jackson v. Denno, 378 U.S. 368, 376–77 (1964).

and Fourteenth Amendments.[179] A long line of precedent equates coercion with involuntariness.[180]

The Supreme Court has observed that "coercion can be mental as well as physical."[181] Some argue that a confession induced by any government promise of leniency, however slight, is sufficiently coercive as to render it involuntary.[182] The Supreme Court repudiated this view,[183] stating that a government promise is only coercive if, in light of the totality of the circumstances, the defendant's "will was overborne in such a way as to render his confession the product of coercion."[184] Under this standard, government misrepresentations or false statements may render a confession involuntary.[185] Courts differ in their application of this standard, likely due to its fact-specific nature.[186] Perhaps responding to this ambiguity, some states have codi-

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179 *See* Dickerson v. United States, 530 U.S. 428, 433 (2000).

180 *See, e.g.*, Blackburn v. Alabama, 361 U.S. 199, 205, 207 (1960) (noting that a confession that has been coerced is involuntary and thus, inadmissible).

181 *Id.* at 206.

182 *See* George E. Dix, *Promises, Confessions, and Wayne LaFave's Bright Line Rule Analysis*, 1993 U. ILL. L. REV. 207, 234–35 (arguing that the promise rule should not only cover explicit promises of benefits but also less concrete representations); *see also* Welsh S. White, *Confessions Induced by Broken Government Promises*, 43 DUKE L.J. 947, 988 (1994) (arguing that the holding of *Santobello v. New York*, 404 U.S. 257 (1971), that a guilty plea is invalid if the prosecutor's promise that induced the guilty plea is not kept, should also apply in the context of confessions induced by broken or illusory government promises).

183 Prior Supreme Court precedent arguably dictated the exclusion of confessions "obtained by any direct or implied promises, however slight" as involuntary. Bram v. United States, 168 U.S. 532, 542–43 (1897).

184 Arizona v. Fulminante, 499 U.S. 279, 288 (1991) (holding that defendant's confession was coerced because it was in response to a government agent's promise to protect him from a credible threat of violence).

185 *See id.*; *see also* Colorado v. Spring, 479 U.S. 564, 576 n.8 (1987) ("In certain circumstances, the Court has found affirmative misrepresentations by the police sufficient to invalidate a suspect's waiver of the Fifth Amendment privilege."); Spano v. New York, 360 U.S. 315, 319, 323 (1959) (noting police misrepresentation that the suspect's friend would lose his job as a police officer if the suspect failed to cooperate as a factor rendering suspect's confession involuntary); White, *supra* note 182 at 962–63. *But see* Frazier v. Cupp, 394 U.S. 731, 737–39 (1969) (finding that confession rendered after false statement by police officer that friend had confessed was voluntary).

186 *Compare* Lynumn v. Illinois, 372 U.S. 528, 534 (1963) (finding confession involuntary where police promised recommendation of leniency in exchange for cooperation and also threatened loss of custody of defendant's children), *and* Haynes v. Washington, 373 U.S. 503, 514 (1963) (finding promise to defendant that he would be allowed to call his wife as soon as he made statement to police was coercive and violated due process), *with* Miller v. Fenton, 796 F.2d 598, 609–10 (3d. Cir. 1986) (finding confession voluntary where police officer told defendant he was "not a criminal" but did not make any explicit promise of leniency), *and* United States v. LeBrun, 363 F.3d 715, 725–27 (8th Cir. 2004) (finding confession in response to police officer's promise of nonprosecution voluntary because defendant's will was not overborne as interrogation was short and defendant had attended law school).

fied procedural rules to dictate which types of government promises are to be considered coercive.[187]

Individuals must confess their undocumented status to immigration authorities to receive deferred action under the policy.[188] They do so out of a belief that they will be conferred significant benefits—a two-year stay of deportation and a work permit—by the government.[189] DHS also explicitly promises that the information submitted in deferred action applications will be protected from disclosure to the immigration enforcement authorities for purposes of removal, except in certain delineated circumstances.[190] Accordingly, in line with criminal case law involving promises of leniency,[191] a court adjudicating an applicant's fate in removal proceedings could find that the applicant's confession of immigration-law violations was coerced by the government's explicit promise and was thus involuntary.

C. Detrimental Reliance May Require Fulfillment of a Government Promise

In certain limited circumstances, a criminal defendant's detrimental reliance on a prosecutorial promise may require specific enforcement of the broken plea agreement.[192] In the seminal case of *Santobello v. New York*,[193] the Supreme Court held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor . . . such promise must be fulfilled."[194] The Court held that the defendant, who entered into a guilty plea in exchange for the prosecutor's promise to refrain from making a sentencing recommendation,

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187 For a discussion of the states' disparate treatment of confessions induced by government promises, ranging from Georgia's prohibition on confessions induced by "the slightest hope of benefit" to New York's determination that a confession is involuntary only if induced by a promise that "creates a substantial risk that the defendant might falsely incriminate himself," see Dix, *supra* note 182, at 218–25, and also GA. CODE ANN. § 24-8-824 (2013); N.Y. CRIM. PROC. LAW § 60.45(2)(b)(i) (McKinney 2004).

188 The application requires the date of initial entry into the United States, status at entry, and date on which authorized stay expired (if applicable). FORM I-821D, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS, *supra* note 175, at 2; *see also* 8 U.S.C. § 1325(a) (2012) (entry of alien without inspection).

189 *See* Napolitano Memorandum, *supra* note 13, at 2–3.

190 USCIS states that information will be protected "unless the requestor meets the criteria for the issuance of a Notice To Appear or a referral to U.S. Immigration and Customs Enforcement under the criteria set forth in USCIS's Notice to Appear guidance." USCIS FAQ, *supra* note 116.

191 *See supra* notes 184–86 and accompanying text.

192 *See* Santobello v. New York, 404 U.S. 257, 262–63 (1971); *see also* United States v. Savage, 978 F.2d 1136, 1138 (9th Cir. 1992).

193 Santobello v. New York, 404 U.S. 257 (1971).

194 *Id.* at 262.

was entitled to some remedy for the prosecutor's failure to comply with the agreement—either specific enforcement of the plea agreement or withdrawal of the guilty plea.[195]

Although this conclusion seemed to be rooted in traditional contract principles, subsequent precedent clarified that the appropriate analysis entails a determination of whether the broken agreement invalidates the constitutionally required elements of voluntariness and intelligence in the guilty plea.[196] The Court stated the standard for determining the validity of a guilty plea as follows:

> [A] plea of guilty entered by one *fully aware of the direct consequences*, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), *misrepresentation (including unfulfilled or unfulfillable promises)*, or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).[197]

A prosecutor's broken promise of immunity may also be subject to specific enforcement.[198] In *United States v. Coon*,[199] however, the Eighth Circuit held that the defendant could not invoke detrimental reliance because his statement—allegedly induced by the prosecutor's misrepresentation—could have been excluded and his status quo ante restored by withdrawing the guilty plea and proceeding to trial.[200]

Specifically in the deportation context, the Supreme Court held in *INS v. St. Cyr*[201] that "an alien's reasonable reliance on the continued availability of discretionary relief" precluded the application of a new statute rescinding that relief.[202] Similar to deferred action appli-

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195 *Id.* at 262–63; *cf.* Mabry v. Johnson, 467 U.S. 504, 508–11 (1984) (holding that defendant was not entitled to specific enforcement of withdrawn plea agreement because he pled guilty fully knowing that the prosecutor would recommend a longer sentence than the original offer).

196 For a thorough analysis of the doctrine of detrimental reliance in criminal plea agreements, see David Aram Kaiser, United States v. Coon*: The End of Detrimental Reliance for Plea Agreements?*, 52 HASTINGS L.J. 579 (2001).

197 *Mabry*, 467 U.S. at 509 (emphasis added) (quoting Brady v. United States, 397 U.S. 742, 755 (1970)) (internal quotation marks omitted).

198 *See, e.g.*, Rowe v. Griffin, 676 F.2d 524, 528 (11th Cir. 1982) (enforcing transactional immunity agreement and upholding injunction of pending prosecution after defendant testified for the state).

199 United States v. Coon, 805 F.2d 822 (8th Cir. 1986).

200 *Id.* at 825 (holding that guilty plea was valid and detrimental reliance did not apply because the statement induced by the prosecutor's misrepresentation could have been excluded at trial).

201 INS v. St. Cyr, 533 U.S. 289 (2001)

202 *Id.* at 324, 326 (holding that statute repealing discretionary relief from deportation did

cants who waive their Fifth Amendment privilege with the expectation that the information they provide in their applications will be shielded from the enforcement agencies, the defendant in *St. Cyr* waived his Fifth Amendment privilege expecting the availability of discretionary relief from deportation.[203] The Court's conclusion that an alien may invoke the doctrine of detrimental reliance to preclude the application of new immigration laws in removal proceedings supports this proposal.

IV. Estopping the Government in Civil Cases

If an individual is placed in removal proceedings based on information submitted in his or her deferred action application, a court could find that the individual had detrimentally relied on the explicit promise by DHS not to disclose such information to immigration authorities, that this promise—which DHS knows it cannot keep—constituted affirmative misconduct by the government, and therefore that the government should be estopped from using the information in a removal proceeding against the individual. The Supreme Court has imposed a "heavy" burden on an individual asserting estoppel against the government, requiring the individual to prove that the government engaged in affirmative misconduct in addition to the traditional elements of estoppel.[204] Lower courts have construed the affirmative misconduct standard to encompass only intentional or reckless—not merely negligent—conduct by the government.[205] Detrimental reliance on oral advice from a government agent has also been deemed insufficient to support an estoppel claim against the government.[206] These requirements serve "to defray endless liability concerns" due to a government agent's "[n]egligence in communication."[207]

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not apply retroactively to alien who entered plea agreement relying on availability of such relief).

203 *See id.* at 321–23; *see also* Instructions for Consideration of Deferred Action for Childhood Arrivals, *supra* note 105.

204 Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc., 467 U.S. 51, 59–61 (1984); INS v. Miranda, 459 U.S. 14, 17 (1982) (per curiam).

205 *See, e.g.*, United States v. Marine Shale Processors, 81 F.3d 1329, 1350 (5th Cir. 1996) (adopting the conclusion that to satisfy the affirmative misconduct standard, the government, at minimum, "must intentionally or recklessly mislead the estoppel claimant"); Kennedy v. United States, 965 F.2d 413, 421 (7th Cir. 1992) ("[A]ffirmative misconduct is something more than mere negligence." (internal quotation marks omitted)).

206 *See, e.g.*, *Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. at 65–66.

207 Stephen Holstrom, Note, *Contract Law—Estopping Big Brother: The Constitution, Too, Has Square Corners*, 33 W. New Eng. L. Rev. 163, 183–84 (2011).

The Supreme Court has yet to find a scenario in which it believed the affirmative misconduct standard had been met.[208] In *INS v. Miranda*,[209] for example, the Court declined to find affirmative misconduct when the INS delayed processing the respondent's application for eighteen months, which contributed to his ineligibility for permanent residence.[210] Similarly, in *INS v. Hibi*,[211] the Court held that the "failure to fully publicize the rights which Congress accorded under the Act of 1940, or the failure to have stationed in the Philippine Islands . . . an authorized naturalization representative [to explain the rights]" did not constitute affirmative misconduct on the part of the government.[212] The Court has also declined to find affirmative misconduct in cases involving erroneous advice from government officials.[213] Prior to articulating the affirmative misconduct standard, however, the Court endorsed the equivalent of estoppel against the government when a foreign national relied on erroneous advice from the State Department in claiming an exemption from military service that would later bar him from citizenship.[214]

Here, DHS has assured deferred action applicants in its official written guidance that the information they provide will not be disclosed to the immigration enforcement agencies.[215] This Administration or any subsequent administration, however, is free to rescind the policy—due to its nonbinding nature—and utilize the information

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208 *See* Julia A. Hershiser, Note, *Estoppel and the Affirmative Misconduct Requirement*—Chien-Shih Wang v. Attorney General, 21 CREIGHTON L. REV. 1149, 1177 (1988).

209 INS v. Miranda, 459 U.S. 14 (1982) (per curiam).

210 *Id.* at 17–19.

211 INS v. Hibi, 414 U.S. 5 (1973).

212 *Id.* at 8–9.

213 *See, e.g.*, Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 416–18, 434 (1990) (declining to find affirmative misconduct where agency official erroneously told respondent he could earn a specified amount without losing his disability payments); Montana v. Kennedy, 366 U.S. 308, 314–15 (1961) (declining to find affirmative misconduct where a consular official told petitioner's mother that she could not travel to the United States in her pregnant condition, thus preventing petitioner's citizenship by birth in the United States).

214 *See* Moser v. United States, 341 U.S. 41, 47 (1951). Although the Court did not base its decision on an estoppel theory, it used language that outlined an estoppel claim:

> Petitioner had sought information and guidance from the highest authority to which he could turn, and was advised to sign Revised Form 301. He was led to believe that he would not thereby lose his rights to citizenship. If he had known otherwise he would not have claimed exemption. In justifiable reliance on this advice he signed the papers sent to him by the Legation.

Id. at 46. For a thorough analysis of the estoppel worked in *Moser*, see Hershiser, *supra* note 208, at 1161–64.

215 *See supra* note 190 and accompanying text.

from the applications to initiate removal proceedings.[216] The official written representation by the agency that the information will not be disclosed is potentially the type of intentional or reckless affirmative misconduct that the Supreme Court has acknowledged may give rise to an estoppel claim: circumstances in which the government's interest in "enforc[ing] the law free from estoppel [is] outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government."[217] Based on precedent, a court could find that the representation by DHS constituted affirmative misconduct and thus the agency may be estopped from utilizing information from the deferred action applications against individuals in removal proceedings.

V. Arguing Alternative Legal Theories in Deferred Action Applicants' Removal Proceedings

Because DHS has explicitly stated that the benefits are not legal entitlements and can be terminated at any time,[218] applicants face a serious dilemma if a subsequent administration rescinds the deferred action policy and instead initiates deportation proceedings. The discretionary nature of the deferred action policy, which shields it from judicial review and precludes the creation of a right that may be relied upon, prevents applicants from seeking enforcement of its benefits. Alternative legal theories, however, may aid a deferred action applicant in defending against removal. By analogizing to criminal confession jurisprudence and invoking the doctrine of detrimental reliance, a deferred action applicant could possibly obtain relief from deportation.

A. Deferred Action Applicants in Removal Proceedings Should Draw from Criminal Confessions Jurisprudence

Because submitting a deferred action application requires one to confess violations of immigration law, deferred action applicants could urge courts to apply Fifth Amendment jurisprudence in removal proceedings. The Due Process Clause of the Fifth Amendment requires an individual's confession to be voluntary and free from coercion in order to be admissible.[219]

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216 *See supra* Part II.C.1.

217 *See* Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc., 467 U.S. 51, 60–61 (1984).

218 *See* Napolitano Memorandum, *supra* note 13; USCIS FAQ, *supra* note 116.

219 *See, e.g.*, Blackburn v. Alabama, 361 U.S. 199, 205, 207 (1960) (noting that a confession that has been coerced is involuntary and thus, inadmissible).

Here, DHS has assured deferred action applicants that the information they provide will not be used against them for enforcement purposes "unless the requestor meets the criteria . . . set forth in USCIS's Notice to Appear guidance."[220] As a result of this pledge, applicants who later find themselves in removal proceedings, and did not meet the Notice to Appear criteria, could argue that their confessions were induced by an explicit government promise of leniency and were therefore coerced and involuntary.[221] Despite the admonition that the information provided in the application is voluntary,[222] DHS's explicit promise to protect an applicant's information makes the decision to submit an application appear to be one seemingly without repercussions.[223] Applying the totality of the circumstances test, a court will likely consider the applicant's age, education, and whether the applicant received legal advice.[224] Here, the majority of deferred action applicants are young: thirty-six percent of applicants are eighteen years old or younger.[225] The expense of hiring an attorney to navigate the process will likely result in a significant number of individuals submitting a deferred action application without first consulting an attorney to learn of the possible consequences.[226] Drawing on precedent holding that an explicit government promise of leniency may render a confession involuntary, a court could find that a confession of immi-

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220 INSTRUCTIONS FOR CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS, *supra* note 105, at 9.

221 *See supra* notes 184–86 and accompanying text.

222 INSTRUCTIONS FOR CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS, *supra* note 105, at 10.

223 *See supra* note 190.

224 *See* United States v. LeBrun, 363 F.3d 715, 725–27 (8th Cir. 2004) ("As we have noted, one of the key concerns in judging whether confessions were involuntary, or the product of coercion, [is] the intelligence, mental state, or any other factors possessed by the defendant that might make him particularly suggestible, and susceptible to having his will overborne." (internal quotation marks omitted)).

225 FOIA-requested data encompassing applications through March 2013 shows that deferred action applicants aged fifteen to eighteen made up thirty-six percent of applicants, and applicants between ages nineteen and twenty-three constituted forty percent of applicants. AUDREY SINGER & NICOLE PRCHAL SVAJLENKA, BROOKINGS INST., IMMIGRATION FACTS: DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) 8 (2013), *available at* http://www.brookings.edu/~/media/research/files/reports/2013/08/14%20daca/daca_singer_svajlenka_final pdf.

226 Angy, *Deferred Action: Attorney Fees Are Too Damn High*, N.Y. STATE YOUTH LEADERSHIP COUNCIL (Dec. 19, 2012), http://www.nysylc.org/2012/12/deferred-action-attorney-fees-are-too-damn-high/. There are, however, nonprofit organizations that offer free or low-cost legal clinics to put together and review the applications. *See, e.g.*, *DACA Clinic*, OWN THE DREAM, http://www.weownthedream.org/events/event.497710-DACA_Clinic (last visited Feb. 28, 2014) (run by legal staff at CASA de Maryland).

gration law violations in the form of a deferred action application was coerced and thus involuntary where the applicant was young, did not understand the legal ramifications of submitting the application, and confessed the violations based on DHS's explicit promise to shield the information from disclosure to the immigration enforcement agencies for removal purposes.

In such a case, the government would likely point to the subsequent paragraph in the instructions, which arguably diminishes the certainty of an application's protection from disclosure.[227] Recent Supreme Court precedent suggests, however, that the possibility that the law will be modified does not justify foreclosing deportation relief to an alien who depends upon it when entering a guilty plea.[228] Similarly, deferred action applicants rely upon the government's assurance that the information they provide in the deferred action application will not be used against them in removal proceedings.[229] Particularly relevant to a totality of the circumstances analysis, if the warning that the policy "may be modified, superseded, or rescinded at any time" was indeed clear, many applicants might not have confessed their undocumented status in the application and would instead have prolonged the status quo: life in the shadows. Finding applicants' reliance on the promise by DHS not to disclose their information to be reasonable is bolstered by the agency's guidance, which does not encourage the pursuit of legal advice prior to the submission of an application replete with potentially adverse legal consequences.[230] Accordingly, a court could be persuaded that the confessions were coerced by an explicit promise by DHS that was seemingly without repercussions, and were thus involuntary.

B. Deferred Action Applicants in Removal Proceedings Should Invoke the Doctrines of Detrimental Reliance and Estoppel

In the event that a future administration rescinds the deferred action policy and initiates removal proceedings against an individual

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227 INSTRUCTIONS FOR CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS, *supra* note 105, at 9 ("This policy, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.").

228 *See* INS v. St. Cyr, 533 U.S. 289, 321–23 (2001).

229 INSTRUCTIONS FOR CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS, *supra* note 105, at 1 ("Individuals who receive deferred action will not be placed into removal proceedings . . . .").

230 USCIS FAQ, *supra* note 116.

using the information provided in the application, the individual could argue detrimental reliance and estoppel in their defense. The Supreme Court recently confirmed that an alien may invoke the doctrines in removal proceedings, even if the law has subsequently changed.[231] Unlike in *Coon*,[232] where the defendant's incriminating statement could have been excluded at trial, thus restoring his status quo ante,[233] here individuals who submit deferred action applications cannot have their status quo ante restored because once their identities are in federal immigration databases they cannot resume living their lives under the radar of federal immigration authorities.

Similar to criminal defendants who testify for the state in reliance on a prosecutor's promise of transactional immunity, deferred action applicants confess their identities and undocumented status in reliance on assurances by DHS that their information will be protected from disclosure to the immigration enforcement agencies.[234] An applicant reading these instructions would understandably expect that the agency would hold itself to these explicit parameters. This assurance would likely induce even a skeptic to apply for the policy's benefits, due to the apparent lack of repercussions.

Moreover, the official written representation by DHS that the information will not be disclosed may meet the high standard of affirmative misconduct that the Supreme Court has left open to an estoppel claim: circumstances in which the government's interest in "enforc[ing] the law free from estoppel [is] outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government."[235] After this (albeit significant) hurdle is met, a deferred action applicant in removal proceedings could readily argue the traditional elements of estoppel:[236] (1) the government knew the true facts—here, that it could not promise that the applicants' information would never be disclosed to the immigration enforcement agencies because the policy is a nonbinding policy statement that can be rescinded at any time; (2) the government intended that its conduct be acted on—here, the Administration and DHS created the policy with the intention that

231 *St. Cyr*, 533 U.S. at 326.

232 United States v. Coon, 805 F.2d 822 (8th Cir. 1986).

233 *See id.* at 825.

234 *See* INSTRUCTIONS FOR CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS, *supra* note 105, at 9.

235 *See* Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc., 467 U.S. 51, 60–61 (1984).

236 *See* JANA, Inc. v. United States, 936 F.2d 1265, 1270 (Fed. Cir. 1991) (outlining the elements of an estoppel claim against the government in the context of a contract dispute).

people apply; (3) the person asserting estoppel must be ignorant of the true facts—for this element, the applicant would have to prove her subjective mental state; and (4) the applicant must rely on the government's conduct to her detriment—this element should be rather easy to prove if the applicant is in removal proceedings and credibly testifies that she would not have submitted the deferred action application but for DHS's assurance that her information would be protected from disclosure. In such circumstances, a court could find that a deferred action applicant detrimentally relied on DHS's representation, that this representation constituted affirmative misconduct, and that the agency may therefore be estopped from utilizing information from the applications against individuals in removal proceedings.

Conclusion

The Obama Administration's deferred action policy, although implemented with noble intentions, puts its intended beneficiaries in a precarious position. Due to the policy's manifestation as an agency policy statement outlining an exercise of prosecutorial discretion, administrative law precedent suggests that deferred action applicants are unable to seek enforcement of the policy's benefits. Because the policy requires applicants to confess their violations of immigration law and thus implicates the Fifth Amendment, these individuals should be afforded constitutional protections.

If a future administration rescinds the policy, an applicant could be placed in deportation proceedings based upon the information provided in the application, despite the agency's assurance that the information would not be used for enforcement purposes. Most would agree that such bait and switch tactics violate notions of fundamental fairness that are at the heart of due process.

Fortunately, the doctrine of detrimental reliance may provide an avenue for relief. Individuals who are placed in deportation proceedings should invoke the doctrine to seek specific enforcement of the government's promise to protect the information provided in the deferred action application from disclosure to the immigration enforcement agencies. Alternatively, they should argue that by making such a promise—one that it knew it could not keep—DHS committed affirmative misconduct and thus should be estopped from utilizing information from the deferred action applications against individuals in removal proceedings.

The deferred action policy aspired to provide humanitarian relief to more than one million young people who are "as American as ap-

ple pie"[237] and dream that one day they will be able to enjoy the rights and privileges of the country they love and call home. By extending Fifth Amendment protections and estoppel remedies to DREAMers who find themselves in the grip of deportation proceedings, courts will preserve the principle of fundamental fairness that is the bedrock of our justice system.

237 Alex Leary, *Miami Woman Pressing for Dream Act: "I Am as American as Apple Pie"*, TAMPA BAY TIMES, (Nov. 30, 2010, 2:59 PM), http://www.tampabay.com/blogs/the-buzz-florida-politics/content/miami-woman-pressing-dream-act-i-am-american-apple-pie (quoting DREAM Act activist, Gaby Pacheco).