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The Limits of Discretion: Challenges and Dilemmas of Prosecutorial Discretion in Immigration Enforcement

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THE LIMITS OF DISCRETION: CHALLENGES AND DILEMMAS OF PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT

ABSTRACT

The history of US immigration policy and practice reflects a series of attempts to address complex political demands and organizational tensions. Yet this

complexity has rendered comprehensive immigration reform elusive in recent decades. When legislative action appears impossible, what other avenues are available to confront these challenges? During the first term of the Obama administration, prosecutorial discretion emerged as a key mechanism. This article draws on archival data and interviews with immigration attorneys, advocates, analysts, and policy makers to better understand how prosecutorial discretion is used in immigration policy and practice today, why it came to have such a central role, recent challenges to its use, and what these tensions suggests for socio-legal scholarship on immigration.

INTRODUCTION

More than eleven million unauthorized immigrants currently reside in the United States. Nearly two-thirds of these immigrants have resided in the country for more than a decade, and almost half are parents of US-citizen children (Pew 2013). The large number of children in families with mixed legal status poses challenges and dilemmas for everyone involved in immigration policy and practice, from legislators to law enforcement officers to teachers.

Hopes for comprehensive immigration reform during the Bush and first Obama administrations were dashed in the face of a deep economic recession and congressional gridlock. Fears that immigrants increase crime and harm the economy, regardless of the veracity of such claims, further sharpened the conflicts surrounding immigration and led to the passage of close to 2,000 state and local laws since 2005, most of which were highly restrictive (Varsanyi 2010; National Conference of State Legislatures 2012; Zatz and Smith 2012). At the same time, mass marches for immigrants' rights were held in cities across the US in 2006, and a small number of local jurisdictions enacted pro-immigrant initiatives. Within this highly polarized context,

prosecutorial discretion became a critical, and controversial, means of addressing some of the contradictions inherent in immigration policy.

Law making can be seen as a temporary effort to resolve dilemmas resulting from larger social, political, and economic contradictions. Inevitably, the process must be revisited as new conflicts and dilemmas emerge (Chambliss 1979; Chambliss and Zatz 1993). The history of immigration legislation exemplifies this dialectical model of law making (Calavita 1989). But when Congress is at an impasse, making legislative fixes unlikely, what other options are available? During President Obama's first term, the administration identified a variety of spheres in which the executive branch has authority to act on its own. Within the immigration arena, this includes the authority to decide how to most efficiently and effectively enforce immigration law. As Adam Cox and Cristina Rodríguez explain, "[t]he President's power to decide which and how many noncitizens should live in the United States operates principally at the back end of the system, through the exercise of prosecutorial discretion with respect to whom to deport, rather than at the front end of the system, through decisions about whom to admit" (2009, 464). One of the central dilemmas confronting the executive office, thus, was determining which, and how many, unauthorized immigrants should be deported. Multiple competing factors shape this evaluation, including the resources required for detecting, detaining, and deporting individuals; the humanitarian consequences of deporting persons with strong family and community ties, and especially those with US-citizen spouses or children; and assessments of what constitutes a proportional response to unauthorized immigration and to crimes committed by immigrants (Kanstroom 2012; Wishnie 2012; Banks 2013).

The exercise of prosecutorial discretion has faced repeated criticisms on a number of fronts. On the one hand, some members of Congress and some immigration enforcement agents want to constrain the exercise of discretion, arguing that it is tantamount to amnesty. On the other hand, there have been frequent and forceful critiques of prosecutorial discretion by immigration activists and advocates who argue that the administration is not doing enough to protect children and

families. Yet prosecutorial discretion has endured as an essential, bedrock element of official policy for at least two reasons. First, it is the primary means by which presidential administrations set their enforcement priorities in the context of chronic underfunding; and second, it enables immigration officials (and prior to 1996, immigration judges) to be responsive to the myriad humanitarian concerns that would be raised by rigid, unreflective enforcement of the immigration laws.

This article seeks to untangle some of these tensions to better understand how prosecutorial discretion is used in immigration policy and practice today, why it came to have such a central role, recent challenges to the policy, and what these suggest for socio-legal scholarship on immigration. Prosecutorial discretion has always been present in immigration law but, we suggest, it has only recently been articulated in a transparent and public manner. This public attention has raised expectations on the part of the immigrant and advocacy community, and resistance from opponents of immigration reform and some in law enforcement.

While discretion may arise at many points within the immigration enforcement system, our focus is primarily on decision making by Immigration and Customs Enforcement officers and attorneys as they decide whether to process, detain, and deport individuals.[1] Our analysis draws on archival documents available in the public domain and provided to the authors; in-depth interviews with twenty-five immigration attorneys, advocates, policy analysts, and former government officials; and informal conversations with five current government officials. We begin with a discussion of the socio-legal scholarship on discretion, turn next to a review of legal understandings of prosecutorial discretion in immigration policy and practice from 1976 through 2012, analyze the challenges and dilemmas confronting the Obama administration's immigration strategy from within the Immigration and Customs Enforcement (ICE) agency and from immigrants' advocates, and finally we examine whether prosecutorial discretion has changed deportation practices, particularly as these affect parents of US-citizen children.

SOCIO-LEGAL SCHOLARSHIP ON PROSECUTORIAL DISCRETION

Law and society scholars have long recognized the gap between law on the books and law in action, and the role of administrative and judicial discretion in creating that disjuncture (Gould and Barclay 2012). Discretion is necessary, but it can be destabilizing and has social and political costs. For example, Michael Lipsky (1980) coined the term "street-level bureaucrat" to describe the sorts of policy choices that police officers, social workers, and other professionals make while in the field. Lipsky contends that they are not simply implementing policies, but also using their discretion to interpret policy, acting as "street-level bureaucrats," often to the chagrin of those who are attempting to manage them. Toch (2012) reminds us that the perspectives held by mid-level administrators may, in turn, differ from those of the police leadership and from rank-and-file officers, as each reinterprets policy and concrete events playing out on the ground in light of their respective positions in the police hierarchy. And, Stith and Koh's (1993) analysis of the history of federal sentencing guidelines demonstrates a clear recognition among legislators that discretion is "an enduring component of any sentencing policy. [Restricting judicial discretion] will not eliminate discretion, but merely shift the discretion to an earlier stage" (H.R. Rep. No. 1017, 98th Congr., 2d Sess. 94 (1984) at 35-36, cited in Stith and Koh (1993, 263)). Thus, perspectives on who should wield discretion, how, and under what conditions are sometimes slippery, moving sideways as well as vertically to fill the gap between policy and action.

Theorizing Prosecutorial Discretion in Immigration Law

With a few exceptions, immigration scholars are more apt to write about immigration policy--the law on the books--than about how prosecutorial discretion shapes the practice of immigration enforcement--the law in action. As Shoba Wadhia notes in her recent review of prosecutorial discretion, "[w]hile many scholars have written articles about undocumented immigration, restrictions on immigration, and immigrants' rights, there is a dearth of literature on the role of prosecutorial discretion in immigration law" (2010, 244). This may be, in part, because immigration scholars tend not to think of discretion in this arena as *prosecutorial* discretion, and most socio-legal scholarship on prosecutorial discretion focuses on the criminal justice system.

Wadhia scales the divide between criminal and administrative law, suggesting that "the cost and justice-related theories behind prosecutorial discretion" are similar in these two contexts; both "have witnessed an explosion of activities that qualify as infractions subject to penalties;" immigration enforcement agencies have "historically relied on documents produced and utilized in the criminal context to create guidance for immigration officers;" and "the surge in immigration-related criminal prosecution raises a number of questions about how prosecutorial discretion is exercised against noncitizens in both the criminal and civil contexts" (2010, 268; see also Legomsky 2007; Motomura 2012; Wishnie 2012).

Wadhia contends that the theory behind prosecutorial discretion is two-fold, based on how best to use limited resources and on recognition that there are situations in which humanitarian concerns should come into play (2010, 254-255). Daniel Kanstroom argues similarly that discretion is an essential element in immigration law, and in the rule of law more generally, suggesting "[d]iscretion might be described as the flexible shock absorber of the administrative state. It is a venerable and essential component of the rule of law that recognizes the inevitable complexities of enforcement of laws by government agencies" (2012, 215). And, Cox and Rodríguez remind us that legislative restrictions on judicial discretion "have simply consolidated this discretion in the agency officials responsible for charging decisions. Prosecutorial discretion has thus overtaken the exercise of discretion by immigration judges when it comes to questions of relief" (2009, 518-519). Yet as we will demonstrate, prosecutorial discretion has become both a defining feature of the Obama administration's immigration strategy and a source of tremendous controversy, with criticism coming both from enforcement officials allied with Obama's political opponents and from supporters disappointed with the limits of discretion.

Prosecutorial Discretion in Immigration: The Historical Context

Kanstroom reminds us that discretion has historically been central to immigration policy and practice. The Alien and Sedition Acts of 1798 "gave the President unfettered discretion to deport any alien he deemed sufficiently dangerous to warrant the sanction" (2012, 62), and the 1918 Alien

Law was used to deport alleged anarchists, Bolsheviks and other dissidents. Similarly, Ngai (2004), Abrams (2005), Gardner (2005), and others identify the multiple ways in which US immigration law since at least the mid-1800s has selectively permitted and excluded entry based on race, religion, gender, and other considerations thought relevant at the time. For example, by defining Chinese women immigrants as prostitutes and thus excludable, the Page Act of 1875 prevented the immigration of Chinese women, thus slowing the growth of Chinese American communities while appearing more inclusive (Abrams 2005). And, Calavita (1992) demonstrates how the INS used its discretion during the Bracero Period of 1942 - 1964 to ignore those undocumented workers that agribusiness needed, while deporting those who were seen as troublemakers.

Harwood, writing just prior to passage of the 1986 Immigration Reform and Control Act, argues that "a tough, no-holds-barred enforcement policy" would have been difficult because well-organized interest groups wanted weak immigration enforcement, there were not sufficient resources to deport all unauthorized immigrants, and political considerations required trade-offs (1986, 168). According to Harwood, "[w]hether consciously articulated or not, political factors are often clearly intertwined with considerations of optimal resource allocations in the agency's effort to achieve what it considers to be the most advantageous enforcement strategy" (1986, 172). As a result, "the INS must engage in selective enforcement, and even underenforcement, of the law" (1986, 175).

Turning to the contemporary immigration context, Kanstroom suggests, "the key question is not whether the rule of law demands the elimination of discretion—that is simply impossible. Rather, the more serious question is: what is the proper relationship among enforcement duties, such as inevitable discretion, basic rights claims, and judicial oversight?" (2012, 214-215). The recent literature on proportionality adds another element to this discussion. Proportionality is "the notion that the severity of a sanction should not be excessive in relation to the gravity of an offense" (Wishnie 2012, 416) and "provides a basis for balancing the government's interest in punishment and an individual's fundamental rights" (Banks 2013, 1267). Accordingly, deportation should only

be used when it is a proportionate response to a criminal act, and the length of any bar to reentry must also be proportionate to the offense (see also Stumpf 2009; Kanstroom 2012).

LEGAL UNDERSTANDINGS OF PROSECUTORIAL DISCRETION IN IMMIGRATION POLICY AND PRACTICE

A senior official in the Department of Homeland Security told us that the starting point for the Obama administration's conceptualization of prosecutorial discretion was a 1976 memorandum written by Sam Bernsen, then General Counsel to the Commissioner for Immigration and Naturalization Services. Bernsen defines prosecutorial discretion as “the power of a law enforcement official to decide whether or not to commence or proceed with action against a possible law violator … The reasons for the exercise of prosecutorial discretion are both practical and humanitarian” (1976, 1). Bernsen further asserts that prosecutorial discretion “is inherent in the nature of [the INS’s] enforcement function” and offers a number of reasons why deportation proceedings may be cancelled, including proceedings that were “improvidently begun.” In such cases, “the person is placed in the ‘deferred action’ … category, meaning that deportation proceedings will not be instituted or continued against the alien” for policy or humanitarian reasons (Bernsen 1976, 6). As we shall see, the concept of “deferred action” reappears in later policy proposals, including the Vanison, Bacon, Rogers and Neufeld memo (n.d.) and Deferred Action for Childhood Arrivals (2012).

Between Bernsen’s memorandum establishing the rationale for prosecutorial discretion in immigration enforcement and the contemporary context, Congress adopted three key pieces of legislation--the 1986 Immigration Reform and Control Act (IRCA), the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). The 1996 laws greatly expanded the number of deportable offenses and, reminiscent of federal sentencing guidelines, stripped judges of much of their discretion. The final version of the 1996 laws, according to then-INS General Counsel David Martin, was a “perfect storm” that expanded the grounds for deportation, was retroactive, and precluded most relief

possibilities, even for legal permanent residents (Martin 2012a). Similarly, immigration attorneys whom we interviewed referred to the 1996 laws as "pivotal" in terms of both the mandatory deportation provisions and the stripping of discretion from immigration judges. Even when immigration judges want to take family ties into account, we were told, "their hands are tied" if the person, including legal permanent residents, has an aggravated felony conviction.

Prosecutorial Discretion in Light of the 1996 Laws: Commissioner Meissner's Memorandum

Some members of Congress and the Clinton administration were concerned that the 1996 laws might be interpreted as eliminating all forms of discretion in immigration enforcement. Bo Cooper, then General Counsel for INS Commissioner Doris Meissner, wrote an influential memorandum dated October 4, 1999, outlining the legal bases for prosecutorial discretion, proposing limits on discretion, and offering examples of its proper use. Cooper had considerable experience in immigration, having served as Principal Legal Advisor to INS in two earlier administrations. His memorandum was explicitly "intended to be the first step in the INS' examination of its use of prosecutorial discretion" (Cooper 1999, 1). This discretion, he argues, was not new. Rather, the INS, like other law enforcement agencies, "does not have the resources fully and completely to enforce the immigration laws against every violator [and so] it exercises prosecutorial discretion thousands of times every day" (1999, 3).

A month later, twenty-eight members of Congress sent a letter to Attorney General Janet Reno and INS Commissioner Doris Meissner, citing Cooper's memo and affirming their sense that the 1996 laws did not erase all elements of discretion (Meissner 2012; Martin 2012a). The letter states, "There has been widespread agreement that some deportations were unfair and resulted in unjustifiable hardship" (Congress of the United States 1999, 1). Examples cited include removal proceedings against:

> legal permanent residents who came to the United States when they were very young, and many years ago committed a single crime at the lower end of the 'aggravated felony' spectrum, but have been law-abiding ever since, obtained and held jobs and remained self-sufficient, and started families in the United States (1999, 1).

The letter concludes with a request for guidelines for INS District Directors, “both to legitimate in their eyes the exercise of discretion and to ensure that their decisions … are not made in an inconsistent manner” (1999, 2). Commissioner Meissner’s November 17, 2000 directive established this guidance and how it should be implemented. The “Meissner memo,” as it has come to be known, has stood the test of time, becoming the standard upon which later prosecutorial discretion memos rely.

Referencing the connection with criminal law, Meissner states, “There are significant differences, of course, between the role of the U.S. Attorneys’ offices in the criminal justice system, and INS responsibilities to enforce the immigration laws, but the general approach to prosecutorial discretion stated in this memorandum reflects that taken by the Principles of Federal Prosecution” of October 1997 (Meissner 2000, 2, note 2). Echoing the memo from her General Counsel as well as the recently decided Supreme Court case *Reno v. American-Arab Anti-Discrimination Committee* (1999), Meissner stresses that INS “officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process” (2000, 1) and to do so “every day” (2000, 2).

Clearly identifying the dual bases for prosecutorial discretion—limited resources and humanitarian concerns—and anticipating potential criticism, Commissioner Meissner states that prosecutorial discretion “is not an invitation to violate or ignore the law. Rather, it is a means to use the resources we have in a way that best accomplishes our mission of administering and enforcing the immigration laws of the United States” (2000, 4). She continues, “…INS officers may decline to prosecute a legally sufficient immigration case if the Federal immigration enforcement interest that would be served by prosecution is not substantial” (2000, 5). This “individualized determination, based on the facts and the law,” holds even in cases in which an immigrant meets the criteria for mandatory detention under the 1996 laws (2000, 6).

Meissner articulates a set of factors that should be considered, in their totality rather than in isolation, in deciding whether to exercise prosecutorial discretion. These include the person’s

immigration status (with lawful permanent residents generally due greater consideration) and length of residence in the United States, criminal history and any prior immigration violations, humanitarian concerns including family ties in the US, whether the person is (or is likely to become) eligible for future admissibility, cooperation with law enforcement, honorable US military service, community opinion, and the extent to which use of resources in this case meets national or regional priorities, even when detention space is available (2000, 7-8). Recognizing that regional offices in different parts of the country "face different conditions and have different requirements" (2000, 10), Commissioner Meissner reiterates that INS personnel "at all levels should understand that prosecutorial discretion exists and that it is appropriate and expected that the INS will exercise this authority in appropriate cases" (2000, 10).[2]

Two years later, in response to the 9/11 attacks, immigration authority was transferred from the Department of Justice to the newly created Department of Homeland Security. Separate offices were established for US Immigration and Customs Enforcement (ICE), US Citizenship and Immigration Services (USCIS) and US Customs and Border Protection (CBP), all reporting to the Secretary of Homeland Security. Echoing the comments of several immigration attorneys and policy analysts we interviewed, one attorney told us that creating a "special agency that was focused on law enforcement" was "kind of like a self-fulfilling prophecy. Like, you create this agency that is supposed to go after people, and they've put a lot of resources there." The resulting "pressure on the agency to keep those numbers up and do that enforcement" and the "flood of resources" has "continued to ramp up the enforcement and the capacity in detention."

Stepping Stones to the Morton Memos

The next major stepping stone toward today's exercise of prosecutorial discretion was a 2005 memo by William J. Howard, Principal Legal Advisor for ICE. A surge in border enforcement activity led to a tripling of caseloads in immigration courts between 2001 and 2005, stretching limited agency resources and making prosecutorial discretion an important tool for achieving agency goals (Howard 2005, 2). In addition to the value of prosecutorial discretion in times of

scarce resources, Howard also reiterated that discretion “is a very significant tool that sometimes enables you to deal with the difficult, complex and contradictory provisions of the immigration laws and cases involving human suffering and hardship” (2005, 8).

Two years later, in the wake of a series of workplace raids, Julie Myers, DHS Assistant Secretary and Director of ICE, issued a memorandum highlighting “the importance of exercising prosecutorial discretion when making administrative arrest and custody determinations for aliens who are nursing mothers” (Myers 2007, 1). While limited in scope, Myers explicitly states that field agents and officers are “not only authorized by law to exercise discretion within the authority of the agency, but are expected to do so in a judicious manner at all stages of the enforcement process” (2007, 1). Absent threats to national security, public safety, or other investigative interests, she asserts, nursing mothers should not be detained. Myers references Meissner’s memorandum as providing the appropriate process for reaching discretionary decisions and attaches that memo to her own, thus reaffirming its legal guidance.

The Morton Memos

With the 2008 elections, the Democrats again regained the White House, and President Barack Obama appointed former Arizona Governor Janet Napolitano to head the Department of Homeland Security. Efforts by the Obama Administration to enact comprehensive immigration reform early in the first term failed, and congressional gridlock made passage unlikely in the near future. As a government official told us, "Nothing can replace comprehensive immigration reform, but in the absence of that, we'll enforce laws in the smartest possible way."

Accordingly, in 2010, ICE Director John Morton drew upon what was by then a well-established policy of prosecutorial discretion to focus agency resources on a prioritized set of immigrants. At the same time, four senior staff members--Denise Vanison, Roxana Bacon, Debra Rogers, and Donald Neufeld--within ICE's sister agency, the US Citizenship and Immigration Services, sent USCIS Director Alejandro Mayorkas a memo outlining “Administrative Alternatives to Comprehensive Immigration Reform.” These options were identified as promoting family unity, fostering economic growth, achieving improvements in process, and reducing the threat of removal

for certain undocumented immigrants (Vanison et al. n.d.). The Supreme Court also recognized the need for a renewed exercise of discretion in immigration cases, declaring in March of 2010:

> The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation (*Padilla v. Kentucky* 2010, 1478).

"These changes to our immigration law," the Court concluded, "have dramatically raised the stakes of a noncitizen's criminal conviction" (2010, 1478).

It is in this context that John Morton wrote what have come to be called "the Morton memos." The first memo, "Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens," was originally issued to all ICE employees on June 30, 2010. It was reissued on March 2, 2011, with addition of the standard law enforcement disclaimer that the memo creates no enforceable rights or duties.[3] The second and third memos were both issued on June 17, 2011. A fourth memo, providing guidance on the use of immigration detainers consistent with these earlier directives, was issued on December 21, 2012.

The first Morton memo identifies ICE's civil enforcement priorities, with highest priority given to those posing a danger to national security or a risk to public safety. Second priority was given to recent illegal immigrants, with persons who are fugitives or who otherwise obstruct immigration controls assigned third priority. ICE detention resources should support these priorities but should not be expended upon "aliens who are known to be suffering from serious physical or mental illness, or who are disabled, elderly, pregnant, or nursing, or demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest," except under extraordinary circumstances or the requirements of mandatory detention, and then only with the approval of the field office director (Morton 2011a, 4-5). If the person falls within these categories and is subject to mandatory detention, field office directors should request guidance from their local Office of Chief Counsel. The memo continues, noting that particular care

is needed "when dealing with lawful permanent residents, juveniles, and the immediate family members of citizens." Additional guidance on prosecutorial discretion, Director Morton states, will be forthcoming; meanwhile, ICE officers and attorneys should continue to be guided by the Meissner (2000), Howard (2005), and Myers (2007) memoranda.

Morton issued the second and third memos a year later, following considerable pushback from the ICE union, which we discuss below. "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs" (Morton 2011b) focuses primarily on removal cases involving victims and witnesses of domestic violence and other crimes, and those engaged in non-frivolous efforts to protect their civil rights and liberties. "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens" (Morton 2011c) is broader in scope.

Again, Meissner's 2000 memo continues to be the guidepost, with Morton's memos differing in only minor ways. And, again consistent with Meissner, Morton identifies multiple points at which prosecutorial discretion may be applied. Morton reminds ICE officers that "certain classes of individuals warrant particular care," both positive and negative (2011c, 5). The positive factors include:

> veterans and members of the U.S. armed forces; long-time lawful permanent residents; minors and elderly individuals; individuals present in the United States since childhood; pregnant or nursing women; victims of domestic violence, trafficking, or other serious crimes; individuals who suffer from a serious mentor or physical disability; and individuals with serious health concerns.

These negative factors should also prompt special care and consideration:

> individuals who pose a clear risk to national security; serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind; known gang members or other individuals who pose a clear danger to public safety; and individuals with an egregious record of immigration violations (2011c, 5).

On December 21, 2012, ICE announced year-end removal numbers for FY2012. Those numbers set a new high of 409,849 persons removed, exceeding the record set the prior year by

more than 10,000 persons. That same day, John Morton issued a memorandum on "Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems" (Morton 2012). This memo makes clear that ICE's "finite enforcement resources" are to be deployed in accordance with the priorities stated in his June 2010 memo.

Deferred Action for Childhood Arrivals (DACA)

As President Obama approached the end of his first term without passage of comprehensive immigration reform, or even the more limited DREAM (Development, Relief, and Education for Alien Minors) Act, which would have provided a path to citizenship for persons who came to the United States as young children, he faced considerable pressure to reassess the options available to the executive branch. There is strong public sympathy for the "DREAMers," as the young people who were brought to the US as children have come to be known. Yet from the perspective of immigrants' advocates, the Morton memos had not been very effective when it came to DREAMers. In the words of one such supporter:

> [While the ICE leadership and the White House] made it very clear in the memos it was supposed to [apply to DREAMers], there was absolute consensus [among advocates] that no matter what the memo said, it was not clear, and there were a lot of DREAM Act eligible or potentially eligible people who were still facing deportation, who in some cases had been deported … Especially if you look at it from that lens, of the group that was most likely to be helped, [prosecutorial discretion] really had not worked.

In an effort to safeguard the DREAMers, ninety-five law professors sent President Barack Obama a letter identifying three forms of discretionary relief available to him: deferred action, parole-in-place, and deferred enforced departure (Motomura et al. 2012). Deferred action for DREAMers was also proposed in the letter to USCIS Director Alejandro Mayorkas by members of his senior staff (Vanison et al. n.d.). Given this pressure, and most certainly also in recognition of the importance of the Latino vote in the upcoming election, in June of 2012 the Obama administration announced the Deferred Action for Childhood Arrivals (DACA) program, effective August 15 of that year (Napolitano 2012).

The Deferred Action for Childhood Arrivals memorandum outlines how prosecutorial discretion is to be exercised in cases involving young people brought to the US as children. Noting that most childhood arrivals lack the intent to violate the law, Homeland Security Secretary Napolitano states:

> Our Nation's immigration laws … are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Nor are they designed to remove productive young people to countries where they may not have lived or even speak the language. Indeed, many of these young people already contributed to our country in significant ways. Prosecutorial discretion, which is used in so many other areas, is especially justified here (Napolitano 2012, 2).

Under this program, applicants may be considered for deferred action for a period of two years (renewable) if they are not older than 30; entered the US under the age of 16; resided continuously in the US for at least 5 years; were present in the US on June 15, 2012 (the date the program was announced); are enrolled in school, graduated from high school, obtained a GED, or were honorably discharged from the US military; and have not been convicted of a felony, significant misdemeanor, multiple misdemeanors, or of otherwise posing a threat to national security or public safety. Over the course of the summer of 2012, the "enrolled in school" requirement was clarified to include otherwise eligible young people who lacked a high school diploma or GED but who had re-enrolled prior to applying for deferred action (Mayorkas 2012). This clarification made an estimated 350,000 additional young people eligible for deferred action and encouraged them to return to school to earn their high school diploma (Batalova and Mittelstadt 2012).

Persons granted deferred action may apply for work authorization. Equally importantly given unauthorized immigrants' fears of immigration officers, DACA applications were reviewed by ICE's sister agency, the USCIS, and not shared with ICE except under unusual circumstances involving serious crimes.

CHALLENGES AND DILEMMAS FOR THE OBAMA ADMINISTRATION'S PROSECUTORIAL DISCRETION POLICIES

While they are perhaps more concrete in their identification of positive and negative factors, we suggest the Morton memos did not differ significantly from earlier prosecutorial discretion memorandums. Nevertheless, the Morton memos, as well as the new Deferred Action for Childhood Arrivals program, were met with forceful critiques. The larger social context was politically charged as well, with anti-immigrant moral panics depicting immigrants as dangerous criminals, economic burdens on their communities, and taking jobs away from Americans (Chavez 2008; Newton 2008; Varsanyi 2010; Kubrin, Zatz and Martínez 2012; Zatz and Smith 2012). These images, in turn, were juxtaposed against demonstrations of support for DREAMers, mothers separated from their children, and other sympathetic figures.

Organizational tensions that have historically plagued law enforcement officers and other street-level bureaucrats probably factor into this mix. Yet as we discuss in the next section, this is at best a partial explanation, as the greatest opposition within ICE came from the leadership of the National Immigration and Customs Enforcement Council, and particularly its president, Chris Crane. A second ICE union, the Federal Law Enforcement Officers Association, is more supportive of Morton's prosecutorial discretion policies. And, according to government officials we interviewed, the extent to which rank-and-file officers supported or challenged the directives varied, depending upon the dynamics of the individual ICE office, regional politics, and how prosecutorial discretion was implemented across different jurisdictions.

In addition to criticisms from some members of Congress and the ICE union that Director Morton, Secretary Napolitano, and the Obama administration were using prosecutorial discretion as an unofficial form of amnesty and thus not upholding the rule of law, the administration also confronted challenges from immigrant advocacy groups. These criticisms focused on the record high number of deportations, and especially deportations of parents of US-citizen children, and

more general concerns that prosecutorial discretion was not being implemented as quickly or as widely as they had anticipated.

Challenges From Within ICE

Challenges from within ICE included very public complaints filed by the Houston regional office, a unanimous vote of no confidence in Director Morton by the ICE Council, and a lawsuit filed against Homeland Security Secretary Janet Napolitano and Directors Morton and Mayorkas in response to DACA (*Crane v. Napolitano* 2012).[4]

In the fall of 2010, ICE officers in Houston publicly contested Morton's prosecutorial discretion policy, arguing that it called for a "secretive review process" resulting in dismissals of hundreds of cases that did not fit the agency's top priorities. The chief counsel in Houston made a Freedom of Information Act request of internal documents. About the same time, seven members of Congress, led by Texas Senator John Cornyn, asked Secretary Napolitano to provide a detailed listing of the number of cases dismissed since January 2010 and "exactly how much funding your Department would require to ensure that enforcement of the law occurs consistently for every illegal alien encountered and apprehended by ICE or U.S. Customs and Border Protection" (Cornyn 2010, Carroll 2011).

On June 11, 2011, the National Immigration and Customs Enforcement Council unanimously voted no confidence in Director Morton and Assistant Director Phyllis Coven. The statement by Union President Chris Crane asserts that Morton and Coven "have abandoned the Agency's core mission … and have instead directed their attention to campaigning for programs and policies related to amnesty" (Crane 2011; see also Feere 2011).

Morton immediately countered, issuing his second and third memorandums a week later, on June 17th. The next volley came within two weeks, when Representatives Lamar Smith (who, ironically, was one of the members of Congress asking INS to exercise prosecutorial discretion in 1999) and Robert Aderholt wrote Secretary Napolitano, calling the Morton memos "a grossly irresponsible expansion of the use of prosecutorial discretion for the apparent purpose of administrative amnesty" and a violation of the will of Congress (Smith and Aderholt 2011, 2). They

concluded by requesting that ICE "utilize the extensive resources available to rigorously enforce the immigration laws of the United States and that ICE's future budget requests include the funds necessary to effectively support the men and women of ICE in executing their critical mission" (2011, 4-5).

Given this ongoing antipathy, it is perhaps not surprising that on August 23rd 2012, one week after DACA went into effect, ten ICE officers sued in federal court to block the program on the grounds that it violates immigration statutes and the constitutional separation of powers (*Crane v. Napolitano* 2012). Kris Kobach, who helped write Arizona's SB 1070 as well as anti-immigration legislation for other states, was lead counsel for the ICE officers (Martin, 2012b).

While Crane's rhetoric makes it appear as though the ICE rank-and-file are all in agreement with his position, only 7,700 of ICE's 20,000 employees are members of Crane's union. Another 9,000 ICE agents are represented by the Federal Law Enforcement Officers Association, which did not join in the no confidence vote against Morton or the lawsuit against Morton and Napolitano, and which is generally more amenable to working with the ICE leadership (Preston 2013). Nevertheless, Crane's union has been extremely vocal, reflects more than one-third of ICE agents, and has considerable support from some members of Congress.

The challenges to the Morton memos and DACA rest in part on differing interpretations of the legal basis for prosecutorial discretion, but also on different understandings of the limits of discretion on the part of state and local law enforcement. Opinions by the Department of Justice's Office of Legal Counsel in 1989 and 1996 (Kmiec 1989; Roseborough 1996) made it clear that state and local law enforcement may only arrest immigrants for criminal, and not civil, violations. In contrast, a 2002 memorandum to Attorney General John Ashcroft from his Assistant Attorney General, Jay Bybee, concluded, "[t]his Office's 1996 advice that federal law precludes state police from arresting aliens on the basis of civil deportability was mistaken" (Bybee 2002: 15). Two months later, Ashcroft (2002) referenced this opinion in remarks announcing the National Security Entry-Exit Registration System. This interpretation is also central to Kris Kobach's "quintessential

force multiplier” argument (Kobach 2005), his legal challenges to prosecutorial discretion, and the anti-immigration legislation he helped to write.

David Martin, the immigration scholar who served as Principal Deputy General Counsel of the Department of Homeland Security from 2009-2010 and as General Counsel of the Immigration and Naturalization Service from 1995 to 1998, responds that Kobach’s statutory theory is incorrect, saying that it “takes out of context a provision Congress enacted in 1996, marries it up with a misunderstanding of two provisions that have been in place for decades, and ignores the actual practice under those provisions” (Martin 2012b, 169).

Why did John Morton face such serious challenges from ICE officers in response to his memos, when his memo drew so clearly from the policies of other INS Commissioners and ICE directors, including especially Doris Meissner? First, while immigration has always been a politically sensitive issue, the surge of anti-immigrant legislation at the state and local levels, combined with the antagonistic relationship between the White House and the Republican congressional leadership, made any changes to immigration policy particularly thorny. Second, the organizational context had changed. When Doris Meissner issued her memorandum, customs and border control, immigration enforcement, and citizenship and immigration services were all under the direction of a single commissioner within the Department of Justice. With creation of the Department of Homeland Security following 9/11, the three services were separated into distinct units, coming together only at the cabinet level. This reorganization may have reinforced a differentiated sense of mission and within each sector (see similarly Rabin 2013).

Realistically, discretion is inevitable--ICE officers could not detain and deport eleven million unauthorized immigrants. Its flexibility enables decision makers to respond to varying circumstances and resources; in this case, to the priorities set by Director Morton. But precisely because it is ever present, discretion is always available as a convenient rationale for critiquing political opponents perceived as going too far, or not far enough, in following the letter or the spirit of the law. And in this case, it appears that Kris Kobach, along with Chris Crane and others in

leadership positions within the ICE union, sought to mobilize outrage about the use of discretion because they disagreed with the substance of the policy decision.

Challenges from Immigrants' Advocates

Deportations reached an all-time high under the Obama administration, climbing from 369,221 in FY2008 to 409,849 in FY2012 (ICE 2012a). According to Daniel Kanstroom, this level of deportation "has vastly exceeded any historical precedent in terms of its size, its ferocity, its disproportionality, its disregard for basic rights, and its substantial negative effects" (2012, 5). The Latino community, immigrants' advocates and attorneys, and child welfare advocates were dismayed by the large number of persons removed, and especially by the continued high numbers of parents who were detained and deported and the resulting family fragmentation and trauma (Rabin 2011, Wessler 2011, 2012, Phillips et al. 2013).

Three primary sets of criticisms emerged from our interviews. First, the Morton memos were not sufficient to change the enforcement culture within ICE, and their implementation was slow, uneven and insufficient. Second, they were unable to address those caught in the mandatory deportation net. Third, making the case for prosecutorial discretion is particularly difficult for immigrants already in detention.

Considering first the implementation process, an advocate we interviewed in fall of 2012 concluded:

> The prosecutorial discretion memos that were issued in 2010 were important and ambitious in their own right, and yet I think the criticism of them is that they really didn't go far enough in terms of being able to translate from a memo and an idea into a total change in culture … In the grand scheme of things, I think most people on the outside [of government] were, like, 'yeah, this is a drop in the bucket.'

Similarly, an immigration attorney praised the Morton memos as a positive development because they outline "areas for prosecutorial discretion and one of them is primary caregivers, and there are also some that are related to DREAM Act kids and so I think that that's definitely good. [But] … Like I said, I haven't seen a lot of change yet as a result."

The slow and, at best, uneven, response to the Morton memos across jurisdictions was noted by many. An immigration advocate familiar with national trends reported, "It's not happening. It's not happening fast enough … The line staff is not moving that fast." Similarly, an immigration attorney recalled that ICE officers in a southern state told her in 2010, "Those memos don't mean anything." More colorfully, a former government official told us that many field officers ignored the directives, viewing them as “toilet paper.”

Having heard such reports from the advocacy community, the American Immigration Lawyers Association and the American Immigration Council surveyed attorneys nationwide, finding that "[w]hile practices have improved in a few ICE offices, in the majority of offices ICE agents, trial attorneys and supervisors admitted that they had not implemented the memoranda and there had been no changes in policy or practice." (American Immigration Lawyers Association and American Immigration Council 2011, 4). This had not changed by 2012, at least in some jurisdictions, as an immigration attorney in a southwestern state told us that the Chief Counsel for ICE in her state "took the approach that she was going to construe it narrowly. She was going to be very sparse with her discretion and, as such, I didn't even consider that as an option."

In informal conversations with DHS officials in the fall of 2012, it was clear that they were aware of this problem, recognizing that they need to do a better job of following up after new policies are announced and ensuring that any new theory of the office is adequately adopted by rank-and-file officers. According to these officials, the prosecutorial discretion policies are being adopted in more offices, though the process is still uneven and nonlinear.

The second challenge highlighted by the advocacy community concerns the constraints created by the mandatory deportation requirements in the 1996 laws. As we were told, "prosecutorial discretion itself isn't a solution if the people getting into the process are defined in a way that you've said they can't have access to that [discretion]." Similarly, in discussing the large numbers of parents still being deported, another attorney concluded that because so many parents enter the immigration system via the criminal justice system and are subject to mandatory

sentences, sometimes for old and relatively minor offenses, prosecutorial discretion "never kicks in."

A third and related problem concerns immigrants who are in detention. According to one attorney, "if you are in immigration detention, your case is not being looked at for prosecutorial discretion. They are supposed to be reviewing all of the cases. Well, they are reviewing the non-detained cases, but they are not reviewing the others." In part, this may reflect the much greater likelihood that immigrants who are not detained will be represented by counsel; nationwide, 75 percent of those in immigration proceedings who are not detained are represented by counsel, compared with 26 percent of those who are detained. Nevertheless, even when represented by counsel, detention continues to be a barrier. As another attorney said, "I just haven't seen it… I mean, we're in the clinics right now and representing two people who have either no criminal history or very, very minor criminal history who are still in the middle of proceedings ... it just doesn't seem to me like it's actually resulting in that many actual changes in cases, " adding "at least not those already pipelined."

Why, if Morton's prosecutorial discretion policies were as soft on immigrants as critics argued they were, didn't deportation numbers decrease? A number of explanations are possible, including (1) it is too soon to see any systematic effect nationwide; (2) the number of unauthorized immigrants—over eleven million—is so large that ICE had to continue removing as many violators as feasible with current resources; (3) political pressure required the Obama administration to take a hard line on immigration violators; (4) a tough stance was necessary to create a political climate in which comprehensive immigration reform might be possible; and (5) Congress appropriated a specific dollar figure for immigration detention and, if those appropriations were not fully utilized, Congress might mandate stronger steps.

While all of these explanations are plausible, by the end of 2012 a downward shift in the number of deportations should have been visible if the intent were to actually decrease deportations, rather than reshape the population of deportees. There has been a decrease in the number of new

filings in immigration court, perhaps due in part to prosecutorial discretion, but between January 2011 and July 2013, ICE had closed only seven percent of its caseload--23,063 court cases--through prosecutorial discretion. And, while there is variation across jurisdictions, the rate of closure has not picked up, with only 1,382 pending deportation cases closed in the month of July 2013 nationwide (Transaction Records Access Clearinghouse 2013).

The second rationale is also unsatisfactory, because the number of unauthorized immigrants vastly surpasses the number of deportations. More likely, then, the stable pattern of 400,000 deportations per year is largely attributable to the political context. As the October 2010 letter to Secretary Napolitano from Senator Cornyn and his colleagues and the July 2011 letter from Representatives Smith and Aderholt suggest, some members of Congress made it clear that they were quite willing to appropriate more funds to support additional deportations. The appropriations supported 33,400 detainees per day in FY 2011 and 34,000 in FY 2012 and 2013, which translates to 400,000 deportations per year. And, it was only upon release of the FY 2012 removal numbers, which for the first time exceeded 400,000 and, thus, the number of detention beds for which funds had been appropriated, that Morton issued a memorandum limiting the use of detention in federal, state, local, and tribal criminal justice systems to those meeting ICE enforcement priorities (Morton 2012).

PROSECUTORIAL DISCRETION IN ACTION: WHO IS BEING DEPORTED?

Regardless of the rationale for maintaining high deportation numbers, has there been a change in who is being deported? And specifically, are those with established ties to the US, including especially parents of US-citizen children, now at lower risk of deportation? Are persons with criminal records more likely to be deported? And if so, for what sorts of offenses are they being deported?

Immigration advocates hoped prosecutorial discretion would result in fewer family separations, but they have been disappointed. Seth Wessler of the Applied Research Center obtained relevant data through a FOIA request. He reports that the number of parental deportations has increased as a proportion of all removals:

> Between 1998 and 2007 … approximately eight percent of almost 2.2 million removals were parents of U.S.-citizen children. The new data, released to the Applied Research Center in September [2011], reveals that more than 22 percent of all people deported in the first half of this year were parents of citizen kids (Wessler 2011; see also ICE 2012b).

Updated statistics provided to the Applied Research Center in December 2012 indicate that this trend has continued, with about 23 percent of the deportations between July 1, 2010 and September 31, 2012 involving parents of US-citizen children. Parental deportations may be starting to decline, as the figures appear to have dropped by about ten percent for the last quarter for which data were available, July 1 to September 31, 2012. However, as Wessler reports, because the overall data for this quarter are not yet available, it is unclear whether this is due to a decrease in the overall rate of deportations or altered practices (Wessler 2012). A new directive issued on August 23rd, 2013 by Morton's successor, Acting INS Director John Sandweg, has raised new hopes among advocates. "Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities" includes many of the recommendations from the advocacy community and, if fully implemented, has potential to mitigate problems they have identified (Sandweg 2013).

According to ICE officials interviewed by Wessler and our own conversations with government officials, most of the parents who were deported had factors weighing against them, such as criminal histories, a history of DUI or other serious public safety offenses, or histories of immigration violations that placed them in priority categories. The *Arizona Republic* reports that seventy-four percent of the parents of US-citizen children who were deported between January and July 2011 had been convicted of crimes, and another seventeen percent had either been previously deported or had failed to comply with deportation orders and were now fugitives (González 2012). Wessler (2012), however, notes that nearly forty percent of those persons deported through the Secure Communities program had convictions for less serious crimes, including driving offenses.

The number of crime-related removals has varied historically. They rarely exceeded seven percent of total annual deportations between 1908, when deportation statistics were first compiled, and 1986, when the Immigration Reform and Control Act was passed (Legomsky 2007). They rose rapidly between 1986 and 1999, comprising the majority of all deportations for three consecutive years in the early 1990s (1993, 1994, and 1995) (Legomsky 2007, 487-89). Crime-related removals fell once again, and then rose during President Obama'a first term from thirty-three percent of all deportations in FY 2008 to fifty-five percent in FY 2012 (ICE 2012a, 2012c), as immigration and criminal law became increasingly intertwined and deportation identified as a tool for crime control (Sklansky 2012; Eagly 2013). Yet the crimes for which immigrants are deported are typically not serious violent offenses; rather, approximately thirty-five percent of the crime-related removals in recent years are for drug or DUI offenses.

As Bill Ong Hing (1980) notes, drug offenders have historically been disfavored by immigration law, as seen in the Ninth Circuit rulings in *Nicholas v. INS* (1979) and *Bowe v. INS (1979)*. Legislation in 1988, 1990, and 1996 expanded the number of drug offenses that are deportable, and the 1996 laws made drug offenses deportable retroactively. In addition to drug offenses, officials with whom we spoke confirmed that very few immigrants with DUI convictions are exempted from deportation. Although simple DUIs are no longer classified as aggravated felonies and thus subject to mandatory detention and deportation, the Department of Homeland Security views driving under the influence as a serious public safety offense carrying considerable negative weight in deportation decisions.

Turning finally to Deferred Action for Childhood Arrivals as a special type of prosecutorial discretion, an estimated 1.76 million young people may be eligible for temporary relief under this program (Migration Policy Institute 2012). DACA was implemented very quickly, two months after being announced, and applications began pouring in immediately at an initial rate of about 4,400 per day, now decreased to fewer than 1,000 per day. Between August 15, 2012, when USCIS

began accepting applications, and July 31, 2013, 573,404 applications were received. Of these, 430,236 have been approved, 20,486 were rejected at intake, and 7,450 have been denied (USCIS 2013).

The small number of DACA denials is largely a reflection of USCIS's efforts to communicate eligibility criteria on its web site and in other venues, and to work closely with the advocacy community to communicate those criteria and what constitutes proper documentation. The initial applicants also tended to have the strongest cases, where applicants were enrolled in school and had substantial documentation that they met conditions for eligibility. Although the policy is still in its infancy, it appears to offer a politically viable mechanism for reducing harm to a vulnerable population. And, as one of our respondents suggested, by demonstrating that it is possible to implement such a program quickly and efficiently while still ensuring careful review of a wide range of background and biometric data on each applicant, DACA may serve as a "test case" for legalization as part of comprehensive immigration reform.

CONCLUSIONS

In the immigration context, law making is fraught with contradictions. This is one explanation for why efforts over the past thirty years to enact comprehensive immigration reform have collapsed. This paper contributes to understandings of immigration law as a response to complex political demands and organizational tensions. We focus particular attention on the avenues available for managing these tensions in highly polarized contexts, such as the congressional gridlock marking President Obama's first term. Prosecutorial discretion, we suggest, is one such mechanism, as it helps balance competing goals such as public safety and family unification. Yet the flexibility of discretion also makes it controversial, and vulnerable to political challenges.

Our historical analysis of prosecutorial discretion explores how it came to have such a central role in immigration enforcement, and whether contemporary policies differ in form or scope from those employed by previous administrations. We then consider recent legal and political challenges to the Obama administration's use of prosecutorial discretion. With the exception of the

Deferred Action for Childhood Arrivals program, we suggest that the prosecutorial discretion policies of the Obama administration do not differ significantly from those of earlier administrations, and even that has precedent in earlier policies. Nevertheless, DHS Secretary Napolitano and ICE Director Morton faced fierce challenges from within ICE's administrative ranks and legislators who oppose what they see it as an unwarranted incursion into law making, and from immigration advocates who argue that the record high number of deportations is fragmenting families.

We conclude that immigration reform and the exercise of discretion is dependent upon the context. In this case, it includes today's highly charged political climate (e.g., local anti-immigrant legislation, sympathy for the DREAMers), changes in organizational structures (e.g., the creation of the Department of Homeland Security and its distinct mission agencies in 2002), and challenges from key parties (e.g., Crane's ICE union and the response from ICE officials on the ground). As we have shown, in the absence of comprehensive immigration reform, challenges that might otherwise have manifested as policy critiques come forth in the form of critiques of discretion.

We encourage future research to untangle the layers of complexity we have uncovered. How, for example, do local and state jurisdictions respond to prosecutorial discretion in their interactions with ICE officials? Can generalized memos from agency heads effectively direct the use of prosecutorial discretion on the ground, or does this require specific executive orders, such as DACA?

The saga of prosecutorial discretion in immigration enforcement offers an important story for those who doubt the legitimacy, and inevitability, of discretion and its relevance for socio-legal research. Yet it has been understudied, perhaps because socio-legal scholars studying immigration tend not to examine prosecutorial discretion, and those studying prosecutorial discretion typically focus on the criminal justice system or other regulatory bodies. Our analyses of prosecutorial discretion based on interviews with immigration advocates and attorneys, child welfare advocates, and current and former government employees reveal the severe limitations of its implementation.

Finally, we ask, if comprehensive immigration reform is enacted, to what extent will it formalize the priorities already outlined in prosecutorial discretion guidelines? And conversely, how might comprehensive legislation reshape prosecutorial discretion? Because surely discretion will endure, in one form or another.

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1 We do not explicitly consider the decisions of immigration judges since their discretion has been severely limited since the 1996 laws. Nor do we consider the actions of local and state police or correctional officers; while their discretionary decision making is important, it is beyond the scope of this paper.

2 This was confirmed by the Supreme Court, which held in *INS v. St. Cyr* (2001) that certain discretionary waivers of deportations remained available to noncitizens.

3 While the memo was unchanged except for addition of the standard disclaimer and thus should for substantive historical purposes be thought of as having been issued in June of 2010, it is typical to cite reissued memoranda by the reissue date.

4 On July 31, 2013, the US District Court dismissed this case on procedural grounds.