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# Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law

Shoba S. Wadhia

*Penn State Law*

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## Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law

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# Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law

SHOBA SIVAPRASAD WADHIA\*

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If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

- James Madison<sup>1</sup>

## I. INTRODUCTION

This Article is about deferred action and transparency in related immigration cases falling under the jurisdiction of the Department of Homeland Security (DHS). While scholars from other genres have written extensively on the topic of prosecutorial discretion, the subject is largely absent from immigration scholarship, with the exception of early research conducted by Leon Wildes in the late 1970s and early 2000s,<sup>2</sup> and a law review article I published in 2010 outlin-

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1. THE FEDERALIST NO. 51, at 286 (James Madison) (Scott ed., 2002).

2. See Leon Wildes, *The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?*, 17 SAN DIEGO L. REV. 99, 101 (1980) [herein-

ing the origins of prosecutorial discretion in immigration law and related lessons that can be drawn from administrative law and criminal law.<sup>3</sup> That article ends with specific recommendations for the agency, such as codifying deferred action into a regulation and recognizing it as a formal benefit as opposed to a matter of “administrative convenience,” and streamlining the array of existing memoranda of prosecutorial discretion floating within each DHS agency.<sup>4</sup> An additional recommendation included increasing oversight of prosecutorial discretion to ensure that officers and agencies that fail to exercise prosecutorial discretion by targeting and enforcing the laws against low-priority individuals are held accountable.

In this Article, and building upon recommendations published in *The Role of Prosecutorial Discretion in Immigration Law*,<sup>5</sup> I describe the state of prosecutorial discretion and deferred action in particular by surveying the political climate, public reaction, and advo-

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after Wildes, *The Operations Instructions*]; Leon Wildes, *The United States Immigration Service v. John Lennon: The Cultural Lag*, 40 BROOK. L. REV. 279 (1974); 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 (1977) [hereinafter Wildes, *The Litigative Use of the FOIA*]; Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service - A Measure of the Attorney General's Concern for Aliens, Part I*, 53 INTERPRETER RELEASES 25 (January 26, 1976) [hereinafter Wildes, *The Nonpriority Program Part I*]; Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service - A Measure of the Attorney General's Concern for Aliens, Part II*, 53 INTERPRETER RELEASES 33 (January 30, 1976) [hereinafter Wildes, *The Nonpriority Program Part II*]; Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Cases*, 41 SAN DIEGO L. REV. 819 (2004) [hereinafter Wildes, *A Possible Remedy*].

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

4. ICE prefaced its most recent memorandum on prosecutorial discretion as building upon the pre-existing memoranda. See John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, 1–2 (2011) [hereinafter Morton Memo on Prosecutorial Discretion], <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

5. See Wadhia, *supra* note 3, at 293–99.

cacy efforts in the last two years. I also chronicle my repeated Freedom of Information Act (FOIA) requests to DHS for information about deferred action, and the stumbling blocks I encountered during this 19-month journey. The Article will show that while deferred action is one of the very few discretionary remedies available for noncitizens with compelling equities, it currently operates as a secret program accessible only to elite lawyers and advocates. Moreover, the secrecy of the program has created the (mis)perception by some, that deferred action can be used as a tool to legalize the undocumented immigrant population or ignore congressional will. This Article explains why transparency about deferred action is important and makes related recommendations that include, but are not limited to, subjecting the program to rulemaking under the Administrative Procedures Act, issuing written decisions when deferred action is denied, posting information about the application process, and maintaining statistics about deferred action decisions. Without these remedies, noncitizens that possess similarly relevant equities will face unequal hardships.

#### *A. Background*

The Department of Homeland Security (DHS) is a cabinet-level agency with jurisdiction over many immigration functions.<sup>6</sup> The Department has jurisdiction over immigration “services” such as asylum, citizenship, and green card applications;<sup>7</sup> border-related enforcement actions such as border patrol and inspections;<sup>8</sup> and interior enforcement activities, such as the detention and removal of noncitizens.<sup>9</sup> The immigration court system is called the Executive Office for Immigration Review (EOIR) and rests within the Department of

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6. See U.S. DEPARTMENT OF HOMELAND SECURITY, <http://www.dhs.gov/index.shtm> (last visited Aug. 9, 2011).

7. See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/portal/site/uscis> (last visited Aug. 9, 2011).

8. See U.S. CUSTOMS AND BORDER PROTECTION, <http://www.cbp.gov/> (last visited Aug. 9, 2011).

9. See U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/> (last visited Aug. 9, 2011).

Justice.<sup>10</sup> Removal proceedings are initiated by DHS and operate as adversarial hearings at which U.S. Immigration and Customs Enforcement attorneys represent the DHS. On the other hand, noncitizens are entitled to find their own lawyers at no expense to the government.<sup>11</sup> Many noncitizens in removal proceedings are unrepresented because the proceeding itself is considered “civil” and without guaranteed safeguards like court-appointed counsel.<sup>12</sup> At a removal proceeding, an Immigration Judge reviews allegations and charges with the noncitizen defendant, as well as enters pleas.<sup>13</sup> If appropriate, the Immigration Judge presides over applications for relief from removal such as asylum, adjustment of status, and cancellation of removal.<sup>14</sup> The noncitizen bears the burden of proving that she is eligible for such relief.<sup>15</sup> Decisions by the Immigration Judge may be appealed with the Board of Immigration Appeals.<sup>16</sup> Not every noncitizen residing or entering the United States without legal authority is placed in removal proceedings.<sup>17</sup> Some are removed expeditiously by the Department through other means, while others are considered for prosecutorial discretion.<sup>18</sup>

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10. See EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, <http://www.justice.gov/eoir/> (last visited July 17, 2011).

11. See Immigration and Nationality Act (INA) § 292, 8 U.S.C. § 1362 (2006).

12. For a more detailed look at noncitizens’ lack of representation, see Donald Kerwin, *Revisiting the Need for Appointed Counsel*, 2 INSIGHT (MIGRATION POLICY INSTITUTE) (Apr. 2005), available at [http://www.migrationpolicy.org/insight/Insight\\_Kerwin.pdf](http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf); Andrew I. Shoenholtz & Hamutal Bernstein, *Improving Immigration Adjudications Through Competent Counsel*, 21 GEO. J. LEGAL ETHICS 55, 55–56 (2008).

13. See *Office of the Chief Immigration Judge*, U.S. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, <http://www.justice.gov/eoir/ocijinfo.htm> (last visited Aug. 9, 2011).

14. *Id.*

15. See *U. S. Dep’t of Justice*, U.S. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, <http://www.justice.gov/eoir/press/04/ReliefFromRemoval.htm> (last visited Dec. 30, 2011).

16. *Office of the Chief Immigration Judge*, *supra* note 13.

17. *Id.*

18. Note that this background section is intended as a brief review of the Department of Homeland Security and the removal process. For a more detailed discussion of the removal process and the agency components involved, see Wadhia, *supra* note 3. For an organizational chart listing the different components of

A favorable exercise of “prosecutorial discretion” identifies the Department of Homeland Security’s authority to not assert the full scope of the agency’s enforcement authority in each and every case.<sup>19</sup> The Department’s motivations for exercising prosecutorial discretion are largely economic and humanitarian.<sup>20</sup> According to the agency’s own statistics, Immigrations and Customs Enforcement (ICE) has the resources to remove less than 4% of the total undocumented population.<sup>21</sup> Moreover, many individuals and groups who present redeeming qualities such as lengthy residence, employment or family ties in the United States, and/or intellectual, military, or professional promise are living in the United States, vulnerable to immigration enforcement and without a statutory vehicle for legal status. In the first two years of the Obama Administration, such humanitarian cases have swelled in the wake of congressional stalemates over even discrete immigration reforms. At one time, prosecutorial discretion was called “nonpriority” and later “deferred action,” but today, prosecutorial discretion is associated with many

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DHS and a description of each, see *Organizational Chart*, U.S. DEPARTMENT OF HOMELAND SECURITY, [http://www.dhs.gov/xabout/structure/editorial\\_0644.shtm](http://www.dhs.gov/xabout/structure/editorial_0644.shtm) (last visited Aug. 9, 2011).

19. See, e.g., Morton Memo on Prosecutorial Discretion, *supra* note 4, at 5; memorandum from William J. Howard, Principal Legal Advisor, on Prosecutorial Discretion, 2, 8 (Oct. 24, 2005) [hereinafter Howard Memo], available at <http://www.shusterman.com/pdf/prosecutorialdiscretionimmigration2005.pdf>; memorandum from Doris Meissner, Commissioner of Immigration and Naturalization Service, on Exercising Prosecutorial Discretion, 2 (Nov. 17, 2000) [hereinafter Meissner Memo], available at <http://www.scribd.com/doc/22092970/INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00>; memorandum from John Morton, Director, Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens, 4 (March 2, 2011) [hereinafter Morton Memo on Civil Enforcement Priorities], available at <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>; memorandum from John Morton, Director, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011) [hereinafter Morton Memo on Certain Victims, Witnesses, and Plaintiffs], available at <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>; memorandum from Julie L. Myers, Assistant Secretary, Prosecutorial and Custody Discretion, 4 (Nov. 7, 2007) (on file with author);

20. Morton Memo on Civil Enforcement Priorities, *supra* note 19, at 1.

21. *Id.*

different actions by the government.<sup>22</sup> For example, a DHS officer can exercise favorable discretion by granting a temporary stay of removal, joining in a motion to terminate removal proceedings, granting an order of supervision, cancelling a Notice to Appear, or granting deferred action.<sup>23</sup> Prosecutorial discretion can also be exercised during different points in the enforcement process, including, but not limited to, interrogation, arrest, charging, detention, trial, and removal.<sup>24</sup>

This Article is limited to the Department's exercise of prosecutorial discretion and deferred action in particular. This Article does not discuss immigration adjudications before DHS (beyond deferred action) or the EOIR. Notably, many scholars have written extensively about immigration adjudications in these contexts.<sup>25</sup> On the other hand, I rely on process values that have been analyzed in other immigration adjudicatory contexts to analyze and advance the importance of transparency in deferred action.

### B. *Summary of Deferred Action Process*

In theory, any person who is in the United States without authorization may apply for deferred action before any component of DHS, including CBP, ICE, and USCIS. Oft-times deferred action requests are reviewed by a local office, and following up to three levels of review, are either granted, denied, or unresolved.<sup>26</sup> There is no for-

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22. Wildes, *A Possible Remedy*, *supra* note 2, at 820-23; *see* Morton Memo on Prosecutorial Discretion, *supra* note 4, at 2; Meissner Memo, *supra* note 19, at 2; Howard Memo, *supra* note 19, at 2.

23. *See* Morton Memo on Prosecutorial Discretion, *supra* note 4, at 2; Howard Memo, *supra* note 19, at 2; Meissner Memo, *supra* note 19, at 2.

24. *See* Morton Memo on Prosecutorial Discretion, *supra* note 4, at 2; Howard Memo, *supra* note 19, at 2; Meissner Memo, *supra* note 19, at 2.

25. *See, e.g.*, Jill E. Family, A Broader View of the Immigration Adjudication Problem, 23 GEO. IMMIGR. L.J. 595 (2009); Steven Legomsky, Restructuring Immigration Adjudication, 59 DUKE L. J. 1635 (2010); Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13-1 BENDER'S IMMIGR. BULL. 1, 3 (2008).

26. *See, e.g.*, *Ombudsman Recommendation: Recommendations on USCIS Deferred Action Processing*, U.S. DEPARTMENT OF HOMELAND SECURITY (July 11, 2011), <http://www.dhs.gov/files/programs/cisomb-recommendation.shtm> (citing the Homeland Security Act (HSA) of 2002, Pub. L. No. 107-296, § 442(c), 116

mal deferred action application form or fee. Upon receiving deferred action, the person may remain in the United States and may apply for work authorization unless, and until, the agency decides to target the person for enforcement under the immigration laws.<sup>27</sup> Specifically, the regulations governing immigration contain a specific subsection for individuals applying for work authorization on the basis of deferred action.<sup>28</sup> If a person is denied deferred action, there is no mechanism for review by the Department or the immigration court, nor is there a guarantee that the person will receive a notification about the Department's decision.<sup>29</sup> Because deferred action is a function of prosecutorial discretion, decisions are generally immune from judicial review in the absence of equal protection claims involving "outrageous discrimination."<sup>30</sup> Moreover, decisions about deferred action often rest with one agency and in many cases non-attorney employees of the Department, despite the fact that grave consequences attach when an agency fails to consider or denies a person deferred action status.<sup>31</sup> As of this writing, the Department does not keep public records about deferred action grants, nor does it

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Stat. 2135, 2194); Department of Homeland Security Secretary Tom Ridge, *Delegation to the Bureau of Citizenship and Immigration Services* (Mar. 1, 2003) (delegating authority to grant voluntary departure under section 240B of the INA 8 U.S.C. § 1229c, and deferred action).

27. *See id.*

28. *See* 8 C.F.R. § 274a.12(c)(14) (2011) ("An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment . . .").

29. While the June 17 memorandum from DHS on prosecutorial discretion includes some additional procedures that would include a case to be initiated by the ICE officer, private attorney, or ICE agent, it does not appear to include a specific method for notifying the noncitizen when they have been denied deferred action. *See* Morton Memo on Prosecutorial Discretion, *supra* note 4.

30. *See, e.g., Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999).

31. Notably, the June 17, 2011 Morton Memo on prosecutorial discretion enables ICE attorneys to review the charging decisions by ICE, CBP, and USCIS. *See* Morton Memo on Prosecutorial Discretion, *supra* note 4, at 3. By including and amplifying the role of the ICE attorney, the memo includes an important and new check to the deferred action process before ICE and prosecutorial discretion generally. *See id.*

make information about the program available on its website, forms, or memoranda.

## II. DEPARTMENT GUIDELINES ON PROSECUTORIAL DISCRETION

### A. *Operations Instruction and Meissner Memo*

Two seminal policy statements on deferred action that have survived enormous structural changes of the immigration agency and immigration statute include a former “Operations Instruction” on deferred action, and a memorandum published by former INS Commissioner Doris Meissner.<sup>32</sup> The Operations Instruction (O.I.) was revealed in the 1970s in connection with litigation filed on behalf of John Lennon. That now-defunct Operations Instruction advises officers to consider:

(1) advanced or tender age; (2) many years' presence in the United States; (3) physical or mental condition requiring care or treatment in the United States; (4) family situation in the United States—effect of expulsion; (5) criminal, immoral or subversive activities or affiliations. If the district director's recommendation is approved by the regional commissioner the alien shall be notified that no action will be taken by the Service to disturb his immigration status, or that his departure from the United States has been deferred indefinitely, whichever is appropriate.<sup>33</sup>

That Operations Instruction was the subject of significant courtroom traffic beginning in the late 1970s that revolved around whether deferred action operates as a substantive benefit or an act of pure administrative convenience.<sup>34</sup> Concluding that the O.I. on deferred

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32. Meissner Memo, *supra* note 19; (Legacy) Immigration and Naturalization Service, Operations Instructions, O.I. § 103.1(a)(1)(ii) (1975).

33. (Legacy) Immigration and Naturalization Service, Operations Instructions, O.I. § 103.1(a)(1)(ii) (1975).

34. See *Velasco-Gutierrez v. Crossland*, 732 F.2d 792, 798 (10th Cir. 1984); *Pasquini v. Morris*, 700 F.2d 658, 661 (11th Cir. 1983); *Nicholas v. Immigration & Naturalization Serv.*, 590 F.2d 802, 807 (9th Cir. 1979); *Soon Bok Yoon v.*

action operated like a substantive benefit, the Ninth Circuit in *Nicholas v. INS* articulated the five criteria listed in the O.I., the directive language of the O.I., and the fact that a grant of deferred action provided the benefit of “an indefinite delay in deportation.”<sup>35</sup> From the agency’s point of view, the tension of what to call deferred action (administrative convenience or substantial benefit) was eliminated with a tweaking of the O.I. in 1981 and more explicit language in future memoranda including the Meissner Memo.<sup>36</sup>

Published in 2000, the Meissner memo identifies a list of examples of factors that should be considered by immigration officers in making prosecutorial decisions like deferred action, including, but not limited to:

- immigration status of the applicant;
- length of residence in the United States;
- criminal history and circumstances surrounding such history;
- humanitarian concerns such as family ties, tender age at the time of entry into the United States, special medical conditions or conditions and circumstances in the country to which the beneficiary could be potentially removed; likelihood of being removed;
- current or past cooperation with law enforcement;

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Immigration & Naturalization Serv., 538 F.2d 1211, 1213 (5th Cir. 1976); *Lennon v. Immigration & Naturalization Serv.*, 527 F.2d 187, 193 (2d Cir. 1975); *Wan Chung Wen v. Ferro*, 543 F. Supp. 1016, 1017–18 (W.D.N.Y. 1982); *Zacharakis v. Howerton*, 517 F. Supp. 1026, 1027–28 (S.D. Fla. 1981); *see also Siverts v. Craig*, 602 F. Supp. 50, 53 (D. Haw. 1985) (construing 1981 instruction).

35. *Nicholas*, 590 F.2d at 806–807.

36. The relevant part of the amended instruction reads “Deferred action. The district director may, at his discretion, recommend consideration of deferred action, an act of administrative choice to give some cases lower priority and in no way an entitlement, in appropriate cases . . .” (Legacy) Immigration and Naturalization Service, Operations Instructions, O.I. § 103.1(a)(1)(ii) (1981). Despite the disclaimers placed in the amended O.I. and subsequent memoranda, the data below combined with the agency’s continued application of deferred action based on specific factors present a strong argument for recognizing deferred action as a substantive benefit.

- service in the U.S. military; immigration history; and
- likelihood that she could be eligible for a legal immigration status in the future among other factors.<sup>37</sup>

### B. Morton Memoranda

In the last two years, the immigration agency has published additional guidance about its authority to exercise prosecutorial discretion.<sup>38</sup> In June 2010, ICE issued a broad memorandum about its “Civil Enforcement Priorities” and limited resources, highlighting the importance of prosecutorial discretion during the apprehension, detention, and removal of noncitizens.<sup>39</sup> The memo reaffirms earlier memoranda on prosecutorial discretion and further states “Particular care should be given when dealing with lawful permanent residents, juveniles, and the immediate family members of U.S. citizens.”<sup>40</sup> In

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37. Meissner Memo, *supra* note 19, at 7–8.

38. For a detailed description of memoranda and policy about prosecutorial discretion prior to 2010, see Wadhia, *supra* note 3.

39. Morton Memo on Civil Enforcement Priorities, *supra* note 19, at 1. EOIR highlighted the relationship between implementation of the June 2010 Morton Memo and an increased detained docket at EOIR. *Immigration Court System: Hearing Before the S. Comm. On the Judiciary*, 112th Cong. (2011) (statement of Juan P. Osuna, Director, Executive Office for Immigration Review), available at <http://www.justice.gov/eoir/press/2011/EOIRtestimony05182011.pdf> (“As DHS enforcement programs reach their full potential, EOIR is planning ahead and shifting resources to meet the anticipated corresponding increase in the agency’s detained caseload.”). Note that Morton’s June 30, 2010 memo on Civil Enforcement priorities was reissued by ICE on March 2, 2011, with one additional clause at the end to confirm that the memo itself did not create any right or benefit or limit the legal authority of ICE to enforce immigration laws. See Morton Memo on Civil Enforcement Priorities, *supra* note 19, at 4 (“These guidelines and priorities are not intended to, do 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.”).

40. Morton Memo on Civil Enforcement Priorities, *supra* note 19, at 4. For an in-depth analysis of the June 30 Morton memo, see Shoba Sivaprasad Wadhia, *Reading the Morton Memo: Federal Priorities and Prosecutorial Discretion*, IMMIGRATION POLICY CENTER-AMERICAN IMMIGRATION COUNCIL, THE PENNSYLVANIA STATE UNIVERSITY LEGAL STUDIES RESEARCH PAPER NO. 46-

June 2011, ICE issued another memorandum on prosecutorial discretion that was intended to support the Morton Memo on Civil Enforcement Priorities and also build upon many of the historic policy memoranda by INS and DHS on the subject of prosecutorial discretion.<sup>41</sup> The broad Morton Memo on Prosecutorial Discretion contains a tone similar to previous memoranda in that it identifies the resource limitations of the agency, furnishes a laundry list of largely humanitarian factors that ICE may consider in deciding whether or not to assert the full scope of enforcement authority available to ICE, and “clarifies” that the directive itself confers no right to the noncitizen or limitation on the agency to apprehend, detain, or remove “any” alien unlawfully within the United States.<sup>42</sup> The factors posted for consideration by ICE include, but are not limited to:

- the agency's civil immigration enforcement priorities;
- the person's length of presence in the United States, with particular consideration given to presence while in lawful status;
- the circumstances of the person's arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child;

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2010 (2010) [hereinafter Wadhia, *Reading the Morton Memo*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1723165](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1723165).

41. Morton Memo on Prosecutorial Discretion, *supra* note 4, at 1. ICE issued a second memorandum on prosecutorial discretion specific to certain victims, witnesses, and plaintiffs. See Morton Memo on Certain Victims, Witnesses, and Plaintiffs, *supra* note 19. This memo highlights the importance of exercising prosecutorial discretion towards:

victims of domestic violence, human trafficking, or other serious crimes; witnesses involved in pending criminal investigations or prosecutions; plaintiffs in non-frivolous lawsuits regarding civil rights or liberties violations; and individuals engaging in a protected activity related to civil or other rights who may be in a non-frivolous dispute with an employer, landlord, or contractor.

*Id.* at 2. That memo also states somewhat conclusively “[I]t is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime.” *Id.* at 1.

42. Morton Memo on Prosecutorial Discretion, *supra* note 4, at 4, 6.

- the person's pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States;
- whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat;
- the person's criminal history, including arrests, prior convictions, or outstanding arrest warrants;
- the person's immigration history, including any prior removal, outstanding order of removal, prior denial of status, or evidence of fraud;
- whether the person poses a national security or public safety concern;
- the person's ties and contributions to the community, including family relationships;
- the person's ties to the home country and condition in the country;
- the person's age, with particular consideration given to minors and the elderly;
- whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
- whether the person is the primary caretaker of a person with a mental or physical disability, minor, or seriously ill relative;
- whether the person or the person's spouse is pregnant or nursing;
- whether the person or the person's spouse suffers from severe mental or physical illness;
- whether the person's nationality renders removal unlikely;
- whether the person is likely to be granted temporary or permanent status or other relief from re-

moval, including as a relative of a U.S. citizen or permanent resident;

- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime; and
- whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities, such as ICE, the U.S. Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others.<sup>43</sup>

The Morton Memo on Prosecutorial Discretion also articulates that “particular care” should be given to the following classes of individuals:

- 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 and nursing women
- victims of domestic violence, trafficking, or other serious crimes
- individuals who suffer from serious mental or physical disability; and
- individuals with serious health conditions.<sup>44</sup>

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43. *Id.* at 4.

44. *Id.* at 5. For a detailed analysis about the Morton Memo on Prosecutorial Discretion, see Shoba Sivaprasad Wadhia, *The Morton Memo and Prosecutorial Discretion: An Overview*, IMMIGRATION POLICY CENTER, 6 (July 20, 2011), available at <http://www.immigrationpolicy.org/special-reports/morton-memo-and-prosecutorial-discretion-overview-0>.

The Morton Memo on Prosecutorial Discretion is somewhat unique from previous memoranda in that it explicates who within ICE has authority to exercise prosecutorial discretion and the special role of ICE attorneys to “exercise prosecutorial discretion in any immigration removal proceeding before EOIR” including any removal proceedings that have been proposed by CBP or USCIS.<sup>45</sup> Rather than relying on the initial charging agency’s decision to issue an NTA, the Morton Memo on Prosecutorial Discretion suggests that the ICE Chief Counsel or Deputy Director for ICE should handle any conflicts that arise between the charging agency and the ICE trial attorney seeking to exercise prosecutorial discretion.<sup>46</sup>

### C. Other ICE Policies

ICE also released a “toolkit” for U.S. Prosecutors in April 2011, which contains a separate section on prosecutorial discretion and the related tools of deferred action and administrative stays of removal.<sup>47</sup> In describing the concept of deferred action, the toolkit advises:

Deferred Action (DA) is not a specific form of relief but rather a term used to describe the decision-making authority of ICE to allocate resources in the best possible manner to focus on high priority cases, potentially deferring action on cases with a lower priority. There is no statutory definition of DA, but federal regulations provide a description: “[D]eferred action [is] ‘an act of administrative convenience to the government which gives some cases lower priority. . . .’” There are two distinct types of DA requests: (i) those seeking DA based on sympathetic facts and a low-enforcement priority, and (ii) those seeking DA based on his/her status as an important witness in an investigation or prosecution. Basically, DA means the

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45. Morton Memo on Prosecutorial Discretion, *supra* note 4, at 3.

46. *Id.* For a more detailed analysis of the Morton Memo on Prosecutorial Discretion, see Wadhia, *supra* note 44, at 5.

47. *Protecting the Homeland: Toolkit for Prosecutors*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, 4–8 (2011), available at <http://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf>.

government has decided that it is not in its interest to arrest, charge, prosecute or remove an individual at that time for a specific, articulable reason.<sup>48</sup>

The enforcement activities of ICE bear a direct relationship to the activities undertaken by the immigration court system, housed within the Department of Justice's Executive Office for Immigration Review.<sup>49</sup> EOIR assumes jurisdiction of immigration cases once a Notice to Appear (NTA) is filed with the immigration court.<sup>50</sup> A wide array of Department employees have the authority to assemble a NTA, which in and of itself raises concerns about the quality and consistency of NTA issuance. According to recent data calculated by the American Bar Association:

The number of Notices to Appear (NTA) issued by the Department of Homeland Security (DHS) to initiate removal proceedings grew by 36% in just two years, from 213,887 in FY 2006 to 291,217 in FY 2008. These numbers are expected to increase as DHS focuses on apprehending and removing all criminal noncitizens, such as through the Secure Communities initiative.<sup>51</sup>

In addition, and in response to an overwhelmed immigration court system, ICE published guidance for dismissing select cases before EOIR where a benefit such as a marriage-based green card could be conferred by USCIS.<sup>52</sup> Specifically, the memo advises the

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48. *Id.* at 4 (citations omitted).

49. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, <http://www.justice.gov/eoir/> (last visited July 17, 2011).

50. *See* Jurisdiction and Commencement of Proceedings Rule, 8 C.F.R. § 1003.14 (2011) (“(a) Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service. . .”).

51. *Improving Efficiency and Ensuring Justice in the Immigration Court System: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Karen T. Grisez, American Bar Association), available at [http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011may18\\_grisez\\_t.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011may18_grisez_t.authcheckdam.pdf).

52. Memorandum from John Morton on Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Peti-

ICE Office of Chief Counsel to “dismiss” removal cases before the immigration court involving “adjustment of status” (green card) cases in which the applicant appears eligible for a green card. The purpose of this guidance is to reduce the number of cases pending at the EOIR.<sup>53</sup> The need for operationalizing a policy dismissing cases in which the noncitizen is eligible for an immigration benefit before the United States was underscored by EOIR Director Juan Osuna’s recent recitation about the current number of cases pending at EOIR.

At the end of FY 2010, EOIR’s immigration courts had 262,622 proceedings pending, marking an increase of more than 40,000 proceedings pending over

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tions, 2–4 (Aug. 20, 2010), *available at* [www.ice.gov/doclib/detention-reform/pdf/aliens-pending-applications.pdf](http://www.ice.gov/doclib/detention-reform/pdf/aliens-pending-applications.pdf).

53. *Id.* at 3. The relevant section of that memo states:

As a matter of prosecutorial discretion and to promote the efficient use of government resources, I hereby issue new ICE policy to govern the handling of removal proceedings involving aliens with applications or petitions pending with USCIS. This policy extends both to the prosecution of removal proceedings by OCCs and to any associated detention decisions by Enforcement and Removal Operations (ERO).

...

Where there is an underlying application or petition and ICE determines in the exercise of discretion that a non-detained individual appears eligible for relief from removal, OCC should promptly move to dismiss proceedings without prejudice before EOIR.

...

Only removal cases that meet the following criteria will be considered for dismissal:

The alien must be the subject of an application or petition filed with USCIS to include a current priority date, if required, for adjustment of status;

The alien appears eligible for relief as a matter of law and in the exercise of discretion;

The alien must present a completed *Application 10 Register Permanent Residence or Adjust Status* (Form 1-485), if required; and

The alien beneficiary must be statutorily eligible for adjustment of status (a waiver must be available for any ground of inadmissibility).

*Id.* at 2–3.

the end of FY 2009. In the first half of FY 2011, that pending caseload grew by an additional 9,400. This caseload is directly tied to annual increases in cases filed in the immigration courts by DHS. In FY 2010, the immigration courts received 325,326 proceedings. By contrast, in FY 2007, proceedings received were 279,430.<sup>54</sup>

### III. THE POLITICS OF IMMIGRATION AND DEFERRED ACTION

#### A. *Legislative Stalemates and Deferred Action*

The 2009–11 legislative debate on immigration helps demonstrate the political context under which deferred action has been spotlighted.<sup>55</sup> Efforts by select members of Congress, attorneys, and pro-immigration advocates to advance broad immigration reforms were unsuccessful despite the promise proffered by the Obama Administration in 2008.<sup>56</sup> In December 2010, the Senate failed to move

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54. See *Statement of Juan P. Osuna*, *supra* note 39, at 2. In response to the swelling court docket and recent Morton Memos, the American Bar Association has further recommended that:

DHS personnel should be encouraged to reduce the burden on the removal adjudication system by exercising discretion to not serve a Notice to Appear on noncitizens who are *prima facie* eligible for relief from removal, to concede eligibility for relief from removal after receipt of a clearly meritorious application, to stop litigating a case after key facts develop that make removal unlikely, or to waive appeal in certain appropriate types of cases.

*Statement of Karen T. Grisez*, *supra* note 51, at 7. It should also be noted, the new Morton Memo on Prosecutorial Discretion and its focus on the role of ICE trial attorneys when appearing before EOIR in removal proceedings has the potential to reduce the docket at EOIR, especially if the memo becomes a tool for the ICE trial attorney to join in motions to terminate or dismiss cases that are not among the priorities identified by ICE.

55. This article does not attempt to analyze “why legislative reform has failed” nor does it suggest that prosecutorial discretion can ever be a substitute for such reforms.

56. *Immigration Policy: Transition Blueprint*, OBAMA-BIDEN TRANSITION PROJECT, 20–21 (2008), available at <http://www.aila.org/content/fileviewer.aspx?>

forward on the Development, Relief, and Education for Alien Minors Act (DREAM Act), a bill that would have provided legal status to eligible young residents who have been in the United States for an extended period of time, finished high school, and plan to enter college; after several years in “conditional” resident status, the DREAM Act would have enabled young people who have completed higher education or service in the military to achieve permanent residence in the United States.<sup>57</sup> To many advocates, the failure of the DREAM Act was symbolic of an Administration with little will and, more importantly, a Congress unwilling to put the policy of regularizing status for arguably the most sympathetic population in the United States, namely, young people with great intellectual promise whose immigration status was beyond their control, before politics.<sup>58</sup> Weeks later, the 112th Congress opened up with a cadre of congressional members at the National Press Club highlighting the benefits of repealing birthright citizenship.<sup>59</sup> That Congress was willing to renounce children and infants, speaks volumes to the political landscape on “the Hill” with respect to the immigration question.<sup>60</sup> Whereas President Obama has made public announcements and

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docid=27611&linkid=188816. For a longer discussion about previous efforts to enact legislative reform, see Shoba Sivaprasad Wadhia, *Policy and Politics of Immigrants’ Rights*, 16 TEMP. POL. & CIV. RTS. L. REV. 387, 410–18 (2007).

57. See Development, Relief, and Education for Alien Minors Act of 2010, S. 3992, 111th Cong. (2010), available at [http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN03992](http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN03992;); Development, Relief, and Education for Alien Minors Act of 2010, H.R. 6497, 111th Cong. (2010), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR06497>.

58. See, e.g., Brian Naylor, *Democrats Push DREAM Act; Critics Call It Amnesty*, NPR.ORG (Dec. 6, 2010), <http://www.npr.org/2010/12/06/131796206/democrats-push-dream-act-critics-call-it-amnesty>.

59. Julia Preston, *State Lawmakers Outline Plans to End Birthright Citizenship, Drawing Outcry*, NY TIMES, Jan. 5, 2011, <http://www.nytimes.com/2011/01/06/us/06immig.html>.

60. See, e.g., Birthright Citizenship Act of 2011, H.R. 140, 112th Cong. (1st Sess. 2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr140ih/pdf/BILLS-112hr140ih.pdf>; Marc Lacey, *Birthright Citizenship Looms as Next Immigration Battle*, NY TIMES, Jan. 4, 2011, <http://www.nytimes.com/2011/01/05/us/politics/05babies.html>; Washington Post Staff, *DREAM Act delayed in Senate: Prospects of cloture by year’s end fading*, WASHINGTON POST, Dec. 9, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/09/AR2010120903504.html>.

hosted a handful of stakeholder meetings about the importance of comprehensive immigration reform, the outcome as of this writing has not led to any serious proposal by Congress about reforming immigration holistically, a legislative scheme that in past years has included a statutory update to the family and employment-based immigration system, a legal pathway for noncitizens to enter the United States in the future on the basis of work or a family relationship, and a registration program that enables individuals and other special populations such as high school students and migrant workers currently in the United States without authorization to come before the government and apply for a legal visa.<sup>61</sup>

Meanwhile, staff members of USCIS circulated an internal draft memorandum outlining potential ways in which the agency could reprieve individuals and certain classes of persons who are ineligible for legal immigration status, but who nonetheless exhibit compelling qualities or equities.<sup>62</sup> In discussing deferred action, that memorandum acknowledged that it could be used as a tool to protect certain individuals or groups from the threat of removal.<sup>63</sup>

USCIS can increase the use of deferred action. Deferred action is an exercise of prosecutorial discretion

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61. For a sampling of President Obama's public discussion about comprehensive immigration reform, see David Jackson, *Obama talks immigration with officials -- but no members of Congress*, USA TODAY, Apr. 19, 2011, <http://content.usatoday.com/communities/theoval/post/2011/04/obama-talks-immigration-with-officials---but-no-members-of-congress/1>; Julie Mason, *President Obama Pushes Immigration Overhaul*, POLITICO.COM (MAY 10, 2011), <http://www.politico.com/news/stories/0511/54696.html>; For an analysis of previous congressional proposals on comprehensive immigration reform; PRESIDENT OBAMA ON COMPREHENSIVE IMMIGRATION REFORM, <http://www.whitehouse.gov/photos-and-video/video/president-obama-comprehensive-immigration-reform> (last visited July 17, 2011). See Shoba Sivaprasad Wadhia, *Policy and Politics of Immigrants' Rights*, *supra* note 56; Shoba Sivaprasad Wadhia, *Immigration: Mind Over Matter*, 5 U. OF MD. L. J. ON RACE, RELIGION, GEND. & CLASS 201 (2005), available at <http://ssrn.com/abstract=1346586>.

62. Memorandum from Denise A. Vanison, et al, to Alejandro Mayorkas, on Administrative Alternatives to Comprehensive Immigration Reform (undated) (on file with author), available at <http://abcnews.go.com/images/Politics/memo-on-alternatives-to-comprehensive-immigration-reform.pdf>.

63. *Id.* at 10–11.

not to pursue removal from the U.S. of a particular individual for a specific period of time . . . . Were USCIS to increase significantly the use of deferred action, the agency would either require a separate appropriation or independent funding stream. Alternatively, USCIS could design and seek expedited approval of a dedicated deferred action form and require a filing fee.<sup>64</sup>

### B. Congressional Criticism of Deferred Action

Following the “leak” of the draft USCIS memo, select members of Congress freed themselves from working on a legislative solution and instead criticized the Department for its modest exercise of prosecutorial discretion. Notably, in a congressional hearing dated March 9, 2011, Senator Charles Grassley (R-IA) interrogated DHS Secretary Janet Napolitano about a memorandum drafted by a staff member at USCIS containing, among other things, a discussion about the use of prosecutorial discretion and deferred action in particular.<sup>65</sup> The Secretary indicated that the Department had made roughly 900 deferred action grants, juxtaposing the agency’s 395,000 removals during the same time period.<sup>66</sup> Pro-immigration advocates were stunned by the record low number of actual deferred action grants in contrast with the previous Administration.<sup>67</sup> For example, the American Immigration Lawyers Association wrote to the Secretary: “We are concerned that in your testimony on March 9 before the Senate Judiciary Committee regarding prosecutorial discretion, you highlighted that the number of cases where discretion was favorably exercised was very small, suggesting that your department is discouraging and limiting its exercise.”<sup>68</sup> Following the

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64. *Id.*

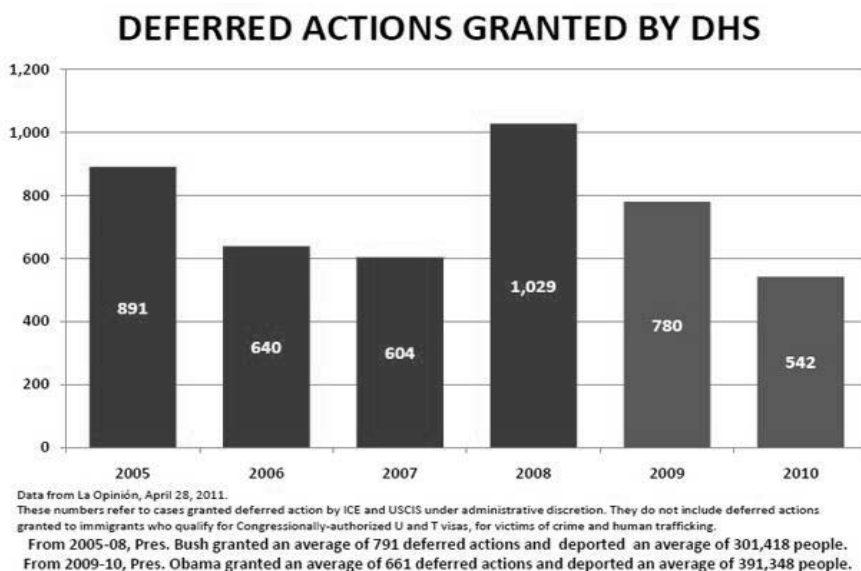
65. *Department of Homeland Security Oversight: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (testimony of Janet Napolitano, Secretary, U.S. Department of Homeland Security).

66. *Id.*

67. *Id.*

68. Letter from AILA and Immigration Council to Janet Napolitano, DHS Secretary, 1 (Apr. 6, 2011), *available at*

Senate hearing, *La Opinion*, the largest Hispanic newspaper in the United States, reported that DHS granted deferred action to only 542 individuals. The pro-immigration group America's Voice pulled together a chart below based on the data from *La Opinion* and concluded: "According to our calculations, the Bush Administration averaged 771 deferred action grants and 301,418 deportations from 2005-2008, while the Obama Administration averaged 661 deferred action grants and 391,348 deportations its first two years in office . . .<sup>69</sup>



The publication of the Morton Memo on Prosecutorial Discretion spurred a new wave of congressional criticism against the agency's use of prosecutorial discretion and deferred action in particular. On June 23, 2011, Congressman Lamar Smith announced his plans to

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<http://www.americanimmigrationcouncil.org/sites/default/files/docs/AILA-AIC-Napolitano-4-6-2011.pdf>.

69. Dara Lind, *La Opinion: Obama Has Granted a Record Low Number of Deferred Actions to Immigrants*, AMERICA'S VOICE (Apr. 28, 2011), [http://americasvoiceonline.org/blog/entry/la\\_opinion\\_obama\\_has\\_granted\\_a\\_record\\_low\\_number\\_of\\_deferred\\_actions](http://americasvoiceonline.org/blog/entry/la_opinion_obama_has_granted_a_record_low_number_of_deferred_actions).

introduce the “HALT (Hinder the Administration’s Legalization Temptation) Act” and issued a related “Dear Colleague” letter.<sup>70</sup> The HALT Act was introduced in July 2011 in both the House of Representatives and Senate and, among other provisions, would prevent DHS from granting deferred action as a matter of prosecutorial discretion and “suspend” the handful of discretionary remedies available under the immigration laws for compelling cases.<sup>71</sup> The politics behind the HALT Act are plentiful and illustrated in part by the fact that the bill expires on January 21, 2013, at the end of President Obama’s first term.<sup>72</sup> The HALT Act was the centerpiece of a hearing in the House Judiciary’s Subcommittee on Immigration Policy and Enforcement on July 26, 2011.<sup>73</sup>

Like with Lamar Smith and congressional members who support the HALT Act, the ICE union criticized the Morton Memo on Prosecutorial Discretion, calling such policies a “law enforcement nightmare” and “just one of many new ICE policies in queue aimed at stopping the enforcement of U.S. immigration laws in the United States . . . . Unable to pass its immigration agenda through legislation, the Administration is now implementing it through agency pol-

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70. “Dear Colleague” letter from Lamar Smith, House Judiciary Comm. Chairman, to members of Congress (June 23, 2011), *available at* [http://big.assets.huffingtonpost.com/Smith\\_DearColleague.pdf](http://big.assets.huffingtonpost.com/Smith_DearColleague.pdf).

71. *Id.* at 2–3. *See also* Hinder the Administration’s Legalization Temptation Act (HALT Act), H.R. 2497, 112th Cong. (1st Sess. 2011), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-112hr2497ih/pdf/BILLS-112hr2497ih.pdf>; Hinder the Administration’s Legalization Temptation Act (HALT Act), S. 1380, 112th Cong. (1st Sess. 2011), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-112s1380is/pdf/BILLS-112s1380is.pdf>. On a historical note, in 1999, Representative Lamar Smith went on record supporting prosecutorial discretion by co-authoring a letter from select members of Congress to the immigration agency. For a copy of the letter and commentary about Rep. Smith’s reverse position on prosecutorial discretion, see Editorial, *The Forgetful Mr. Smith*, NY TIMES, July 12, 2011, <http://www.nytimes.com/2011/07/13/opinion/13wed3.html>.

72. *See* “Dear Colleague” letter from Lamar Smith, House Judiciary Comm. Chairman, *supra* note 70, at 3; *see also* *Hearing Information: Hearing on H.R. 2497*, U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY, [http://judiciary.house.gov/hearings/hear\\_07262011\\_2.html](http://judiciary.house.gov/hearings/hear_07262011_2.html) (last visited July 31, 2011).

73. *Hearing Information: Hearing on H.R. 2497*, *supra* note 72.

icy.”<sup>74</sup> The union’s president, Chris Cane, testified at the July 26, 2011, hearing which attacked the Morton Memo on Prosecutorial discretion and ICE’s lack of guidance and resources to implement the memo.<sup>75</sup>

Adding fuel to the fire, Senator John Cornyn (R-Texas) accused DHS of operating a secret policy of dismissing high priority immigration cases as a matter of prosecutorial discretion after his staff reviewed a series of internal memoranda and emails retrieved by the *Houston Chronicle*.<sup>76</sup> On July 5, 2011, House Judiciary Committee Chairman Lamar Smith (R-Texas) and Homeland Security Subcommittee Chairman Robert Aderholt (R-Ala.) sent a letter to Secretary Janet Napolitano chronicling the release of various draft and official agency memoranda on prosecutorial discretion and expressing concerns that these memos are being used to “circumvent Congress and use executive branch authority to allow illegal immigrants to remain in the United States.”<sup>77</sup> On July 13, 2011, and citing to the Morton Memo on Prosecutorial Discretion, Orrin Hatch, former chairman of the Senate Judiciary Committee, joined Sen. Jeff Ses-

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74. Press Release, U.S. Immigration and Customs Enforcement, ICE Agent’s Union Speaks Out on Director’s “Discretionary Memo” Calls on the public to take action, 1 (June 23, 2011), *available at* <http://www.iceunion.org/download/286-287-press-release-pd-memo.pdf>.

75. *Immigration Legislation: Hearing Before the Subcomm. on Immigration Policy and Enforcement and the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Chris Crane, President, National Immigration and Customs Enforcement Council 118 American Federation of Government Employees), *available at* <http://judiciary.house.gov/hearings/pdf/Crane07262011.pdf>. Beyond the scope of this article but noteworthy are Crane’s remarks about the importance of training, and the ostentatious lack of training or guidance field officers received on the Morton Memo on Prosecutorial Discretion prior to its publication.

76. See Susan Carroll, *Report: Feds downplayed ICE case dismissals; Documents show agency had approval to dismiss some deportation cases*, HOUSTON CHRONICLE, June 27, 2011, 5:30 AM, <http://www.chron.com/disp/story.mpl/chronicle/7627737.html>; Susan Carroll, *Cornyn presses Napolitano over immigration case dismissals*, HOUSTON CHRONICLE, June 28, 2011, 5:30 AM, <http://www.chron.com/disp/story.mpl/chronicle/7631394.html>.

77. Letter from Lamar Smith, House Judiciary Comm. Chairman, and Robert Aderholt, Homeland Security Subcomm. Chairman to Janet Napolitano, DHS Secretary, 1 (July 5, 2011), *available at* <http://judiciary.house.gov/news/pdfs/Administrative%20Amnesty.pdf>.

sions (R-Ala.) and four more Republican colleagues in urging U.S. Immigration and Customs Enforcement (ICE) to stop trying to “grant administrative amnesty to millions of illegal aliens” and to start enforcing immigration laws.<sup>78</sup>

### C. Congressional Support for Deferred Action

Deferred action has not been contentious with every Member of Congress. Select Members of Congress have taken positions supporting the executive branch’s exercise of prosecutorial discretion. For example on April 13, 2011, 22 U.S. Senators sent a letter to President Obama urging him to grant deferred action to qualifying DREAM Act students who are not a law enforcement priority to DHS.<sup>79</sup> The letter states:

We would support a grant of deferred action to all young people who meet the rigorous requirements necessary to be eligible . . . under the DREAM Act. . . . We strongly believe that DREAM Act students should not be removed from the United States, because they have great potential to contribute to our country and children should not be punished for their parents’ mistakes.<sup>80</sup>

In their letter, the Senators are critical of the Department’s lack of a process for applying for deferred action and the fact that many DREAM Act students are unaware of this form of relief.<sup>81</sup> On the

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78. Press Release, Sen. Orrin Hatch, Hatch, Senate Colleagues Press U.S. Immigration and Customs Enforcement to Enforce Immigration Laws (July 13, 2011), [http://hatch.senate.gov/public/index.cfm/releases?ContentRecord\\_id=86f43fd7-bb7c-4d03-8bb8-f83ea8468843](http://hatch.senate.gov/public/index.cfm/releases?ContentRecord_id=86f43fd7-bb7c-4d03-8bb8-f83ea8468843).

79. Letter from Harry Reid, Senator, et al., to President Barack Obama, 2 (Apr. 13, 2011), *available at* <http://www.scribd.com/doc/53014785/22-Senators-Ltr-Obama-Relief-for-DREAMers-4>.

80. *Id.* For an example of a DREAM Act student granted deferred action, see *Michigan Student's Deportation Put On Hold, Warren Student Wants To Graduate, Continue Schooling At University Of Michigan*, CLICKONDETROIT.COM (last updated May 25, 2011, 9:36 AM), <http://www.clickondetroit.com/news/28010704/detail.html>.

81. Letter from Harry Reid, Senator, et al., to President Barack Obama, *supra* note 79, at 2.

heels of this letter, Senator Charles Schumer, a Democrat from New York and Chair of the Judiciary Committee remarked in another letter to DHS:

According to a March 2, 2011 memorandum of John Morton, Director of Immigration and Customs Enforcement, ICE only has the funding to remove 400,000 individuals per year. Given that this entire number can be filled by criminal aliens and others posing security threats, it makes eminent sense to focus ICE's enforcement efforts on these criminals and security threats, rather than non-criminal populations. On a daily basis, my office receives requests for assistance in many compelling immigration cases. These cases often involve non-criminal immigrants such as: (1) high-school valedictorians and honor students who did not enter the country through their own volition and yet are being deported solely for the illegal conduct of their parents; (2) bi-national same-sex married couples who are being discriminated against based on their sexual orientation who would otherwise be able to remain in the United States if they were in an opposite-sex marriage; (3) agricultural workers who perform back-breaking labor and are providing for their families; and (4) immigrant parents with U.S. citizen children, whose deportation will only lead to increased costs to the states in foster care and government benefits.<sup>82</sup>

On June 28, 2011, Senator Al Franken (D-MN) indicated that he would be sending his own letter to the Department in support of deferred action for DREAM Act students, remarking, "I'd like to let everyone know that today I'll be sending a letter, my own letter, to the president in support of deferred action . . . . I think it is the least

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82. Letter from the Senate Judiciary Subcomm. on Immigration to Janet Napolitano, DHS Secretary (Apr. 14, 2011), *available at* <http://arnolaw.blogspot.com/2011/04/letter-from-senate-judiciary.html>.

that we can do to stop this injustice from getting any worse.”<sup>83</sup> And on July 21, 2011, seventy-five Democratic members from the House of Representatives sent a letter to President Obama critical of Republican efforts to freeze executive branch authority by introducing legislation like the HALT Act.<sup>84</sup> Likewise, Democratic members of the House Subcommittee on Immigration Policy and Enforcement expressed their opposition to the HALT Act at the July 26, 2011, hearing and the importance of preserving the few discretionary remedies available under the immigration laws, like deferred action. Rep. Zoe Lofgren (D-CA) expressed her disbelief that Congress would waste so much time on a bill like the HALT Act and pointed to the unintended human consequences if the legislation were enacted.<sup>85</sup> Meanwhile, Rep. John Conyers (D-MI) focused on the politics of the HALT Act noting that “[The HALT Act] is not an attack on the Presidency, but an attack on the President himself.”<sup>86</sup>

#### *D. Public Activities and Support for Prosecutorial Discretion*

The political context for, and lack of, transparency of deferred action is also illustrated by the public’s response to the various agency memoranda and legislative reactions to prosecutorial discretion in the last two years. This section illustrates the activities and positions on prosecutorial discretion by select bar associations, journalists, and immigration advocates since the 2010 publication of *The Role of Prosecutorial Discretion in Immigration Law*. Relying on its

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83. *DREAM Act Education for Alien Minors: Hearing on S. 952 Before the Subcomm. on Immigration, Refugees and Border Security of the S. Comm. on the Judiciary*, 112th Cong. 27 (2011) (statement of Sen. Al Franken).

84. Letter from Democratic members from the House of Representatives to President Barack Obama, 1 (July 21, 2011), [http://www.gutierrez.house.gov/images/stories/HALT\\_Act\\_letter\\_complete.pdf](http://www.gutierrez.house.gov/images/stories/HALT_Act_letter_complete.pdf).

85. See *The Hinder the Administration's Legalization Temptation Act: Hearing on H.R. 2497 before the Subcomm. on Immigration Policy and Enforcement of the H. Comm. on the Judiciary*, 112th Cong. 3–4 (2011).

86. *Id.* at 5. For a short analysis of the HALT Act and related politics, see Marshall Fitz, *HALT the Insanity: New Hyperpartisan Bill Tries to Handcuff the President*, CENTER FOR AMERICAN PROGRESS (July 25, 2011), [http://www.americanprogress.org/issues/2011/07/halt\\_act.html](http://www.americanprogress.org/issues/2011/07/halt_act.html).

groundbreaking report on immigration adjudications,<sup>87</sup> the American Bar Association testified before the Senate Judiciary Committee on May 17, 2011, highlighting the importance of prosecutorial discretion:

Prioritization, including the prudent use of prosecutorial discretion, is an essential function of any adjudication system. Unfortunately, it has not been widely utilized in the immigration context. There are numerous circumstances in which a respondent is not likely to be removed regardless of the outcome of the legal case. The most obvious cases are those where the respondent is terminally ill or is the parent or spouse of someone who is critically ill, but there are other examples where it is clear from the circumstances at the beginning of the process that the interests in removing the respondent will almost certainly be outweighed on humanitarian or other grounds.<sup>88</sup>

The American Immigration Lawyers Association and its sister group, American Immigration Council, have also published information about prosecutorial discretion. To illustrate, the Immigration Council published a practice advisory for immigration attorneys about the strategies and forms of prosecutorial discretion, as well as an article on the highs and lows of the June 30, 2010, Morton Memo.<sup>89</sup> Similarly, the American Immigration Lawyers Association conducted a nationwide poll of its more than 11,000 members regarding their experiences with prosecutorial discretion requests to

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87. See AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION, [http://www.americanbar.org/groups/public\\_services/immigration.html](http://www.americanbar.org/groups/public_services/immigration.html) (last visited July 18, 2011).

88. *Statement of Karen T. Grisez*, *supra* note 51, at 7.

89. See *Prosecutorial Discretion: How to Advocate for Your Client*, LEGAL ACTION CENTER (June 24, 2011), <http://www.legalactioncenter.org/practice-advisories/prosecutorial-discretion-how-advocate-your-client>; Wadhia, *Reading the Morton Memo*, *supra* note 40, at 4. See also *Just The Facts*, IMMIGRATION POLICY CENTER, <http://www.immigrationpolicy.org/just-facts/executive-action-resource-page> (last visited July 18, 2011).

ICE,<sup>90</sup> and received more than 200 responses. AILA sent a follow up letter to DHS remarking:

Many of these cases involve people who, if deported, would be separated from U.S. citizen and Lawful Permanent Resident immediate family members who depend on their noncitizen relatives for care and support. Several cases involve people who suffer from severe medical conditions; who are victims of domestic violence, trafficking or other serious crimes; or who are serving as valuable witnesses in criminal prosecutions. Many are students whose academic performance shows great promise for their ability to contribute to this nation in the future.<sup>91</sup>

Similarly, the former president of AILA, David Leopold, published an article in Bloomberg Law Reports describing the concept of prosecutorial discretion and authorities of the Executive Branch to grant deferred action in compelling cases.<sup>92</sup> Likewise, attorney Margaret Stock testified about the importance of deferred action at the July 26, 2011, hearing on the HALT Act by showcasing the types of individuals that would be deported without the discretionary relief the HALT Act seeks to “halt.”<sup>93</sup> One example provided by Professor Stock in her written testimony included:

An example of a person who will be harmed immediately by passage of the HALT Act is Fereshteh Sani, a woman whose father and mother were executed by

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90. *Prosecutorial Discretion Survey*, AILA (2011), <http://www.surveymonkey.com/s/LMMTBSG>.

91. Letter from AILA and Immigration Council to Janet Napolitano, DHS Secretary, *supra* note 68, at 2. 2 (Apr. 6, 2011).

92. David W. Leopold, *What Legal Authority Does President Obama Have to Act on Immigration?*, BLOOMBERG LAW REPORTS, 2 (May 16, 2011), available at <http://www.aila.org/content/default.aspx?docid=35404>.

93. *Executive Immigration Enforcement Limitations: Hearing Before the Subcomm. on Immigration Policy and Enforcement and the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Margaret D. Stock, Adjunct Professor, University of Alaska Anchorage), available at U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY, 3–4 (2011) <http://judiciary.house.gov/hearings/pdf/Stock07262011.pdf>.

Iranian government officials in 1988. Fereshteh has been in the United States since 1999, and has graduated from college and medical school here; she is currently a resident in Emergency Medicine at Bellevue Hospital in New York City. She is in the United States on a grant of deferred action, which is scheduled to expire on September 14, 2011.<sup>94</sup>

Like the private bar associations, and following the administrative and legislative roadblocks on immigration during the first two years of the Obama Administration, public policy think-tanks, advocacy groups, and law firms have published affirmative positions on deferred action and prosecutorial discretion more generally. For example, the Migration Policy Institute highlighted the importance of prosecutorial discretion in a 2011 report highlighting actions for the Executive Branch in the absence of legislative reform.<sup>95</sup> Specifically, the MPI report recommends that the Government develop a uniform set of enforcement priorities and, in cases of lesser priority, exercise prosecutorial discretion in the form of deferred action with work authorization.<sup>96</sup> Similarly, the 10,000 membership organization NAFSA: Association of International Educators highlighted the importance of prosecutorial discretion in a May, 2011, press release stating:

We urge President Obama to exercise his executive authority and act now to direct the Department of Homeland Security to implement such a deferred-action policy. This is a matter of humanitarian necessity, and it would represent the kind of national leadership that is needed to move the one-sided, enforcement-first debate about immigration that has so far

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94. *Id.* at 9.

95. Donald M. Kerwin, Doris Meissner & Margie McHugh, *Executive Action on Immigration: Six Ways to Make the System Work Better*, MIGRATION POLICY INSTITUTE, 14–19 (2011), [http://www.migrationpolicy.org/pubs/administrative\\_fixes.pdf](http://www.migrationpolicy.org/pubs/administrative_fixes.pdf).

96. *Id.*

poisoned prospects for what is ultimately needed – comprehensive reform – in a more fruitful direction.<sup>97</sup>

Law firms, law clinics, and advocacy organization have also assembled practical tools for noncitizens potentially eligible for deferred action. In May 2011, Duane Morris, Maggio Kattar, and Pennsylvania State University's Dickinson School of Law published a practitioner's toolkit addressing private bills and deferred action, underscoring the dearth of information about how to go about applying for deferred action and the heightened importance of pursuing these forms of relief.<sup>98</sup> Developed to help immigration judges, lawyers, public officials, and nonprofit groups navigate what has become a last-resort option for those facing deportation, the toolkit includes "Best Practices" from attorneys around the country; a summary of the laws and procedures governing deferred action and private bills; sample letters of support, exhibit lists, and legal briefs; and selected resources.<sup>99</sup> In June, 2011, Asian Law Caucus, Educators for Fair Consideration, DreamActivist.org, and National Immigrant Youth Alliance published a resource manual titled "Education Not Deportation: A Guide for Undocumented Youth in Removal Proceedings."<sup>100</sup> This manual is "intended to aid certain undocumented students and their lawyers to fight effectively throughout a removal (deportation) proceeding."<sup>101</sup> The production of these toolkits underscores the absence of quality information about the deferred action program and procedures.

The growing chorus of immigration attorneys, advocates, and media outlets speaking about the importance of prosecutorial discretion in immigration law is striking and in part responds to their frustration about the stalemate in Congress over immigration. While I

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97. Press Release, NAFSA: Association of International Educators, NAFSA Statement on Immigration Reform and Undocumented Students (May 10, 2011), <http://www.nafsa.org/PressRoom/PressRelease.aspx?id=26639>.

98. *New toolkit sheds light on lesser known immigration remedies*, PENN STATE LAW (May 17, 2011), [http://law.psu.edu/news/immigration\\_toolkit](http://law.psu.edu/news/immigration_toolkit).

99. *Id.*

100. *Guide for Undocumented Youth in Removal Proceedings*, ASIAN LAW CAUCUS, <http://www.asianlawcaucus.org/alc/publications/guide-for-undocumented-youth-in-removal-proceedings/> (last visited July 18, 2011).

101. *Id.* at 6.

disagree with those who label the recent agency memoranda on prosecutorial discretion as a “backdoor amnesty” or alternative for legislation like the DREAM Act, I nevertheless believe that some potential beneficiaries of immigration legislation are likely to carry qualities that resemble the equities listed in the O.I., Meissner Memo, and Morton Memoranda. As such, it should not be surprising that some would-be DREAM Act beneficiaries for example, are also deserving of deferred action.<sup>102</sup>

#### IV. ANALYZING DEFERRED ACTION CASES

##### A. *Previous Empirical Studies*

Leon Wildes is an attorney who represented the former Beatle John Lennon in his immigration case.<sup>103</sup> Believing that Lennon’s prosecution by INS was politically motivated, Wildes (on behalf of Lennon) corresponded with INS for more than one year to gain information about INS’ deferred action program.<sup>104</sup> Conceding that records pertaining to the deferred action were not specifically exempt from the FOIA, and moreover existed as an identifiable “class or category” of documents, INS provided Wildes with case histories of 1843 deferred action cases granted by INS.<sup>105</sup> Upon examining the 1843 cases, Wildes calculated that deferred action was granted to individuals subject to a spectrum of deportability or excludability grounds, and suggested that equitable factors played a far greater role in the outcome than the actual charge.<sup>106</sup>

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102. For a longer explanation about why prosecutorial discretion cannot serve as a substitute for legislative reforms, see Wadhia, *supra* note 3, at 297–98.

103. E.g., Wadhia, *supra* note 3, at 246–47; Wildes, *The Litigative Use of the FOIA*, *supra* note 2, at 42.

104. Wildes, *The Litigative Use of the FOIA*, *supra* note 2, at 45; Wildes, *The Nonpriority Program Part I*, *supra* note 2; Wildes, *The Nonpriority Program Part II*, *supra* note 2; Wildes, *The Cultural Lag*, *supra* note 2, at 280. See generally Wildes, *The Operations Instructions*, *supra* note 2 (discussing the importance of John Lennon’s immigration case as the first to provide the public with knowledge of the Nonpriority Program).

105. Wildes, *The Litigative Use of the FOIA*, *supra* note 2, at 48–49.

106. *Id.* at 52–53 & n.35.

In Wildes's study, more than 98% of the deferred action cases granted by INS involved one of the following discernable factors that drove the agency's decision: individuals who were of tender age or elderly age; mentally incompetent; medically infirm; or would be separated from their family members if deported.<sup>107</sup> Separation from family was the greatest category of cases analyzed by Wildes that led to a favorable decision by the agency.<sup>108</sup> Moreover, a U.S. citizen or lawful permanent resident (LPR) family member was involved in more than 80% of the 1,843 cases granted.<sup>109</sup> This data indicates that the presence of a family member with long-term ties to the United States was important, but not always determinative, to whether or not the agency granted deferred action.

Seeking to update his 1979 article on deferred action, Wildes filed FOIA requests to the Central, Western, and Eastern Regional offices of USCIS for all records of cases in which deferred action was granted.<sup>110</sup> Wildes received information from the Central and Western regions, which cumulated to 499 deferred action cases.<sup>111</sup> Wildes received some cases that were denied or discontinued.<sup>112</sup> The data indicated that nearly 89% of the deferred action cases furnished to Wildes were granted.<sup>113</sup> Like his 1979 study, Wildes found that USCIS was granting deferred action based on a strict set of criteria as opposed to arbitrarily.<sup>114</sup> Specifically, the cases granted deferred action fell within seven specific categories: (1) separation of family; (2) medically infirm; (3) tender age; (4) mentally incompetent; (5) potential negative publicity; (6) victims of domestic violence; and (7) elderly age.<sup>115</sup> In both studies, Wildes found that separation from a family member was an overriding factor in deferred

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107. *Id.* at 53 & n.36.

108. *Id.* at 53, 58.

109. *Id.* at 60 & n.45.

110. Wildes, *A Possible Remedy*, *supra* note 2, at 825.

111. *Id.* at 826–27.

112. *Id.* at 826 & n.44 (“The calculation assumes that all relevant cases, whether approved, denied, or removed by the two regions, were released and forwarded to [Wildes].”).

113. *Id.* at 826.

114. *Id.* at 830.

115. *Id.*

action grants.<sup>116</sup> The second greatest operating factor for cases granted in the 2003 study was medical infirmity, which according to Wildes included “life-threatening” situations such as HIV and cancer.<sup>117</sup> These figures indicate that both in 1976 and in 2003, the agency relied predominantly on humanitarian criteria in granting deferred action.<sup>118</sup>

#### B. FOIA Requests to ICE

I filed my first FOIA request to ICE on October 6, 2009, requesting for all records and policies involving prosecutorial discretion. A reply letter from ICE was sent on November 19, 2009, acknowledging receipt of the request, assigning a control number to the request, and stating that ICE had “queried the appropriate program offices within ICE for responsive records.”<sup>119</sup> On November 30, 2009, another letter was sent from ICE stating that the request was “overly broad” and requesting clarification.<sup>120</sup> On December 19, 2009, less than thirty days later, a clarifying letter was sent to ICE.<sup>121</sup> On February 3, 2010, the status of the request was “administratively closed.”<sup>122</sup> According to ICE, my request was closed on December 30, 2009, because there was “no response to letter requesting additional information.”

I sent a new FOIA request to ICE on March 30, 2010, containing an expanded request for information on prosecutorial discretion and

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116. Wildes, *A Possible Remedy*, *supra* note 2, at 831 & n.64.

117. *Id.* at 831–32.

118. *Id.* at 832.

119. Letter from Catrina M. Pavlik-Keenan, Freedom of Info. Act Dir., U.S. Immigration & Customs Enforcement, to author (Nov. 19, 2009) (assigning to the request reference number: 2010FOIA1069) (on file with author).

120. Letter from Catrina M. Pavlik-Kennan, Freedom of Info. Act Dir., U.S. Immigration & Customs Enforcement, to author (Nov. 30, 2009) (on file with author).

121. Letter from author to Catrina M. Pavlik-Kennan, Freedom of Info. Act Dir., U.S. Immigration & Customs Enforcement (Dec. 19, 2009) (on file with author).

122. Letter from U.S. Customs & Immigration Enforcement to author (Feb. 3, 2010) (on file with author).

deferred action.<sup>123</sup> No response from ICE was received. On July 12, 2010, a follow up e-mail was sent to ICE for a status update on the March 30, 2010, request, but no response was received.<sup>124</sup> On November 9, 2010, I followed up with a contact in ICE to inquire about the status of my request and learned that ICE had no record of the request.<sup>125</sup> On November 24, 2010, ICE e-mailed me with a clarifying question about whether I preferred open or closed cases as well as detained and non-detained cases.<sup>126</sup> In January, 2011, I received a yellow package from ICE holding a single compact disc containing a single chart identifying only a handful of active deferred action cases between the years of FY 2003 and 2010.<sup>127</sup> This chart is pasted below and, if complete, indicates that ICE granted less than 500 deferred action cases between 2003 and 2010. I contacted ICE by phone and e-mail in February, 2011, and at the time learned that ICE had mistakenly sent the disc without a letter.<sup>128</sup> ICE electronically sent a formal decision letter on February 9, 2011.<sup>129</sup> The letter itself indicated that a full search of the ICE Office for Enforcement and Removal yielded the single chart below.<sup>130</sup>

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123. Letter from author to U.S. Citizenship & Immigration Serv., U.S. Immigration & Customs Enforcement & U.S. Customs & Border Protection (Mar. 30, 2010) (on file with author).

124. E-mail from Nicole Comstock, Research Assistant of author, to U.S. Immigration & Customs Enforcement (July 12, 2010, 11:20 EST) (on file with author).

125. E-mail from Andrew Strait, U.S. Immigration & Customs Enforcement, to author (Nov. 9, 2010, 12:51 EST) (on file with author).

126. E-mail from Ryan McDonald, Paralegal Specialist, U.S. Immigration & Customs Enforcement, to author (Nov. 24, 2010, 11:07 EST) (on file with author).

127. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, NO. OF ACTIVE CASES GRANTED DEFERRED ACTION STATUS SINCE CY 2003, (undated) (on file with author).

128. E-mail from Ryan McDonald, Paralegal Specialist, Immigration & Customs Enforcement, to author (Feb. 2011, 12:27 EST) ("Attached is a copy of the ICE response letter that was supposed to be included with the CD.") (on file with author).

129. *Id.*

130. *Id.* Note that the letter itself was dated December 17, 2010.

*C. Chart Provided by ICE: Number of Active Cases Granted Deferred Action Status Since CY 2003*

CY	Detained	Non Detained	Total
2003	0	117	117
2004	0	68	68
2005	0	62	62
2006	0	64	64
2007	0	71	71
2008	0	39	39
2009	2	34	36
2010	1	15	16
Total	3	470	473

As of IIDS November 29, 2010 as provided by the Statistical Tracking Unit.

Data only reflects Deferred Action Granted and Case Status Active (i.e. open cases). Data cannot be reported for Deferred Action Granted, Case Status inactive (i.e. closed cases).

Concerned in part that ICE did not make a complete search, I filed an appeal with ICE on March 29, 2011, hoping to receive more data.<sup>131</sup> As to the adequacy of its search, the appeal letter highlighted the data Wildes was able to retrieve in the late 1970s and early 2000s and also indicated:

Responsive records [to my FOIA request] exist that were not included in ICE's response. Specifically, records on deferred action are required to be maintained under the Detention and Removal Operations and Procedure Manual § 20.8(c). The Manual pro-

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131. Letter from author to Assoc. Gen. Counsel, Dep't of Homeland Sec. (Mar. 29, 2011) (appealing adverse decision in FOIA matter 2011FOIA1845) (on file with author).

vides that all deferred action considerations be summarized using a Form G-312 and placed in the alien's A-file. Decisions regarding grants and denials of deferred action must also be in writing and signed by an agency official making the determination. Production of these records would be responsive to the original FOIA request, even if redaction were required to protect an individual's privacy interests . . . .<sup>132</sup>

On May 18, 2011, I contacted ICE by telephone and learned that ICE had not received the FOIA appeal. As such, the appeal was entered into ICE's system on May 18, 2011, nearly two months after the original appeal was filed.<sup>133</sup> On May 24, 2011, I communicated for up to an hour with an ICE FOIA officer in charge of appeals to clarify the procedural history of my FOIA request and confirmed that the date of my original appeal letter was filed within sixty days of ICE's original decision letter, so that my appeal would be preserved.<sup>134</sup> Hearing nothing for two months, I called the ICE FOIA office on July 27, 2011 to inquire about the status of my appeal. I was told that I would need to speak with the same ICE FOIA officer and thereafter provided a callback number with the expectation that I would receive a return phone call.<sup>135</sup> In a letter dated September 27, 2011 ICE denied my appeal regarding the adequacy of ICE's search.<sup>136</sup> According to the letter, ICE conducted an additional

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132. *Id.*

133. Letter from Susan Mathias, Chief, Gov't Info. Law Div., U.S. Immigration & Customs Enforcement, Office of the Principal Legal Advisor, to author (May 18, 2011) ("On behalf of the Chief for the Government Information Law Division, we acknowledge your appeal request of 2011FOIA1845 and are assigning it number OPLA11-181 for tracking purposes.") (on file with author).

134. Phone Conversation with Mark Graff, Freedom of Info. Act Officer, U.S. Immigration & Customs Enforcement (May 24, 2011) (discussing 2011FOIA1845).

135. Phone Call to U.S. Immigration & Customs Enforcement, Freedom of Info. Act Office (July 27, 2011) (attempting to discuss 2011FOIA1845 and OPLA11-181).

136. Letter from Catrina M. Pavlik-Kennan, Freedom of Info. Act Dir., U.S. Immigration & Customs Enforcement, to author (Sep. 27, 2011) (regarding matter number OPLA-181, 2011FOIAFOIA14736) (on file with author).

search on remand of the Office of the Principal Legal Advisor (OPLA) and found that no records were responsive.<sup>137</sup>

#### D. FOIA Requests to USCIS

My initial FOIA request to USCIS headquarters was made on October 6, 2009.<sup>138</sup> A letter was sent from USCIS on October 9, 2009, which acknowledged receipt of my request and assigned it a control number.<sup>139</sup> On October 28, 2009, a second letter was sent from USCIS, requesting additional information about the records sought.<sup>140</sup> More specifically, USCIS required the inquiry be made regarding particular individuals with their consent. On February 9, 2010, the FOIA request was closed.<sup>141</sup>

I made a second and more detailed FOIA request on March 30, 2010. USCIS sent a response on April 1, 2010, assigning the request a control number.<sup>142</sup> As of August 31, 2010, my FOIA request was listed on the USCIS website as 65 out of 219 requests pending in Track 2. After nearly one year without a response, I discussed my request with the Office of Citizenship and Immigration Services' Ombudsman on February 25, 2011; the office, which had initiated a study of deferred action processing, reviewed and inquired with USCIS about the status of the FOIA request.<sup>143</sup> On March 11, 2011, I received an e-mail from a USCIS FOIA officer stating "[we have] received most of the records responsive to your request and are contacting an additional program office to determine if additional rec-

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137. *Id.*

138. Letter from author to U.S. Citizenship & Immigration Serv. (Oct. 6, 2009) (on file with author).

139. Letter from T. Diane Cejka, Dir., U.S. Citizenship & Immigration Serv., to author (Oct. 9, 2009) (assigning FOIA request control number: NRC2009057166) (on file with author).

140. Letter from T. Diane Cejka, Dir., U.S. Citizenship & Immigration Serv., to author (Oct. 27, 2009) (concerning control number NRC2009057166) (on file with author).

141. *Id.*

142. Letter from T. Diane Cejka, Dir., U.S. Citizenship & Immigration Serv., to author (Apr. 1, 2010) (on file with author).

143. E-mail from Gary Merson, Office of the U.S. Citizenship & Immigration Serv. Ombudsman, to author (Feb. 25, 2011, 18:41 EST) (on file with author).

ords exist on this subject.”<sup>144</sup> Three months later, in a letter dated June 17, 2011, USCIS responded to my FOIA request with three compact discs, which together contained a cover letter, a 270-page PDF document containing data, and several spreadsheets listing statistical data.<sup>145</sup> A subsequent conversation with the FOIA officer responsible for implementing the FOIA request indicated that deferred action records from FY 2003 through FY 2010 were requested from every USCIS regional service center and field office.<sup>146</sup> Because USCIS does not formally track information about deferred action, the data I received was variable depending on the office and location. It is neither possible to conclude that the records I received were complete, nor is it possible to analyze the entirety of what I received, because there is great disparity between how the data on deferred action is collected and recorded by each office, if at all. The legible data I received on deferred action came in one of three variations: (1) spreadsheet or chart; (2) Form G-312s Deferred Action Case Summary; and/or (3) written request or memorandum by the applicant or attorney seeking deferred action.<sup>147</sup> To manage the data and create a meaningful qualitative analysis, I did not incorporate data that was unclear or cases where deferred action appeared to serve as a pre-adjudication form of relief – i.e., those who filed applications for relief as a victim of trafficking, crime, or abuse (a.k.a., prospective U or T visa holders).<sup>148</sup>

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144. E-mail from Tembora Greenwood, Nat’l Records Ctr., Freedom of Info. Act Div., to author (Mar. 11, 2011, 13:48 EST) (referring to NRC2010021400) (on file with the author). The email also estimated the author’s FOIA request would be completed in approximately three months. *Id.*

145. Letter from Jill A. Eggleston, Dir., Freedom of Info. Act Operations, U.S. Customs & Immigration Serv., to author (June 17, 2011) (on file with author); *see infra* note 161.

146. Phone Conversation with Tembora Greenwood, Nat’l Records Ctr., Freedom of Info. Act Div. (June 28, 2011).

147. Eggleston, *supra* note 145.

148. For an overview of how deferred action serves as important form of relief for abuse victims who are eligible and awaiting trafficking related visas, see Letter from organizations to Reps. Lamar Smith, John Conyers, Elton Gallegly, & Zoe Lofgren (July 25, 2011) (on file with author).

More than 100 cases involved Haitian citizens who entered the United States after the 2010 earthquake.<sup>149</sup> Much of the data on cases involving Haitians applying for deferred action after the earthquake lacked information about the factual information and/or outcome. About fifty of these cases included some information, mostly in the form of copies of deferred action request letters submitted, and involved individuals who: entered the United States as B-2 visitor; were transported to the United States; had at least one family member already living in the United States; had their home destroyed during the earthquake; and/or entered the United States with minor children.<sup>150</sup> In some cases, the applicant was forced to separate from a spouse or child in Haiti.<sup>151</sup> Below is a sampling of the case summaries provided in some of the USCIS logs:

- Thirteen-year-old girl came to the United States with her seventeen-year-old sister; house destroyed by earthquake; living with United States Citizen (USC) aunt and legal guardian in the United States; attending school in the United States.<sup>152</sup>
- Entered United States on B-2 visa with two daughters, one a USC; owned warehouse in Haiti that was destroyed by the earthquake; many customers killed in earthquake; living with brother in United States.<sup>153</sup>
- Entered United States with twelve-year-old USC son as evacuees after earthquake in Haiti; home and business destroyed by quake; son was injured in earthquake.<sup>154</sup>

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149. Eggleston, *supra* note 145.

150. *Id.*

151. *Id.*

152. Letter from [name removed] to Dep't of Homeland Sec. (July 7, 2010) (on file with author).

153. Affidavit in Support of Deferred Action Status for [name removed] (June 22, 2010) (on file with author).

154. Letter from [name removed] to A. Castro, Acting Field Office Dir., Dep't of Homeland Sec. (June 30, 2010) (on file with author).

- Entered with twelve-year-old daughter; left Haiti to escape from man who had sexually abused his daughter; the criminal escaped from jail when it was damaged in earthquake and told subject he was going to abuse daughter again.<sup>155</sup>
- Infant USC daughter; family home destroyed in earthquake; wife and one child entered the United States as evacuees; children have health problems as a result of the quake; wife persecuted by Haitian gang members.<sup>156</sup>
- Transported to United States with three minor children as evacuees following earthquake; one child is a USC; home severely damaged; husband remains in Haiti working and trying to rebuild home.<sup>157</sup>
- Transported to United States with three minor children as evacuees following earthquake; infant child is a USC; family home and business destroyed in quake; subject is diabetic and requires insulin shots twice daily.<sup>158</sup>

In July 2011, the DHS Ombudsman recognized the influx in post-earthquake cases from Haiti: “Over the past year, stakeholders expressed concerns to the Ombudsman’s Office regarding the delayed processing of numerous deferred action requests submitted by Haitian nationals following the earthquake in January 2010.”<sup>159</sup>

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155. Letter from [name removed] to Dep’t of Homeland Sec. (July 10, 2010) (on file with author).

156. Affidavit in Support of Deferred Action Status for [name removed] (June 21, 2010) (on file with author).

157. Affidavit in Support of Deferred Action Status for [name removed] (June 25, 2010) (on file with author).

158. Letter from [name removed] to A. Castro, Acting Field Office Dir., Dep’t of Homeland Sec. (June 30, 2010).

159. January Contreras, *Deferred Action: Recommendations to Improve Transparency and Consistency in the USCIS Process*, OFFICE OF THE U.S. CITIZENSHIP & IMMIGRATION SERV. OMBUDSMAN, 6 (2011), <http://www.dhs.gov/xlibrary/assets/cisomb-combined-dar.pdf>.

The remaining qualitative data within the 270-page PDF document included 118 identifiable deferred action cases. It was difficult to label a case as tender or elder age because much of the data lacked identifiers. However, when a field included the word “minor,” “infant,” or a specific age (e.g., eighty-nine-year-old), the case was calculated as involving tender or elder age for purposes of this analysis. It should also be mentioned that some of the cases approved, pending, or unknown contained little to no factual information and, as a consequence, were not identified as bearing any of the “positive” factors listed above.<sup>160</sup> The outcomes for many of these cases were unknown because the field was blank or there simply was not a field in the log maintained by a particular office. Many of the cases also had outcomes that were marked as “pending.” Of the 118 cases, fifty-nine (59/118 or fifty percent) were pending or unknown; forty-eight (48/118 or 40.7%) were granted; and eleven (11/118 or 9.3%) were denied.<sup>161</sup>

Among the 107 cases approved, pending, or unknown, fifty (50/107 or 46.7%) involved a serious medical condition, nineteen (19/107 or 17.8%) involved cases in which the applicant had USC family members, twenty-two (22/107 or 21.5%) involved persons who had resided in the United States for more than five years, and thirty-two (32/107 or 29.9%) cases involved persons with a tender or elder age.<sup>162</sup> Many of these cases (29/107 or 27.1%) involved more than one “positive” factor.<sup>163</sup> For example, many of the cases (10/107 or 9.3%) involved both a serious medical condition and USC family members.<sup>164</sup> Likewise, many of the cases (21/107 or 19.6%) involved both tender or elder age and a serious medical condition.<sup>165</sup>

Among the forty-eight granted cases, twenty-four (24/48 or 50%) involved a serious medical condition; ten (10/48 or 20.8%) involved

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160. *See supra* Part IV.A.

161. Freedom of Info. Act Request Responses & Logs (June 17, 2011) (providing dozens of documents including letters to the agency for deferred action, agency responses, and regional offices’ case logs) (on file with author).

162. *Id.*

163. *Id.*; *see supra* Part IV.A.

164. Freedom of Info. Act Request Responses & Logs, *supra* note 161.

165. *Id.*

cases in which the applicant had USC family members; four (4/48 or 8.3%) involved persons who had resided in the United States for more than five years; and thirteen (13/48 or 27.1%) cases involved persons with a tender or elder age.<sup>166</sup> Many of these cases (12/48 or 25%) involved more than one “positive” factor.<sup>167</sup> For example, four (4/48 or 8.3%) of the cases involved both a serious medical condition and USC family members. Likewise, ten (10/48 or 20.8%) of the cases involved both tender or elder age and a serious medical condition.<sup>168</sup>

Below is a sampling of approved cases involving a serious medical condition, tender or elder age, and/or the presence of United States Citizen family members:

- Eighty-nine-year-old man suffering from Parkinson’s disease, dementia, Alzheimer’s disease, glaucoma, hypertension, and hypotension
- Twenty-two-year-old with Downs Syndrome unable to care for self; daughter of an LPR
- Entered U.S. as an EWI; ----- was in an automobile accident that rendered him in a quadriplegic in a vegetative state that requires continuous care and supervision; Mother has Temporary Protected Status, living in FL.
- Cerebral palsy victim, Korean orphan with USC sponsors
- Father of eight-year-old child receiving extensive neurological treatment
- Father of eleven-year-old USC daughter with severe heart problems
- Mother of eleven-year-old USC daughter with severe heart problems
- Mother of U.S. national child with progressive muscular dystrophy

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166. *Id.*

167. *Id.*; see *supra* Part IV.A.

168. Freedom of Info. Act Request Responses & Logs, *supra* note 161.

- Forty-seven-year-old schizophrenic B-2 overstay; son of LPR parents; USC siblings<sup>169</sup>

#### E. *Survey Monkey*

As a supplement to my FOIA requests, I circulated an informal survey to immigration attorneys and advocates using Survey Monkey.<sup>170</sup> Specifically, my survey was sent by e-mail to the following listservs: National Immigration Project, Detention Watch Network, Immigration Professors, and other immigration advocates on May 22, 2011, May 31, 2011, and June 17, 2011.<sup>171</sup> Most of the questions included in the survey were “multiple choice” and limited to a series of possible answers. The survey included the following questions:

1. Have you ever applied for deferred action or prosecutorial discretion to USCIS or ICE?
2. Which agency did you apply to?
3. What type of action did you request?
4. In what geographic region did your request take place?
5. What was the result of your request?
6. What was the sex of your client?
7. What factors did your client have in their favor?

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169. *Id.*

170. DEFERRED ACTION & PROS. DISCRETION, <https://www.surveymonkey.com/s/5DYY68K> (last visited July 18, 2011).

171. The body of the e-mail indicated:

I am continuing to research the agency's use of prosecutorial discretion and deferred action in particular since FY 2003. This research builds upon writing projects that are available here: [http://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=1035598](http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1035598). At the moment, I have pending FOIA requests with the DHS sub-agencies and have otherwise been informally collecting information from advocates about their experiences. If you have applied for deferred action with DHS on or after FY 2003, PLEASE CONSIDER TAKING THIS 5 MINUTE SURVEY (one survey for each case): <http://www.surveymonkey.com/s/5DYY68K>.

E-mail from author to Immigration listservs (May 22, 2011; May 31, 2011; June 17, 2011) (on file with author).

- Tender age
- Elderly
- Medical condition
- Psychological condition
- DREAM Act eligible
- Widow of USC
- Military service
- Involvement in community
- Has children who are USCs
- Has other family members who are USCs
- Has little or no family in native country
- Has resided in the United States for over ten years
- Has resided in the United States since childhood
- Strong showing of community support
- Media coverage of the case

8. What negative factors negative factors did your client have working against them?

- Criminal history
- Medical condition
- Psychological condition
- History of drug abuse
- Has ties to a gang
- Has only resided in the United States for a short time
- Has little or no family in the United States
- Could be easily removed to native country (or other country)
- Has ties to a foreign organization at odds with the U.S. government.<sup>172</sup>

#### 9. Other Comments

The survey yielded seventy-two responses, fifty-eight of which were deferred action cases.<sup>173</sup> Despite the small sample size, the surveys are revealing about the primary factors that drive deferred

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172. *Id.*

173. Survey Monkey Results, Deferred Action & Pros. Discretion (on file with author).

action requests. Among the fifty-eight deferred action cases, nine were denied, thirty-five were granted, seven were pending, one was unknown, and six lacked a response from the agency.<sup>174</sup> Notably, twenty-four of the thirty-five granted cases involved more than one positive factor.<sup>175</sup> Below are a few case examples where a deferred action grant involved more than one positive factor:

- Case # 1 - Psychological condition  
Involvement in community  
Has children who are USCs  
Has other family members who are USCs  
Has little or no family in native country
- Case # 2 - Medical Condition  
Has children who are USCs  
Has other family members who are USCs  
Has resided in the United States for over ten years  
Strong showing of community support  
Media coverage of the case
- Case # 3 - Medical Condition  
Psychological condition  
Has children who are USCs  
Has resided in the United States for over ten years
- Case #4 - Medical Condition  
Psychological condition  
Has children who are USCs  
Has other family members who are USCs
- Case #5 - Tender Age  
Has children who are USCs  
Has little or no family in native country  
Has resided in the United States for over ten years  
Strong showing of community support.<sup>176</sup>

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174. *Id.*

175. *Id.*; see *supra* Part IV.A.

176. Survey Monkey Results, *supra* note 173.

Notably, the positive factors indicated for the nine cases denied were largely similar to the cases granted.<sup>177</sup> Moreover, only two of the nine cases involved criminal history, insofar as such a history might have caused a negative decision.<sup>178</sup> In fact, six of the nine cases denied included more than one of the positive factors reflected in the granted cases.<sup>179</sup> This raises a concern that cases involving similarly relevant facts resulted in a different outcome, which intersects with the forthcoming discussion about the importance of transparency. The foregoing analysis of deferred action cases obtained by USCIS and through Survey Monkey indicate that five equitable factors influence deferred action grants: (1) serious medical condition; (2) tender or elder age; (3) long term residence in the United States; (4) presence of USC children in the United States; and/or (5) other USC family members in the United States.<sup>180</sup>

While the grant rate for deferred action cases might cause alarm for those who challenge the deferred action program as an abuse of executive branch authority, it should be clear that regardless of outcome, the number of deferred action cases considered by ICE and USCIS are quite low. These numbers suggest that the real concern lies in the fact that many non-citizens who meet the common criteria utilized by the agency in assessing deferred action lack access or knowledge about deferred action, the process for applying, and basic eligibility requirements. Even doubling the number of legible deferred action grants produced by USCIS and ICE between 2003 and 2010 (118 plus 946) yields less than 1,100 cases, or less than 130 cases annually! One can appreciate this exceptionally low number when comparing it to the unauthorized immigrant population (10.8 million<sup>181</sup>); number of persons removed in 2010 (387,000<sup>182</sup>); or the

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177. *Id.*

178. *Id.*

179. *Id.*; *supra* Part IV.A.

180. Survey Monkey Results, *supra* note 173; *see supra* Part IV.A.

181. Michael Hoefer et al., U.S. Dep't of Homeland Sec., *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010*, 1 (2011),

[http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf).

182. U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2010 OFFICE OF IMMIGRATION STATISTICS 2 (2011),

number of persons placed in removal proceedings in 2010 (approx. 300,000<sup>183</sup>).

The next section challenges the agency's lack of transparency about the deferred action program and offers specific recommendations for rulemaking and greater transparency. The goals behind these recommendations are not geared primarily towards escalating the grant rate to unmanageable levels, but rather to ensuring that immigrants bearing equities similar to the ones already utilized by the agency in assessing deferred action requests are given equal consideration.

## V. THE DEFERRED ACTION PROGRAM LACKS TRANSPARENCY

From the earliest days, when prosecutorial discretion was revealed in 1975, up to the present, the immigration agency has lacked transparency about both the various forms of prosecutorial discretion and deferred action in particular.<sup>184</sup> Whereas the agency has continued to include its authority to exercise prosecutorial discretion in various memoranda and manuals, it has been less willing to offer statistics on the individuals granted discretionary relief under prosecutorial discretion, or the method by which one should go about applying for such relief.<sup>185</sup> The data above also shows that attorneys who are fortunate enough to figure out the deferred action process and make a formal request are not always guaranteed a response by the Department.

The agency's lack of transparency about deferred action is also evidenced by my experience in requesting information about de-

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<http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf>.

183. *Statement of Juan P. Osuna*, *supra* note 39, at 2. Note that while the actual testimony suggests that 325,326 proceedings were receiving by EOIR in FY 2010, I have reduced the number to accommodate those proceedings which are unrelated to formal removal proceedings such as bond proceedings and motions proceedings.

184. See Wildes, *The Litigative Use of the FOIA*, *supra* note 2, at 42-43.

185. The most revealing information about deferred action is included in the memoranda and is limited to informing the public and authorization officials that deferred action is a form of prosecutorial discretion. See e.g. Meissner Memo, *supra* note 19.

ferred action cases from ICE, CBP, and USCIS.<sup>186</sup> Seeking to update Wildes's studies, I filed multiple FOIA requests to the DHS sub-agencies (ICE, CBP, and USCIS) beginning in October 2009, inquiring first about all records and policies pertaining to prosecutorial discretion decisions, and later narrowing the request to deferred action cases.<sup>187</sup> The intermittent letters by the DHS sub-agencies seeking clarification and/or closing the request altogether sheds light on the difficulty in obtaining basic information about prosecutorial discretion generally and deferred action in particular.<sup>188</sup>

Notably, USCIS conducted a complete search to produce a 270-page PDF document in addition to statistical charts about deferred action.<sup>189</sup> However, the data itself was variable and incomplete because the agency does not have a clear tracking mechanism for deferred action cases. Moreover, not only did the data I receive come more than one year after my initial request, I had the assistance of the DHS Ombudsman, who agreed to help move my FOIA request; like the deferred action process itself, my experience illustrates how an accidental phone call with a government official can influence outcomes more readily than merit and the following of vague procedures.<sup>190</sup>

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186. See *supra* Part IV.B.

187. Letter to Sub-agencies, *supra* note 121; Letter from author to U.S. Immigration & Customs Enforcement (Oct. 6, 2009) (on file with author).

188. See *supra* Part IV.B for my procedural history in obtaining information from USCIS and ICE. Note that my FOIA request with CBP was ultimately closed without any data. My initial request was made to CBP on October 6, 2009. On October 26, 2009, an email reply was sent from Ada Symister of CBP's Office of International Trade, requesting clarification. A reply to Ms. Symister was sent on November 4, 2009. On November 9, 2009 an additional e-mail was sent from Elissa Kay of CBP's Office of International Trade seeking further clarification on the information sought in the FOIA request. A response was sent to Ms. Kay on November 11, 2009. There was no additional response from CBP. On March 30, 2010 I made a second, more detailed FOIA request to CBP. On April 29, 2010 CBP responded to the request stating that the information sought is under the purview of USCIS and that the request should be forwarded there.

189. Freedom of Info. Act Request Responses & Logs, *supra* note 161.

190. According to the DHS Ombudsman, USCIS Headquarters has recently begun tracking deferred action requests in local offices. See Contreras, *supra* note 159, at 5.

In the case of ICE, the result of a single chart detailing active cases in which deferred action was granted was thin on detail about the facts involved in each case, the process by which deferred action was considered, the evidence presented to meet eligibility for deferred action, and the conditions under which each case was granted. Even if I were to concede that the data provided by ICE constitutes the universe of active deferred action cases granted between 2003 and 2010, this raises questions about ICE's recordkeeping regarding inactive cases, the number of applications filed and received by ICE, the number of cases denied by ICE, the number of cases initiated as a deferred action requested and treated as something else (i.e., stay of removal), and so on. Tracking this data is important both for the agency and the public.<sup>191</sup>

In the case of CBP, I can only speculate that CBP lacks a specific policy about how it executes prosecutorial discretion generally and deferred action particularly.<sup>192</sup> My FOIA experience also suggests that CBP lacks data about prosecutorial discretion grants or denials. Together, these limitations give CBP the lowest transparency marks within DHS.<sup>193</sup> The next section explores the normative benefits of

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191. Notably, the Secretary of DHS testified on June 28 about her willingness to share data about deferred action cases with the Senate Judiciary Committee. In response to a question posed by Senator Charles Grassley (R-IA) she noted:

Senator, we've had an awful lot of correspondence with the committee on various issues. But I think the point of the question is would we agree to some oversight of how the deferred action process is being administered? And the answer is we want to be very transparent about how we are exercising the authorities the statutes give us.

*DREAM Act Education for Alien Minors: Hearing on S. 952 Before the Subcomm. on Immigration, Refugees & Border Security of the S. Comm. on the Judiciary, 112th Cong. (2011)* (statement of Janet Napolitano, Sec'y of Dep't of Homeland Sec.), available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=3d9031b47812de2592c3baeba604d881>.

192. See *supra* note 148.

193. My research is consistent with recent findings by the DHS Ombudsman with regards to transparency and the deferred action program within USCIS:

Stakeholders lack clear, consistent information regarding requirements for submitting a deferred action request and what to expect following submission of the request. There is no formal national procedure for handling deferred action requests. When experiencing a change in the type or

transparency generally and codifying a regulation about deferred action in particular.

A. *Why Transparency Matters*

Transparency about deferred action matters and is premised first on the acceptance that an officer or agency's decision about deferred action is an adjudicatory function that demands the same kind of analysis that would be given to other immigration benefits that fall within the formal adjudicatory framework. There is no shortage of literature scrutinizing an administrative process against a set of normative values.<sup>194</sup> Administrative law scholar Roger Cramton has

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number of submissions, local USCIS offices often lack the necessary standardized process to handle such requests in a timely and consistent manner. As a result, many offices permit deferred action requests to remain pending for extended periods. Stakeholders lack information regarding the number and nature of deferred action requests submitted each year; and they are not provided with any information on the number of cases approved and denied, or the reasons underlying USCIS' decisions.

Contreras, *supra* note 161, at 1.

194. See, e.g., Lenni B. Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, 54 ADMIN. L. REV. 203, 263-64 (2002) [hereinafter Benson, *Breaking Bureaucratic Borders*]; Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37, 40 (2006-2007); Roger C. Cramton, *Administrative Procedure Reform: The Effects of S. 1663 on the Conduct of Federal Rate Proceedings*, 16 ADMIN. L. REV. 108, 112 (1963) [hereinafter Cramton, *Administrative Procedure Reform*]; Roger C. Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 592-93 (1972); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 80 (1983) (arguing for a "precision calculus" framework for interpreting adjudicative rules, which leads to more transparency and accessibility); *Family*, *supra* note 19, at 598 (examining the problem of diverting individuals away from immigration administrative adjudication); Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1313-14 (1986); David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1322 (1990); Abraham D. Sofaer, *The Change-of-Status Adjudication: A Case Study of the Informal Agency Process*, 1 J. LEGAL STUD. 349, 419-21

identified “accuracy,” “efficiency,” and “acceptability” as goals for evaluating administrative designs. Immigration law scholar Steven Legomsky has also explored “consistency” in asylum adjudications along with the criteria identified by Cramton.<sup>195</sup> Administrative and immigration law scholar Lenni Benson has examined transparency as a separate process value.<sup>196</sup> For purposes of this article, I analyze the values of equal justice, accuracy, consistency, efficiency, and acceptability in the deferred action context. I chose these criteria because I believe that the lack of transparency in deferred action undermines these values and underscores why transparency is so important. I concede that many of the values analyzed below are overlapping in that one bears relationship to another.

### B. *Equal Justice*<sup>197</sup>

Transparency can promote a fair process and more equitable outcomes. One of the most important benefits of transparency is perhaps the least obvious: the reduction to the number of requests for deferred action that are never made because the individual who may qualify is unaware of the process. To my knowledge, no public memoranda from DHS have authorized employees to automatically consider cases for deferred action before they enter the system, if at all. The Morton Memo on Prosecutorial Discretion takes a step in the right direction by indicating that it is “preferable for ICE officers, agents, and attorneys to consider prosecutorial discretion in cases without waiting for an alien or alien’s advocate or counsel to request a favorable exercise of discretion.”<sup>198</sup>

There is also a fairness component to the practical uncertainty faced by non-citizens. It is possible that a potential beneficiary of deferred action is aware of the process but is unable to decide

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(1972) (discussing the inconsistencies broad discretionary power imposes on administrative decisions in an immigration context).

195. Cramton, *Administrative Procedure Reform*, *supra* note 194, at 111–12; Legomsky, *supra* note 194, at 1313.

196. Benson, *Breaking Bureaucratic Borders*, *supra* note 194, at 262–63.

197. While Cramton intentionally analyzes accuracy, efficiency, and acceptability as an alternative to “fairness” or “due process,” I think it is appropriate to mention how the current deferred action program undermines these latter values.

198. *Morton Memo on Prosecutorial Discretion*, *supra* note 4, at 5.

whether he should hire an attorney and apply for it. Moreover, an applicant for deferred action who never hears back from the agency is unable to plan his affairs because he is unaware about the outcome of his case. Even where the individual has been granted deferred action and given a legitimate basis for work authorization, a U.S. employer might be unsure about whether to hire the individual because of the secrecy or in-limbo nature of deferred action. All of these scenarios have a fairness component that should be considered when thinking about the protections and greater certainty of other discretionary remedies.

Finally, and less clear, is the subject of due process, which at the very least requires that the interests at stake bear some relationship to the procedures.<sup>199</sup> In deferred action cases, the interest at stake for the non-citizen is significant. If deferred action is denied or never considered, the consequences could include arrest, detention, deportation, or a combination of the three. The deferred action program also lacks notice. As it stands, many people who apply for deferred action have hired a lawyer who is familiar with the process.<sup>200</sup> Whereas these interests lie at the top of the “hierarchy” of actions that deprive the individual of liberty, the scenario is complicated by the fact that most individuals applying for or eligible to apply for deferred action do not have a formally recognizable immigration status.<sup>201</sup> On the other hand, many such individuals have resided in the United States for a meaningful number of years. The Supreme Court has more than once concluded that “[o]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or per-

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199. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). There, the Supreme Court distinguished the need for a preliminary hearing in administering disability benefits from welfare benefits on the basis that a welfare recipient warrants a hearing because he could be deprived of the “very means by which to live while he waits.” *Id.* at 340.

200. On the other hand, the government might view that greater notice will increase the incentives to utilize deferred action as a delay tactic. See Paul R. Verkuil, *A Study of Immigration Procedures*, 31 UCLA L. REV. 1141, 1170 (1984).

201. *Id.* at 1150.

manent.”<sup>202</sup> Furthermore, the Court compared deportation to “banishment or exile.”<sup>203</sup>

### C. *Efficiency*

Efficiency refers to the time and expense invested in a particular process. Professor Cramton explains efficiency “emphasizes the time, effort, and expense of elaborate procedures. The work of the world must go on, and endless nitpicking, while it may produce a more nearly ideal solution, imposes huge costs and impairs other important values.”<sup>204</sup> On the one hand, one might think that the current deferred action design is superbly efficient because it lacks the costs associated with an application form or process, lacks review by an administrative or judicial appellate body, lacks recordkeeping or reporting by the Department, and so on. On the other hand, the lack of transparency about the deferred action program has resulted in congressional inquiries about the Department’s recordkeeping, research by the DHS Ombudsman on how to improve deferred action processes, and lengthy FOIAs between the author and the Department. Similarly, the Department’s review of voluminous submissions by attorneys fortunate enough to know about deferred action and the ensuing correspondence that takes place between Department employees and attorneys because of the lack of guidance or process conceivably results in great costs to the government. In short, the lack of transparency about deferred action has resulted in enormous monetary expenses and personal time for the Department.

### D. *Accuracy*

Accuracy means that once an adjudicator interprets relevant factors, the law that is applied to the factors is correct and the conclusion is consistent with the sources of law. To Professor Benson,

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202. *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001).

203. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (“We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile. . . . [W]e will not assume that Congress meant to trench on [the individual’s] freedom beyond that which is required by the narrowest of several possible meanings of the words used.”).

204. Cramton, *Administrative Procedure Reform*, *supra* note 194, at 112.

“[a]ccuracy ensures the law is being carried out, and not undermined through error or fraud.”<sup>205</sup> Practically, it is difficult to measure the accuracy of the current deferred action program because the government does not maintain basic information about the process and its decisions. Moreover, the deferred action program undervalues the accuracy objective, because it prevents potentially eligible individuals from applying for deferred action and immunizes officers from liability when a deferred action is denied or disregarded altogether. If a person is denied deferred action but has facts similar to a family member who was granted deferred action in a neighboring region, it can be identified as inaccurate. Similarly, if the same person never applies for deferred action because she does not have a lawyer and is otherwise unaware of the program, accuracy is also disregarded. When a person has the opportunity to consult with published criteria after being denied deferred action, he is able to understand the reasons for this denial and, if appropriate, enable the agency to catch errors.<sup>206</sup>

#### E. *Consistency*

To Professor Benson, “[c]onsistency, not only of outcome, but also of treatment along the way, is required to maintain fairness among and between participants, and thus, is necessary to foster respect for and trust in the system.”<sup>207</sup> Americans also value consistency because it treats similarly situated people equally. In sharp contrast, decisions about deferred action are uneven and in some cases unknown to attorneys and advocates who file applications.<sup>208</sup> Transparency about the deferred action process promotes consistency by directing potential applicants to a similar procedure at the front

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205. Benson, *Breaking Bureaucratic Borders*, *supra* note 194, at 263.

206. E-mail from Stephen Legomsky to author (July 16, 2011, 19:41 EST) (on file with author).

207. Benson, *Breaking Bureaucratic Borders*, *supra* note 194, at 263.

208. *See, e.g.*, Contreras, *supra* note 159, at 5 (“USCIS does not have a nationwide process for acknowledging the receipt of deferred action requests, but many USCIS offices have implemented a local method for logging submissions and acknowledging their receipt. Other offices do not issue a written acknowledgement of receipt for deferred action requests.”); Wadhia, *supra* note 36; Survey Monkey, *supra* note 170.

end, and ensuring more consistent outcomes at the back end.<sup>209</sup> The importance of transparency and consistency in deferred action cases was also highlighted by DHS' own Ombudsman in 2007 when he remarked:

[M]inimal measures, including tracking requests for deferred action and regular review by USCIS headquarters of the requests and the determinations made, would help to ensure that there is no geographic disparity in approvals or denials of deferred action requests and that like cases are decided in like manner.

....

If implemented, this recommendation would make USCIS more efficient by tracking requests for deferred action and helping to ensure consistency in adjudications.<sup>210</sup>

Consistency is also enhanced when officers are held accountable for their actions. My own belief is that a more transparent process for deferred action can have a disciplinary effect on the adjudicator and, as a consequence, advance the quality and consistency of decisions on deferred action. A similar argument has been set forth by Professor Legomsky in his writings about the benefits of agency review when he remarks:

I believe that the mere prospect of review can have a sobering effect on administrative officials. Most of us do not like to be embarrassed, especially in our work. When we know that someone might be scruti-

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209. Legomsky contends that the arguments supporting an agency's head to review adjudicative decisions for the purpose of promoting consistency fall short, since there are other alternatives that are no less consistent. See Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STANFORD L. REV. 413, 458 (2007) [hereinafter Legomsky, *Learning to Live with Unequal Justice*]; see also Legomsky, *supra* note 194.

210. Recommendation from Prakash Kharti, Ombudsman, U.S. Customs & Immigration Serv., to Dr. Emilio T. Gonzalez, Dir., U.S. Customs & Immigration Serv., 3-4 (Apr. 6, 2007), [http://www.dhs.gov/xlibrary/assets/CISOmbudsman\\_RR\\_32\\_O\\_Deferred\\_Action\\_04-06-07.pdf](http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_32_O_Deferred_Action_04-06-07.pdf).

nizing our work and testing our reasons, we have an extra incentive to approach our decisions carefully. . . .<sup>211</sup>

#### F. *Acceptability*

Acceptability is not so much focused on whether a particular process is in fact fair or acceptable, but rather on whether the procedure is perceived to be fair by members of the public and parties to the process.<sup>212</sup> Here, my specific recommendation for promulgating a rule on deferred action subsumes the “so what” of transparency in that rulemaking itself ensures that members of the public are provided with an opportunity to provide input before a rule is made final. More predictable rules and procedures about deferred action also promote acceptability because non-citizens and attorneys can make reliable plans based on an articulated set of criteria proffered by the agency and, over time, a body of case law to indicate how these criteria are applied to individual cases.<sup>213</sup>

From the agency’s perspective, transparency about deferred action and publication of a regulation may be more trouble than it is worth. “Transparent rules tend to spotlight a value choice. Opponents of that choice will attack the agency’s action, forcing the agency to expend its own resources for defense. Rules having low transparency thus become more attractive, since they conceal value choices.”<sup>214</sup> The agency might argue that transparency by the Department about prosecutorial discretion and deferred action in particular could result in a storm of objections by restrictionists and other members of the public who equate deferred action to an “amnesty” that received no support by Congress.<sup>215</sup> In response to any concern that a published rule on deferred action is akin to a “backdoor legalization” program, I would opine that a legislative scheme is distin-

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211. See, e.g., Legomsky, *Learning to Live with Unequal Justice*, *supra* note 206, 458; Stephen H. Legomsky, *Refugees, Administrative Tribunals, and Real Independence: Dangers Ahead for Australia*, 76 WASH. U. L.Q. 243, 245 (1998).

212. See, e.g., Legomsky, *supra* note 194, at 1313.

213. Legomsky, *Learning to Live with Unequal Justice*, *supra* note 209, at 426–28.

214. Diver, *supra* note 194, at 106.

215. See, e.g., Wadhia, *supra* note 36, at 6 & n.22.

guishable and more generous in both its application and its benefits. For example, the published rule proposed in this article would be limited to non-citizens who possess specific qualities and criteria and enable the individual to be legally present in the country and apply for work authorization.<sup>216</sup> In contrast, a legalization program includes the benefits of temporary residence, work authorization, permission to travel, and a path to green card status and eventual citizenship.<sup>217</sup>

The concern that a published rule on deferred action may attract future illegal migration is a legitimate one, but this concern can be addressed by catering the rule to people who meet specific qualifying criteria and, if appropriate, setting an annual numerical cap. Since the agency already employs specific criteria for considering deferred action cases, spelling out the criteria in a published rule would not necessarily create a new or objectionable policy for the Department, but would advance the goals of equal justice, accuracy, consistency, efficiency, and acceptability. Achieving these values requires transparency about how deferred action works as well as a newly codified regulation subject to the “notice and comment” requirement of the Administrative Procedures Act (APA).<sup>218</sup>

Nevertheless, the immigration agency has previously held reservations about promulgating rules under the APA. The best illustration of this was in 1979, when the former INS proposed a rule that would have explained the various criteria utilized by officers in determining the discretionary component of “adjustment of status” and other immigration remedies involving a discretionary component.<sup>219</sup>

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216. See *infra* Part VI.

217. See, e.g., Comprehensive Immigration Reform Act of 2011, S. 1258, 112th Cong. (2011); Security Through Regularized Immigration and a Vibrant Economy Act of 2007, H.R. 1645, 110th Cong. (2007).

218. See generally 5 U.S.C. § 553 (2011).

219. See Factors To Be Considered in the Exercise of Administrative Discretion, 44 Fed. Reg. 36,187, 36,191 (June 21, 1979) (proposing 8 C.F.R. 245.8); see also Diver, *supra* note 194, at 94; *Prosecutorial Discretion*, *supra* note 3, at 284-86 (“Several provisions of these proposed regulations would have required a favorable exercise of discretion in the absence of adverse factors. For example, with regard to the exercise of discretion under the former 212(c) waiver, the rule identified the following factors for consideration in the exercise of discretion: ‘alien is likely to continue type of activity which gave rise to the grounds of excludability;

In most cases, to qualify for adjustment of status, the non-citizen must generally have a qualifying relationship with a U.S. employer or family member, be admissible to the United States, and have a visa immediately available to him or her.<sup>220</sup> In addition to meeting these statutory criteria, the applicant must qualify for adjustment as a matter of discretion. The discretionary component has not been defined in the statute or the regulations, but at one time was articulated in the former INS O.I. as requiring “substantial equities.”<sup>221</sup> The published rules would have given clarity to the discretion exercised in adjustment of status and other cases but was instead repealed in 1981 because the INS feared that:

[L]isting some factors, even with the caveat that such list is not all inclusive, poses a danger that use of guidelines may become so rigid as to amount to an abuse of discretion . . . . The INS also argued that the rules would “eliminate discretionary powers by converting discretionary powers into a body of law.”<sup>222</sup>

INS’ fear of litigation is not merely theoretical, but underscored by a relating memorandum to then INS Commissioner Lionel J. Castillo who remarked:

[T]he proposals embodied in this draft would subject the Service to a constant barrage of spurious appeal [sic] by Immigration attorneys on the basis of semantics proposed to be injected into the regulations. They subvert Government to the vagaries of attorney dilatory tactics and would appear to tie our hands

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alien has a history of criminal, immoral, narcotic, or subversive activity; act giving rise to grounds of excludability was relatively recent; no unusual hardship would accrue to alien or family members if the waiver is denied.”) (citations omitted).

220. INA § 245, 8 U.S.C. § 1255 (2006).

221. IMMIGRATION & NATURALIZATION SERV., OPERATIONS INSTRUCTIONS, O.I. § 245.5d(5), available at <http://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-53690/0-0-0-60138/0-0-0-60293.html>; see also Diver, *supra* note 194, at 93.

222. Wadhia, *supra* note 3, at 284–85 & n.238.

completely in the cobwebs of endless liturgical [sic] dialogue.<sup>223</sup>

The agency's desire for flexibility and fear of litigation are not new, and have historically served as a basis for less transparency.<sup>224</sup> But the argument from an agency that regulatory language providing factors to assess discretionary adjudication would limit its flexibility is unpersuasive. First, the Department has the ability to craft a rule that both lists criteria and adopts a discretionary component. In fact, there are many humanitarian-like remedies that operate in this way. For example, cancellation of removal is a remedy codified in the statute in 1996 that is available to eligible non-LPRs and LPRs who meet specific statutory requirements, such as continuous physical presence and residence in the United States for a specified time period, or hardship to a qualifying family member who is either a green card holder or USC, among other requirements.<sup>225</sup> Similarly, the O.I., Meissner Memo, and Morton Memo on Prosecutorial Discretion all include a listing of factors that should be considered by immigration officers, agents, or attorneys, but qualifies that list of relevant factors as illustrative. More important, the factors used by the agency to make decisions about deferred action are identifiable and operate as a "benefit" for those non-citizens fortunate enough to have a knowledgeable attorney who can apply for it.

## VI. CONCLUSION AND RECOMMENDATIONS

### A. *Recognize Deferred Action as a Rule*

Deferred action should be published as a rule in the Federal Register.<sup>226</sup> The regulation should be subject to a 120-day public notice

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223. Diver, *supra* note 194, at 95 (citing to Memorandum from [name and position deleted], INS, to Lionel Castillo, Commissioner, INS (September 12, 1978), at 1.).

224. See, e.g., Benson, *Breaking Bureaucratic Borders*, *supra* note 194, at 263–64.

225. INA § 240A, 8 U.S.C. § 1229b (2006).

226. See Wadhia, *Prosecutorial Discretion*, *supra* note 3, at 286; See also AILA's comments on the Department of Homeland Security's implementation of Executive Order 13563, "Improving Regulation and Regulatory Review." Special

and comment period. The regulatory language as proposed must recognize both the humanitarian and economical bases for deferred action. The advantages of rulemaking promotes the values that are so interconnected with principles of administrative law, including but not limited to transparency, consistency, acceptability, and accountability. As described by Professor Legomsky:

[R]ulemaking has tremendous advantages over adjudication as a vehicle for policy formation. These advantages include broader public input, notice to Congress, avoidance of adjudicative hearings to resolve issues of legislative fact, avoidance of litigating the same issues repeatedly, more enforceable rules, clearer advance notice of allowable and prohibited conduct, fairer applicability of the rules to similarly situated individuals at different points in time, and the opportunity for affected individuals to make policy submissions before the rule is adopted.<sup>227</sup>

In addition to advancing various process values, rulemaking would assist with narrowing the various factors used by adjudicators to determine whether deferred action should be granted. An analysis

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thanks to the AILA Interagency Liaison Committee. AILA Doc. No. 11041463 (“Guidance on deferred action was contained in the now withdrawn INS Operating Instructions. Though the relief is still available, there are currently no regulations that would facilitate a more meaningful and consistent application of prosecutorial discretion in context of deferred action. We ask that such regulations be promulgated.”).

227. Legomsky, *Learning to Live with Unequal Justice*, *supra* note 209, at 459; *see also id.* at 423 & n.67 (“Inconsistent procedures and inconsistent employment criteria for adjudicators were among the problems that inspired the Administrative Procedure Act”). For an insightful description, *see* Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L.J. AM. U. 65, 65-68 (1996). These problems were also the focus of a superb consultants’ report prepared for the Administrative Conference of the United States. Paul R. Verkuil et al., *Report For Recommendation 92-7: The Federal Administrative Judiciary*, in 2 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 777 (1992). *See also* Recommendations and Statements of the Administrative Conference, 57 Fed. Reg. 61,759 (Dec. 29, 1992) (codified at 1 C.F.R. pts. 305, 310) (recommending many of the reforms urged by the consultants’ report).

of the data on deferred action cases indicate that decisions are based on distinguishable criteria and that a single regulation would only bolster the application of this criteria in like cases, and stave the inevitable abuse of discretion that stems from a system where cases are decided by different regional officers and without accountability. The benefit of using rules to guide discretionary decisions is not a new argument and has been affirmed by scholars in various other immigration contexts.<sup>228</sup>

Rulemaking is also cost-effective. I believe the costs associated with rulemaking would be recovered by enabling immigration adjudicators to follow a clear rule. Clearer rules on deferred action could also remove the costs associated with documenting every rationale and factor in a particular A-file, gaining approval from a supervisor before granting deferred action, or ICE attorneys having to review every NTA for sufficiency under the prosecutorial discretion guidelines. Interestingly enough, the internal checks and balances created by the Morton Memo on Prosecutorial Discretion, however important, are a costly endeavor that could be streamlined by crafting a rule limited to deferred action cases. I also believe that implementation of a regulation would not particularly increase litigious costs but, to the contrary, infuse a level of internal quality control and incentive for immigration adjudicators to apply the rule faithfully.<sup>229</sup>

The proposed rule should include information about the scope of deferred action, namely that it is a temporary benefit available to eligible non-citizens who meet specific criteria and who warrant deferred action as a matter of discretion. The agency should create a form for deferred action requests, and attach a nominal fee for processing the form. An applicant who is unable to pay a filing fee should be eligible to fill out a fee-waiver form. The application should be filed to the Vermont Service Center or another regional Service Center. By maintaining all applications at a specific service center, it will be easier for DHS to keep statistics and also adjudicate related requests for work authorization. The rule should be discre-

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228. See, e.g., Sofaer, *supra* note 194, at 421; Verkuil, *supra* note 200, at 1205–06.

229. Diver, *supra* note 194, at 95; Legomsky, *Learning to Live with Unequal Justice*, *supra* note 209, at 463.

tionary and place the burden on the non-citizen to present substantial equities that may include: continuous residence in the United States for at least ten years; presence of a USC or LPR child, spouse, or parent in the United States; serious mental health condition or physical disability; and/or tender or elderly age.

While my proposal provides concrete guidelines, it offers flexibility for the Department to consider equally compelling factors not listed. That said, my goal is not to “codify” previous memoranda like the Morton Memo on Prosecutorial Discretion, but instead to create a discreet remedy in the form of deferred action that is based on an identifiable set of factors that (as illustrated by the data) the agency has relied upon for more than thirty years. The Department will and should continue to follow the current memoranda on prosecutorial discretion when making prosecutorial decisions. Deferred action is merely one slice of the scores of decisions that currently serve as an exercise of prosecutorial discretion.

Those who are denied deferred action should receive a written decision with reasons for the denial. Written decisions promote accuracy, consistency, and acceptability by allowing the applicant to be heard. While written decisions would likely add costs onto the agency, these costs could be offset by the fees that accompany the new deferred action form and the current costs associated with the internal checks and reviews that accompany deferred action processing.

Those who are successful in obtaining a deferred action grant should be granted temporary residence for a renewable three-year period, work authorization, and permission to travel for good cause. A grant of deferred action should not lead to permanent residency, but neither should it prohibit a grantee from applying for a more permanent legal benefit if she is otherwise eligible. The period during which an individual is in deferred action status should be recognized as a lawful status as is currently the case.<sup>230</sup> If the newly pro-

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230. See Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, Lori Scialabba, Associate Director Refugee, Asylum and International Operations Directorate, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I)

posed regulation on deferred action needs alteration, the Department should make adjustments to the regulation “relying on exceptions, time extensions, variances, and waivers.”<sup>231</sup>

### B. *Publicize Information About Deferred Action*

The Department of Homeland Security should train immigration employees about the new rule. Moreover, DHS should create a system whereby every case that is brought to the Department’s attention is automatically considered for deferred action. Alternatively, individuals who are facing removal before EOIR or DHS should be notified about their right to apply for deferred action before USCIS. Information about deferred action should be posted on the relevant DHS websites. This information should include a step-by-step process about how to apply for deferred action, basic eligibility requirements, and related benefits. If a policy is implemented whereby DHS automatically considered cases for deferred action, then such policy should be posted on the various DHS websites and also accompanied by a “Fact Sheet” in user-friendly English.<sup>232</sup> Even if the procedures themselves are not codified as regulations, they should be published in the Federal Register.

Finally, DHS must publish the facts of individual cases as well as decisions about deferred action and keep statistics about the cases in which deferred action is considered, denied, and/or granted. Such statistics must be made part of the annual statistics published by

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of the Act, 42 (May 6, 2009), available at [http://www.uscis.gov/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/2009/revision\\_redesign\\_AFM.PDF](http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF)

231. *Raising the Agency’s Grades – Protecting the Economy, Assuring Regulatory Quality and Improving Assessments of Regulatory Need*, Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary, 112th Cong. (2011) (citing Robert L. Glicksman & Sidney A. Shapiro, *Improving Regulation Through Incremental Adjustment*, 52 U. KAN. L. REV. 1179 (2004) (statement of Robert L. Glicksman)), <http://judiciary.house.gov/hearings/pdf/Glicksman03292011.pdf>.

232. As noted before, the Morton Memo on Prosecutorial Discretion takes a step forward by asking ICE employees to initiate decision on prosecutorial discretion without waiting for an affirmative request by an attorney. Note however that the language does not create a mandate or “automatic” process nor does it imply that in all cases deferred action (which is but a sliver in the universe of ways in which prosecutorial discretion can be exercised) will be considered as the remedy.

DHS and also posted on the various websites. DHS must publish the training officers receive on deferred action. Cumulatively, publishing information about the deferred action process, related decisions, statistics, and training programs will advance transparency and acceptability, while also providing the public with tools for measuring efficiency, accuracy, and consistency in deferred action cases.<sup>233</sup>

## VII. APPENDIX: TABLE OF ABBREVIATIONS

Administrative Procedures Act – APA  
American Immigration Council – Immigration Council  
American Immigration Lawyers Association – AILA  
Board of Immigration Appeals – BIA or Board  
Civil Rights and Civil Liberties – CRCL  
Customs and Border Protection – CBP  
Deferred Action – DA  
Department of Homeland Security – DHS or Department  
Department of Justice – DOJ or Justice  
Doris Meissner, Exercising Prosecutorial Discretion – Meissner  
Memo  
Executive Office for Immigration Review – EOIR  
Immigration and Customs Enforcement – ICE  
Immigration and Nationality Act – INA or the Act  
Immigration and Naturalization Service – INS  
John Morton, Civil Immigration Enforcement: Priorities for the  
Apprehension, Detention, and Removal of Aliens – Morton Memo  
on Civil Enforcement Priorities  
John Morton, Exercising Prosecutorial Discretion Consistent  
with the Civil Immigration Enforcement Priorities of the Agency for  
the Apprehension, Detention, and Removal of Aliens – Morton  
Memo on Prosecutorial Discretion  
Notice to Appear – NTA  
Office of the Principal Legal Adviser – OPLA  
Operations Instruction – O.I.  
Prosecutorial Discretion – PD

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233. See, e.g., Benson, *Breaking Bureaucratic Borders*, *supra* note 194, at 263–64.

United States Citizen – USC

United States Citizenship and Immigration Services – USCIS

## VII. POSTSCRIPT

This article was completed in July 2011. Subsequently, on August 18, 2011, the White House “announced” a policy whereby an interagency working group consisting of officials from DOJ and DHS would review 300,000 cases pending removal and as a matter of prosecutorial discretion administratively close cases that are deemed “low priority.”<sup>234</sup> Without spelling out a legal vehicle or process, the announcement also suggested that individuals whose cases were successfully closed would be eligible for work authorization.<sup>235</sup> Thereafter, ICE issued a series of documents in November 2011 to implement the August 18th announcement.<sup>236</sup> Together, these documents identified the Morton Memo on Prosecutorial Discretion as the “cornerstone” for what officers should follow in making

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234. Cecilia Munoz, *Immigration Update: Maximizing Public Safety and Better Focusing Resources*, THE WHITE HOUSE BLOG (Aug. 18, 2011, 2:00 PM), <http://www.whitehouse.gov/blog/2011/08/18/immigration-update-maximizing-public-safety-and-better-focusing-resources>; see also Shoba Sivaprasad Wadhia, *Sivaprasad Wadhia on the White House's Review of Removal Cases*, IMMIGRATIONPROF BLOG (Sept. 4, 2011), <http://lawprofessors.typepad.com/immigration/2011/09/shoba-sivaprasad-wadhia-on-the-white-houses-review-of-removal-cases.html>.

235. Wadhia, *supra* note 234.

236. See Memorandum from Peter Vincent, Principle Legal Advisor, U.S. Immigration and Customs Enforcement, on Case-by-Case Review of Incoming and Certain Pending Cases (Nov. 17, 2011), available at [http://www.ice.gov/doclib/foia/dro\\_policy\\_memos/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf](http://www.ice.gov/doclib/foia/dro_policy_memos/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf); U.S. DEP'T OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, GUIDANCE TO ICE ATTORNEYS REVIEWING THE CBP, USCIS, AND ICE CASES BEFORE THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (2011), available at [http://www.ice.gov/doclib/foia/dro\\_policy\\_memos/guidance-to-ice-attorneys-reviewing-cbp-uscis-ice-cases-before-eoir.pdf](http://www.ice.gov/doclib/foia/dro_policy_memos/guidance-to-ice-attorneys-reviewing-cbp-uscis-ice-cases-before-eoir.pdf); U.S. DEP'T OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, NEXT STEPS IN THE IMPLEMENTATION OF THE PROSECUTORIAL DISCRETION MEMORANDUM AND THE AUGUST 18TH ANNOUNCEMENT ON IMMIGRATION ENFORCEMENT PRIORITIES (2011), available at <http://www.ice.gov/doclib/about/offices/ero/pdf/pros-discretion-next-steps.pdf>.

prosecutorial discretion decisions; furnished an additional set of substantive criteria officers should use to making short term decisions about prosecutorial discretion; explained that every ICE officer authorized to exercise such discretion would be trained by January 13, 2012; launched a short-term process for reviewing select cases entering the immigration court or pending removal for prosecutorial discretion in the form of administrative closure; and initiated a special review of cases pending removal at the Denver and Baltimore immigration courts. A detailed analysis of these initiatives is beyond the scope of this article. While there remain a number of outstanding and unresolved questions about these protocols<sup>237</sup>, the author acknowledges that the steps the Administration has taken improves the process and application of prosecutorial discretion in immigration matters.<sup>238</sup>

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237. For example, many of these protocols sunset in January 2012; appear to be limited to non-detained cases; fail to address a specific procedure for individuals who lack counsel; appear to limit the immediately available forms of prosecutorial discretion to remedies that provide no independent basis for work authorization; seem to widen the list of “negative” factors ICE officers should consider in the short term as a basis for denying prosecutorial discretion; and provide no guarantee or process for reviewing cases that result in a denial or creating a public record that includes a listing of cases considered, denied or granted prosecutorial discretion.

238. For an analysis of the November 2011 documents and a related letter by the American Bar Association, see ALEXSA ALONZO & MARY KENNEY, DHS REVIEW OF LOW PRIORITY CASES FOR PROSECUTORIAL DISCRETION (2011), *available at* [http://www.legalactioncenter.org/sites/default/files/DHS\\_Review\\_of\\_Low\\_Priority\\_Cases\\_9-1-11.pdf](http://www.legalactioncenter.org/sites/default/files/DHS_Review_of_Low_Priority_Cases_9-1-11.pdf); Letter from Thomas M. Susman, Director of ABA Governmental Affairs Office, to John Morton, Director of Immigration and Customs Enforcement (Dec. 15, 2011), *available at* [http://www.americanbar.org/content/dam/aba/uncategorized/2011/gao/2011dec15\\_prosecdiscretion\\_1.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/2011/gao/2011dec15_prosecdiscretion_1.authcheckdam.pdf)



# Random Chance or Loaded Dice: The Politics of Judicial Designation

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## I. INTRODUCTION

In the 1950s and 1960s, the southern states struggled to respond to the civil rights decisions being issued by the U.S. Supreme Court as well as the new civil rights laws being passed by Congress. The judicial battleground for this perfect storm of evasion and massive resistance was found in the “old” Fifth Circuit Court of Appeals,

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which encompassed the states of Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas.<sup>1</sup> In the “old” Fifth Circuit, a minority of liberal appeals court judges—sympathetic to the civil rights movement—used all legal and administrative power at their disposal to make sure that the federal district and appeals courts were complying with the U.S. Supreme Court’s mandate in *Brown v. Board of Education*.<sup>2</sup> In their ground-breaking book *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform*,<sup>3</sup> political scientists Deborah J. Barrow and Thomas G. Walker carefully examined the political behavior of these aforementioned liberal appeals court judges and found evidence that Elbert Parr Tuttle, the Fifth Circuit’s chief judge from 1960 to 1967, was manipulating, or “gerrymandering,” the assignment of appeals court judges to both three-judge district court panels,<sup>4</sup> and three-judge appellate court panels to guarantee that the panels had at least two liberal judges who would enforce the Supreme Court’s desegregation rulings.<sup>5</sup>

The finding that a federal court of appeals judge may have used his administrative powers to create judicial panels sympathetic to civil rights cases is hardly surprising to Barrow and Walker; the basic assumption of their entire study is that “federal judges in the United States are by nature and necessity politicians” or “black-robed homo sapiens” who are “subject to the same forces that influence the behavior of other individuals.”<sup>6</sup> Add Barrow and Walker: “A judge must always be cognizant of the obligations and responsibilities of the judicial role, but putting on the black robe cannot be

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1. DEBORAH J. BARROW & THOMAS G. WALKER, *A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM*, 40–41, 56–60 (1988).

2. 347 U.S. 483 (1954).

3. See generally BARROW & WALKER, *supra* note 1.

4. Federal law authorized three-judge district court panels to hear specific types of cases, including civil rights and reapportionment cases. The panel is composed of the original district court judge assigned to the case and at least one federal appeals court judge. See generally Thomas G. Walker, *Behavioral Tendencies in the Three-Judge District Court*, 17 AM. J. POL. SCI. 407 (1973).

5. BARROW & WALKER, *supra* note 1, at 40–41, 56–60.

6. *Id.* at ix (citing S. Sidney Ulmer, *Dissent Behavior and the Social Background of Supreme Court Justices*, 32 J. POL. 580, 580 (1970)).

expected to neutralize an individual's political nature."<sup>7</sup> Of course, the argument that judges achieved preferred policy outcomes by the selective interpretation of controlling legal principles is hardly a new insight.<sup>8</sup> Barrow and Walker, however, examine the more interesting question of whether an appeals court judge can take advantage of administrative rules—such as how judges are selected to sit on appeals court panels—to pack panels with like-minded jurists, bring lower courts into compliance with the chief judge's policy preferences, and achieve specific policy goals.<sup>9</sup>

In highlighting the role that panel packing played in the "old" Fifth Circuit, Barrow and Walker contribute to a rich socio-legal literature that explores the mechanisms used for effective oversight and control in a judicial hierarchy.<sup>10</sup> Nearly all judicial systems provide for some means of oversight, and research into the interplay of such systems and the legal actors situated within them is of interest to scholars of constitutional design, judicial administration, and judicial decision making.<sup>11</sup> In particular, the relative effectiveness of various mechanisms of hierarchical control has long been a central

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7. *Id.*

8. *See generally* JEFFREY SEGAL & HOWARD SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).

9. BARROW & WALKER, *supra* note 1, at 40–41, 56–60.

10. *Id.*

11. *Id.*

focus for students of socio-legal phenomena,<sup>12</sup> as well as for scholars of social and political institutions more generally.<sup>13</sup>

In common law systems, judicial institutions often face significant challenges relating to oversight.<sup>14</sup> Hierarchy is arguably the signature institutional trait of the U.S. federal courts, and social scientists have long recognized the importance of that structure for the operation of those courts.<sup>15</sup> Higher court oversight of the decisions of lower courts has been found to be important in a host of different contexts.<sup>16</sup> Most of these studies have focused on the U.S. courts of appeals, investigating the influence of such factors as Supreme Court doctrinal trends on court of appeals decision making,<sup>17</sup> as well as on more direct forms of monitoring such as en banc rehearings.<sup>18</sup> Other studies have looked beyond the courts of appeals, either to the dis-

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12. See generally LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR (2006); LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR (1997); VIRGINIA HETTINGER, STEFANIE LINDQUIST & WENDY MARTINEK, JUDGING ON A COLLEGIAL COURT: INFLUENCES ON APPELLATE DECISION MAKING (2006); DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS (2002); Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1 (1994); Frank B. Cross, *Decisionmaking in the U.S. Circuit Court of Appeals*, 91 CALIF. L. REV. 1459 (2003); David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579 (2003); Andrew P. Morriss, Michael Heise & Gregory C. Sisk, *Signaling and Precedent in Federal District Court Opinions*, 13 SUP. CT. ECON. REV. 63 (2005).

13. See generally HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATIONS (3d ed. 1976).

14. *Id.*

15. *Id.*

16. *Id.*

17. See generally Klein & Hume, *supra* note 12; Donald R. Songer, *Consensual and Nonconsensual Decisions of the United States Court of Appeals*, 26 AM. J. POL. SCI. 225 (1982); Donald R. Songer, *The Impact of the Supreme Court on Trends in Economic Policy Making in the United States Courts of Appeals*, 49 J. POL. 830 (1987); Donald R. Songer & Reginald S. Sheehan, *Supreme Court Impact on Compliance and Outcomes*, 43 W. POL. Q. 297 (1990).

18. See generally Tracey George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213 (1999); Tracey George & Michael E. Solimine, *Supreme Court Monitoring of the United States Court of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171 (2001).

strict courts<sup>19</sup> or to other actors, including state supreme courts,<sup>20</sup> litigants,<sup>21</sup> and even the agenda-setting of the U.S. Supreme Court itself.<sup>22</sup>

Here, we take advantage of a unique characteristic of the procedures of the U.S. courts of appeals—the discretion held by chief judges to designate district court judges to three-judge appellate panels<sup>23</sup>—to examine empirically the importance of oversight and judicial hierarchy on judges' behavior in those courts. Specifically, we examine the extent to which decisions about the policy preferences of designated judges vary systematically with the ideological tenor of the chief judge himself, the court as a whole, and the U.S. Supreme Court. More simply put, we ask: are district court judges selected to sit on appeals court panels simply to help ease the workload of the federal courts of appeals, or are the chief judges of the courts of appeals free to take a page from Chief Judge Tuttle's playbook and use the designation process to select district court judges that share the chief judges' political preferences? In Part II of this article, we outline in detail the court of appeals designation process. Part III sets forth a series of expectations regarding chief judges' decisions about the delegation decision. We then examine those expectations empirically, using data on a random sample of court of appeals cases decided between 1925 and 1988. Part IV outlines our data and methods, while Part V discusses our findings and Part VI

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19. See generally Lawrence Baum, *Responses of Federal District Judges to Courts of Appeals Policies: An Exploration*, 33 W. POL. Q. 217 (1980); Susan B. Haire, Donald R. Songer & Stephanie A. Lindquist, *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 LAW & SOC'Y REV. 143 (2003).

20. See generally Bradley C. Canon, *Reactions of State Supreme Courts to a U.S. Supreme Court Civil Liberties Decision*, 8 LAW & SOC'Y REV. 109 (1973); Scott A. Comparato & Scott D. McClurg, *State Supreme Court Compliance with the United States Supreme Court* (2002) (paper presented at the annual meeting of the Midwest Political Science Association, Chicago, IL).

21. See generally Donald R. Songer, Charles M. Cameron & Jeffrey A. Segal, *An Empirical Test of the Rational-Actor Theory of Litigation*, 57 J. POL. 1119 (1995).

22. See generally Charles M. Cameron, Jeffrey A. Segal & Donald Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101 (2000).

23. S. Res. 253, 106<sup>th</sup> Cong. (1999) (enacted).

briefly examines future research questions regarding judicial designation.

## II. DISTRICT COURT JUDGE DESIGNATION IN THE FEDERAL COURTS OF APPEALS

The familiar structure of the modern federal judiciary has its roots in the Evarts Act.<sup>24</sup> Passed by Congress in 1891, the Evarts Act dramatically restructured the federal judiciary by creating the federal courts of appeals. The Act also affected the duties performed by federal court judges, including authorizing district court judges to sit by designation on three-judge appellate panels. The statutory authority for judicial designation is codified at 28 U.S.C. § 292, which states that a chief circuit court judge may designate district court judges within the circuit (and from outside the circuit, if authorized by the Chief Justice of the Supreme Court) to hear appeals on three-judge appellate panels.<sup>25</sup> In other words, district court judges are permitted to sit by designation on three-judge appellate panels, hear appeals taken from federal district courts, vote on the merits of the appeal, and draft the panel opinion as if they were court of appeals judges.<sup>26</sup>

The process by which district court judges are selected to sit by designation on court of appeals panels is illustrated in Figure 1. It is especially important to note that each federal circuit follows strict procedures designed to guarantee that appellate judges are randomly selected to each three-judge panel, and that cases are randomly assigned to those panels.<sup>27</sup> This is very different from the practices of the “old” Fifth Circuit studied by Barrow and Walker, in which a

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24. Evarts Act, ch. 517, 26 Stat. 826 (1891) (codified as amended at 28 U.S.C. § 292 (2006)).

25. 28 U.S.C. § 292 (2006).

26. Beyond the scope of this paper is the question of how the practice of selecting district court judges to sit by designation might run afoul of the United States Constitution. For an excellent discussion on this point, see Richard B. Saphire & Michael E. Solimine, *Diluting Justice on Appeal?: An Examination of the Use of District Court Judges Sitting by Designation on the United States Court of Appeals*, 28 U. MICH. J.L. REFORM 351, 360 (1995).

27. See, e.g., 11TH CIR. INTERNAL OPERATING P. 34-2(b).

chief judge knew the exact case that a designated judge would be hearing. There are no rules, however, which stipulate that the selection of a designated judge to complete an appellate panel is similarly conducted in a random fashion;<sup>28</sup> instead, chief judges are given only loosely-bounded authority to designate judges as they see fit.<sup>29</sup> As a practical matter, chief judges retain complete discretion to create a pool of designated judges from which to select and, more importantly, to hand-pick specific district court judges and assign them to pre-existing appellate panels of two court of appeals judges.<sup>30</sup> While the completed panels are then randomly assigned to blocks of cases—thus preventing the deliberate assignment of specific panels to certain cases—chief judges nonetheless clearly have at least the potential to shape the composition of the circuit's three-judge panels<sup>31</sup>.

The lack of institutional rules regarding designation provides scholars with a unique opportunity to study the impact of circuit-level environmental factors on the actions of chief judges. First, in making their designation decisions, chief judges are presented with a random stimulus: a court of appeals panel already consisting of two randomly-selected judges<sup>32</sup>. Second, and more important, the fact that the subsequent assignment of cases to panels occurs randomly means that case-level factors do not (indeed, cannot) play a role in the designation decision<sup>33</sup>. The designation process thus provides a valuable natural quasi-experiment for examining questions of judicial behavior as well as greatly simplifying our analysis of the designation decision.<sup>34</sup>

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28. See Saphire & Solimine, *supra* note 26, at 361.

29. S. Res. 253, 106<sup>th</sup> Cong. (1999) (enacted).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. As a secondary matter, we would note that this discretion over district court judge designation is also potentially important for studies of the federal courts of appeals. In fact, despite their nearly universal presence in the courts of appeals, no clear consensus has emerged regarding the treatment of district court judges sitting by designation in studies of those courts. Compare Burton M. Atkins & Justin J. Green, *Consensus on the United States Court of Appeals: Illusion or Reality?*, 20 AM. J. POL. SCI. 735, 744 (1976) (excluding designated judges in determining that panel structure of the U.S. Courts of Appeals permits conflict to be hidden within

It is interesting to note that, with the exception of Barrow and Walker, scholars have not focused on the strategic possibilities afforded chief judges by the designation of district court judges to appellate panels in the U.S. context.<sup>35</sup> Scholars have, however, studied other institutional rules that provide chief judges with the discretion

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unanimous decisions); Burton M. Atkins & William Zavoina, *Judicial Leadership on the Court of Appeals: A Probability Analysis of Panel Assignment in Race Relations Cases on the Fifth Circuit*, 18 AM. J. POL. SCI. 701, 701–11 (1974); Virginia Hettinger, Stefanie Lindquist & Wendy Martinek, *Comparing Strategic and Attitudinal Accounts of Dissenting Behavior on the United States Courts of Appeals*, 48 AM. J. POL. SCI. 123, 131 (2004) [hereinafter Hettinger, *Comparing Strategic and Attitudinal Accounts*] (limiting analysis to decisions rendered by three-judge panels composed of active or senior court of appeals judges); John P. McIver, *Scaling Judicial Decisions: The Panel Decisionmaking Process of the U.S. Courts of Appeals*, 20 AM. J. POL. SCI. 749, 753 (1976) (excluding district court judges sitting by designation in order to isolate the nine judges and their working relationships with each of their fellow circuit judges); Donald R. Songer & Susan Haire, *Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals*, 36 AM. J. POL. SCI. 963, 963–82 (1992) with Martha Anne Humphries & Donald R. Songer, *Law and Politics in Judicial Oversight of Federal Administrative Agencies*, 61 J. POL. 212 (1999) (deliberately including designated judges in analysis). *Contra*, Virginia Hettinger, Stefanie Lindquist & Wendy Martinek, *The Role and Impact of Chief Judges on the United States Courts of Appeals*, 24 JUST. SYS. J. 91, 105 (2003) [hereinafter Hettinger, *The Role and Impact of Chief Judges*]; Donald R. Songer, Danna Smith & Reginald S. Sheehan, *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 FLA. ST. U. L. REV. 963, 980 (1989); Isaac Unah, *Specialized Courts of Appeals' Review of Bureaucratic Action and the Politics of Protectionism*, 50 POL. RES. Q. 851–878 (1997) (examining the potential effects of designation on judicial behavior, while other studies are unclear on precisely how they treat the presence or absence of designated judges). *See, e.g.*, Virginia Hettinger, Stefanie Lindquist & Wendy Martinek, *Acclimation Effects and Separate Opinion Writing in the U.S. Courts of Appeals*, 84 SOC. SCI. Q. 792 (2003) [hereinafter Hettinger, *Acclimation Effects and Separate Opinion Writing*]; Songer, *supra* note 17; Donald R. Songer & Sue Davis, *The Impact of Party and Region on Voting Decisions in the United States Courts of Appeals, 1955–1986*, 43 W. POL. Q. 317 (1990). If there are systematic differences in the characteristics and behavior of designated judges vis-à-vis their appellate colleagues, then this broad inconsistency in treatment is potentially troubling.

35. *See, e.g.*, Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79, 111–12 (1996).

to appoint judges to achieve certain goals.<sup>36</sup> Moreover, one recent study found compelling evidence of ideologically-driven behavior in the making of panel assignments in both the Canadian and South African Supreme Courts.<sup>37</sup> These two courts are similar to the circuit courts of appeals because chief judges have significant discretion over panel assignments; to the extent that the same dynamics hold across the various systems, we have at least some reason to believe that judges in these systems might use designation in a policy-driven fashion.<sup>38</sup>

### III. IDEOLOGY, OVERSIGHT, AND THE POLITICS OF DESIGNATION

As noted above, the lack of formal rules governing the selection of district court judges to sit by designation provides at least the opportunity for chief judges to use the designation process to pursue their own goals. We begin with the contention that judges in the courts of appeals are motivated by substantive political preferences. In addition to the widely-supported importance of such considerations on judges's decisions on the merits,<sup>39</sup> scholars have amassed substantial evidence that policy-related factors also exert influence in other facets of court of appeals decision making, including panel assignments,<sup>40</sup> opinion assignments,<sup>41</sup> authorship of dissenting opinions,<sup>42</sup> and publication decisions.<sup>43</sup> Accordingly, we begin with the

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36. *Id.*

37. See Lori Hausegger & Stacia Haynie, *Judicial Decisionmaking and the Use of Panels in the Canadian Supreme Court and the South African Appellate Division*, 37 LAW & SOC'Y REV. 635, 653 (2003).

38. *Id.*

39. See J. WOODFORD HOWARD, COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH AND DISTRICT OF COLUMBIA CIRCUITS 184–85 (1981); McIver, *supra* note 34, at 753, 755; Songer & Davis, *supra* note 34, at 319–20; Songer & Haire, *supra* note 34, at 970, 978.

40. See Atkins & Zavoina, *supra* note 34, at 708.

41. See Burton M. Atkins, *Opinion Assignments on the United States Courts of Appeals: The Question of Specialization*, 27 W. POL. Q. 409, 427 (1974).

42. See Hettinger, *Acclimation Effects and Separate Opinion Writing*, *supra* note 34, at 807; Hettinger, *Comparing Strategic and Attitudinal Accounts*, *supra* note 34, at 130, 134.

43. See Songer, Smith & Sheehan, *supra* note 34, at 14.

expectation that chief judges will use the designation process to bring the law into accord with their own personal policy preferences by designating ideologically like-minded judges to panels. At the same time, we suggest that chief judges will be constrained, both in their incentives to do so (by the ideological makeup of the existing panel) and in their ability to do so (by the possibility of oversight by the circuit sitting en banc or the U.S. Supreme Court). We outline the contours of these expectations below.

#### A. "Split" Panels

At the broadest level, chief judges faced with the decision of whom to designate to an existing two-judge panel are presented with two circumstances: those two judges are either ideologically similar (what we term a unified panel) or they are ideologically different (or split). Consider first the case of a split panel, consisting of one ideologically conservative and one ideologically liberal circuit court judge. Such a situation presents a chief judge with the greatest opportunity to affect the decisions of the panel, since he or she is effectively appointing the swing vote. In the absence of other constraints, our policy-based perspective would suggest that he or she would appoint a judge with an ideology similar to his or her own. At the same time, however, a number of other factors suggest that his or her ability to do so effectively may be limited.

The most important such factor is oversight: both the circuit as a whole (sitting en banc) and the U.S. Supreme Court may reverse what they perceive as incorrect panel decisions of the courts of appeals. The possibility of such a reversal is exacerbated to the extent that the panel's minority judge might act as a watchdog,<sup>44</sup> bringing the actions of the panel to the attention of the circuit and/or the Supreme Court through dissenting opinions and/or requests for rehearing en banc. Note, however, that if the ideology of the chief judge is consistent with that of the panel's overseers, such considerations cease to be a concern. Thus, for example, a conservative chief judge

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44. See Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2175-76 (1998); Steven R. Van Winkle, *Dissent as a Signal: Evidence from the U.S. Courts of Appeals* (1997) (Unpublished manuscript).

may designate an equally conservative district court judge to a split panel if the circuit and/or the Supreme Court are also conservative. If, however, there is a liberal majority at the circuit or Supreme Court level, the chief judge's ability to select such a like-minded designee is reduced since the chances are relatively good that a conservative decision rendered by the panel would be revisited. The reverse is true for liberals: the ability of a liberal chief judge to select a liberal designee will be constrained by the presence of conservative oversight at the circuit or Supreme Court level. Put differently, we predict that the probability that a liberal chief judge will designate a liberal district court judge increases as the fraction of liberal judges on the circuit and/or the U.S. Supreme Court increases and that the reverse is true for conservative chief judges (that is, that they will be more likely to designate a conservative district court judge as the fraction of conservative judges on the circuit and/or the Supreme Court increases).

More generally, our expectation for split panels is that the influence of the ideology of the chief judge on the identity of the designee will depend on the ideological tenor of the court exercising oversight. This in turn implies an interactive empirical model, of the form:

$$\begin{aligned} \text{Pr(Like-Minded Designee)} = & f [\beta_0 + \beta_1 (\text{Conservative} \\ & \text{Chief Judge}) + \beta_2 (\text{Conservative Circuit/Supreme Court}) + \beta_3 \\ & (\text{Conservative Chief Judge (1)} \times \text{Conservative Cir-} \\ & \text{cuit/Supreme Court}) + u] \end{aligned}$$

Equation (1) specifies that the probability that a chief judge designates a like-minded district court judge is a function  $f(\bullet)$  of three things: how conservative (or liberal) that chief judge is; how conservative or liberal the circuit as a whole (and/or the Supreme Court) is; and the interaction of the two. The multiplicative interaction of the two components allows for the effect of each variable on the probability of a like-minded designee to depend on the value of the other.<sup>45</sup>

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45. See generally Thomas Brambor, William Clark & Matt Golder, *Understanding Interaction Models: Improving Empirical Analyses*, 14 POL. ANAL. 63 (2006)

The discussion above suggests that, for split panels, we would expect that on a liberal circuit (or in the presence of a liberal Supreme Court), a conservative chief judge would be less likely to designate a like-minded judge than would a liberal. Statistically, this expectation is borne out if the estimated value of  $\beta_1$  is less than zero. Similarly, for liberal chief judges (that is, when *Conservative Chief Judge* = 0), the probability of designating a like-minded judge should decrease as the fraction of conservatives on the circuit as a whole or on the Supreme Court increases; this implies that  $\beta_2$ , the coefficient on the term for Conservative Circuit/Supreme Court, should also be less than zero. Finally, we expect these effects to reverse for conservative chief judges and/or conservative oversight: on a conservative circuit or in the presence of a conservative Supreme Court, a conservative chief judge will be more likely to designate a like-minded district court judge; for a conservative chief judge, the probability of picking a like-minded designate increases as the fraction of conservatives on the circuit or the Supreme Court increases. These last expectations imply that the sign of the coefficient on the interaction term  $\beta_3$  is positive and that the relative size of that coefficient is greater than either  $\beta_1$  or  $\beta_2$ . These expectations are summarized in column two of Table 1, located in the appendix.

### B. Unified Panels

Panels consisting of two ideologically-similar circuit court judges present a different designation scenario for chief judges. The signature characteristic of such unified panels is that, as a practical matter, the chief judge's decision about who to designate will not affect that panel's decisions to the same degree as in split panels, since he or she is no longer selecting the pivotal voter. Accordingly, in des-

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(outlining the use of multiplicative interaction terms for testing conditional expectations in statistical models); Bear Braumoeller, *Hypothesis Testing and Multiplicative Interaction Terms*, 58 INT'L. ORG. 807 (2004) (explaining that when a statistical equation incorporates a multiplicative term in an attempt to model interaction effects, the statistical significance of the lower-order coefficients is largely useless for the typical purposes of hypothesis testing). For a recent illustration of this approach, see generally Christopher Zorn, William D. Henderson & Jason J. Czarnecki, *Working Class Judges*, 88 B.U. L. Rev. 829 (illustrating the interpretation of regression models with multiplicative interactions).

ignating judges to such a panel, chief judges might seek to achieve one of two possible (and, in some cases, inconsistent) goals: selecting watchdog judges and administrative efficiency.

The first of these two goals is directly implied by our assumption about chief judges' interest in influencing policy. As we mentioned above, watchdogs are partisans who, by dissent or other means, will signal to the circuit when the panel makes decisions at odds with the rest of the circuit, the Supreme Court, and/or the chief judge himself.<sup>46</sup> These signals, in turn, increase the likelihood of either en banc review<sup>47</sup> or certiorari by the U.S. Supreme Court.<sup>48</sup>

It is useful to note some important elements of this watchdog theory. First, the ability of a designee to act as a watchdog depends on a very specific set of conditions being present; in particular, the ideological orientation of the overseeing courts must differ from that of the two judges on the unified panel to which she or he is designating. In the absence of that difference, the expectation would be that the reviewing court would ratify the decision of the panel, and so the choice of a designated judge would be expected to have little effect on the final outcome of a case. Second, from the perspective of the chief judge, the value of a watchdog also depends on whether or not the chief judge is in ideological agreement with the overseeing court; a liberal chief judge, for example, would hardly be expected to designate a conservative watchdog to call the actions of a liberal panel to the attention of a more conservative circuit. Taken together, these two points make clear that the use of watchdog judges cuts both ways: just as we would expect a liberal chief judge on a liberal circuit to designate a liberal watchdog to a conservative panel, we would also expect that a conservative chief judge in the same situation would endeavor to ensure that his or her designee was conservative (in order to prevent watchdog-like behavior and so minimize the chance of en banc or Supreme Court review).

The fact that a chief judge's incentives to designate a watchdog depend on his or her ideological congruence with both the existing

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46. See Cross & Tiller, *supra* note 44, at 2175–76; Van Winkle, *supra* note 44.

47. See George, *supra* note 18, at 247.

48. See Gregory A. Caldeira, John R. Wright & Christopher Zorn, *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549, 570 (1999).

panel and the overseeing court implies that the marginal influence of both the ideology of the chief judge and that of the circuit or Supreme Court on the probability of a like-minded designee will also depend on the ideology of the two existing panelists. In this respect, a model for unified panels differs from that for split panels, in that it requires a three-way interaction among the composition of the panel, the ideology of the chief judge, and the ideology of the overseeing court. In terms of the model in equation (1), the expectations stemming from the watchdog theory would be that, for a panel consisting of two liberal court of appeals judges, we would expect to find no direct effect of *Conservative Chief Judge* (that is, the value of  $\beta_1$  would be zero), while the direct effect of *Conservative Circuit/Supreme Court* ( $\beta_2$ ) would be less than zero, and the interactive term ( $\beta_3$ ) would be greater than zero. The first of these expectations is due to the fact that, when both the panel and the overseeing court are liberal, the ideology of the chief judge should have little or no impact on the likelihood of a like-minded designee. The second is because, given both a liberal panel and a liberal chief judge, the likelihood of a like-minded (liberal) designee increases as the overseeing court grows more conservative. Finally, the third is due to the fact that, when the overseeing court is conservative, both conservative and liberal chief judges should strongly prefer to pick like-minded designees—the former to act as watchdogs and the latter to ensure that such behavior did not occur. In a similar fashion, the expectations for unified conservative panels are somewhat reversed; there, we would expect that the direct influence of the *Conservative Chief Judge* variable ( $\beta_1$ ) on the probability of designating a like-minded judge would be negative, while that of *Conservative Circuit/Supreme Court* ( $\beta_2$ ) would be negative and that for the interaction term ( $\beta_3$ ) would be positive.<sup>49</sup> All of these expectations are presented in columns three and four of Table 1.<sup>50</sup>

A second possibility for unified panels is that the chief judge, recognizing that the choice of designee will have little or no effect

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49. See generally Brambor, Clark & Golder, *supra* note 45.

50. The Appendix contains a table of expectations for each of the  $2 \times 2 \times 2 =$  eight possible ideological combinations of panel (liberal or conservative), chief judge (liberal or conservative), and overseeing court (liberal or conservative), along with the corresponding contrasts in Equation (1).

on the panel's decisions, will attempt to maximize the decision making efficiency of the panel. This administrative efficiency motivation suggests that, at the margin, we would expect a chief judge to select a designated judge who would increase the probability of what we term ideological harmony on the panel. Such ideological harmony contributes to the efficiency of panel decision making by making it more likely that panel decisions will be issued quickly without oral argument,<sup>51</sup> speeding the review of amicus briefs,<sup>52</sup> minimizing lengthy delays stemming from contentious debates among the judges, and reducing the extent of writing and circulation of multiple drafts of concurring or dissenting opinions. In addition, an ideologically homogenous panel is less likely to grant a party's petition for a panel rehearing.<sup>53</sup> Empirically, this view suggests that, irrespective of their own ideology, chief judges will designate judges with ideologies consistent with the existing panel members. With reference to the model in (1), the administrative view leads us to expect that the effect of *Conservative Chief Judge* ( $\beta_1$ ) will be negative for ideologically liberal panels and positive for ideologically conservative ones, while the effects of *Conservative Circuit/Supreme Court* will be zero across all panels; these expectations are outlined in columns five and six of Table 1.<sup>54</sup> Importantly, the expectations derived from the administrative efficiency view present a stark contrast to those based in policy considerations.

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51. On appeal, the panel may decline to grant a motion for oral argument if all three judges unanimously agree that argument is unnecessary. FED. R. APP. P. 34(a)(2).

52. FED. R. APP. P. 29. This rule only permits the filing of amicus briefs by leave of court or the consent of all parties (with some exceptions). *Id.*

53. FED. R. APP. P. 40.

54. A third possibility is that chief judges act at all times as if the panel was split; such behavior might occur, for example, if judges do not vote precisely along ideological lines. If this is the case, then a chief judge's behavior in the face of unified panels ought to be more-or-less consistent with that when the panel is split, and we would expect precisely the same relationship between designation, a chief judge's ideology and that of the circuit or Supreme Court as discussed above.

### C. Workload and Designation

As we mentioned in Part II, the conventional wisdom states that the courts of appeals have turned with greater frequency to federal district court judges for assistance with their rising workloads. In their recent survey of circuit clerks and chief judges, Saphire and Solimine found that workload concerns were among the most frequently cited reasons for the use of designated judges.<sup>55</sup> Yet studies examining district court judges sitting by designation have uncovered widely varying levels of district court designation, ranging from a high of 47%<sup>56</sup> to lows between 12% and 24%.<sup>57</sup> Drawing upon Songer's *United States Court of Appeals Data Base, Phase I*, we find that district court judges participated in 3,389 (or 22.46%) of the 15,086 non-en banc decisions in Songer's data for the 1925–1988 period.<sup>58</sup> Figure 2 presents the annual proportion of three-judge decisions in Songer's data in which a designated district court judge participated from 1925 to 1988. The data points in Figure 2 are broadly consistent with earlier findings regarding the incidence of designations: aggregate annual percentages average 21.0% over the entire period, and range from a low of 5.5% in 1953 to highs of 42.3% in 1930 and 37.1% in 1981.<sup>59</sup> In accord with the earlier studies of Green and Atkins, and Wasby, we note an increase in the inci-

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55. See Saphire & Solimine, *supra* note 26, at 362.

56. See Justin J. Green & Burton M. Atkins, *Designated Judges: How Well Do They Perform?*, 6 JUDICATURE 358, 363 (1978).

57. See Daniel R. Pinello, Linking Party to Judicial Ideology in American Courts: A Meta-analysis, 20 JUST. SYS. J. 219, 236 tbl.3 (1999); Stephen L. Wasby, Of Judges, Hobgoblins, and Small Minds: Dimensions of Disagreement in the Ninth Circuit (September 2–5, 1982) (paper presented at the Annual Meeting of the American Political Science Association, Denver, CO).

58. DONALD R. SONGER, U.S. COURT OF APPEALS DATA BASE, PHASE I (last updated Oct. 21, 2008), available at <http://www.cas.sc.edu/poli/juri/appct.htm>. These data are a probability sample of decisions of the United States courts of appeals published in the Federal Reporter from 1925 to 1988. We rely on Songer's coding of the identity of judges sitting on each panel to identify district court judges sitting by designation. Specifically, we code decisions as containing a designated district court judge if one or more of the judge codes in Songer's data are identified as such.

59. *Id.*

dence of designations during the late 1960s and 1970s.<sup>60</sup> The highest rates occurred in the late 1920s and early 1930s, and again in the late 1970s and early 1980s, while the lowest levels are found in the 1940s and 1950s.<sup>61</sup> Moreover, designation rates clearly track closely with aggregate workload levels over time; the Pearson's  $r$  correlation between the two variables is 0.57, an effect that is statistically differentiable from zero with a high degree of confidence ( $p < .001$ ).<sup>62</sup>

The apparent importance of workload in the incidence of designation suggests that workload-related factors may play a role in the practice of designating district court judges to the courts of appeals. In particular, workload concerns may suppress the ability of chief judges to select like-minded panelists from the district courts. To address this possibility, we include a control variable for the circuit/year-specific workload in our models of the designation decision below, with the expectation that its effects will be negative.

#### IV. DATA, OPERATIONALIZATION, AND METHODS

We assess the determinants of the designation process using Songer's (1997) data on the U.S. courts of appeals between 1925 and 1988. We restrict our analysis to the 3,320 cases in which a district court judge sat by designation, and on which data are available for all variables. For all district court judges appearing in Songer's data, we coded their political party affiliation, as well as that of their appointing president.<sup>63</sup> Our response variable is whether (coded one) or not (coded zero) the political party of the designated judge is the same as that of the chief judge of the circuit responsible for the des-

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60. See Atkins & Green, *supra* note 34; Wasby, *supra* note 57.

61. Songer, *supra* note 58.

62. H.T. REYNOLDS, JANET BUTTOLPH JOHNSON, & JASON D. MYCOFF, *POLITICAL SCIENCE RESEARCH METHODS*, 140-142 (2007).

63. Several sources were used to gather data on district court judges, including *Directory of American Judges*, *The American Bench*, *the Almanac of the Federal Judiciary*, and *Directory of Minority Judges in the United States*. If the judge did not self-identify as a Democrat or a Republican, we used the appointing president's party as a surrogate.

ignation decision.<sup>64</sup> To address matters relating to caseload, we include a variable measuring the nominal workload of active judges on the circuit in any given year. From Songer's (1997) Appendix 5, we obtained the total number of published decisions in each circuit in each year. We then divided this number by the number of active judges sitting on each circuit in each year, as derived from Zuk et al.,<sup>65</sup> to obtain a measure of the effective caseload per active judge. This variable ranges from a low of just under seven cases per judge to a high of 141.5 cases, with a mean of 44.9 cases per judge per year. While imperfect—for example, it fails to account for the increasing use of senior judges over time<sup>66</sup>—it is nonetheless an accurate proxy for each court's true workload.

We assess our hypotheses regarding the influence of ideological factors on the designation process through three key independent variables. First, we note the party identification of the circuit's chief judge, coded one for Republicans and zero for Democrats. Second, we operationalize oversight by higher courts in two ways. As a measure of circuit-level ideology, for each case we include a variable measuring the proportion of the circuit who are Republicans in that year. Similarly, we measure Supreme Court ideology as the fraction of Supreme Court justices who are Republicans. Following

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64. Recognizing that party identification is an imperfect surrogate for a judge's ideology, we opt for it nonetheless. Party identification is generally a good indicator of political ideology, and has been shown in other studies to be a good predictor of the behavior of judges on the courts of appeals. *E.g.*, HOWARD, *supra* note 39, at 184–85; Donald Songer, *Factors Affecting Variation in Rates of Dissent in the U.S. Courts of Appeals*, in JUDICIAL CONFLICT AND CONSENSUS: BEHAVIORAL STUDIES OF AMERICAN APPELLATE COURTS # (Sheldon Goldman & Charles Lamb eds., 1986); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 504–05 (1975); Songer and Davis, *supra* note 34, at 319–20. Also, to account for potential differences between Southern and non-Southern Democrats, we conducted separate analyses for Southern (defined as the 4th, 5th, and 11th) and Northern circuits. While smaller *N*s led to slightly larger standard error estimates in these analyses, the substantive direction of the results did not change.

65. GARY ZUK, DEBORAH J. BARROW & GERARD S. GRYSKI, MULTI-USER DATABASE ON THE ATTRIBUTES OF UNITED STATES APPEALS COURT JUDGES, 1801–1994 (1997).

66. See Albert Yoon, *As You Like It: Senior Federal Judges and the Political Economy of Judicial Tenure*, 2 J. EMPIRICAL LEGAL STUD. 495, 517–20 (2005).

equation (1), we include as well an interaction between the chief judge and overseeing court variables. Finally, for each case in our data, we record the party identification of the two circuit court judges comprising the panel prior to designation, and we undertake separate analyses for split (one Democrat and one Republican) and unified (two Democrats or two Republicans) panels.<sup>67</sup>

As we note above, the fact that cases are randomly assigned to panels after the designation decision has been made permits us to omit case-specific factors from the model, since any such characteristics are by construction unrelated to the designation decision. At the same time, because of the panel-like structure of our data, there is a significant possibility of interdependence across cases. In particular, cases arising in the same circuit in a given year may be related due to similarities in case types, regional effects, or other factors. To address this issue, we estimate a series of probit models incorporating random effects for each circuit-year.<sup>68</sup>

These models—which are appropriate when the outcome variable is a dichotomous outcome, as it is here—include a separate intercept (or baseline) term for each circuit in each year of the data. A key requirement of such models is that the independent variables be unrelated to those unit-specific effects; failure to meet this requirement can lead to parameter estimates and standard errors that are badly biased. Here again, the structure of the designation process outlined in Figure 1, in the appendix, ensures that this requirement is

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67. We are also aware that the seniority of the district court judge may affect designation patterns. For example, chief judges often designate newly-appointed district court judges as part of their socialization process, while judges with senior status might be called up more often due to their reduced workloads at the district court level. While such considerations are potentially important, we leave inquiry into the possible effects of seniority to future work, for a number of reasons. First, because our data represent only a sample of all court of appeals cases, it is impossible for us to ascertain if the first instance of designation for a particular judge is, in fact, his or her first time on the higher court. This difficulty is compounded by our lack of knowledge of the effective pool from which district court judges are chosen; without this information, we have no way of assessing chief judges's decisions regarding the selection of senior versus active district court judges. Finally, with respect to senior status, the precise date on which district court judges take such status is often hard to determine, making such distinctions very difficult to make in practice.

68. See, e.g., CHENG HSIAO, ANALYSIS OF PANEL DATA (2d ed. 2003).

met: because court of appeals judges are randomly selected for panels, we can be certain that the panels' pre-designation compositions are unrelated to those effects.

## V. ANALYSIS AND RESULTS

Results of our analyses are presented in Table 2 in the appendix. We note at the outset that workload has no appreciable influence on the propensity of chief judges to designate their ideological allies to court of appeals panels. In light of existing work, this is unsurprising; Cohen, for example, highlights the ability of the courts of appeals to respond to increasing workloads without substantially affecting their decision making process.<sup>69</sup> More generally, one might expect that, to the extent that workload is a factor in designation, its influence should appear only on the incidence of such designation itself, but not necessarily on the identity of the designee.<sup>70</sup>

Broadly speaking, our findings with respect to the influence of ideology and oversight are consistent with a pattern of chief judge behavior motivated by policy considerations; moreover, these results are remarkably consistent across a range of different specifications and conditions. Columns two through five of Table 2 report results that operationalize oversight at the circuit level. The clear pattern

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69. JONATHAN MATTHEW COHEN, *INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS* (2002).

70. To further address this issue, and to support our contention that there is no relationship between designation and case-related factors, we also estimated a two-stage probit model with selection, where the first stage indicated whether the panel contained a designated judge and the second was the party of that designee. *See* WILLIAM H. GREENE, *ECONOMETRIC ANALYSIS* § 21.6.4, at 713–14 (5th ed. 2003). In those analyses, we included an indicator for the year of the decision, a count of amicus curiae briefs in the selection stage, and fixed effects for each circuit. Such a model allows us to assess whether case-related factors such as the importance of the case (using the number of amici present in a given case serves as a proxy for the case's importance) are related to the incidence of designation and hence whether the results in Table 2 are biased by selection effects. In all cases, we found no relationship between case-related factors and designation decisions, and the estimates of the selection effects parameter were small and insignificant. These results are available from the authors upon request.

that emerges corresponds precisely to that expected from the policy influence perspective: the significant, negative estimate for  $\beta_1$  indicates that, irrespective of the composition of the panel (unified or split, Democratic or Republican), the presence of a Democratic majority at the circuit level makes Republican chief judges less likely (and Democratic chief judges more likely) to select a member of their own party to sit by designation. At the same time, the large, positive estimate for the coefficient on the interaction term ( $\beta_3$ ) indicates that the reverse is true on Republican-dominated circuits: there, Republican chief judges are more likely (and Democrats less likely) to tap their ideological allies for service on the courts of appeals.

Equally important is what we do not find; in particular, our results offer little or no support for the administrative perspective and only marginal support for the watchdog perspective. The consistently large and significant estimates for  $\beta_3$ , particularly in the models of unified panels, are telling evidence against the administrative theory. Similarly, evidence for the watchdog hypotheses is partial at best. For the models of unified panels, we can distinguish between the watchdog and policy influence hypotheses only via the differential effects across Republican and Democratic panels; while we find no significant direct effects among the Democratic-majority panels (column five), we also find no significant interaction effect.

These same findings persist—and, in fact, are even stronger—when we operationalize oversight in terms of Supreme Court ideology. Those results are presented in columns six through nine of Table 2. To illustrate the size of these effects, Figure 3 plots the predicted probabilities (along with their associated 95 percent confidence intervals) of designating a like-minded judge, for both Democratic and Republican chief judges, as a function of the Republican proportion of the U.S. Supreme Court.<sup>71</sup> The results are striking: for Republican chief judges, increasing the degree of sympathetic oversight from 0.09 to 0.73 (that is, from one Republican justice to seven, effectively the full range of values in the data) yields a corresponding increase of 0.76 in the probability of a Republican designee (from

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71. Results in Figure 2 are based on the analysis in column seven of Table 2, holding the unit-level effects constant at their mean value of zero: similar results are obtained if we base our predictions on the other Supreme Court results presented in Table 2.

0.09 to 0.85). The same increase in the Republican composition of the Supreme Court causes a decline in the probability of a Democratic judge designating a fellow Democrat, from 0.54 to 0.40. In both instances, the magnitude of these changes exceed their confidence intervals, leading us to conclude that, particularly for Republican chief judges, the presence of judicial oversight exerts a strong effect on those individuals' designation decisions.

## VI. CONCLUSION

The phenomenon of district court judge designation on the U.S. courts of appeals is a unique example of a practice in which chief judges have almost unconstrained discretion over a potentially crucial aspect of the decision-making process. Scholars are increasingly aware of the significance of this power<sup>72</sup> as well as the importance of the chief judges in the operation of the circuit courts of appeals more generally.<sup>73</sup> Our analysis of the means by which those judges are selected provides clear and consistent evidence that chief judges, in making designation decisions, tend to choose individuals with similar ideologies. In this respect, our results mirror those of Hausegger and Haynie,<sup>74</sup> who suggest that the practice of judicial designation provides at least the potential for policy-motivated behavior across a range of different institutional contexts. Our results make equally clear, however, that the extent to which judges are willing and able to do so depends on their institutional context—in particular, the potential for oversight provided by the circuit en banc and/or the U.S. Supreme Court.

But while our results regarding designation are both robust and substantial, it is important to note that the selection of judges with a particular ideological bent is only the first step in influencing the direction of the law. Whether or not these judges behave in a manner consistent with the designating chief judge's intentions remains an empirical question, though a number of previous studies suggest

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72. See, e.g., Robert J. Brown Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1066 (2000).

73. See Hettinger, *The Role and Impact of Chief Judges*, *supra* note 34, at 93.

74. Hausegger & Haynie, *supra* note 37, at 651, 653.

that, owing to internal pressures on three-judge panels, a given judge's influence over case outcomes is likely to be small.<sup>75</sup> Until the extent of such influence is more precisely determined, the practical value of policy changes to limit the influence of the designation process remains uncertain.

More broadly, our findings thus support two general propositions: that chief judges' decisions about designation are motivated by policy factors, and these same judges behave strategically by taking into consideration the likely actions of other actors in making decisions relating to the operation of the courts. A long line of empirical research on the courts of appeals support the notion that such judges are driven by policy goals; in the second case, our work squares with other recent studies of court of appeals decision making,<sup>76</sup> as well as those that expand the notion of strategic behavior beyond case-level votes to include such other institutional phenomena as the selection of decision-making instruments.<sup>77</sup> At the same time, our work contrasts with a number of recent studies that have called into question the conditional nature of court of appeals behavior,<sup>78</sup> suggesting the importance of additional inquiries into the contours of constraints in the federal judicial hierarchy.

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75. See, e.g., Atkins & Green, *supra* note 34, at 740.

76. See, e.g., Cross & Tiller, *supra* note 44, at 2175; Van Winkle, *supra* note 44.

77. See, e.g., Joseph Smith & Emerson H. Tiller, *The Strategy of Judging: Evidence from Administrative Law*, 31 J. LEGAL STUD. 61, 81 (2002).

78. See, e.g., Hettinger, *Comparing Strategic and Attitudinal Accounts*, *supra* note 34, at 134; Klein & Hume, *supra* note 12.

## VII. APPENDIX

EXPECTATIONS FOR DESIGNATION DECISIONS ON UNIFIED PANELS  
UNDER THE WATCHDOG MODEL

Unified Liberal Panel				
		Circuit/Supreme Court Oversight		
		<i>Liberal</i>		<i>Conservative</i>
<b>Chief Judge</b>	<i>Liberal</i>	Either	$\leftrightarrow (\beta_2) < 0$	Liberal
		$\updownarrow (\beta_1) = 0$		$\updownarrow (\beta_1 + \beta_3) > 0$
	<i>Conservative</i>	Either	$\leftrightarrow (\beta_2 + \beta_3) > 0$	Conservative

Unified Conservative Panel				
		Circuit/Supreme Court Oversight		
		<i>Liberal</i>		<i>Conservative</i>
<b>Chief Judge</b>	<i>Liberal</i>	Liberal	$\leftrightarrow (\beta_2) > 0$	Either
		$\updownarrow (\beta_1) > 0$		$\updownarrow (\beta_1 + \beta_3) = 0$
	<i>Conservative</i>	Conservative	$\leftrightarrow (\beta_2 + \beta_3) < 0$	Either

Note: Cells denote the ideology of the expected designee under the watchdog perspective. Arrows between cells denote the corresponding contrasts in Equation (1). Note that the expectations imply  $\beta_3 > 0$  for liberal panels and  $\beta_3 < 0$  for conservative ones. This proposition is discussed more fully above in Section III. A-B.

TABLE 1: EXPECTED INFLUENCE OF CHIEF JUDGE AND CIRCUIT/SUPREME COURT IDEOLOGY ON THE PROBABILITY OF DESIGNATING A LIKE-MINDED DISTRICT COURT JUDGE

Variable/ Influence	Split Panels	Unified Panels			
	Policy Influ- ence	Watchdog		Administrative Efficiency	
		Liberal Panel	Conserva- tive Panel	Liberal Panel	Conserva- tive Panel
Conservative Chief Judge	< 0	= 0	= 0	< 0	> 0
Conservative Circuit / Supreme Court	< 0	> 0	< 0	= 0	= 0
Conservative Chief Judge × Conservative Circuit/ Supreme Court	> 0	> 0	< 0	= 0	= 0

TABLE 2: RANDOM-EFFECTS PROBIT MODELS OF DISTRICT COURT JUDGE DESIGNATION

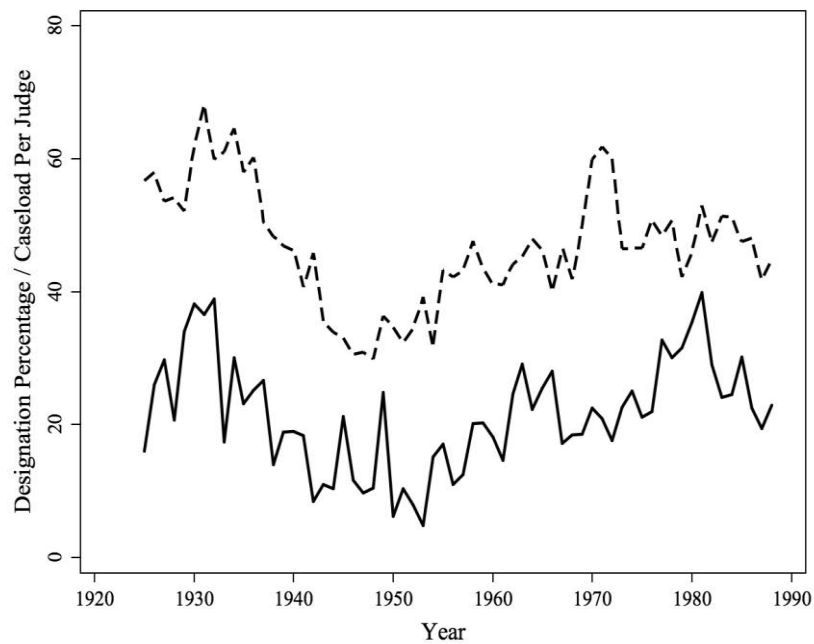
Variables	Circuit Oversight				Supreme Court Oversight			
	All Panels		Unified Panels		All Panels		Unified Panels	
	Split Panels	Unified Panels	Republican Majority	Democratic Majority	Split Panels	Unified Panels	Republican Majority	Democratic Majority
(Constant)	0.262 (0.190)	-0.062 (0.140)	-0.008 (0.342)	-0.035 (0.205)	0.129 (0.309)	0.147 (0.217)	0.331 (0.540)	0.245 (0.327)
Workload	0.004 (0.003)	-0.001 (0.003)	-0.004 (0.004)	0.006 (0.005)	0.003 (0.003)	-0.001 (0.003)	-0.006 (0.004)	0.006 (0.005)
Republican Chief Judge	-0.756* (0.337)	- 0.667** (0.266)	-0.815* (0.465)	-0.470 (0.481)	-0.694* (0.413)	-1.797** (0.351)	-1.878** (0.614)	-1.959** (0.669)
Republican Circuit Majority	-0.810* (0.389)	-0.104 (0.291)	-0.327 (0.570)	0.045 (0.517)	-	-	-	-
Republican Chief Judge × Republican Circuit Majority	1.661** (0.640)	1.434** (0.451)	1.823** (0.719)	0.389 (1.134)	-	-	-	-
Republican Supreme Court Majority	-	-	-	-	-0.470 (0.612)	-0.533 (0.437)	-0.993 (1.012)	-0.584 (0.672)
Republican Chief Judge × Republican Supreme Court Majority	-	-	-	-	1.649* (0.853)	4.185** (0.708)	4.610** (1.166)	3.753** (1.439)
$\sigma_e$	0.833** (0.072)	0.765** (0.071)	0.630** (0.092)	1.102** (0.132)	0.836** (0.073)	0.695** (0.070)	0.503** (0.092)	1.069** (0.141)
Valid <i>N</i>	1632	1688	887	801	1632	1688	887	801

Note: Response variable is whether (=1) or not (=0) the designated district court judge was Republican. Numbers in parentheses are coefficient estimates; standard errors are in parentheses. One asterisk indicates  $p < .05$ , two indicate  $p < .01$  (one-tailed). This proposition is discussed more fully above in Section V.

FIGURE 1: U.S. COURT OF APPEALS DESIGNATION PROCESS

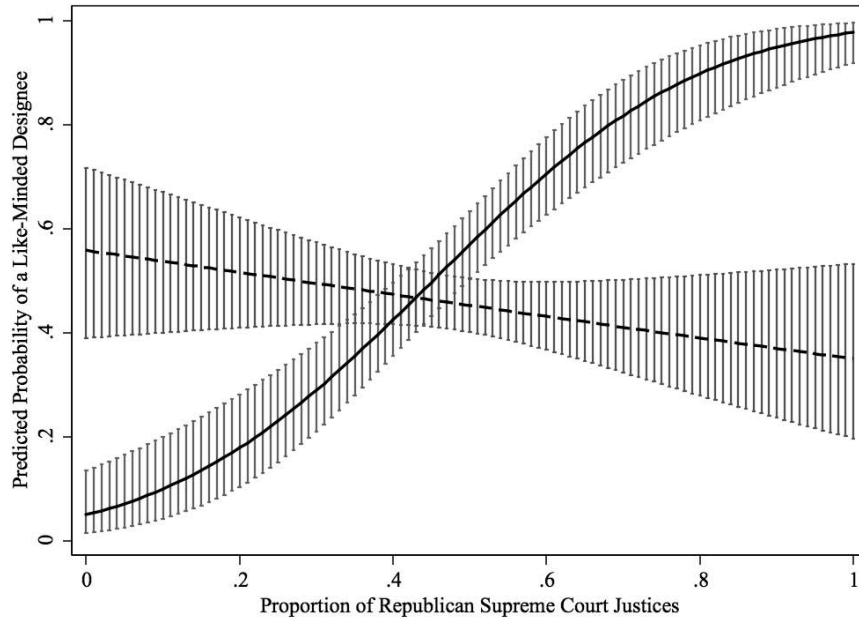


FIGURE 2: PERCENTAGE OF COURT OF APPEALS CASES WITH DISTRICT COURT JUDGES SITTING BY DESIGNATION AND COURT OF APPEALS WORKLOAD, 1925–1988



Note: Dashed line plots the mean number of cases decided per active judge in each year; smooth line is the annual percentage of cases in which a district court judge sat by designation in the U.S. courts of appeals. Estimates are based on Songer's (1997) data. This proposition is discussed more fully above in Section III. C.

FIGURE 3: PREDICTED PROBABILITIES OF A SAME-PARTY DESIGNEE, BY CHIEF JUDGE AND SUPREME COURT PARTISANSHIP



Note: Lines indicate predicted probabilities, holding *Workload* and the random effects constant at their means; bars denote 95% confidence intervals. Solid line is for panels overseen by a Republican chief judge; dashed line is for a Democratic chief judge. Results are for a unified panel (column seven in Table 2). This proposition is discussed more fully above in Section V.

# Finding the Original Meaning of American Criminal Procedure Rights: Lessons from Reasonable Doubt's Development

RANDOLPH N. JONAKAIT \*

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## I. INTRODUCTION

The prosecution must prove every element of the crime beyond a reasonable doubt for a valid conviction. The Constitution nowhere explicitly contains this requirement, but the Supreme Court in *In re Winship*<sup>1</sup> stated that due process commands it.<sup>2</sup> Justice Brennan, writing for the Court, noted that the Court had often assumed that the standard existed,<sup>3</sup> that it played a central role in American criminal justice by lessening the chances of mistaken convictions,<sup>4</sup> and that it was essential for instilling community respect in criminal enforcement.<sup>5</sup> The reasonable doubt standard is fundamental because it makes guilty verdicts more difficult. As *Winship* said, the requirement “protects the accused against conviction . . . .”<sup>6</sup>

Justice Harlan’s eloquent concurring opinion in *Winship* elaborated by noting that “a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for

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1. 397 U.S. 358 (1970).

2. *See id.* at 364 (“[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”); *see also Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (“The government must prove beyond a reasonable doubt every element of a charged offense.”).

3. *See In re Winship*, 397 U.S. at 362 (“Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required.”).

4. *See id.* at 363 (“The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error.”).

5. *See id.* at 364 (“[U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.”).

6. *Id.* at 364.

a particular type of adjudication.”<sup>7</sup> Incorrect factual conclusions can lead either to the acquittal of a guilty person or the conviction of an innocent one. “Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.”<sup>8</sup> Society views the harm of convicting the innocent as much greater than that of acquitting the guilty. Thus, Harlan concluded, “I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”<sup>9</sup>

The reasonable doubt standard was constitutionalized because of the societal function it now serves. *Winship* did not find it constitutionally required because the original meaning of a constitutional provision required it. Indeed, the Court indicated that the standard had not fully crystallized until after the Constitution was adopted.<sup>10</sup> Even so, the reasonable doubt standard provides a fertile field for examining the methodology of finding the original meaning of constitutional criminal procedure rights. First, its status seems secure.

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7. *Id.* at 370 (Harlan, J. concurring).

8. *Id.* at 371.

9. *In re Winship*, 397 U.S. at 372.

10. *See id.* at 361 (“The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation.”); *see also Apodaca v. Oregon*, 406 U.S. 404, 411 (1972), where Justice White, writing for the plurality stated, “As the Court noted in the *Winship* case, the rule requiring proof of crime beyond a reasonable doubt did not crystallize in this country until after the Constitution was adopted.” White continued that scholars had concluded that

the requirement of proof beyond a reasonable doubt first crystallized in the case of *Rex v. Finny*, a high treason case tried in Dublin in 1798 . . . . Confusion about the rule persisted in the United States in the early 19<sup>th</sup> century . . . ; it was only in the latter half of the century . . . that American courts began applying it in its modern form in criminal cases.

*Id.* at 412 n. 6; *see also Victor v. Nebraska*, 511 U.S. 1, 8 (1994) (noting that the 1850 formulation of the standard by Massachusetts Chief Justice Shaw in *Commonwealth v. Webster*, 59 Mass. 295, 320 (1850), “is representative of the time when American courts began applying [the beyond a reasonable doubt standard] in its modern form in criminal cases.”) (quotations omitted).

No debate questions the constitutional requirement that an accused can only be convicted if the crime is proven beyond a reasonable doubt. Its original meaning can be explored uncolored by the partisanship often engendered when present seekers of original meaning hope to define a new contour to a constitutional guarantee.

Furthermore, serious scholars have studied the reasonable doubt standard's early development and its original meaning, purposes, and intent. An examination of those scholarly sources, methods, and conclusions provides a number of valuable insights that should affect the search for finding the original meaning of other American criminal procedure guarantees. These are first that the seeker of original meaning of evolved criminal procedure rights has to go beyond traditional legal sources and explore the broader epistemological developments in religion, philosophy, and science that affected the development of the right. Second, conclusions about original meaning drawn primarily from English and other European sources can be misleading without a consideration of American developments. What might seem like a sound conclusion when English sources are examined may look suspect when viewed in the light of American developments. Finally, the reasonable doubt scholarship reveals that definitive conclusions about the original meaning of American constitutional rights will often be impossible to find both because the necessary American record is absent and because evolved rights never really had a definitive original meaning.

The starting point here is with the scholars who have concluded that the original purpose of the reasonable doubt standard was not, as the Court now has it, to protect the accused, but instead emerged to make convictions easier.

## II. REASONABLE DOUBT AS A REPLACEMENT FOR ANY DOUBT

Anthony Morano's path-breaking article in 1975 maintained that the reasonable doubt requirement emerged not as a protection for the accused, but to make it easier for prosecutors to get convictions.<sup>11</sup> He concluded that juries were not instructed about a burden of per-

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11. Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. REV. 507, 508 (1975).

suaſion until the ſeventeenth century, with courts then uſually ſtat-  
ing that jurors ſhould convict only if they were ſatisfied in their con-  
ſciences that the accuſed was guilty. Although Morano did not point  
to any authoritative explication of the term, he ſpeculated that the  
ſatisfied conſcience teſt

probably required jurors to vote for acquittal if they en-  
tertained any doubt. It implied that, unleſs they were  
morally certain of the correctness of a guilty verdict,  
they would violate their oath if they failed to acquit. It  
is probable that moral certainty was defined during this  
period as requiring proof beyond any doubt.<sup>12</sup>

The eighteenth century produced no uniform inſtruction about  
the burden of perſuaſion, but moſt frequently, Morano maintained,  
judges ſtated that jurors ſhould acquit “if they had *any* doubt of the  
accuſed’s guilt.”<sup>13</sup> This was not a new ſtandard but only “crystal-  
lized the ſtandard of perſuaſion that had been applied in Engliſh  
criminal trials for centuries.”<sup>14</sup> And this burden, he ſtressed, “did  
not require that a doubt be ‘reasonable’ or ‘rational’ to be a ſufficient  
baſis for an acquittal.”<sup>15</sup>

Engliſh philoſophers of the late ſeventeenth century, however,  
realized that abſolute certainty was not attainable in various human  
endeavors but that “moral certainty” could be reached about theſe  
matters. This “required only that one have no reasonable doubts  
about one’s beliefs.”<sup>16</sup> Furthermore, becauſe the law began both to  
limit the evidence that proſecutors could preſent and to allow criminal  
defendants to preſent more evidence, it became harder for the  
proſecutor “to overcome a juror’s irrational or fanciful doubts. . . .  
One way to minimize this [defense] advantage . . . was to reduce the  
degree of certainty neceſſary to juſtify a guilty verdict.”<sup>17</sup> As a re-  
ſult of theſe intellectual and legal developments, the reaſonable

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12. *Id.* at 512.

13. *Id.*

14. *Id.* at 513.

15. *Id.*

16. *Id.*

17. Morano, *supra* note 11, at 514–15.

doubt standard replaced the any doubt rule. Morano maintained “that the reasonable doubt rule was actually a prosecutorial innovation that had the effect of *decreasing* the burden of proof in criminal cases. Prior to the rule’s adoption, juries were expected to acquit if they had *any* doubts—reasonable or unreasonable—of the accused’s guilt.”<sup>18</sup>

Morano also challenged the conventional history on the standard’s earliest appearance. That history then had the rule’s first articulation in a series of treason trials in Dublin in 1798.<sup>19</sup> Morano, however, not only found reasonable doubt charged a generation earlier, but across the Atlantic “in the famous Boston Massacre Trials of 1770—*Rex v. Preston* and *Rex v. Wemms*. There is reason to believe that *Wemms* was the first case to specifically and purposefully distinguish between the any doubt and the reasonable doubt standards of persuasion.”<sup>20</sup>

Since Morano wrote, scholars have found that English courts as early as the 1780s instructed juries about reasonable doubt,<sup>21</sup> but the Boston Massacre trials remain the first known legal use of the standard. Whether the Massachusetts court was truly the first to articulate it, however, cannot be known. Sources for what happened in eighteenth century English courts are limited,<sup>22</sup> and we know even less about what occurred in American proceedings. In eighteenth century America, cases were not regularly reported. Trial transcripts were

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18. *Id.* at 508; *see also id.* at 515 (“[I]t is clear that the rule helped to reduce the potential for irrational acquittals and to that extent operated to the prosecution’s advantage.”). *But see id.* (“It is not clear whether judges and prosecutors were actually aware of the prosecutorial benefits of the reasonable doubt rule as contrasted with the any doubt test.”).

19. Morano writes that an article by Judge May is the source for the conventional view. May, *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases*, 10 AM. L. REV. 642 (1876). This assertion was influential, for, as Morano notes, “[b]oth Dean Wigmore and Dean McCormick accepted Judge May’s thesis. The United States Supreme Court referred to Judge May’s theory in *Apodaca v. Oregon*.” Morano *supra* note 11, at 515 (citing *Apodaco*, 406 U.S. at 412 n. 6; 9 J. Wigmore, *Evidence* § 2497 (3d ed. 1940); C. McCormick, *Law of Evidence* § 341 (2d ed. 1972)).

20. Morano, *supra* note 11, at 516.

21. *See* WHITMAN, *infra* note 27 and accompanying text at note 39.

22. *See* Gallanis, *infra* note 49 and accompanying text at note 54.

seldom made.<sup>23</sup> Furthermore, the avenues of appellate review of criminal convictions in early America were constrained<sup>24</sup> and, thus, few early judicial considerations of the burden of persuasion can be found.<sup>25</sup>

The available historical record, however, does find that the first use of the reasonable doubt standard was in the 1770 Boston trial. This has great importance in considering the origins of the rule. It means that we cannot presuppose that America simply inherited the standard from English law.<sup>26</sup> We have to consider the possibility

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23. See Morano, *supra* note 11, at 520 (“One obstacle is the general lack of extant trial transcripts from 1750 to 1830. Another problem is that the trial court proceedings in many criminal cases were never recorded.”).

24. *Id.* at 526 (“The avenues for appellate review of convictions were severely restricted in early America because the English appellate procedures, which the colonies inherited upon independence, were themselves very limited. For example, the writ of error, although generally employed in early America, provided a means for reviewing neither the sufficiency of the evidence nor the correctness of the trial judge’s instructions. The bill of exceptions, which was the proper procedure for obtaining review of such matters [sic] was not recognized in English criminal law or in the federal courts of the United States. It was not available in America until it was established by state statutes. In some states, appeals from convictions were virtually nonexistent.”)

25. See *id.* at 520 (“[O]ne must often search for jury instructions in criminal appellate reports. These reports often do not reproduce the instructions or even allude to them. . . . Moreover, very few appellate courts directly considered whether the reasonable doubt standard had to be charged in all criminal cases.”).

26. The development of the reasonable doubt standard in America may have influenced its emergence elsewhere. English interest in the Boston Massacre trials was high. HILLER B. ZOBEL, *THE BOSTON MASSACRE* 300 (1970) (“In England, the Massacre and its aftermath had attracted wide attention. Even before word of the soldiers’ acquittals had reached home, a demand had built up for information about Preston’s trial. One bookseller said that if he had a report of the testimony, he ‘could soon sell a thousand copies of it.’”). Certainly, the trial’s participants thought that the proceedings would get a wide audience. For example, in the *Wemms* case, defense attorney Josiah Quincy in his opening statement urged the jury to be dispassionate and said, “We must steel ourselves against passions, which contaminate the fountain of justice. We ought to recollect, that our present decisions will be scann’d, perhaps thro’ all Europe.” 3 *LEGAL PAPERS OF JOHN ADAMS* 166 (L. Kinvin Wroth & Hiller B. Zobel, ed. 1965) [*hereinafter* ADAMS PAPERS]. A report of the proceedings was published in 1771, and it quickly became available in both the colonies and England. See Morano, *supra* note 11, at 518–19; ADAMS PAPERS, at 38 n. 70. This widespread availability, coupled with the fact that the reasonable doubt standard emerged at almost the same time in far

that it developed in America before it did in England; indeed, the available historical record indicates precisely that. Consequently, we cannot assume that if we understand the origins of the English standard, we truly understand the original meanings and purposes of the American one. It is, of course, possible that similar currents in both places produced the standard in each. If so, understanding the development of the English standard aids in understanding the American development, but certainly, assertions about the birth of the English reasonable doubt standard should also be examined under an American light to test their likely validity for understanding the American origins of the rule. As such, an examination reveals that some claims about reasonable doubt's development look dubious when American conditions and developments are considered.

### III. REASONABLE DOUBT TO EASE JURORS' SPIRITUAL ANXIETIES (AND TO MAKE CONVICTIONS EASIER)

James Q. Whitman, in his 2008 study, *The Origins of Reasonable Doubt: The Theological Roots of the Criminal Trial*, also concludes that the standard appeared to make convictions easier, not harder, by supplanting the rule that jurors could acquit if they had any doubt. Whitman finds the burden of persuasion's emergence rooted firmly in religion.<sup>27</sup>

Whitman stresses that not merely the fate of the accused was at stake in early trials, but also the souls of those who judged. This was so because "convicting an innocent defendant was regarded, in

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flung places, led Morano to suggest that the Massachusetts proceedings were an important impetus for the rule's general development. He states,

By the mid-1790s, reasonable doubt charges appeared in English, Canadian and American cases. It is at least as likely as not that, because of their notoriety, the Boston Massacre Trials influenced these other courts in their employment of the reasonable doubt standard and thus significantly contributed to the rule's development as the accepted burden of persuasion in criminal cases.

Morano, *supra* note 11, at 519. *But see id.* at 518 ("[T]he impact of the Boston Massacre Trials on subsequent cases is not altogether clear.").

27. See JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* 2 (2008) ("This is a book about the forgotten theological roots of the criminal trial.").

the older Christian tradition, as a potential mortal sin.”<sup>28</sup> This concern was especially high for “‘blood punishments’—that is, execution and mutilation, the standard criminal punishments of pre-nineteenth-century law.”<sup>29</sup> Consequently, those fearing God’s retribution were reluctant to enter legal condemnations, and this fear drove the evolution of the reasonable doubt standard. Whitman asserts that “there is no way to explain ‘reasonable doubt’ unless we focus resolutely on the *spiritual* anxieties of judging . . . .”<sup>30</sup> To understand how that standard came about, “knowledge of the broader world of Latin Christendom” is necessary.<sup>31</sup>

That Christian doctrine provided a sanctuary for judges. The soul of the judge who authorized a blood punishment was safe as long as he strictly followed the legalities and did not use his personal knowledge to condemn, for then, theologians had concluded, it was not he but the rule of law that was responsible for the judgment.<sup>32</sup> Jurors, however, did not have this theological loophole. A wrong decision condemning another to a blood punishment endangered the jurors’ soul.

According to Whitman, the jurors were especially spiritually endangered because “well into the early nineteenth century, jurors were still expected to make use of their private knowledge of the case, at least occasionally. . . . This deserves to be underlined, since histori-

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28. *Id.* at 3.

29. *Id.*

30. *Id.* at 151 (emphasis in original).

31. *Id.* at 126. Whitman notes that others have also recognized that the actors in common law trials were afraid of making the legal judgments and refers to historians citing fears of vengeance, criminal liability, and making mistakes that could damage a career. Whitman concedes, “There is undoubtedly some truth in all of these explanations of the dangers of judging. In particular, there is no doubt that fear of vengeance was strong in the Middle Ages, though it had faded by the eighteenth century.” *Id.* at 151. Whitman, however, maintains that these explanations largely miss the mark because they “explain premodern fears by anything except the fear of damnation.” WHITMAN, *supra* note 27, at 151; *see also id.* at 186 (noting that the likelihood of retaliation had ebbed by the late eighteenth century, but “the fear of moral responsibility had not. The risk to the soul still shadowed the trial.”).

32. *Id.* at 93–94; *see also id.* at 151 (“[T]he role of the judge was to be kept separate from the role of the witness. Judges were not to use their private knowledge.”).

ans have not got the history quite right.”<sup>33</sup> Those historians maintain that jurors stopped using their personal knowledge of an accused and the crime to reach a judgment by the sixteenth century, after the jurors began to hear witness testimony. But, Whitman maintains, this conclusion “is clearly false.”<sup>34</sup> Blackstone and other eighteenth century writers still asserted that jurors could decide issues based on private knowledge as long as they testified in open court. Whitman concludes that while it may have been rare in the eighteenth century for jurors to render verdicts on personal knowledge, especially in large cities such as London, it still happened. That rarity, however, was the not the real issue for the spiritually anxious.

[F]rom the point of view of moral theology . . . , it did not matter all that much whether jurors only potentially had such knowledge. What moral theology required was a kind of spiritual exercise: a determined effort to keep the body of the judge separate from the body of the witness. The very structure of the office of the juror made this spiritual exercise impossible.<sup>35</sup>

Moreover, the spiritual concerns of jurors were magnified because an eighteenth century trial, according to Whitman, was not a “whodunit” or a what-happened determination, but a proceeding to declare formally what was already known. “[A] trial was not to solve factual riddles, but to *confirm* truths.”<sup>36</sup> Guilt was generally clear,<sup>37</sup> and the law’s goal was not to have triers of fact but jurors “willing to cooperate in the process of inflicting punishment. To put it a little differently, the primary role of the ‘witness,’ in Christian

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33. *Id.* at 151–52.

34. *Id.* at 152.

35. *Id.* at 152–53.

36. WHITMAN, *supra* note 27, at 195.

37. *See id.* at 203 (noting that a trial “did not involve any great mystery about the particular facts: it was assumed that the guilt of the accused would be more or less clear, much or most of the time, to the ‘neighbours’ who were called upon to judge them.”).

moral theology, was not to provide factual clues but to take moral responsibility.”<sup>38</sup>

Jurors could avoid the spiritual anxiety of wrongly imposing blood punishments, of course, by simply refusing to convict. Even so, and even though such punishments decreased in England in the 1700s,<sup>39</sup> “the fear of divine vengeance remained strong.”<sup>40</sup> This fault line—guilty defendant, but jurors concerned for their souls in authorizing blood punishments—forced out the reasonable doubt rule. Whitman concludes, “It was the resulting tensions that produced the reasonable doubt formula at the end of the eighteenth century: ‘Reasonable doubt’ emerged as formula intended to ease the fears of those jurors who might otherwise refuse to pronounce the defendant guilty.”<sup>41</sup>

The moral literature of the eighteenth century, according to Whitman, lit the path out of the spiritual thicket by distinguishing

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38. *Id.* at 203.

39. Blood punishments diminished in eighteenth century England because transportation to the American colonies substituted for many harsher punishments and because jurors “avoided inflicting blood punishments through the ‘pious perjury,’ systematically undervaluing stolen goods in order to allow the accused to escape the most severe penalties of the law.” *Id.* at 187. Whitman says that if all blood punishments had been eliminated, “there would have been much less need for the reasonable doubt instruction. . . . Nevertheless, these changes in punishment practices were not enough to eliminate all moral concerns.” *Id.* Of course, the fact that juries indulged in pious perjury undercuts Whitman’s arguments about the strength of the spiritual anxieties jurors faced. “Such acts of mercy . . . suggest that oaths were not always taken literally and that jurors in such instances did not anticipate divine retribution.” BARBARA J. SHAPIRO, *A CULTURE OF FACT: ENGLAND, 1550–1720* 21 (2000).

40. WHITMAN, *supra* note 27, at 204.

41. *Id.* at 186. Whitman also maintains that the same dynamic produced the jury unanimity rule. He stresses, again, that the purpose of trials was not fundamentally to determine facts but to obtain moral judgments that could imperil jurors’ souls. He continued:

There is no reason to suppose that an uncertain fact is more securely established because twelve out of twelve laypeople agree on it, rather than nine out of twelve, or ten out of twelve. The unanimity rule serves a different purpose: it allows the twelve to share the heavy moral responsibility for judgment, and therefore to diffuse it among themselves. The unanimity rule is a moral comfort rule . . . .

*Id.* at 204.

between “doubts” and “scruples.” “Christians were to stay upon the safer path, which meant that they were to listen to their doubts. . . . Doubts were legitimate and had to be obeyed; scruples were foolish and had to be ignored.”<sup>42</sup> The distinction was grounded in reason. “In particular, the moralists held, the good Protestant was always to use his ‘reason,’ wherever possible, in order to remove his doubts. . . . Doubts were, as they always had been, subject to a test of reason . . . .”<sup>43</sup> Scruples, on the other hand, “were dangerously irrational impulses.”<sup>44</sup> Following such scruples “might easily lead the Christian into a terrible error, the error of sins of omissions.”<sup>45</sup> When applied to criminal trials, this distinction meant that a juror should acquit if he had doubts based in reason, not because of any irrational reluctance.<sup>46</sup>

Whitman accepts that the standard’s initial appearance is unknown, but maintains that even so, examination of early instances is fruitful.<sup>47</sup> He briefly discusses its first known articulation in the Boston Massacre trial. Those proceedings will be explored more fully later in this article, but Whitman concludes that they support his thesis: “The Boston Massacre trial arguments, like everything else we have seen from the period, were framed in the language of the safer path theology.”<sup>48</sup>

Whitman, however, focuses more on the next discovered reasonable doubt cases, which come from London’s Old Bailey in the 1780s.<sup>49</sup> He sees these trials mirroring older ones in that they were

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42. *Id.* at 190.

43. *Id.*

44. *Id.* at 179.

45. WHITMAN, *supra* note 27, at 180.

46. *See id.* at 192 (“All of this should make it completely unsurprising to discover that the reasonable doubt standard grew out of the old safer way moral theology of doubt, and the old fears that public justice would be endangered by the private conscience; and so it did.”).

47. *See id.* at 193 (“To hunt for the first case use of the rule would be misguided; . . . the reasonable doubt rule was quite simply in the air in the later eighteenth century. Nevertheless, it is revealing to look closely at the earliest cases in which the formula does turn up.”).

48. *Id.* at 194.

49. *See* Thomas P. Gallanis, *Reasonable Doubt and the History of the Criminal Trial*, 76 U. CHI. L. REV. 941, 941 n. 1 (2009) (“The Old Bailey was the principal

not proceedings to find facts, but to make moral judgments.<sup>50</sup> It was a time when “the reluctance of jurors to convict could infuriate critics of English criminal justice. . . . [For some commentators,] English criminal jury trial seemed a wayward institution in the latter decades of the eighteenth century—a setting in which unduly ‘merciful’ jurors ignored obvious truths.”<sup>51</sup>

The Old Bailey judges responded in the 1780s by instructing jurors to acquit if they had a *reasonable* doubt. For Whitman it is clear that “[t]he underlying concern [of the instruction] was not with protecting the defendant at all. It was with protecting the jurors.”<sup>52</sup>

Whitman goes on to consider more specific reasons “why the standard established itself in the Old Bailey when it did, in the mid-1780s.”<sup>53</sup> Whitman suggests that the reasonable doubt standard then emerged because American independence made transportation of

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criminal court for cases of serious crime arising in the city of London and the adjacent county of Middlesex.”).

50. Whitman states that eighteenth century

[j]urists still sometimes spoke of the trial in the way their medieval forebears had done—as an event involving a solemn moral decision to condemn a clearly guilty defendant. . . . [A] trial was not to solve factual riddles but to *confirm* truths. We find the same assumptions in the reports of Old Bailey.

WHITMAN, *supra* note 27, at 195. Whitman says that pre-1800 courts did not have plea-bargaining. With nearly every case going to trial, guilty defendants were “paraded before the court for ceremonious condemnation.” *Id.* at 19. Today a trial is, in essence, the final chapter of a detective story with the jury charged with finding the facts, but in the past it was different.

Instead, they often thought of the trial as a solemn event in which the court and the community formally took responsibility for inflicting punishment on a defendant who was fairly clearly guilty. . . . Certainly there were occasionally factual puzzles that the jurors had to solve. But frequently the toughest question in such a trial was whether the defendant’s neighbors would be willing to take the momentous step of giving their formal, unanimous, ‘confirmation.’

*Id.*; see also *id.* at 209 (“Because the old moral theology assumed that the facts would typically be pretty straightforward, and that the accused was usually guilty, its moral focus was not on the problems of fact-finding. Instead, its focus was on the morality of punishment itself.”).

51. *Id.* at 197.

52. *Id.* at 194.

53. *Id.* at 199.

convicted criminals to the American colonies, which had reduced blood punishments, impossible.<sup>54</sup> After 1783, when American independence was formally recognized, jurors had to be especially concerned that a conviction would lead to an execution.

The first cases using the reasonable doubt formula in the Old Bailey crop up during that same period [when transportation punishment was unavailable]—indeed, they crop up in the year [1783] in which it became clear for the first time that transportation to America was an impossibility, while it remained uncertain what was otherwise to be the fate of those convicted. Perhaps—though I offer the suggestion somewhat diffidently—this raised the punishment stakes sufficiently that jurors needed more coaxing to convict than had been the case in previous decade. Seventeen eighty-three was the year when no one could be quite certain where the future of punishment lay.<sup>55</sup>

While Whitman does mention the Boston Massacre trials, his study concentrates on English and continental developments, and even if he has correctly identified the original purposes for the emergence of the English reasonable doubt standard, it should not be assumed that his conclusions truly inform us about the original American meaning of the standard. As we have seen, the available histori-

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54. Gallanis, *supra* note 49, at 962 (“After American transportation ended in 1775, England responded initially by ordering hard labor in hulks on the river Thames and in houses of correction, and later by beginning an ambitious program of prison construction and initiating transportation to Australia. These noncapital punishments were likely more severe than the prior regime of transportation to the established colonies in America, but the punishments did not involve blood.”).

55. WHITMAN, *supra* note 27, at 200; *see also id.* at 187 (“[T]o the extent that transportation substituted for execution, or other mitigating devices were used, the moral stakes were lower. If blood punishments had been completely eliminated, there would have been much less need for the reasonable doubt instruction. Indeed, it is perhaps not surprising that the reasonable doubt instruction emerged in the Old Bailey (the criminal court of London) in the early 1780s, precisely the years when the system of transportation had collapsed in the wake of the American Revolution.”).

cal record indicates that Americans did not simply inherit reasonable doubt from England, but used it earlier than did the English. Instead, his history is valuable only if the forces and currents he identifies as producing the standard operated in a similar manner in America to the way they did in England. His conclusions need to be examined under an American light, and this focus makes it dubious that his assertions can be applied to the original American meaning and purposes of reasonable doubt.

#### IV. EXAMINING THE CLAIMS UNDER AN AMERICAN LIGHT

##### A. *Transportation*

Clearly, the suspension of English transportation in the 1780s cannot explain the presence of the standard in the 1770 Boston Massacre trial. Perhaps that punishment's hiatus forced out the rule in England;<sup>56</sup> clearly, it did not in America. Instead, Whitman's history

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56. Cf. Gallanis, *supra* note 49, at 963 ("Lacking better primary sources, I cannot warrant that there is no connection between the rising harshness of punishment and the use of the reasonable doubt instruction. But the link between them remains to be proven."). Whitman relies on the Old Bailey Session Papers (OBSP), "pamphlet accounts of criminal trials, printed and sold to members of the public." *Id.* at 962. Reports of the reasonable doubt instruction first appear in the OBSP in the 1780s. As Thomas Gallanis points out, however, this source has limitations. The OBSP concentrated on the proceeding's aspects that were most likely to catch a layperson's interest. For cost reasons, the reports were often minimal, especially before 1778. Gallanis notes that the period of 1782 to 1790 brought lengthier reports and states, "Given the changes in size and detail of the OBSP, it is often hard to tell whether something first perceived in the mid-1780s is truly new or simply the result of fuller reporting." *Id.* at 962; see also George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L. J. 575, 639 (1997) ("For now it is safe to assume, . . . that what the Sessions Paper reports probably did happen, but what it omits to mention might have happened too."); c.f. Thomas Y. Davies, *Selective Originalism: Sorting Out Which Aspects of Giles's Forfeiture Exception to Confrontation Were or Were Not "Established At The Time Of the Founding"*, 13 LEWIS & CLARK L. REV. 605, 618 n. 7 (2009) ("Because case reporting was quite unsystematic in earlier times, it is certainly possible that a doctrine could have developed in cases that were never reported and are now lost in time . . . . [O]ur knowledge of legal evolution is dependent on the happenstances of when doctrines were preserved in reported cases.")

has a bearing on the American development of reasonable doubt only if the forces other than transportation's interruption that he identifies had the same effect in the colonies that he asserts that they did in England.

B. *Spiritual Anxieties*

Whitman's central assertion, however, is not about transportation, but that because jurors had such strong spiritual anxieties in imposing blood punishments, jurors, acquitted if they had any doubts, rational or not, with the resulting acquittals forcing out the reasonable doubt standard. It allowed for convictions that kept jurors' souls safe. There are reasons, however, to doubt that this dynamic much affected American jurors.

First, religion in general may not have had a particularly strong hold in eighteenth century America. Thus, historian Stephen Prothero maintains, "Christianity was not particularly popular in the New World colonies. Spiritual indifference was the rule . . . ." <sup>57</sup> This did change somewhat in the mid-eighteenth century, but, according to Prothero, many have misperceived the true extent of the religious fervor.

The celebrated Great Awakening of the 1740s powerfully reversed that decline in many locales, but its revivals were not as widespread as many historians have claimed . . . . On the eve of the Revolution, only 17 percent of adults were church members, and spiritual lethargy was the rule. <sup>58</sup>

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57. STEPHEN PROTHERO, AMERICAN JESUS: HOW THE SON OF GOD BECAME A NATIONAL ICON 43 (2003).

58. *Id.* at 44. *But see* John E. Smith et. al., *Introduction* in A JONATHAN EDWARDS READER vii (John E. Smith, Harry S. Stout & Kenneth P. Minkema, ed. 1995) (noting that the early eighteenth century in America was "an age when religion predominated.").

And however extensive the revivals, their effect on jury trials can be doubted since at a time when jurors were male, women were apparently more swept up in these religious awakenings than men.<sup>59</sup>

Furthermore, the predominant theology in eighteenth century America seems to be fundamentally different from the religious teachings that Whitman describes as having produced the spiritual angst that resulted in reasonable doubt. The beliefs he finds so influential stem from medieval Catholicism.<sup>60</sup> While we may not always recognize the influences that compel us to act, it should give pause if the argument is that eighteenth century Americans, the Puritans, the Presbyterians, the Baptists, the Anabaptists, the Quakers, and even the Anglicans as well as the Deists and the nonbelievers, were acting under ancient Catholicism's power. If they were, surely they were not consciously doing so.

The concern over blood punishments and the safer way theology is based on the belief that salvation was won or lost by a person's deeds. This is at odds with much that was preached in eighteenth century America. For example, Jonathan Edwards,<sup>61</sup> America's most prominent theologian of that era, said time and again that salvation came through faith and God's grace, not through good deeds.<sup>62</sup> Edwards stressed that man's nature was inherently evil, and only the magnanimity of God's mercy prevented a person from being

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59. In a 1737 letter to Benjamin Colman, pastor of Boston's Brattle Street Church, Jonathan Edwards stated, "I hope that 300 souls were savingly brought home to Christ in this town in the space of half a year (how many more I don't guess) and about the same number of males as females; which, by what I have heard Mr. Stoddard say, was far from what has been usual in years past, for he observed that in his time, many more women were converted than men." *Id.* at 65.

60. See WHITMAN, *supra* note 27, at 3.

61. See John E. Smith et. al., *Introduction* in JONATHAN EDWARDS READER, *supra* note 58, at vii ("Jonathan Edwards (1703–1758) is colonial America's greatest theologian and philosopher. During his life, he served as teacher, pastor, revivalist, missionary, and college president, in the process established himself as one of the most influential churchmen in the Anglo-American religious world.").

62. *E.g.* JONATHAN EDWARDS READER, *supra* note 58, at 47 ("And thus it is that we are said to be justified by faith alone: that is, we are justified only because our souls close and join with Christ the Savior, his salvation, and the way of it; and not because of the excellency or loveliness of any of our dispositions or actions, that moves God to it.").

plunged into the abyss.<sup>63</sup> Redemption was not earned by a person's deeds as a desired good can be bought by money. Salvation came through God, and man could only hope to obtain it through faith and being born again in Jesus.<sup>64</sup> Good deeds, in this Protestant view, were secondary to faith and God's grace.<sup>65</sup> A person's soul was fundamentally put in jeopardy not because of a bad deed, but because the person lacked the requisite faith. Edwards was not alone; the theology of faith over good deeds was the dominant theme of the eighteenth century revivals.<sup>66</sup> We might hope that in all eras jurors

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63. See e.g., *id.* at 96 ("Your wickedness makes you as it were heavy as lead, and to tend downward with great weight and pressure towards hell; and if God should let you go, you would immediately sink and swiftly descend and plunge into the bottomless gulf, and your healthy constitution, and your own care and prudence, and best contrivance, and all your righteousness, would have no more influence to uphold you and keep you out of hell, than a spider's web would have to stop a falling rock."). See also *id.* at 224–25 (noting that man has an "innate sinful depravity of the heart . . . [which is man's] natural or innate disposition . . . without the interposition of divine grace. Thus, that state of man's nature, that disposition of the mind, is to be looked upon as evil and pernicious, which as it is in itself, tends to extremely pernicious consequences, and would certainly end therein, were it not that the free mercy and kindness of God interposes to prevent that issue.").

64. See, e.g., *id.* at 100–02 ("If you cry to God to pity you, he will be so far from pitying you in your doleful case, or showing you the least regard or favor, that instead that he'll only tread you under foot . . . How dreadful is the state of those that are daily and hourly in danger of this great wrath, and infinite misery! But this is the dismal case of every soul in this congregation, that has been born again, however moral and strict, sober and religious they may otherwise be.").

65. See, e.g., *id.* at 47 ("And we are justified by obedience or good works, only as a principle of obedience or a holy disposition is implied in such a harmonizing or joining [with Christ the Savior], and is a secondary expression of the agreement and union between the nature of the soul and the gospel, or as an exercise and fruit and evidence of faith . . ."). See also *id.* at 170–71 ("Christian practice is the most proper evidence of the gracious sincerity of professors, to themselves and others; and the chief of all the marks of grace, the sign of signs, and evidence of evidences, that which seals and crowns all other signs. . . . Not that there are no other good evidences of a state of grace but this. . . . [B]ut yet this is the chief and most proper evidence.").

66. For example, the English evangelist, George Whitefield was on his seventh American revival tour when he died in Boston September 30, 1770, shortly before the Boston Massacre trials. "Whitefield had by his fiery preaching in the 1740s infused with ascetic zeal a whole generation." ZOBEL, *supra* note 26, at 237. And the basic message he presented from Georgia to New York was similar to Edwards'. Whitefield stated, "[G]ood works have nothing to do with our justification

have had a concern over wrongly convicting an accused, but the more immediate spiritual concern of eighteenth century Americans, if they listened to those who preached to them, was that their innate, sinful natures would provoke God to sunder the spider's web and plunge them into perdition. One would think with that view of eternal life that concern over blood punishments would be well down on the list of spiritual anxieties.

### *C. The Acquittal Crisis*

Whitman's thesis contends that the reasonable doubt instruction came in response to the jurors' reluctance to convict. This suggests that something like an acquittal crisis must have existed in the years preceding the emergence of the standard. Whether an eighteenth century American acquittal crisis existed, however, seems impossible to determine. Thus, nothing has been found to indicate that Massachusetts not-guilty rates precipitately increased, or increased at all, in the period immediately before the Boston Massacre trials. Nothing has been found to indicate that they did not. The evidence, one way or the other, just does not seem to exist.

Early American criminal trial records are incomplete. Douglas Greenberg made an extensive study of criminal practice in colonial New York and examined surviving records of 5,297 cases, adding, however, that "as is readily apparent, this represents only a portion of all the cases that actually came before the courts."<sup>67</sup> Jack D. Marietta and G.S. Rowe have similarly studied criminal practice in early Pennsylvania. They "undertook to count every crime recorded

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in [God's] sight. We are justified by faith alone . . . . Notwithstanding, good works have their proper place: they justify our faith, though not our persons; they follow it, and evidence our justification in the sight of men." SERMONS OF GEORGE WHITEFIELD 24 (2009); *see also id.* at xx ("[R]emember that you are fallen creatures; that you are by nature lost and estranged from God; and that you can never be restored to your primitive happiness, till by being born again of the Holy Ghost. . . .").

67. DOUGLAS GREENBERG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691–1776 37 (1974). Greenberg later discusses a New York case described by another historian and then says, "It is interesting to note, moreover, that this case never appears in any of the surviving court records—another indication that mine is but a partial sampling of criminal defendants." *Id.* at 82 n. 9.

in the extant justice records and other public sources.”<sup>68</sup> But, of course, other documents might not have survived.

Greenberg indicates that the limitations of his data make suspect comparisons across time periods. He states, “A serious problem of chronological comparability is thereby built into this study, since there is no period for which there are surviving records for every court.”<sup>69</sup> On the other hand, Marietta and Rowe do present decade-by-decade information about Pennsylvania criminal cases. A striking fact is that only a minority of accusations, from any of the decades, ended with the formal disposition of conviction or acquittal. Most dispositions could be labeled “other.” Some were like civil cases and ended by formal or informal arbitration or mediation. Some were resolved when a judge imposed a bond on a defendant to guarantee future good behavior. Some cases faded away for lack of resources or interest. Some ended when an accused escaped from custody.<sup>70</sup>

Greenberg’s study found something similar for New York. He found that 48% of the cases ended with a conviction and 15% in acquittals. “The missing 37% of the 5,297 cases were never resolved at all . . . . They simply disappear from the records entirely before a verdict is recorded. This is an essential point to keep in mind.”<sup>71</sup>

In light of these dispositions, patterns, and the possibility of missing data, maybe the best way to analyze the information on what jurors were doing is to examine Marietta and Howe’s calculation for what they call the “simple conviction rate (SCR), which is the percent of convictions among all charges brought to trial.”<sup>72</sup> Those figures show a lower conviction rate in mid-eighteenth century Pennsylvania than at the end of the seventeenth century.<sup>73</sup> They also show the 1730s conviction rate of 76.3% dropping to 67.5% in the 1740s.<sup>74</sup> Perhaps, although we have no evidence of anyone arguing

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68. JACK D. MARIETTA & G.S. ROWE, *TROUBLED EXPERIMENT: CRIME AND JUSTICE IN PENNSYLVANIA, 1682–1800* 2 (2006).

69. GREENBERG, *supra* note 67, at 37.

70. *See* MARIETTA & HOWE, *supra* note 68, at 44–47.

71. GREENBERG, *supra* note 67, at 71.

72. MARIETTA & HOWE, *supra* note 68, at 45.

73. *Id.* at 46.

74. *Id.*

this, that drop fueled a contention that there were too many “wrong” acquittals which helped lead to a pro-prosecution reasonable doubt standard decades later. On the other hand, the conviction rate in Pennsylvania rose to 71.3% in the 1750s and stayed basically steady at that level for the rest of the century. In other words, the conviction rate had rebounded well before we know of any articulation of the reasonable doubt standard anywhere.<sup>75</sup> All in all, it is hard to see this data as indicating an “acquittal crisis” that brought about a new standard for the burden of proof.

#### D. *Other Explanations for “Wrong” Acquittals*

If there were early American “wrong” acquittals, the cause may have been something other than spiritual anxiety over blood punishments. Religious people with differing beliefs can be reluctant to have their actions result in an execution; the non-religious can feel the same. Certainly, empathy for a defendant can be a factor in acquittals, and this factor seems to have affected colonial jurors, as indicated by Pennsylvania infanticide prosecutions.

A woman charged with killing a newborn could be tried for infanticide. The law presumed that a child was born alive, and the punishment was death. The defendants were almost always young, single women, and indictments for the crime rose steady, especially after 1750. Convictions, however, did not keep pace. “Juries balked at assigning young women to death in infanticide cases and effectively thwarted the law.”<sup>76</sup> If the defendant showed that she had grieved for the death of the child or prepared for its birth, acquittals often followed.<sup>77</sup>

Something other than spiritual anxieties over mistaken impositions of blood punishments was operating. If the driving force was

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75. *Id.* at 46. Indeed, the lowest reported conviction rate was in the 1710s of 59.7%, thirteen points below the rate for the previous decade. The 1720s, however, saw the rate rebound to 74.6% with no change in the burden of proof as far as we know. *Id.*

76. *Id.* at 116–17.

77. *See id.* at 117 (“If defendants in infanticide cases shed tears or were found to have prepared in any way for the coming of the child (‘benefit of linen,’ it was called), acquittal ordinarily followed. Tears and ‘linen’ indicated to jurors that the woman presumably loved the child and regretted its demise.”).

the jurors' concern for their own souls, the acquittals would not have been affected by the defendants' characteristics. The remedy for this acquittal crisis was not to change the burden of proof. No matter what that burden, the sympathy for the defendants would have remained, and in all likelihood, so would have the "wrong" acquittals. Instead, the remedy was to alter the punishment, and that is what happened with imprisonment replacing death. With this change and further reforms that allowed for greater prosecutorial flexibility in charging and for greater jury discretion in determining the punishments, the conviction rate increased without any apparent change in the burden of proof.<sup>78</sup>

#### *E. American Jurors as Finders of Fact*

Whitman views almost all eighteenth century acquittals as wrongful. He maintains that trials were not about finding facts since it was clear that the defendants were guilty. The proceedings only sought to have society, as represented by juries, render moral judgments in order to punish those who had broken the law.<sup>79</sup> Even if this were true for England, the situation in America appears different and appeared differently to eighteenth century Americans.

For example, Douglas Greenberg's examination of early New York criminal cases found that women were frequently accused of theft, a crime with a high acquittal rate.<sup>80</sup> Many of these were unmarried women, who had difficulty in supporting themselves and were often seen as a threat to traditional family life.<sup>81</sup> Greenberg maintains that, "the single woman was more likely than others of her sex to be an object of suspicion and antagonism—the natural social pariah."<sup>82</sup> These conditions provide an explanation for the large number of acquittals—many of those women were wrongly accused.

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78. See MARIETTA & HOWE, *supra* note 68, at 116 ("In the first ten prosecutions following the law's revision on infanticide, juries voted seven convictions.").

79. See *supra* text accompanying note 50.

80. GREENBERG, *supra* note 67, at 79.

81. See *id.* at 80 ("Unlike single men, they often had no legitimate means of supporting themselves. Moreover, they seemed to pose a threat to the stability of family life, since they might seduce husbands from the home and hearth to the tavern and bawdy house.").

82. *Id.*

Greenberg concedes that not every such verdict came from an impartial consideration of the evidence, but that still

[t]he high percentage of acquittals among women . . . is less mystifying if one takes into account the disproportionately high percentage of single women accused of crime, and the strong possibility that some of those accusations were unwarranted by the facts and closely related to the social anxieties of eighteenth-century life. . . . [T]he marital status of the accused provides the most persuasive available explanation . . . [of why more women were acquitted of theft than men.]<sup>83</sup>

Greenberg draws a similar conclusion from data showing that there were more acquittals in New York City than the rest of the colony. He states, “Apprehension of suspects was easier in the city than elsewhere, but it was also less likely that those arrested would be guilty. The process of accusation and arrest probably tended to be more arbitrary in New York.”<sup>84</sup> He reasons that outside the city arrests could be arduous, and constables were unlikely to apprehend people unless the officials were fairly sure of guilt. In contrast, arrests were made in the city on more tenuous grounds.

Because constables were not required to travel long distances to make arrests, and because individuals were more easily located in the city, law-enforcement officers could be less selective about whom they apprehended . . . In other words, it was less important in New York City to be certain that an individual taken into custody was guilty.<sup>85</sup>

The acquittal rate was greater in New York, not because jurors had more spiritual anxiety than jurors elsewhere about convictions, but because more of the charges in the city were dubious. The trials, at

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83. *Id.* at 82–83.

84. *Id.* at 86.

85. *Id.*

least in Greenberg's eyes, were often about determining the facts and weighing the evidence, and verdict patterns indicate that all defendants were not clearly guilty.

Furthermore, those familiar with American law in the era when the reasonable doubt standard emerged, at least as indicated by James Wilson, saw trials as proceedings not merely to confirm what was already known with a guilty verdict, but to determine disputed facts. Wilson, perhaps the most important legal thinker in eighteenth century America, was one of only six people to sign both the Declaration of Independence and the Constitution, and his contributions at the constitutional convention were second to only those of James Madison. He came to America in 1765 after being born and schooled in Scotland and was one of the best-educated people in the New World.<sup>86</sup> Wilson had a large and successful legal practice in Philadelphia,<sup>87</sup> was regarded as the father of the Pennsylvania Constitution of 1790, and was an original justice of the Supreme Court.<sup>88</sup>

He was appointed to the first law professorship at the College of Philadelphia, and, starting in 1790, he gave lengthy legal lectures that he hoped would lay the foundation for an American system of law.<sup>89</sup> Although the lectures do not expressly discuss any controlling burden of proof, they do extensively discuss juries and trials. In Wilson's view, juries resolved guilt and innocence by determining facts. Wilson said it was "of immense consequence . . . that jurors should possess the spirit of just discernment, to discriminate between the innocent and the guilt. . . ."<sup>90</sup> Jurors "will be triers not only of facts; but also the credibility of the witnesses. They will know whom and what to believe . . ."<sup>91</sup> Jurors were to use their reasoning to weigh the evidence.

The testimony of one witness will not be rejected merely because it stands single; nor will the testimony of

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86. See Robert Green McCloskey, *Introduction* in 1 THE WORKS OF JAMES WILSON 9 (1967) [*hereinafter* WILSON].

87. *Id.* at 18.

88. *Id.* at 2.

89. *Id.* at 28–29.

90. *Id.* at 74.

91. *Id.* at 332

two witnesses be believed, if it be encountered by reason and probability. These advantages of a trial by jury are important in all causes: in criminal causes, they are of peculiar importance.<sup>92</sup>

Wilson realized that facts often would not be clear because not all witnesses would tell the truth, and he gave “reasons for suspecting or rejecting testimony.”<sup>93</sup> America entrusted jurors to make such determinations. “In no case . . . does [the law] order a witness to be believed; for jurors are triers of the credibility of witnesses, as well as of the truth of facts.”<sup>94</sup>

#### F. *The Importance of Juries to Americans*

If the spiritual terror among those who might serve as jurors was as strong as Whitman maintains, we might expect to find significant resistance to the jury system. The opposite, of course, was true. Eighteenth century Americans embraced the system as central to their freedoms and derided and fought English denials or abridgement of jury trials.<sup>95</sup> The newly independent states guaranteed criminal jury trials in their fundamental charters. The main body of the

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92. *Id.*

93. WILSON, *supra* note 86, at 386.

94. *Id.* at 383. While Whitman and Morano see this era as one limiting jury power, Wilson saw that judges were increasingly granting jurors more discretion in weighing credibility. Wilson noted that “every intelligent person, who is not infamous or interested” could testify and that the judge applied these competency rules. *Id.* at 545. Wilson continued, however, that the line that made a person incompetent to testify was not clear. Often that interest only affected the credibility of a witness. Wilson, recognizing a legal trend that would continue, stated, “In doubtful cases of this description, the judges especially of late years, presume in favor of the province of the jury. This is done with great reason.” *Id.*

95. See Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L. J. 641, 681 (1996) (“No idea was more central to our Bill of Rights than the idea of the jury. The only right secured in all state constitutions penned between 1776 and 1787 was the right of jury trial in criminal cases . . . .”); see also Eben Moglen, *Consider Zenger: Partisan Politics and the Legal Profession in Provincial New York*, 94 COL. L. REV. 1495, 1520 (1994) (“British North Americans were willing to respond with organized violence when jury trial was interfered with by an assertedly sovereign Parliament in the 1760s and 1770s.”).

Constitution guarantees criminal jury trials as, of course, does the Sixth Amendment. Juries were considered essential.<sup>96</sup> Our political history does not show the rabid fear of making the kinds of judgments that Whitman maintains many jurors had. Instead, Americans wanted juries, insisted upon juries, fought for juries, and counted juries a fundamental right.

G. *An American Reluctance to Convict*

All this does not mean that American jurors did not dread convicting an accused, especially in a capital case. James Wilson certainly recognized that reality, but his response was not to suggest making convictions easier. Instead, he found the answer in his view of jury unanimity.

Wilson asserted that the “conviction of a crime—particularly of a capital crime” required jury unanimity.<sup>97</sup> On the other hand, in what might be a surprise to modern readers, acquittals required only one juror. He stated:

If a single sentiment is not for conviction; [sic] then a verdict of acquittal is the immediate consequence. . . . For by the law, as it has been stated, twelve votes of conviction are necessary to compose a verdict of conviction: but eleven votes of conviction and one against it compose a verdict of acquittal.<sup>98</sup>

Wilson then asked a series of rhetorical questions aimed at the natural reluctance of jurors.

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96. See JACK N. RAKOVE, ORIGINAL MEANING: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 293 (1997) (“Americans [gave] two rights preeminent importance. If the rights to representation and to trial by jury were left to operate in full force, they would shelter nearly all the other rights and liberties of the people.”).

97. WILSON, *supra* note 86, at 503; see also *id.* at 525 (“[W]e shall find no authority to conclude, that, in civil causes, the verdict of a jury must be founded on unanimous opinion.”).

98. *Id.* at 531.

Under this disposition of things, can an honest and conscientious juror dread or suffer any inconvenience, in discharging his important trust, and performing his important duty, honestly and conscientiously? Under this disposition of things, will the citizens discover that strong reluctance, which they often and naturally discover, against serving on juries in criminal, especially capital cases?<sup>99</sup>

Wilson was aware of jurors' fears of rendering criminal judgments, but he showed no concern that juries would acquit when they ought not. He approvingly stressed the juror's power to acquit. "The jury retain[s] an indisputable, unquestionable right to acquit the person accused, if, in their private opinions, they disbelieve the accusers."<sup>100</sup> Wilson did not present arguments to rein in jury discretion to produce more convictions but, instead, stated that America's unanimity rule favored acquittals. The notion that this was an age when American jury powers were being circumscribed to make convictions easier is not supported by, and runs counter to, these eighteenth century views from a learned, knowledgeable, and experienced commentator.<sup>101</sup>

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99. *Id.*

100. *Id.* at 383.

101. No doubt acquittals could be found to support the notion that early American jurors were reluctant to impose blood punishments. But then, contrary instances should also be considered. For example, the Portland, (now) Maine newspaper, Eastern Herald, of July 9, 1792, reported a murder conviction under the headline, "Trial and Condemnation of Joshua Abbot, Jun." Abbot, the story said, was in his sixties, a husband, and the father of six. *Trial and Condemnation of Joshua Abbot, Jun.*, E. HERALD, July 9, 1792. The previous February Moses Gubtail went to Abbot's house and argued over a tool. *Id.* "Gubtail appeared to be in a violent passion, and told Abbot that he was 'damn'd disobliging old fellow' but that notwithstanding this, he should have had the flax break had it not been for his 'damn'd old bitch of a wife.'" *Id.* Abbot ordered Gubtail out of the house, but Gubtail stood outside and yelled several times that he would "cuff" Abbot if Abbot came out. *Id.* An "exasperated" Abbot picked up a piece of an ox sled and struck Gubtail on the head. *Id.* Urged by his brother Benjamin, "who was present during the whole transaction, and who was the only witness of any importance in the cause," Gubtail finally went home where he died within two days. *Id.* The resulting conviction came in spite of a vigorous defense. Each of Abbot's two attorneys

## V. THE BOSTON MASSACRE TRIALS

Perhaps the best crucible for testing out assertions about the origins of reasonable doubt, however, is to examine them in the context of the Boston Massacre trials. If claims do not seem to make sense or ring true in the context of the first known use of the standard, they ought to be considered suspect. And the Boston Massacre Trials do not support many of the assertions made about reasonable doubt's development.

The editors of John Adams' legal papers, L. Kinvin Wroth and Hillier B. Zobel, present the basic facts of the shootings that led to the trials:

British troops had been garrisoned in Boston since 1768; thereafter friction between inhabitants and soldiers had increased steadily; this friction generated heat and even occasional sparks of violence; in the evening of 5 March 1770, the lone sentry before the Custom House on King Street became embroiled with a group of people as he stood his post; he called for help; in response, six soldiers, a corporal, and Captain Thomas Preston marched down to the Custom House from the Main Guard; the tumult continued; the soldiers fired, their bullets striking a number of persons, of whom three died instantly, one shortly thereafter, and a fifth in a few days.<sup>102</sup>

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gave a lengthy summation. *Id.* "During which time, if the most clear and judicious statement of evidence—if the profoundest knowledge of law—and if the utmost ingenuity in the application of it, could have prevailed, Abbot had escaped death." *Id.* On the other hand, the prosecution summation "was short; but pointed, and fatal." *Id.* After the trial judges gave instructions that "were lengthy in their observations—in which they discovered great ability, with a tincture of legal severity[.]" the jury received the case at one in the morning and pronounced the conviction at eight. *Id.* This was not a jury reluctant to impose a blood punishment, even though the verdict came as a shock to the community. The newspaper reported, "There were nearly two thousand persons present at the trial—not two individuals of whom, perhaps, expected this bloody verdict." *Id.*

102. ADAMS PAPERS, *supra* note 26, at 1.

### A. Jurors Determining Disputed Facts

About the resulting trials, Whitman asserts “that there was once again no uncertainty about the facts.”<sup>103</sup> If he means that no one doubted that the eight particular British soldiers were involved in a shooting that left five dead, he is correct. If, however, Whitman means that the guilt of the eight was clear, he is just wrong.

Captain Preston was tried separately from the others, and his trial centered on whether he gave the order to fire. Witnesses testified that he did so, but defense testimony disputed those assertions.<sup>104</sup> Hiller Zobel, in his study of the trials, states that the rebuttal evidence was so strong that an acquittal became assured not because the defense’s case made it clear what happened, but because it created “a picture of confusion, noise and verbal threats. . . . [It] raised serious doubts that the order to fire came from Preston.”<sup>105</sup> The acquittal came not because every one knew what happened, but the opposite—because this was “a case so full of factual uncertainty and evidentiary conflict.”<sup>106</sup> The facts were in doubt even after the trial, and whatever the burden of proof, the acquittal was correct.<sup>107</sup>

The second trial, *Rex v. Wemms*, the trial of the soldiers, contains the first recorded instance of an attorney arguing the reasonable doubt standard and its first recorded judicial instruction.<sup>108</sup> The issue of guilt was closer than in Preston’s trial.<sup>109</sup> Under controlling law, once it was proved that a soldier killed a particular person, the

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103. WHITMAN, *supra* note 27, at 193.

104. ZOBEL, *supra* note 26, at 249–50.

105. *Id.* at 255–56.

106. *Id.* at 256; *see also id.* at 198 (“Like most of the events during the confusion in King Street, the rate of firing is clouded with uncertainty.”).

107. The prosecution probably did not know this before the trial. The prosecutorial office was a part time position, and no money was allocated for investigation. His job was solely to make the trial presentation. “In other words, he was strictly a litigator, not an investigator.” *Id.* at 105.

108. This does not mean that the reasonable doubt standard did not appear in the Preston trial. The surviving records of *Preston* are slenderer than for *Wemms*. While enough exists for a reasonably confident picture of much of what happened in *Preston*, only abbreviated notes are available for the attorneys’ summations and the judges’ instructions. *See id.* at 249; ADAMS PAPERS, *supra* note 26, at 89–97.

109. ZOBEL, *supra* note 26, at 268 (“[T]he question of guilt in the soldiers’ case was much closer than in Preston’s.”).

burden was on him to show that the killing was justified, that is, that he acted in self-defense.<sup>110</sup> *Wemms* focused on whether the soldiers justifiably feared for their safety before they fired. The facts, however, were and remain murky. The jurors' job was not to confirm what was clear, but to make determinations about whether testimony was correct. Thus, John Adams, in his defense summation, stated that witnesses could be, and were, mistaken.<sup>111</sup> Judge Trowbridge instructed the jurors that they ought to reconcile testimony if they could, but if that were not possible, "settle the fact as you verily believe it to be."<sup>112</sup> Later, he noted that testimony indicated that one soldier did not fire and another fired at a boy and missed, but "the witnesses are not agreed as to the person who fired at the boy, or as to him who did not fire at all."<sup>113</sup> Similarly, that judge highlighted that all the evidence could not be correct. For example, testimony indicated, "that there are *two* guns of *eight* not discharged and yet it is said *seven* were fired. This evinces the uncertainty of some of the testimonies."<sup>114</sup>

Zobel concludes:

Somehow it seems fitting that an event so historically inevitable and yet so basically insignificant should have taken place on a moonlit, night before scores of people,

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110. *Id.* at 242 ("Underlying both cases was the legal principle that, once the fact of killing had been proved, the killer bore the burden of convincing the jury that the homicide was legally justified.") Samuel Quincy in addressing the jury for the prosecution in *Wemms* stated, "It is a rule of law Gentleman, when the fact of killing is once proved, every circumstance alleviating, excusing, or justifying, in order to extenuate the crime must be proved by the prisoners, for the law presumes the fact malicious, untill [sic] the contrary appears in evidence." ADAMS PAPERS, *supra* note 26, at 156.

111. *See* ADAMS PAPERS, *supra* note 26, at 261. ("[I]t is apparent, that witnesses are liable to make mistakes . . . I am sure that you are satisfied by this time, by many circumstances, that [Mr. Bass] is totally mistaken in this matter . . ."); *see also id.* at 265 (explaining that the witness Langford "is however most probably mistaken in this matter, and confounds one time with another, a mistake which has been made by many witnesses, in this case, and considering the confusion and the terror of the scene, is not to be wondered at.").

112. *Id.* at 295

113. *Id.* at 298.

114. *Id.* at 308.

without leaving any two witnesses able to give the same account of what happened. If the trials were attempts to establish the truth, they failed; no one yet knows what really happened.<sup>115</sup>

What we do know is that the jury acquitted six soldiers and convicted two of only manslaughter.<sup>116</sup>

B. *Jurors' Private Knowledge*

Unlike what Whitman suggests about eighteenth century trials, the jurors could not use their private knowledge in the Massacre trials.<sup>117</sup> Thus, defense attorney Josiah Quincy told the jury in an opening statement:

But let it be borne deep upon our minds, that the prisoners are to be condemned by the evidence *here in Court* produced against them, and by nothing else. Matters heard or seen abroad, are to have no weight: in general they undermine the pillars of justice and truth.<sup>118</sup>

Justice Trowbridge instructed the jurors that if any of them had relevant knowledge of the case, they should be sworn and testify.<sup>119</sup> He

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115. ZOBEL, *supra* note 26, at 303.

116. ADAMS PAPERS, *supra* note 26, at 312–14. Those two “prayed the *Benefit of Clergy*, which was allowed them, and thereupon they were each burnt in the hand, in open Court, and discharged.” *Id.* at 314.

117. *Id.* at 166.

118. *Id.* Quincy acknowledged that apparently damaging information had appeared about the defendants, but Quincy gave lack of confrontation as a reason for the jurors to disregard it. He said:

It should be remembered, that we were not present to cross examine: and the danger which results from having this publication in the hands of those who are to pass upon our lives, ought to be guarded against. We say we are innocent, by our plea, and are not to be denounced upon a new species of evidence, unknown in the *English* system of criminal law.

*Id.*

119. *Id.* at 290 (“That if any of the jurors are knowing of the facts, they ought to inform the Court of it, be sworn as witnesses, and give their testimonies in Court,

went on to state that the verdict was to be based on the evidence presented in court.

Therefore as by law, you are to settle the facts in this case, upon the evidence given you *in Court*: you must be sensible, that in doing it, you ought not have any manner of regard to what you may have read or heard of the case *out of court*.<sup>120</sup>

### C. Jurors' Spiritual Anxieties

The spiritual concerns that Whitman identifies as leading to wrongful acquittals and forcing out the reasonable doubt rule had no discernible role in the Massacre trials. Nothing indicates that jurors were concerned about their souls for wrongly imposing a blood punishment. Instead, Bostonians were told something quite different. The cry heard again and again was that the righteous should convict, not acquit, a cry supported by Biblical injunctions that in effect demanded blood. Souls were at stake, not for imposing a blood punishment, but if one were not imposed.

These views started to pervade the atmosphere even earlier than the *Preston* and *Wemms* trials. Several weeks before the Boston Massacre, the increasing tensions in Massachusetts produced a confrontation between Ebenezer Richardson and an angry crowd. Richardson fired his musket, wounding several and killing an eleven-year-old boy.<sup>121</sup> Within days, a board with biblical quotations was publicly posted. To anyone who might later sit on Richardson's jury, two of the sacred quotations were particularly applicable: "'Thou shalt take no satisfaction for the life of MURDERER—he shall surely be put to death.' And 'Though Hand join in Hand, the Wicked shall not pass unpunish'd'"<sup>122</sup>

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to the end that it may be legal to their fellows, and the Court may know on what evidence the Jury's verdict is founded.").

120. *Id.* at 291. Trowbridge gave a similar injunction about the law. See ADAMS PAPERS, *supra* note 26, at 291. ("[Y]ou must also be sensible, that you are to take the law from the Court, and not collect it from what has been said by People of Court, or published in the newspapers, or delivered from the pulpits.").

121. See ZOBEL, *supra* note 26, at 176.

122. *Id.* at 178.

Shortly after the Massacre, Boston clergy urged neither hesitancy nor mercy in condemning, but vengeance and convictions.

The Sunday after the shootings, the young Reverend John Lathrop preached a violent sermon in the Old North Church on Genesis 3:10: ‘The voice thy brother’s blood crieth unto me from the ground.’ He spoke of ‘sorrow for the dead, who fell victims to the merciless rage of wicked men; indignation against the worst of murderers. . . .’ Another zealous divine, the Reverend Charles Chauncy, tried to convince one of the wounded to sue Preston for damages. The man refused . . . . Chauncy was unimpressed. ‘If I was to be one of Jury upon his trial,’ he said, ‘I would bring him in guilty, *evidence or no Evidence*.’<sup>123</sup>

Bostonians were citing Genesis 9:6, where God enjoins Noah, “Whoever sheds man’s blood, By man his blood shall be shed; For in the image of God He made man.” At Richardson’s trial, held between the Massacre shootings and the resulting trials, the shorthand version of this verse was shouted out to Richardson’s jury as deliberations began: “Blood requires blood.”<sup>124</sup>

Appeals to this biblical blood injunction and other similar ones urging a killer’s condemnation were so prevalent that they were repeatedly addressed in the Massacre trials. Thus, in the *Wemms* trial, Josiah Quincy’s defense summation acknowledged them, but stressed that the defendants “are *not* to be tried by the *Mosaic* law: a law, we take it, peculiarly designed for the government of a peculiar nation, who being in a great measure under a theocratical form of government, it’s [sic] institutions cannot, with any propriety, be adduced for our regulation in these days.”<sup>125</sup>

Quincy argued that the verse, “[w]hosoever sheddeth blood, by man shall his blood be shed” stated a general rule that could not be

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123. *Id.* at 216.

124. *Id.* at 225. The courtroom crowd said more to the jury. “As the jury began filing out, the shouts increased. ‘Remember, jury,’ someone yelled, ‘you are upon oath. . . . Damn him, don’t bring in manslaughter.’ ‘Hang the dog! Hang him!’ Damn him, hang him! Murder no manslaughter.” *Id.*

125. Josiah Quincy, *Josiah Quincy’s Argument for the Defense*, in ADAMS PAPERS, *supra* note 26, at 234 (quotations omitted).

literally applied because otherwise a person "killing another in self-defence, would incur the pains of death . . . a doctrine that certainly never applied under the *Mosaical* institution."<sup>126</sup> Quincy felt compelled to address two more apparently condemnatory biblical passages, stressing that the defendants were only to be judged by the evidence and law presented in court.<sup>127</sup>

John Adams' summation indicated that a potential juror had been excused because that person thought that God's words to Noah had to be followed.<sup>128</sup> Adams, not surprisingly, was concerned that the biblical passages might still affect those on the jury and went on to say, "I am afraid many other persons have formed such an opinion . . . but this is not the law which does not punish many kinds of killings, including those in self defense."<sup>129</sup>

The judges' concern about the Old Testament passage was so strong that they also felt the need to address it. Judge Trowbridge stated that jurors in the course of the year had heard the precept given to Noah about shedding blood and explicated:

Whence it has been inferred, that whosoever *voluntarily* kills another, whatever the inducement, or

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126. *Id.* at 235.

127. *See id.* He said that "the *murderer* shall flee to the pit," which begged the question whether the defendants were murderers "in the sense of our laws; for you recollect, that what is murder and what is not, is a *question of law*, arising upon facts stated and allowed." Similarly, his statement: "You shall take no satisfaction for the life of a *murderer*, which is guilty of death," begged the same question. Quincy went on to state that the defense had no objection to this when properly applied. "If we have committed a *fault*, on which *our laws* inflict the punishment of *death*, we must suffer. But what fault we have cummitted [sic] you are to enquire: or rather you, Gentlemen, are to find the *facts proved in Court against us*, and the Judges are to see and consider what the law pronounces touching our offence, and what punishment is thereby inflicted as a penalty." *Id.*

128. *See John Adams, Adams' Argument for the Defense*, in ADAMS PAPERS, *supra* note 26, at 255 ("I take notice of this, because one gentleman nominated by the sheriff, for a Juryman upon this trial, because he said, he believed Capt. *Preston* was innocent, but innocent blood had been shed, and therefore somebody ought to be hanged for it, which he thought was indirectly giving his opinion in this cause."). The editors of the *Adams Papers* noted, "The individual has not been identified." *Id.* at 255 n.219.

129. *Id.* at 255–56.

provocation may be, is a *murderer*, and as such ought to be put to death. But surely not only the avenger of blood, and he who killed a thief breaking up an house in the night, were exceptions to the general precept, but also he who killed another in his own defence. Even the Jewish Doctors allowed this and that justly; because the right of self-defence is founded in the law of nature.<sup>130</sup>

Trowbridge stressed and repeated that the defendants were not being tried under Jewish law, but under the common law.<sup>131</sup>

Justice Oliver told the jurors that the command given to Noah that “hath lately been urged in the most public manner very indiscriminately, without any of the softenings of humanity.”<sup>132</sup> Oliver noted that Moses mentioned a similar precept, but

that *Moses* was the best Commentator on his own laws, and he hath published certain restrictions on this law . . . . [T]o construe that law to *Noah* strictly, is only to gratify a blood thirsty revenge, without any of those allowances for human frailties which the law of nature and the *English* law also make.<sup>133</sup>

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130. Edmund Trowbridge, *Trowbridge's and Oliver's Charges to the Jury*, in ADAMS PAPERS, *supra* note 26, at 288.

131. *Id.* at 284 (“[I]t may not be improper, considering what has in the course of this year been advanced, published, and industriously propagated among the people, to observe to you that none of the indictments against the prisoners are founded on the act of this province, or the law given to the *Jews*, but that, all of the indictments are at common law. The prisoners are charged with having offended against the common law, and that only; by that law therefore they are to be judged, and by that law condemned, or else they must be acquitted.”). *See also id.* at 288 (“[T]hese rules of the common law, are the result of the wisdom and experience of many ages. However, it is not material in the present case, whether the common law is agreeable to, or variant from, the law given to the *Jews*, because it is certain, the prisoners are not in this Court to be tried by *that* law, but by the common law, that is according to the settled and established rules, and antient customs of the nation, approved for successions of ages.”).

132. *Id.*

133. *Id.* at 304.

The contention at the heart of Whitman's analysis, that reasonable doubt emerged to aid convictions by salving jurors' souls terrified of wrongly convicting, is simply not supported by the Boston Massacre trials. Whatever effect that spiritual anxiety had on the standard's development in England, it does not seem to have had that effect on the first known use of the standard, which was in America. Instead, the spiritual anxiety at work when the standard was first articulated was just the opposite—that God-fearing jurors would feel religiously compelled to condemn, even if the facts and the applicable law did not support a conviction. The judicial concern in the Boston Massacre trials was that religion would produce an unreasoning conviction, not an acquittal.

*D. The Reasonable Doubt Instruction as an Aid to Acquittals*

The conclusion that the purpose of the first known articulation of the reasonable doubt standard was to aid convictions comes by parsing some trial participants' words. John Adams' summation told the jury, "[T]he best rule in doubtful cases, is, rather to incline to acquittal than conviction . . . . Where you are doubtful never act; that is, if you doubt of the prisoners guilt, never declare him guilty; that is always the rule, especially in cases of life."<sup>134</sup>

The prosecutor, Robert Treat Paine, seemingly responded by stating that English law was benign, a proposition which could best be understood by Coke's observation that the law was

the last improvement of Reason which in the nature of it will not admitt any Proposition to be true of which . . . there remains a doubt; if therefor in the examination of this Cause the Evidence is not sufficient to Convince beyond reasonable Doubt of the Guilt of all or any of the Prisoners by the Benignity and Reason of the Law you will acquit them, but if the Evidence be sufficient to convince you of their Guilt beyond reasonable Doubt the Justice of the Law will require you to declare them Guilty and the Benignity of the

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134. John Adams, Adams' Argument for the Defense, in ADAMS PAPERS, *supra* note 26, at 243.

Law will be satisfied in the fairness and impartiality of their Tryal.<sup>135</sup>

Anthony Morano concluded that Adams was stating the existing law. The jury should “acquit if it doubted that the defendant was guilty.”<sup>136</sup> Paine, in reply, however, was making a “novel plea” that a doubt compelling an acquittal had to be reasonable.<sup>137</sup> Thus, Paine was urging the replacement of an any doubt standard with the reasonable doubt standard, and in Morano’s version, Paine’s midwifery had some success. “Paine’s innovation did influence one justice to break with tradition.”<sup>138</sup> Justice Oliver instructed the jury that “if upon the whole, ye are in any reasonable doubt of their guilt, ye must then, agreeable to the rule of law, declare them innocent.”<sup>139</sup>

Whitman finds Paine not so much an innovator, but an importer, bringing an idea into the law that had long been accepted elsewhere. Paine was expressing “the basic tension between certainty and doubt [that] had been intimately associated with moral theology for centuries . . . .”<sup>140</sup> Paine was merely enunciating the “safer path theology” going back more than a century.<sup>141</sup> “That literature held that doubts that had to be obeyed were those that conformed to ‘reason.’ Indeed, the moralist literature had insisted for a hundred years that qualms of conscience not be allowed prevent the satisfactory workings of public justice.”<sup>142</sup>

If Whitman is correct that it was well accepted that doubts had to conform to reason, then Adams may have been saying the same thing as Paine. Adams’ “doubt” may have been synonymous with Paine’s “reasonable doubt.” If so, this reasonable doubt standard was not something new, invented to aid the prosecution, but just another formulation for what already existed.

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135. Robert Treat Paine, Paine’s Argument for the Crown, in ADAMS PAPERS, *supra* note 26, at 271.

136. Morano, *supra* note 11, at 517.

137. *Id.*

138. *Id.* at 518.

139. Edmund Trowbridge, Trowbridge’s and Oliver’s Charges to the Jury, in ADAMS PAPERS, *supra* note 26, at 309.

140. WHITMAN, *supra* note 11, at 194.

141. *Id.*

142. *Id.* at 193.

What we can be reasonably certain about, however, is that no matter what Adams and Paine meant, the judge who gave that first known reasonable doubt charge was not giving a charge to make convictions easier. While Justice Oliver's language about reasonable doubt might appear as prosecution friendly if it is viewed in isolation, it does not when viewed in its context. The jury instructions containing the reasonable doubt charge were not pro-prosecution but, really, commands to acquit.

The prosecution had faced the difficulty that no witness had testified as to which particular soldier killed three of the victims.<sup>143</sup> The prosecutor offered two theories why, even so, each defendant was still guilty of murder.<sup>144</sup> First, Paine contended that the soldiers were an unlawful assembly, and each soldier was responsible for the assembly's deeds.<sup>145</sup> Paine also maintained that each defendant was liable as a principal if the defendant aided, assisted, and abetted another to do an unlawful act.<sup>146</sup> Paine urged that the rapid firing supported the aiding and abetting theory because it indicated a prior agreement to shoot. And even if the shooting did not show that, it was evidence of abetting "as one by firing encourages the others to do the like."<sup>147</sup>

Justice Trowbridge, who gave the first set of instructions, in essence told the jury to reject Paine's arguments. The rapid firing did not indicate a prior agreement if the defendants were defending themselves.<sup>148</sup>

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143. See Robert Treat Paine, Paine's Argument for the Crown, in *Adams Papers*, *supra* note 26, at 279.

144. *Id.*

145. See *id.* ("But which of the other 5 prisoners killed the other 3 of the deceased appears very uncertain. But this operates nothing in their favour if it appears to you what they were an unlawful Assembly for it has been abundantly proved to you by Numerous Authoritys produced by the Council for the Prisoners, that every individual of an Unlawful Assembly is answerable for the doings [of] the rest.").

146. See *id.* ("[A]ll that are present aiding assisting and abetting to the doing an unlawful act as is charged in the Several Indictments against the Prisoners are also considered as Principals.").

147. Edmund Trowbridge, Trowbridge's and Oliver's Charges to the Jury, in *ADAMS PAPERS*, *supra* note 26, at 297.

148. See *id.* ("The Council for the Crown insist, that the firing upon the people was an unlawful act, in disturbance of the peace, and as the party fired so near together, it must be supposed they previously agreed to do it; that agreement made

If each of the party had been at the same instant so assaulted, as that it would have justified his killing the assailant in defence of his own life, and thereupon each of them had at that same instant fired upon and killed that person assaulted him, surely it would not have been evidence of a previous agreement to fire, or prove them to be an unlawful assembly . . . .<sup>149</sup>

Even if, the Justice continued, that provocation only mitigated murder to manslaughter, the rapid shooting would not indicate a prior agreement or an unlawful assembly.<sup>150</sup> Then, Trowbridge stressed that there was plenty of evidence of an assault that explained the rapid firing.

You will therefore carefully consider what the several witnesses have sworn, with regard to the assault made upon the party of soldiers at the *Custom house*, and if you thereupon believe they were, before, and at the time of, their firing attacked by such numbers, and in such a violent manner, as many of the witnesses have positively sworn, you will be able to assign a cause for their firing so near together, as they did, without supposing a previous agreement so to do.<sup>151</sup>

The judge addressed whether the shooting by one aided and abetted the others by pointing out that since no soldier fired more than

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them an unlawful assembly, if they were not so before, and being so when they fired, all are chargeable with the killing by any one or more of them. However just this reasoning may be, where there is no apparent cause for their firing, yet it will not hold good where there is.”).

149. *Id.*

150. *See id.* (“nor would it have been evidence of such agreement though the attack was not as would justify the firing and killing, if it was such an assault as would alleviate the offence, and reduce it to manslaughter, since there would be *as apparent* a cause of the firing in one case as in the other . . .”).

151. *Id.*

once, the one who fired last could not by that act have encouraged those who fired before.<sup>152</sup> Furthermore, Trowbridge told the jury that a defendant did not unlawfully abet if he had a proper justification for shooting,<sup>153</sup> and the same held even if the provocation only mitigated a killing to manslaughter.<sup>154</sup> He then stressed that soldiers not proven to have aided or abetted others could only be convicted if it were proved that a specific soldier killed a particular person.<sup>155</sup> There was only that kind of proof about two of the five victims and two of the defendants. Thus, this instruction told the jurors that they should acquit all but two of the defendants if the soldiers had been under an attack that allowed for self-defense or mitigated a murder to manslaughter. Finally, the judge, who had already pointed out the many witnesses who had testified to such provocation, dismissed any notion that a jury could not find such an attack.<sup>156</sup> These jury instructions were, therefore, in essence a command to acquit six of the eight defendants. Trowbridge said, "And as the evidence does not shew which three killed the three, nor that either of the six in particular killed either of the three, you cannot find the either of the six guilty of killing them or either [of] them."<sup>157</sup>

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152. *See id.* ("As neither of the soldiers fired more than once, it is evident that he who fired last, could not thereby in fact, abet or encourage the firing of any of those who fired before him, and so it cannot be evidence of such abetment.").

153. Edmund Trowbridge, Trowbridge's and Oliver's Charges to the Jury, in ADAMS PAPERS, *supra* note 26, at 297-98 ("And if he who fired first and killed, can justify it, because it was lawful for him so to do, surely that same lawful act cannot be evidence of an unlawful abetment.").

154. *See id.* at 298 ("[Y]et if it appears he had such a cause for the killing as will reduce it to Manslaughter, it would be strange indeed if the same act should be evidence of his abetting another who killed without provocation, so as to make him who fired first guilty of murder. The same may be said as to all the intermediate firings . . .").

155. *See id.* (If the soldiers were a lawful assembly and did not unlawfully abet each, "they cannot be said to have *in consideration of law* killed those five persons or either of them, but must rest on the evidence of the actual killing: and, if so, neither of the prisoners can be found guilty thereof, unless it appears not that he was of the party, but that he in particular *in fact* did kill one or more of the persons slain.").

156. *See id.* ("[A]nd as the evidence stands, I don't think it necessary to say how it would be in case the first person fired with little or no provocation.").

157. *Id.*

Prosecution evidence, however, showed that William Montgomery and Matthew Killroy each killed a particular victim. Justice Trowbridge stated that a murder conviction for those two was proper only if they had fired without first being assaulted. If there had been an assault that had immediately threatened the soldiers' lives and they fired to preserve their safety, they should be acquitted. If the assault did not place the soldiers' lives in danger, then a verdict of manslaughter was appropriate. Trowbridge continued by stressing that evidence allowed the jury to find self-defense,<sup>158</sup> and the evidence definitely allowed for no more than a manslaughter conviction. He said:

But you must know, that if this part of soldiers *in general* were pelted, with snow-balls, pieces of ice and sticks, *in anger*, this, without more, amounts to an assault, not upon those that were in fact struck, but upon the whole party; and is such an assault as will reduce the killing to manslaughter.<sup>159</sup>

This was not an instruction offering a spiritually safe path that led to a conviction for a blood punishment. Instead, these were instructions that almost commanded an acquittal of murder. Of course, Trowbridge is not the judge who gave the reasonable doubt instruction. Justice Oliver did, but Oliver's charge, which primarily adopted Trowbridge's remarks, sought even more than the earlier instructions to have acquittals of all charges.

Oliver started by castigating those in the community who had sought to prejudice the defendants,<sup>160</sup> and urged the jury "to divest your minds of every thing that may tend to bias them in this

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158. *See id.* (If you believe some of the witnesses, "it will be sufficient to show, that his life was in immediate danger, or that he had sufficient reason to think so.").

159. Edmund Trowbridge, *Trowbridge's and Oliver's Charges to the Jury*, in ADAMS PAPERS, *supra* note 26, at 299.

160. Oliver specifically referred to a newspaper article, which also insulted the court, and said, "I think I never saw a greater malignity of heart expressed in any one piece." *Id.* at 302.

cause.”<sup>161</sup> He then said that because of Justice Trowbridge’s thoroughness, he had little to add to the homicide definitions,<sup>162</sup> and recommended that the jurors first consider whether the soldiers or those confronting the soldiers were an unlawful assembly.<sup>163</sup> His summary stressed the lack of doubt on a key issue:

It would be too tedious to recite the numbers of testimonies to prove a design to attack the soldiers . . . there are no less than *thirty-eight* witnesses to this fact, *six* of whom the council for the King have produced. Compare them Gentlemen, and then determine whether or not there is any room to doubt of the numbers collected around the soldiers at the *Custom house*, being a riotous assembly.<sup>164</sup>

Evidence instead showed that the crowd had committed provocative acts that justified the firing.<sup>165</sup> He, again, echoed Trowbridge by noting that the lack of proof as to which particular defendant killed three of the victims was an evidentiary absence that required acquittals. “[T]his maxim of law cannot be more justly applied, than in this case, *viz.* That it is better that *ten* guilty persons escape, than *one* innocent suffer . . . .”<sup>166</sup>

Oliver conceded that Montgomery had killed one of the victims. While Trowbridge left open the possibility of a manslaughter conviction for that soldier, Oliver indicated that Montgomery should be

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161. *Id.* at 303.

162. *See id.* (“I should have given to you the definitions of the different species of homicide, but as my brother hath spoke so largely upon this subject, and hath produced so many and so indisputable authorities relative thereto, I would not exhaust your patience which hath so remarkably held out during this long trial.”).

163. *Id.* at 304 (“I would recommend to you, *Gentlemen*, in order to your forming a just verdict in this cause, to satisfy yourselves in the *first* place, whether or not the prisoners at the bar were an unlawful assembly when they were at the *Custom-house*, for on that much depends their guilt or innocence.”)

164. Edmund Trowbridge, *Trowbridge’s and Oliver’s Charges to the Jury*, in ADAMS PAPERS, *supra* note 26, at 306.

165. *Id.* at 307–08.

166. *Id.* at 308.

totally acquitted.<sup>167</sup> Oliver asserted that the attacks on Montgomery provided a legal justification for the killing.<sup>168</sup> “[H]ere take the words and the blows together, and then say, whether this *firing* was not justifiable.”<sup>169</sup> He concluded his evidence summary by downplaying the importance of the proof against Killroy.<sup>170</sup> Oliver, as he had in the Richardson trial, indicated that the jury should acquit entirely.<sup>171</sup>

Oliver’s reasonable doubt instruction came after this recital of the reasons why all should be acquitted. He said that if the jury found that the soldiers were acting lawfully and only fired when

there was a necessity to do it in their own defence, which I think there is a violent presumption of: and if, on the other hand, ye should find that the people who were collected around the soldiers, were an unlawful assembly, and had a design to endanger, if not take away their lives, as seems to be evident, from blows succeeding threatnings; ye must, in such case acquit the prisoners; or if upon the whole, ye are in any reasonable doubt of their guilt, ye must then, agreeable to the rule of law, declare them innocent.<sup>172</sup>

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167. *See id.*

168. *Id.*

169. *Id.*

170. Edmund Trowbridge, *Trowbridge’s and Oliver’s Charges to the Jury*, in ADAMS PAPERS, *supra* note 26, at 308–09.

171. In this portion of his charge where he urged a complete acquittal, Oliver was acting as he had in the *Richardson* trial. *See ZOBEL*, *supra* note 26, at 224–25 (explaining that the judges “agreed that Richardson, having acted in self-defense, could be held for nothing more than manslaughter . . . . Oliver went farther than the other judges; Richardson, he said, had committed no offense at all, not even manslaughter.”). Opprobrium was heaped upon Oliver for his role in the Richardson trial, which drew the judge’s comment in the Preston trial. Oliver “also reminded the [Preston] jury of the contempt he had personally received during Richardson’s trial.” *Id.* at 265.

172. Edmund Trowbridge, *Trowbridge’s and Oliver’s Charges to the Jury*, in ADAMS PAPERS, *supra* note 26, at 309.

Justice Oliver, a Royalist and Tory, opposed to what he saw as the Boston mob,<sup>173</sup> did not mention reasonable doubt to aid the prosecution. Oliver's instructions stated that there was a "violent presumption" in favor of justification, but even if the jurors did not agree with what was "evident," that the defendants had proved self-defense, the jurors still had to acquit if the jurors had a reasonable doubt about their guilt.<sup>174</sup> The reasonable doubt instruction was not given to make a conviction easier, but was another arrow that told the jury that they should acquit.<sup>175</sup>

## VI. REASONABLE DOUBT AS ENLIGHTENMENT THINKING

Barbara Shapiro and James Franklin present accounts of the reasonable doubt's development that are similar to each others and differ from Whitman's. In their views, the true driving force for the rule's evolution came not from concerns over blood punishments, but instead from a complex interrelationship between legal developments and the epistemological advances in other disciplines, including religion, philosophy, and science.<sup>176</sup> These disciplines all shared a concern with determining when knowledge derived from the senses "yield conclusions which were sufficiently true to serve as the basis for conduct of human affairs."<sup>177</sup>

The legal system first led the way. Franklin, in *The Science of Conjecture: Evidence and Probability Before Pascal*, notes that seventeenth century English law rejected the rigid notion that facts could be established by merely using presumptions or adding togeth-

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173. See ZOBEL, *supra* note 26, at 4 ("the Tory Peter Oliver"); see also *id.* at 4 ("Royalist").

174. Edmund Trowbridge, *Trowbridge's and Oliver's Charges to the Jury*, in ADAMS PAPERS, *supra* note 26, at 309.

175. *Id.*

176. See BARBARA J. SHAPIRO, "BEYOND REASONABLE DOUBT" AND "PROBABLE CAUSE" 2 (1991) ("[T]he judges confronted twin sources of epistemological guidance. One was the English religious tradition, particularly the casuistical tradition, which sought a rational method of decision making in everyday life. The other was the scientific movement of Bacon, Boyle, and especially Locke and the empirical philosophers, who sought to establish scientific truth from the evidence they gathered.").

177. *Id.* at 7.

er partial proofs.<sup>178</sup> Instead, that law recognized that trial proof was a matter of probabilities and that facts could not be established with absolute certainty or without doubt. Even so, a high degree of certainty could and should be demanded. Shapiro states that this English legal culture was “a widely admired mode of establishing correct beliefs in the world of ‘fact.’” During the early modern era the English legal system had produced a well-accepted epistemological framework and a method of implementing it that worked reasonably well in reaching judgments of ‘fact’ necessary to make important social decisions.”<sup>179</sup> Because this jury system was highly regarded in English society, other fields took note of the methods for reaching “moral certainty” in the legal field.<sup>180</sup> While the nomenclature varied among the disciplines, they all concluded that “[t]here were three subcategories of knowledge, each possessing a different kind of certainty: physical, derived from immediate sense data; mathematical, established by logical demonstration such as the proofs in geometry; and moral, based on testimony and secondhand reports of sense data.”<sup>181</sup> In this last category, knowledge could not be absolutely proved but still could be raised to a level much above mere opinion and form the basis for human conduct.<sup>182</sup> “All the discourses of fact

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178. See JAMES FRANKLIN, *THE SCIENCE OF CONJECTURE: EVIDENCE AND PROBABILITY BEFORE PASCAL* 62 (2001) (“[S]ubtle distinctions among grades of presumptions, and fractions of proof, were ill adapted to explanation to juries.”).

179. SHAPIRO, *supra* note 39, at 32.

180. “[T]he absorption and spread of ‘fact’ in England was facilitated by widespread familiarity with and esteem for lay fact finding juries. Efforts by naturalists, historians, rationalizing theologians, and even novelists to rely on the credible testimony of firsthand witnesses thus built and were assisted by an already existing, legitimate, widely shared, and often glorified cultural practice.” See *id.* at 209. For example, a basic principle of the judicial system spread, and “[a]ll the fact-oriented disciplines exhibited a preference for personal observation and a belief that the testimony of credible witnesses under optimum conditions could yield believable, even morally certain ‘facts.’” *Id.* at 211.

181. SHAPIRO, *supra* note 176, at 7–8. Cf. *id.* at 41 (“[T]here are two realms of human knowledge. In one it is possible to obtain the absolute certainty of mathematical demonstration . . . . In the other, which is the empirical realm of events, absolute certainty of this kind is not possible.”).

182. See *id.* at 7 (“The attempt to build an intermediate level of knowledge, short of absolute certainty but above the level of mere opinion, was made by an overlapping group of theologians and naturalists.”); see also *id.* at 41 (“[J]ust because

emphasized the quest for evidence of facts sufficient to reach ‘moral certainty.’”<sup>183</sup>

A crucial step in reasonable doubt’s emergence was the development of the “satisfied conscience” test, which, according to Shapiro, was the first English legal standard explicitly used for the evaluation of facts and testimony.<sup>184</sup> The concept came from the English Protestant tradition that “insisted that the conscience involved an act of the intellect, not the will . . . [, and] each person to be his own strictest judge. The judgment of conscience thus could not involve deferring to the authority or the wishes of another person.”<sup>185</sup>

This English religious tradition was concerned with the overly scrupulous conscience since such a “doubtful conscience which substituted excessive suspicion for care would never find itself at rest.”<sup>186</sup> Conscience, however, was a product of rationality and understanding and not of the passions or feelings. Since conscience was a product of reason,<sup>187</sup> however, a person seeking the solace of a right conscience did not have to reach mathematical certainty. A satisfied conscience was achieved if the conscience was without reasonable or rational doubt. Shapiro says that the connection between the English religious formulations and the later legal development of

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absolute certainty is not possible, we ought not to treat everything merely as a guess or opinion. Instead, in this realm there are levels of certainty, and we reach higher levels of certainty as the quantity and quality of evidence available to us increase.”).

183. SHAPIRO, *supra* note 39, at 211. *See also id.* at 46–47 (“History and law both were disciplines committed to determining the truth of past events . . . . In history as in law, moral certainty was the highest certainty available for matters of fact.”).

184. *See* SHAPIRO, *supra* note 176, at 13, 14 (“The ‘satisfied conscience’ standard became the first vessel into which were poured the new criteria for evaluating facts and testimony. . . . Satisfied conscience is central to the development of the beyond reasonable doubt standard.”). *See also id.* at 41 (“The earliest standards we have identified were ‘satisfied belief’ and ‘satisfied conscience.’”).

185. *Id.* at 15.

186. *Id.* at 16.

187. *See id.* at 16 (“It is important for us to emphasize that the judgment of conscience was a rational decision . . . . [Religious figures] repeatedly insisted that conscience is a function of the understanding, not the passions. To go against conscience is to go against reason.”).

reasonable doubt can be seen in the words of Robert South, an Anglican cleric who, like others,

insisted that mathematical certainty of demonstration was not necessary in order to be assured of the rightness of one's conscience. It was sufficient 'if he know it upon the grounds of a convincing probability, as shall exclude all rational grounds of doubting it.' The language of rational or reasonable doubt was thus part of the language of the right and sure conscience in England before it entered the legal sphere.<sup>188</sup>

This notion of conscience spread from moral theology to philosophy and science where it appeared most notably in the thinking of John Locke, who "links conscience with the understanding, not passions."<sup>189</sup> Locke's work had a central role in formulating the philosophical concept of fact,<sup>190</sup> and he drew on legal processes to advance his arguments.<sup>191</sup> The crucial insight of this Enlightenment age, as embodied in the work of Locke and others, was that knowledge could be advanced not merely through deductive thought, but also by induction; that knowledge could be gained not merely through mathematical logic, but also by applying reason to experience.

The inductive approach, based ultimately on experience, had a special appeal in the age of Enlightenment. Basically, it implied an experiential test of knowledge or of system, the same kind of criterion of truth that in the sciences had become Newton's 'Proof

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188. *Id.* at 16–17 (quoting HENRY R. MCADOO, *THE STRUCTURE OF CAROLINE MORAL THEOLOGY* 77 (1949) (quoting Robert South, *WORKS*, sermon 23 (Oxford, 1828).).

189. SHAPIRO, *supra* note 39, at 17.

190. *See id.* at 189 ("Locke's *Essay on Human Understanding* (1690) played a central role in generalizing the concept of fact and giving it philosophical form and status.").

191. *Id.* at 191 (For Locke, "[l]egal practice and concepts clearly had philosophical application.").

by Experiments' or a reliance on critical observations.<sup>192</sup>

The intellectual flow between law and the other disciplines reversed.<sup>193</sup> "During the seventeenth century, legal concepts played an important role in shaping empirical philosophy. Now empirical philosophy as formulated by Locke and his successors came to influence legal writing, creating a symbiosis between epistemology and the law of evidence."<sup>194</sup> For example, the first legal treatise on evidence appeared in 1754. This work, written by Sir Geoffrey Gilbert, who also wrote an abstract of Locke's work, presented the law of evidence in a Lockean framework. "The rules of evidence did not change substantially with Gilbert. Instead of appearing as a series of ad hoc professional norms, however, they are now presented as built on a sound and systematic epistemological foundation," which drew on the formulations of Locke and others.<sup>195</sup>

When English judges started to formulate rules or burdens for resolving disputed matters of fact, according to Shapiro they turned to the other intellectual fields that were already developing or accepting such standards. As a result, the law concluded that "[w]hen the . . . jurors reached a state of a 'satisfied conscience' or 'moral certainty,' conviction was appropriate."<sup>196</sup> These two terms were synony-

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192. BERNARD COHEN, SCIENCE AND THE FOUNDING FATHERS: SCIENCE IN THE POLITICAL THOUGHT OF THOMAS JEFFERSON, BENJAMIN FRANKLIN, JOHN ADAMS & JAMES MADISON 58 (1995).

193. See SHAPIRO, *supra* note 39, at 214 ("If the direction of influence in the seventeenth century ran from law to natural history, it appears to have reversed in later centuries as writers on legal evidence began to draw on the authority of scientific fact finding."). Cf. FRANKLIN, *supra* note 178, at 365 ("By 1700 law had served its purpose for the mathematical theory of probability. The service was never returned. Legal probability has continued to exist, and it is accepted in legal theory that such notions as proof beyond reasonable doubt involve probability. But all attempts to quantify the concept have been resisted.").

194. SHAPIRO, *supra* note 39, at 193. See also *id.* at 192 ("Locke's *Conduct of the Understanding* perhaps provides the best summary of my argument for the appropriation of legal and historical fact determination by the virtuosi. . . .").

195. *Id.* at 193.

196. *Id.* at 23.

mous,<sup>197</sup> and judges also used related formulations that were meant to convey the same standard.<sup>198</sup> But, the satisfied conscience and moral certainty tests always conveyed a reasonable doubt standard.<sup>199</sup>

Over time judges became increasingly likely to mention doubts on the part of the jury. From the mid-eighteenth century the now familiar ‘beyond reasonable doubt’ terminology of modern Anglo-American law was added to its cognates, ‘satisfied conscience’ and ‘moral certainty.’ The meaning of all these phrases was identical and they were used together.<sup>200</sup>

In contrast to the assertion that the reasonable doubt rule was a new standard that made convictions easier by replacing an any doubt rule that permitted acquittals based on irrational or frivolous beliefs or feelings, Shapiro maintains reasonable doubt was merely a new formulation for the well-settled test.

The term ‘moral certainty’ was taken to mean proof beyond a reasonable doubt. If one had real doubts, moral certainty was not reached. The term ‘beyond reasonable doubt’ was, I believe, not a replacement

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197. *See id.* at 23 (“The ‘satisfied conscience’ standard was synonymous with the term ‘moral certainty.’”).

198. *See id.* (“Late-seventeenth-century judges often used expressions such as ‘if you are satisfied or not satisfied with the evidence’ or ‘if you believe on the evidence.’ . . . During the early eighteenth century there was increasing reference to the understanding of jurors. . . . Understanding and conscience were concerned with the same mental processes.”); *see also* SHAPIRO, *supra* note 176, at 20 (Early cases used a satisfied conscience formulation, but this satisfaction came “only when the reasoning faculties were exercised upon the evidence.” Over time, courts referred less to conscience and more to mind and belief. “A guilty verdict was appropriate if the jurors ‘believed,’ an acquittal if they were not ‘satisfied.’”).

199. *See* SHAPIRO, *supra* note 39, at 23 (When jurors “entertained reasonable doubts, they were to acquit.”).

200. *See id.*; *see also* SHAPIRO, *supra* note 176, at 20 (illustrating that the concept that jurors should convict only if “satisfied” or “fully satisfied” continued. “The requirement that the jury be ‘fully satisfied’ or ‘satisfied’ on the basis of the evidence continues as a common feature.”).

for the any doubt test but was added to clarify the notions of moral certainty and satisfied belief. . . . Reasonable doubt was simply a better explanation of the satisfied conscience standard that resulted from increasing familiarity with the moral certainty concept.<sup>201</sup>

Franklin essentially agrees with Shapiro that the reasonable doubt concept had been the foundation of the law long before that term emerged. Franklin summarizes:

Eventually all probabilistic concepts in English law were reduced to one word, *reasonable*. The common understanding that the standard of proof in criminal trials should lie somewhere between suspicion and complete certainty came to be expressed solely in the formula 'proof beyond a reasonable doubt.' Gradually, any question on the evidential relation between facts became expressible in terms of what the reasonable man would think.<sup>202</sup>

The reasonable doubt formulation may have emerged around 1770, but the idea it expressed was the same as that contained in "moral certainty,"<sup>203</sup> and that centuries-old moral-certainty term meant, as did the reasonable doubt standard which replaced it, to "a very high but not complete degree of persuasion."<sup>204</sup> The reasonable

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201. SHAPIRO, *supra* note 176, at 21. See also *id.* at 41 ("The highest level of certainty in this empirical realm was called . . . 'moral certainty,' a certainty which there was no reason to doubt.").

202. FRANKLIN, *supra* note 178, at 62–63.

203. See *id.* at 366 ("From around 1770, English law adopted the phrase 'proof beyond a reasonable doubt' (originally defined as equivalent to 'moral certainty') for the standard of proof required in a criminal case.").

204. *Id.* at 69 ("Jean Gerson, chancellor of the University of Paris around 1400 . . . seems to have been the first to introduce the term, occasionally still heard in English, 'moral certainty' . . . to mean a very high but not complete degree of persuasion."); see also *id.* at 371 ("Johnson's *Dictionary* of 1755 defines *probability* as 'Likelihood; appearance of truth; evidence arising from the preponderation of argument: it is less than a moral certainty' . . .").

doubt standard, then, did not make convictions easier by replacing the any doubt standard. Instead, reasonable doubt was just another formulation of a long-utilized standard that did not demand absolute certainty but did require a strong certitude based on reason.

#### VII. JURY REFORMS, NOT FROM THE ENLIGHTENMENT, BUT FROM POLITICAL DEVELOPMENTS

George Fisher's historical study of the jury's role in determining truth, however, casts a dubious eye on the assertion that epistemological advances in such fields as science, philosophy, and religion fueled jury developments. Instead, jury reforms were "the product of political conflict, not intellectual growth."<sup>205</sup>

As an example, Fisher cites the notorious treason trials in late seventeenth century England, where convictions were obtained through perjury. Parliament responded by providing treason defendants rights that the common law had not granted, including the authority to call sworn witnesses. Fisher concludes that the lawmakers did not primarily adopt the reforms because of any new intellectual outlook. He states:

It is true that an evolving epistemology of the sort that Barbara Shapiro describes, which could deal more comfortably with conflicting evidence in the courtroom, might have given the Parliamentarians courage in the change they undertook. . . . But for the religious strife and consequent spate of treason trials of the late Stuart reigns, and but for the sufferings that notorious perjurers . . . inflicted on eminent men of both political persuasions, Parliament would not have granted criminal defendants the right to call sworn witnesses at the end of the seventeenth century or, very likely, for decades to come.<sup>206</sup>

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205. See generally Fisher, *supra* note 56, at 615.

206. *Id.* at 623–24.

Fisher does not suggest that every change in jury practice resulted from a particular political controversy,<sup>207</sup> but the underlying force for reform was not advancing epistemologies. Instead, changes were made to keep the jury system appearing legitimate.<sup>208</sup>

Whitman's views to some extent coincide with the notion that a legitimacy concern brought changes to the jury. He sees the reasonable doubt standard emerging to counter the increasing illegitimacy that the system faced from wrongful acquittals. On the other hand, as we have seen, nothing indicates that the American jury system was under attack because the guilty were being acquitted.<sup>209</sup> As the "constitutionalization" of jury trials indicates, juries in America were seen as essential. Furthermore, Fisher's history has the jury's legitimacy questioned because of wrongful convictions, not acquittals, with the response that more rights were granted to defendants, not more powers to the prosecution.

Fisher may be right about abrupt changes in the system, especially those coming through statutes. Such reforms may have had specific causes that produced political pressures, but the forces underlying evolutionary changes, such as the formulations of the burden of proof, are not as readily identifiable and are, no doubt, more subtle. Epistemological advances permeating society can be important forces for such transformations even if the intellectual developments have not left unambiguous blazes on the legal trail.

#### VIII. AMERICAN REASONABLE DOUBT AND ENLIGHTENMENT THINKING

Shapiro and Franklin's accounts largely focus on developments in England, but their views also lead to an explanation for reasonable doubt's first articulation across the Atlantic. Enlightenment thought

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207. *See id.* at 703 ("It would be foolish to argue that each of these trends and events traces to a political or social controversy that operated outside the justice system.").

208. *See id.* at 704 ("I suggest that the most substantial force behind this enormous historical trend has been the system's concern with its own apparent legitimacy."); *see also id.* at 705 ("The jury . . . promised a remarkably reliable source of systemic legitimacy.").

209. *See supra text* at Part IV.A–G.

pervaded eighteenth century America. Bernard Cohen, in *Science and the Founding Fathers*, points out that

the American nation was conceived in a historical period that is generally known as the Enlightenment, or the great Age of Reason, and science was then generally esteemed as the highest expression of human rationality. . . . It is simply inconceivable that thinking men and women of the eighteenth century would be uninfluenced by the ideals, the concepts, the principles, and even the laws of the science that Newton created or by other achievements in the physical and life sciences and medicine.<sup>210</sup>

Cohen contends that the inductive approach to knowledge of science was especially attractive to Americans.

The constant regard for the lessons of experience had to be significant to citizens of the New World in a way that was not the case for Europeans, simply because in the New World there was a consciousness of a frontier, even for those who lived in urban centers or on farms and plantations far removed from the boundaries of the wilderness and the domains of the Indians. Woe to anyone who was so wedded to theory or abstractions as to neglect the hard facts of brute experience.<sup>211</sup>

Certainly many eighteenth century Americans had knowledge of the twin beacons of the Enlightenment, John Locke and Isaac Newton.<sup>212</sup> This came through formal education,<sup>213</sup> but the knowledge

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210. COHEN, *supra* note 192, at 20.

211. *Id.* at 57–58.

212. *See id.* at 59 (“Two great intellectual heroes of that age were the philosopher John Locke and the scientist Isaac Newton, sometimes called the ‘twin luminaries’ of the Augustan Age.”).

213. *See id.* at 99 (“All students of science in the days of Jefferson’s youth would have studied Newton’s *Opticks* . . . . [T]he *Opticks* was literally a handbook of the

spread further because this was an American age that saw scientific findings being regularly reported in newspapers and presented in popular demonstrations and lectures.<sup>214</sup>

Perhaps the strongest indication that Enlightenment precepts had permeated the society is that eighteenth century Americans could make references to the thinking of Newton and Locke without explanation. It was simply assumed that the audience would understand. For example, James Wilson, in his legal lectures, argued that society should be able to change its constitution. He addressed the contention that an alterable constitution could lead to political instability by stating:

The very reverse will be its effect. Let the uninterrupted power to change be admitted and fully understood, and the exercise of it will not lightly or wantonly assumed. There is a *vis inertiae* in publick bodies as well as in matter; and, if left to their natural propensities, they will not be moved without a proportioned propelling cause.<sup>215</sup>

Wilson was referring, without further explanation, to the Newtonian principle that a body at rest remains that way without an external force.<sup>216</sup> Cohen says about this passage:

It is, I believe, significant that Wilson did not find a need for an explicit reference to Newton or for a mention of the *Principia* by name. He apparently assumed that his audience would be sufficiently

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method of experiment, showing not only how to devise and perform experiments, but also how to draw conclusions from them.”).

214. *Id.* at 181 (“This was an age of great general interest in science, a subject reported regularly in the newspapers and brought to the attention of the curious through popular lectures and demonstrations.”).

215. WILSON, *supra* note 83, at 305.

216. See COHEN, *supra* note 192, at 36 (Wilson was “using Definition Three of Newton’s *Principia*, in which Newton introduced the concept of ‘vis Inertiae,’ or ‘force of inertia,’ an ‘inherent’ force that exists in every variety of matter that causes a body to resist any change in its state of rest or motion.”).

schooled in the Newtonian natural philosophy to recognize the source of his analogy.<sup>217</sup>

The work of Jonathan Edwards further indicates the reach of Enlightenment principles in eighteenth century America. Edwards, who read widely in the philosophers and scientists of the age, “sought to reconcile piety with the new scientific and philosophical age demarcated by Newton and Locke.”<sup>218</sup> His sermons, which no doubt reached many societal strata, contained reference to Newton and Locke by name with little or no exegesis of what they said.<sup>219</sup> Edwards simply assumed that the congregants would understand.

Americans “believed science to be a supreme expression of human reason.”<sup>220</sup> The sound methods of science could not only help explain the present world and make accurate predictions,<sup>221</sup> they, as trials seek to do, “could also retrodict past events . . . .”<sup>222</sup> In this culture, it would have been remarkable if the standards used to gauge scientific testimony and witnesses did not affect the standards used to assess trial proceedings.<sup>223</sup>

The effect of Enlightenment insights on American legal thinking are revealed when James Wilson’s legal lectures turned to the topic of obtaining knowledge from human affairs. Wilson started with the distinction that “evidence, which arises from reasoning, is divided into two species—demonstrative and moral.”<sup>224</sup> Demonstrative evidence concerns abstract truths that are unchangeable. In this realm,

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217. *Id.* at 38. Similarly, Thomas Jefferson’s *Notes on Virginia* incorporates rules obtained from Newton without finding “a need to mention either the name of Newton or the title of his book. [Jefferson] assumed that Newton’s rules were so well known to his readers that to mention either Newton’s name or the title of his treatise would be supererogatory, a breach of good taste in rhetoric.” *Id.* at 76–77.

218. John E. Smith et al., *Introduction* to JONATHAN EDWARDS READER, *supra* note 58, at viii.

219. *See* JONATHAN EDWARDS READER, *supra* note 58, at 15, 194, 205, and 206.

220. COHEN, *supra* note 192, at 279.

221. *See id.* (“Science . . . represented knowledge that was certain. . . . Scientific knowledge was based on sound method . . .”).

222. *Id.*

223. *See id.* at 60 (“In an age in which reason was venerated, science was esteemed as the intellectual manifestation of human reason in action.”).

224. WILSON, *supra* note 86, at 395.

there are no degrees, and demonstrations may vary in their ease of comprehension, but they cannot be opposed to each other. "If one demonstration can be refuted, it must be by another demonstration: but to suppose that two contrary demonstrations can exist, is to suppose that the same proposition is both true and false: which is manifestly absurd."<sup>225</sup>

Other truths, however, are not demonstrative, but moral. In this realm, conflicting proof can, and usually does, exist. "On both sides, contrary presumptions, contrary testimonies, contrary experiences must be balanced. . . . Moral evidence is generally complicated: it depends not upon any one argument, but upon many independent proofs, which, however, combine their strength, and draw on the same conclusion."<sup>226</sup> A factual matter is not an area of absolute truth, but of probabilities that can lead to moral certainty. "In moral evidence, we rise, by an insensible gradation, from possibility to probability, and from probability to the highest degree of moral certainty."<sup>227</sup> Wilson clearly did not see moral certainty as a merely legal construct; it applied to all of human knowledge, and when it reached the highest level, it produced a certainty equivalent to that of demonstrative proof.<sup>228</sup> What is important here is that Wilson's ap-

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225. *Id.* at 396.

226. *Id.*

227. *Id.* Wilson also stated that when a consequence follows an object, the mind begins to anticipate that result when the object occurs. He continued:

If the consequences have followed the object constantly, and the observations of this constant connexion have been sufficiently numerous; the evidence, produced by this experience, amounts to a moral certainty. If the connexion has been frequent, but not entirely uniform; the evidence amounts only to a probability; and is more or less probable, in proportion as the connexions have been more or less frequent.

*Id.* at 389.

228. Wilson said that concurrent testimonies could lead to a probability so strong that it was like demonstrative proof.

When, concerning a great number and variety of circumstances, there is an agreement in the testimony of many witnesses, without the possibility previous collusion between them, the evidence may, in its effect, be equal to that of strict demonstration. That such concurrence could be the result of chance, is as one to infinite; or, to vary the expression, is a moral impossibility.

*Id.* at 386.

proach to matters of fact came not in response to some political event or from a concern that jurors too often acquitted. Instead, his thinking clearly followed the path lit by the Enlightenment. The same standards that applied to science applied to all matters of fact including those disputed at a trial. Wilson's views indicate that American legal thinking in the period when the reasonable doubt standard emerged was greatly influenced by Enlightenment thought about inductive reasoning and how and when to reach the necessary certainty to make decisions.

That reasonable doubt was not something devised to salve the consciences of conviction-reluctant jurors but a general epistemological standard is also indicated by its second known American articulation. In the 1790 case of *Cowperthwaite v. Jones*<sup>229</sup> the Philadelphia branch of the Court of Common Pleas of Pennsylvania considered a motion for a new trial in a civil case.<sup>230</sup> The presiding judge noted that the right of trial by jury required strong reasons to grant new trials so that judges did not replace jurors as the triers of facts.<sup>231</sup> The judge continued:

A reasonable doubt, barely, that justice has not been done, especially in cases where the value or importance of the cause is not great, appears to me to be too slender a ground for them. But, whenever it appears with a reasonable certainty, that actual and manifest injustice is done, or that the jury have proceeded on an evident mistake, either in point of law, or fact, or contrary to strong evidence, or have grossly misbehaved themselves, or given extravagant damages [a court should grant a new trial].<sup>232</sup>

The court's use of reasonable doubt, here, was not in a jury instruction, but was addressed to the judges themselves, and this early use could not have had the purpose of making convictions easier for jurors fearing for their souls. Instead, the court's articulation was con-

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229. 2 Dall. 55 (Pa. 1790).

230. See generally *id.*

231. *Id.* at 55

232. *Id.* at 56.

sistent with the Enlightenment notion that the standard had a wide application for determining when a matter had been well enough established for a particular action to be taken.<sup>233</sup>

### IX. REASONABLE DOUBT AS A NEW STANDARD

The view that reasonable doubt emerged to make convictions easier sees the standard as a conceptually new one. The Boston Massacre trials, however, suggest otherwise and that differing formulations of jury certainty were seen as equivalent.

Justice Trowbridge mingled an in-doubt and an if-you-are-satisfied standard.<sup>234</sup> At one point, he stated, "if upon a full consideration of the evidence in the case, you should be in doubt, as to any one of the prisoners having *in fact* killed either of the persons that were slain," you must consider whether a defendant aided and abetted another's killing.<sup>235</sup> He stated one soldier's killing was justifica-

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233. The third known use of the reasonable doubt by an American court was in a jury instruction. The court in the 1793 New Jersey burglary case of *State v. Wilson*, 1 N.J.L. 439 (1793), charged the jury, "It is, however, a good rule, and it is also a humane rule, to which every virtuous man will assent, that where reasonable doubts exist, the jury, particular in capital cases, should incline to acquit rather than condemn." *Id.* at 442. The standard was a compassionate one to benefit the accused, according to the court, not one to bring convictions in a manner to ease jurors' anxieties. *Cf. id.* The instructing judge went on to say, "If you entertain any doubts, I do not mean doubts wantonly raised, but such as arise from a deliberate consideration of the testimony, these doubts should be determined in favor of life—the prisoner should be acquitted." *Id.* at 444. Here, there is the any doubt standard, but one immediately qualified so that all doubts did not apply. *See id.* The court does not indicate that this formulation is different from a reasonable doubt, but instead seems to say that a doubt has to come out of the reasoning process, that is, that it cannot be wanton and must come from "a deliberate consideration." *Id.* The court gave no hint that this was a new standard, but suggested ancient roots since, according to the court, all virtuous men agree with it, indicating that it had existed as long as virtuous men had existed. *See generally id.*

234. John Adams equated a satisfied mind with not having a doubt. He told the jury about a witness whose testimony was not corroborated, "If you can be satisfied in your own minds, without a doubt, that [the witness] knew *McCauley* so well as to be sure, you will believe he was there." *See* John Adams, Adams' Argument for the Defense, in ADAMS PAPERS, *supra* note 26, at 261.

235. Edmund Trowbridge, Trowbridge's and Oliver's Charges to the Jury, in ADAMS PAPERS, *supra* note 26, at 292. *See also id.* at 290–91 (Trowbridge stated

ble self-defense if the soldier's life had been in danger and continued, "[if] you do not believe that was the case, but upon the evidence are satisfied" that the defendant was attacked without his life being in danger, then the defendant should be convicted of manslaughter.<sup>236</sup> A few moments later, Trowbridge told the jury, "[i]f you are satisfied upon the evidence, that *Killroy* killed *Gray*, you will then enquire, whether it was justifiable, excusable, or felonious homicide . . . ."<sup>237</sup> Thus, the jury was told that if "in doubt" that a defendant killed, consider aiding and abetting. The jury was also told that if "satisfied" that a soldier did kill, then to decide whether the killing was justifiable or, if not, the degree of homicide. Apparently, not being in doubt was the same as being satisfied about the evidence.

These portions of the instruction did not explicitly clarify whether jurors were to use reason or be rational in assessing whether they were satisfied or in doubt, but elsewhere Trowbridge did instruct the jury to use reason. He told jurors to reconcile testimony "if by any reasonable construction of the words it may be done."<sup>238</sup> He also told jurors that instead of concluding that contradictory evidence meant a witness had lied,

if the thing said to be done be such as it may reasonably be supposed some might see and others not, by reason of their want of observation, or particular attention to other matters there, as both may be true, you ought to suppose them to be so . . . .<sup>239</sup>

Thus, according to Trowbridge, jurors were supposed to use reason to see if they were satisfied by the evidence and assess whether they were in doubt about the facts. Trowbridge did not say that all of these tasks were the same, but he certainly did not point to any distinctions among them.<sup>240</sup>

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that the jury could give a general verdict, "but in cases of doubt, and real difficulty, the Jury ought to state the facts and circumstances in a special verdict, that the Court upon farther consideration thereof, may determine what the law is thereon.").

236. *Id.* at 299.

237. *Id.* at 300.

238. *Id.* at 294.

239. *Id.* at 294–95.

240. *See id.* at 282–309.

Trowbridge was certainly not breaking new ground by suggesting that jurors had to use reason to assess if they were satisfied that the evidence established guilt. Jurors were also told that more than a generation earlier in the notorious New York slave conspiracy trials of 1741.<sup>241</sup> There jurors were instructed that “if you should have sufficient reason in your own consciences to discredit [the prosecution witnesses], and that notwithstanding the weight of that evidence, you can think them, or any of them, not guilty, you will then say so and acquit them. . . .”<sup>242</sup> The court then addressed the jury’s role in assessing a particularly important prosecution witness and stated that “if you give credit to her testimony, you will no doubt discharge a good conscience, and find them guilty; if you should have sufficient reason in your own minds to discredit her testimony, if you can think so, you must them acquit them . . . .”<sup>243</sup> The notion that American jurors were to use reason in assessing evidence existed well before the 1770 proceedings.

Justice Oliver, in the Massacre trials, of course, did explicitly talk about reasonable doubt, but he did not state or suggest that he was giving any standard different from Trowbridge’s instructions. Instead, as we have seen, Oliver several times indicated that he agreed with what Trowbridge had instructed. If his use of reasonable doubt had been intended to mean something different from what Trowbridge meant by a satisfied mind, being in doubt, and the use of reason, we might expect that Oliver would have said something explicit about the distinction.

Finally, if Oliver was not just giving another formulation for an existing legal concept, but breaking with established principles and stating a new one that sought to aid convictions, we might expect to find contemporaries commenting on it at its emergence.<sup>244</sup> Nothing in the Boston Massacre trials itself indicates that a new standard was being articulated, and, at least so far, no one has pointed out any account of those proceedings from that time that suggests an unprece-

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241 THE NEW YORK CONSPIRACY TRIALS OF 1741: DANIEL HORMANDEN’S *JOURNAL OF THE PROCEEDINGS* 116–17 (Serena R. Zabin ed., 2004).

242 *Id.*

243. *Id.*

244. *Cf.* SHAPIRO, *supra* note 176, at 22 (“Interestingly, the Boston cases do not suggest that the standard was considered innovative . . . .”).

dented test was being argued and instructed. Since these were not obscure, but closely watched trials, surely the absence of such comment is noteworthy.

## X. LESSONS FOR FINDING THE ORIGINAL MEANING OF AMERICAN CRIMINAL PROCEDURE RIGHTS

### A. *The Impossibility of Finding Definitive Original Meaning for an Evolved Right*

This exploration into the origins of the reasonable doubt standard was not undertaken to ascertain its original meaning, but for insights into searching for the original meaning of other constitutional criminal procedure rights. Perhaps, the most important lesson is that when a right was not legislated, but evolved, finding its definitive original meaning is impossible. The evolutionary steps of reasonable doubt were not accompanied by explanations that might occur today when a statute is proposed and enacted. We do not have cases from the standard's first appearances delineating why it was being used. Contemporaries did not write articles or books about its development, and if they argued about it in court, we do not have those arguments.

It is not just the lack of contemporary commentary, however, that is important. Because the standard evolved, it had neither an individual nor collective drafter. Neither a person nor a specific body decided that the rule should exist. We can look to no historical individual or group who could have authoritatively stated the rule's original purpose, meaning, or intent.<sup>245</sup> Professor Whitman captures an important point when he says about reasonable doubt that, consequently, “[t]here is no original intent to interpret. All that we can do

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245. See WHITMAN, *supra* note 27, at 210–11 (“[T]he phrase has no original drafter . . . . It emerged in a process of collective European rehashing of the precepts of Christian moral theology . . . . It was created not only by English jurists but also by English moralists—and by Italian and Spanish and French moralists and lawyers as well.”).

is try to understand the rule in its original context, which is something quite different.”<sup>246</sup>

Comprehending this context is difficult. To do that, we have to shed our present day biases, but Professor Whitman maintains that we are unlikely to be able to do that because we have lost touch with the world that produced the reasonable doubt standard.<sup>247</sup> This thought should produce humility for those seeking original meaning of criminal procedure rights. When those who have devoted their impressive scholarly powers to capturing the lost world that produced the standard do not agree on the original purposes for that rule, surely only the hubristic among the rest of us can be positive about what that meaning was.

If that is true for reasonable doubt, which has produced so much outstanding scholarship, it is likely true for other criminal procedure rights. The Framers did not create the criminal procedure rights, but were instead protecting already existing rights. If the Framers indicated what they thought a particular right meant, then we might be able to seek the original meaning of the constitutional guarantee in the constitutional debates. But, since they did not, we have to turn to the content of the right, as it existed in the framing era. And since these were evolved rights, the difficulties apparent in finding the original meaning and purposes for the reasonable doubt standard appear for the specifically enumerated constitutional guarantees. Such rights had neither an individual nor collective author and did not have an original intent to interpret. At most, we can seek to understand their evolution in their historical context with all the difficulties that entails.

#### B. *Searching Beyond Legal Texts*

The reasonable doubt scholarship indicates that we can only grasp reasonable doubt's development by seeing the standard's emergence in the broader context of a general eighteenth century epistemological search for how to determine facts from human re-

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246. *Id.* at 211.

247. *See id.* at 209 (“We have lost touch with that old moral world. . . . The older morality required judges to doubt their authority to punish, demanding that they regard the guilty as human beings like themselves.”).

ports and observations. The scholars do not agree on how the other disciplines affected the law, but they agree that we cannot truly understand the development of reasonable doubt merely by looking at judicial opinions and other legal writing. The inquiry must be expanded. If that is true for reasonable doubt, it is also true for other criminal procedure rights concerned about the finding of facts from human actions and reports. The search for a true understanding of the original meaning of such rights has to go beyond judicial opinions, constitutional debates, and legal treatises into the epistemological developments of the age.

An example is the Sixth Amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."<sup>248</sup> Even though the Framers of the Constitution hardly discussed this provision,<sup>249</sup> *Crawford v. Washington*<sup>250</sup> asserted that the Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding."<sup>251</sup> As a result the Court searched for the Confrontation Clause's content by examining the law as it existed at the time of the framing of the Bill of Rights, and the opinion lengthily discusses English cases, and a few American cases, from that era and before as well as various dictionary definitions.<sup>252</sup>

Confrontation is concerned with the determination of facts at trial. The reasonable doubt scholarship indicates that the legal system was not standing alone in seeking how to make factual determinations, but that the law was part of a broader epistemological movement including philosophy, science, and religion that all influenced

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248. U.S. CONST. amend. VI.

249. See Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 77 (1995) ("The origins of the Confrontation Clause are murky. Early American documents almost never mention the right, and the traditional sources for divining the Framers' intent yield almost no information about the Clause.").

250. 541 U.S. 36 (2004).

251. *Id.* at 54; see also *id.* at 43 ("The founding generation's immediate source of the [confrontation] concept . . . was the common law.").

252. See generally Randolph N. Jonakait, "Witnesses" in the Confrontation Clause: *Crawford v. Washington*, Noah Webster, and Compulsory Process, 79 TEMP. L. REV. 155 (2006), for *Crawford*'s use of dictionary definitions.

each other. Other disciplines besides law were concerned with “hearsay” and “testimony” and who were proper witnesses and what evidence was reliable enough to form the basis for decisions.<sup>253</sup> The scholarship about reasonable doubt’s development teaches that this general Enlightenment thinking needs to be studied for any true search into the original meaning and purposes of the Confrontation Clause and other criminal procedure rights concerned with finding facts.

### C. American Original Meaning and English Sources

The reasonable doubt scholarship also illustrates that we should not draw definitive conclusions about the original meaning of American criminal procedure rights from English sources.<sup>254</sup> As we have seen, the available information indicates that the reasonable doubt standard emerged in America before England and that America did not simply adopt or inherit a standard that was first developed in England.

Reasonable doubt is just another possibility illustrating that at least some American rights developed earlier and perhaps in different forms from similar English procedures. The prime example is the right to counsel, which was not granted in England in the eighteenth century, but was in America,<sup>255</sup> to the applause of American legal thinkers.<sup>256</sup>

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253. Barbara Shapiro’s study of the development of “facts” in diverse disciplines including history, science, and religion in early England finds that “suspicion of secondhand or hearsay reports were characteristic of all the discourses of fact.” SHAPIRO, *supra* note 39, at 161. *See also id.* at 211 (“All the fact-oriented disciplines exhibited a preference for personal observation and a belief that the testimony of credible witnesses under optimum conditions could yield believable, even morally certain ‘facts.’ It favored first-person accounts that made vivid the ‘facts’ described.”).

254. *Cf.* Mark deWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 583 (1939) (“[T]he historian cannot assume an explanation of American doctrine to be accurate simply because it is a precise and true statement of English theory.”).

255. *See* Randolph N. Jonakait, *The Rise of the American Adversary System: America Before England*, 14 WIDENER L. REV. 323, 327 (2009) (“England did not permit full representation by defense attorneys until the middle decades of the nineteenth century. In contrast, early America not only did not restrict the role of

The differences in American rights and procedures went beyond the right to counsel and knowledge of the American distinctiveness was not confined to the legal elite. For example, the New York City newspaper *The Royal Gazette*<sup>257</sup> published an article on October 22, 1783, which was datelined London, August 5, and indicated it was reprinting an article from the *Old Bailey Intelligencer*. The recycled English article praised a procedure in the new country.<sup>258</sup>

The Americans, in adjusting their code of criminal law, have adopted one general rule of proceeding, which does honour to their humanity as well as their justice, which is, establishing by law the rule that no man shall be tried for a crime, unless he has notice served on him seven days previous to his trial of the nature of the indictment, together with the names and places of abode of the several witness produced to prove the fact.<sup>259</sup>

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defense attorneys, it guaranteed the right of counsel. It did this not only in the Sixth Amendment to the federal constitution, but also earlier in the state constitutions after Independence -and even before the Revolution, in a number of the colonies.”).

256. For example, Zephaniah Swift in his 1796 treatise about Connecticut law stated that the English law had been rejected in Connecticut.

We have never admitted that cruel and illiberal principle of the common law of England, that when a man is on trial for his life, he shall be refused counsel, and denied those means of defence, which are allowed, when the most trifling pittance of property is in question. The flimsy pretence, that the court are to be counsel for the prisoner will only heighten our indignation at the practice: for it is apparent to the least consideration, that a court can never furnish a person accused of the crime with the advice, and assistance necessary to make his defence.

ZEPHANIAH SWIFT, *A SYSTEM OF THE LAW OF THE STATE OF CONNECTICUT* 398–99 (1796). See also WILSON, *supra* note 86, at 702 (noting that both the United States and Pennsylvania granted a full right of counsel while England did not and stating, “This practice in England is admitted to be a hard one, and not to be very consonant to the rest of the humane treatment of prisoners by the English law.”).

257. This newspaper was published by James Rivington and was preceded by Rivington’s *New-York Gazette* and Rivington’s *New-York Loyal Gazette*. See *THE ENCYCLOPEDIA OF NEW YORK CITY* 811 (Jackson, Kenneth T. ed. 1995).

258. *The Royal Gazette*, Oct. 22, 1783.

259. *Id.*

Obviously this framing-era writer believed that American procedures and rights were not simply the same as those in England and that Americans at least sometimes had greater, desirable protections. Americans reading this article no doubt saw the same. When a few years later Americans were adopting constitutional rights, surely they were not just incorporating narrower, less protective English rights than Americans already had.

The original meaning of American rights cannot be assumed to be found solely in English sources when American rights developed in advance or independently from those in England, but this conclusion only highlights the difficulty in finding the original American rights. Our knowledge of what happened in eighteenth century American courts is so scant that it is often impossible to truly find that original American meaning.

The reasonable doubt scholarship provides an important cautionary lesson. Reasonable doubt is one of the rare times when we have a relevant and detailed early American source. The Boston Massacre trials, and their context, teach that conclusions about the standard's development that might appear valid when only English sources are examined seem dubious when viewed in the American light. Most often, however, we do not have good sources about early American criminal procedure. That should not mean that by default that we rely on English sources to find the original American meaning and purposes of American rights. Instead, the lack of information should make us humble. Without that information, we cannot definitively state the original American meaning of criminal procedure rights.

# A Little Common Sense is a Dangerous Thing: The Inherent Inconsistency Between *KSR* and Current Official Notice Policy

ELI M. SHEETS\*

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“Common sense is not so common.”

-Voltaire<sup>1</sup>

## I. INTRODUCTION

The question of whether an invention is an obvious variation of existing technology is one that has troubled courts for decades. From its roots in nineteenth century case law to the recent Supreme Court decision *KSR v. Teleflex, Inc.*,<sup>2</sup> the doctrine of obviousness has waxed and waned—moving through a variety of judicially-created tests to a current state that is still far from perspicuous.

This paper will examine obviousness through a particular lens: the U.S. Patent and Trademark Office (“USPTO,” “PTO”) tool known as “official notice”—the practice of declaring a patent application’s claims unpatentable as obvious based on undocumented reasoning, such as the common sense or common knowledge of a person having ordinary skill in the art to which the application pertains.<sup>3</sup> After *KSR*, using unsubstantiated common sense-based rationales for rejecting patent claims is considered a completely valid practice.<sup>4</sup> However, a line of obviousness cases, including one from the United States Supreme Court, stands for the polar opposite position—that declaring a patent invalid as obvious without underlying prior art support does not comport with the standards of the Administrative Procedure Act.<sup>5</sup> Unfortunately, this contradiction leaves patent practitioners and the federal district courts to reconcile diametrically opposed holdings, especially when a case involves official notice.

Part II of this paper will give a brief history of general obviousness jurisprudence up to the Supreme Court’s *KSR* decision in 2007. Next, Part III will introduce the reader to the obviousness inquiry through the eyes of a USPTO examiner by presenting a hypothetical

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1. VOLTAIRE, DICTIONNAIRE PHILOSOPHIQUE (1764).

2. 550 U.S. 398 (2007).

3. See MANUAL OF PATENT EXAMINING PROCEDURE § 2144.03 (8th ed. Rev. 8, July 2010) [hereinafter MPEP].

4. See, e.g., *KSR*, 550 U.S. at 421.

5. *Dickinson v. Zurko*, 527 U.S. 150 (1999).

patent application scenario and defining various terms of art. Part IV will introduce the concept of formal official notice at the USPTO, including an examination of the official agency guidelines for the practice, and will present a judicial history of official notice. Part V will return to *KSR*, presenting more recent Federal Circuit obviousness cases and introducing the problems that the current jurisprudence brings about. Finally, Part VI will conclude with potential solutions to the issue, arguing that the judiciary should hold the USPTO to task in providing evidence that an invention is in fact obvious.

## II. A BRIEF HISTORY OF OBVIOUSNESS JURISPRUDENCE: TOWARD A FLEXIBLE APPROACH TO THE § 103 INQUIRY

In 1952, Congress passed the Patent Act, which specifies many requirements that an applicant must fulfill to obtain a patent—best mode, patentable subject matter, written description, enablement, and novelty, to name a few.<sup>6</sup> However, the most frequently litigated section of the Patent Act mandates that, to obtain a United States patent, one must present an invention that is nonobvious.<sup>7</sup> Specifically, the statute mandates that:

A patent may not be obtained . . . if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art . . . .<sup>8</sup>

Interestingly, though the nonobviousness requirement of § 103 is currently mandated by statute, before 1952, the nonobviousness requirement was developed and enforced by the federal courts.<sup>9</sup> In 1850, the Supreme Court decided *Hotchkiss v. Greenwood*,<sup>10</sup> holding that some form of inventive ingenuity greater than that held by

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6. See, e.g., 35 U.S.C. §§ 101–103 (2010).

7. *Id.* § 103(a) (2010).

8. *Id.*

9. See *id.*

10. 52 U.S. 248 (1850).

someone familiar with the art is needed for patentability.<sup>11</sup> *Hotchkiss* involved a rather simple technological improvement: the substitution of clay or porcelain for wood or metal in a doorknob.<sup>12</sup> The Court held that such an improvement was “the work of the skilful mechanic, not that of the inventor,” and held that the patent at issue was invalid.<sup>13</sup> Notably, although *Hotchkiss* did not specifically recite the word “nonobviousness,” it did emphasize the idea of the ordinary knowledge of one of skill in the art when attempting to define “invention.”<sup>14</sup>

A. *Graham v. Deere and the TSM Test: Defining the Obviousness Standard*

Over a decade after Congress’s codification of the nonobviousness requirement, the Supreme Court again took on the nonobviousness principle in *Graham v. John Deere Co. of Kansas City*<sup>15</sup> in an effort to define a discernable judicial and administrative standard for § 103’s application.<sup>16</sup> *Graham* involved the validity of an issued patent drawn to a field plow improvement, which the Court ultimately deemed obvious in view of the prior art.<sup>17</sup> More important than the ultimate invalidity determination, however, was the obviousness test the Court formulated. The *Graham* standard, which is used to this day both in the federal courts and at the USPTO included three technical factors, commonly referred to as the “primary *Graham* factors”:

Under section 103, [1] the scope and content of the prior art are to be determined; [2] differences between the prior art and the claims at issue are to be ascertained; and [3] the level

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11. *Id.* at 267 (“[U]nless more ingenuity and skill . . . were required . . . than were possessed by an ordinary mechanic acquainted with the business, there was an absence of that degree of skill and ingenuity which constitute essential elements of every invention.”).

12. *Id.* at 249.

13. *Id.* at 267.

14. *See id.* at 266 (“The difference is formal, and destitute of ingenuity or invention.”).

15. 383 U.S. 1 (1966).

16. *Id.* at 18.

17. *Id.* at 21, 37.

of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined.<sup>18</sup>

After *Graham*, the USPTO, district courts, and the Federal Circuit were left to apply the *Graham* test in a coherent manner. Unfortunately, at the outset, consistent application of the test was rather difficult.<sup>19</sup> In an effort to cure this challenge during the second half of the twentieth century, the Federal Circuit layered a test over the *Graham* standard: the “teaching, suggestion, or motivation test”—often referred to as the “TSM test.”<sup>20</sup> Under the TSM test, “[t]he party seeking patent invalidity based on obviousness must . . . show some motivation or suggestion to combine . . . prior art teachings.”<sup>21</sup>

The TSM test was not, in theory, limited to explicit teachings—courts could also employ more nebulous “implicit” nods to a teaching, suggestion, or motivation in the prior art.<sup>22</sup> Before 2007, the Federal Circuit had identified two such implicit sources to satisfy the TSM test: the particular nature of the problem the patent-at-issue was attempting to remedy and the general knowledge of a person having ordinary skill in the art (“PHOSITA”).<sup>23</sup>

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18. *Id.* at 17.

19. *See Graham*, 383 U.S. at 18 (“This is not to say, however, that there will not be difficulties in applying the nonobviousness test. . . . The difficulties, however, are comparable to those encountered daily by the courts in such frames of reference as negligence and scienter, and should be amenable to a case-by-case development.”).

20. *See, e.g., KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 407 (2007).

21. *Al-Site Corp. v. VSI Int’l, Inc.*, 174 F.3d 1308, 1323–24 (Fed. Cir. 1999). One of the newly-created Federal Circuit’s first and clearest pronouncements of the existence of the TSM test was its decision in *ACS Hospital Sys., Inc. v. Montefiore Hospital*, 732 F.2d 1572, 1577 (Fed. Cir. 1984), in which the court held that “[u]nder section 103, teachings of references can be combined *only* if there is some suggestion or incentive to do so.” (emphasis added).

22. *In re Sernaker*, 702 F.2d 989, 994 (Fed. Cir. 1983) (reviewing the prior art to determine if “all or any of the references would have suggested (expressly *or by implication*) the possibility of achieving further improvement by combining such teachings along the line of the invention in suit . . . .”) (emphasis added).

23. *See In re Kahn*, 441 F.3d 977, 987–88 (Fed. Cir. 2006); *In re Rouffet*, 149 F.3d 1350, 1357 (Fed. Cir. 1998); *Pro-Mold & Tool Co. v. Great Lakes Plastics*, 75 F.3d 1568, 1574 (Fed. Cir. 1996).

This “implicit reasoning” is not to say that courts or examiners were permitted to manufacture a motivation—the reasoning must have been clearly articulated and the basis for such an implication must have had a concrete and identifiable foundation.<sup>24</sup> Therefore, even though a court or examiner could rely on an implicit TSM test justification, the implication must have ultimately traced back to an explicitly articulated theory or underpinning in the body of prior art available to a PHOSITA.<sup>25</sup> As a consequence, an explicit prior art articulation ultimately arose from a correct employment of the implicit TSM doctrine, and one can argue that, at the end of the day, drawing a line between implicit and explicit TSM reasoning was extremely difficult if not impossible. In effect, therefore, the strongest showing of a teaching, suggestion, or motivation to combine prior art references under § 103 lay in an explicit prior art pronouncement, while an implicit reasoning tended to raise the judicial brow if not clearly supported by its own explicit backing in some form of prior art.<sup>26</sup>

B. *KSR v. Teleflex, Inc.: The Supreme Court Validates “Common Sense” as a Premise for Obviousness Rejections*

In 2007, the Supreme Court handed down its decision in *KSR International Co. v. Teleflex Inc.*<sup>27</sup>—a decision that undoubtedly made an initial determination of obviousness easier to justify. *KSR* involved the validity of a patent issued to Steven J. Engelgau and exclusively licensed to Teleflex that claimed an electronic device attached to an adjustable car pedal that controlled the vehicle’s throttle through the on-board computer.<sup>28</sup> The prior art of relevance in *KSR* included: (1) an adjustable pedal patent issued to Asano, wherein one pivot point or the pedal remained fixed; (2) a sensor patent issued to Smith, which placed a sensor on a pedal assembly to prevent

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24. See, e.g., *In re Kahn*, 441 F.3d at 988.

25. See *id.*

26. See *In re Kahn*, 441 F.3d at 988; *In re Oetiker*, 977 F.2d 1443, 1447 (Fed. Cir. 1992) (“There must be some reason, suggestion, or motivation found in the prior art whereby a person of ordinary skill in the field of invention would make the combination.”) (emphasis added); *infra* note 50 and accompanying text.

27. 550 U.S. 398 (2007).

28. *Id.* at 405–06.

wire wear; and (3) an adjustable pedal patent issued to Rixon, which claimed the placement of an electronic sensor in the pedal footpad.<sup>29</sup>

The trial court found the Engelgau patent obvious at summary judgment.<sup>30</sup> Applying the primary *Graham* factors, the court found “little difference” between the prior art and the Engelgau patent-at-issue, holding that the Asano prior art patent taught almost everything claimed in the Engelgau patent, and the remaining claim features were revealed in other prior art.<sup>31</sup> Applying the mandated TSM test, the court found a motivation to combine the prior art references because:

(1) [T]he state of the industry would lead inevitably to combinations of electronic sensors and adjustable pedals, (2) Rixon provided the basis for these developments, and (3) Smith taught a solution to the wire chafing problems in Rixon, namely, locating the sensor on the fixed structure of the pedal.<sup>32</sup>

Teleflex appealed the trial court ruling, and the Federal Circuit reversed, reasoning that the district court had not been strict enough in its application of the TSM test.<sup>33</sup> The Federal Circuit held that looking to any conceivable motivation to combine prior art references was not enough to satisfy the TSM test.<sup>34</sup> Instead, the court stated that the prior art must address the “precise problem that the patentee was trying to solve,” because otherwise “the problem would not motivate an inventor to look at those references.”<sup>35</sup>

The Supreme Court granted certiorari to both expound on the validity of the TSM test and, if it was to survive, to formulate its correct application in the future.<sup>36</sup> First, in reversing the Federal Circuit, the Court flatly rejected the court’s rigid approach to the TSM test and stated that, when applied in a flexible manner, the TSM test

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29. *Id.* at 408–09.

30. *Id.* at 412.

31. *Id.* at 413.

32. *Id.*

33. *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 413 (Fed. Cir. 2007).

34. *Id.* at 413–14.

35. *Id.* at 414 (citing, in first quotation, *Teleflex, Inc. v. KSR Int’l Co.*, 119 F. App’x 282, 288 (Fed. Cir. 2005)).

36. *See id.* at 407.

is valid and consistent with the Court's precedent.<sup>37</sup> Expounding on the test's correct application going forward, the Court stated that "[t]he obviousness analysis cannot be confined by a formalistic conception of the words teaching, suggestion, and motivation, *or by overemphasis on the importance of published articles and the explicit content of issued patents.*"<sup>38</sup> Rather, the Court held, "[r]igid preventative rules that deny factfinders recourse to *common sense* . . . are neither necessary under our case law nor consistent with it."<sup>39</sup>

This pronouncement would seem to depart from a tradition in the decades leading up to the *KSR* decision wherein a teaching, suggestion, or motivation was most often considered grounded when supported by a direct and explicit mention in a published document.<sup>40</sup> Instead, by declaring such a judicial demand for support in publications or issued patents unwarranted—and declaring "common sense" a viable source of a motivation to combine prior art references—the Court opened the door for a tidal wave of new common sense-based motivation to combine arguments for those seeking to invalidate a patent as a defense in an infringement suit.

Finally, the Court declared:

When there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp. If this leads to the anticipated success, it is likely the product not of innovation but of ordinary skill and *common sense*.<sup>41</sup>

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37. See *id.* at 415 ("Throughout this Court's engagement with the question of obviousness, our cases have set forth an expansive and flexible approach inconsistent with the way the Court of Appeals applied its TSM test here.").

38. *Id.* at 419 (emphasis added).

39. *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (Fed. Cir. 2007) (emphasis added). Additionally, the Court addressed the issue of "common sense" of the PHOSITA when it stated that "[c]ommon sense teaches . . . that familiar items may have obvious uses beyond their primary purposes, and in many cases a person of ordinary skill will be able to fit the teachings of multiple patents together like pieces of a puzzle." *Id.* at 420.

40. See *supra* Part II.A.

41. *KSR*, 550 U.S. at 421 (emphasis added).

Ultimately, applying the correct analysis to the case's facts, the Court stated that "[t]he proper question to have asked was whether a pedal designer of ordinary skill, facing the wide range of needs created by developments in the field of endeavor, would have seen a benefit to upgrading Asano with a sensor."<sup>42</sup> The Court concluded that a PHOSITA would have seen this benefit,<sup>43</sup> and remanded the case.<sup>44</sup> Thus, the upshot of the Court's *KSR* opinion was that "common sense" of a PHOSITA could serve as a valid foundation for an obviousness rejection by an examiner or satisfaction of the TSM test by a court.<sup>45</sup>

### III. TEACHING, SUGGESTION, OR MOTIVATION ON THE GROUND: A HYPOTHETICAL

As discussed above, to prove obviousness in the pre-*KSR* world, an examiner or patent validity challenger needed to come forward with some teaching, suggestion, or motivation to combine references under the TSM test, which was most often found explicitly in the prior art.<sup>46</sup> A USPTO practice known as official notice, which allowed an examiner to reject a claim as obvious without providing such a teaching, suggestion, or motivation, seemed to fly in the face of this notion.<sup>47</sup> Before moving on to a discussion of the USPTO's seemingly violative official notice policy, however, it will be important to understand what the obviousness inquiry looks like in the trenches—as most often undertaken by a patent examiner at the USPTO.<sup>48</sup>

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42. *Id.* at 424.

43. *Id.* at 425 ("The prior art discussed above leads us to the conclusion that attaching the sensor where both *KSR* and *Engelgau* put it would have been obvious to a person of ordinary skill.").

44. *Id.* at 428.

45. *See, e.g., id.* at 421.

46. *See* Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, ch. 4 at 12 (quoting Professor John Duffy as stating that the feel of the case law is that the courts only recognize teachings from the prior art).

47. *See* MPEP § 2144.03.

48. Of course, this is the same inquiry undertaken by federal district courts, the BPAI, and the Federal Circuit. However, because the vast majority of patent ap-

Let us consider a hypothetical patent application, which discloses two features, A and B. The patent examiner to which the application is assigned then reads the application and begins a search for prior art that teaches A and B. The easy case for the patent examiner, of course, is when he or she discovers a piece of prior art that teaches both A and B, which renders the claims unpatentable as anticipated under 35 U.S.C. § 102.<sup>49</sup> The more difficult and more frequent case, however, occurs when a first reference teaches A and a second reference teaches B.<sup>50</sup> To properly reject the patent application's claims, however, the examiner is not permitted to simply cite the first and second references and declare the claims unpatentable. Instead, the examiner must go one step further—providing a reason, most often stated in the prior art, why the PHOSITA would have been motivated to look to and combine the first and second references to arrive at the invention claimed in the application. In essence, this stated motivation provides the “glue” for a proper § 103 obviousness rejection—affixing feature A and B together in such a way that satisfies the TSM test. In practice, this “glue” comes directly from the language of the first or the second reference, but it may also be taken from an independent third source.

To make the process a bit clearer, let us imagine another hypothetical patent application, filed by an inventor, Ingred. Inventor Ingred's patent application teaches a polysilicon gate terminal for a transistor with a gate terminal length of forty-five nanometers. Ingred's application is assigned to Examiner Evan. Evan reads Ingred's patent application and begins a prior art search. During the search, Evan finds two relevant prior art patents, a patent to Anna and a patent to Brian. Anna's patent teaches a polysilicon gate terminal for any transistor. Brian's patent teaches a *metal* gate terminal with a length of forty-five nanometers and states that decreasing the gate terminal length from previously longer gate lengths in transis-

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plications are not litigated, the most relevant inquiry for the typical patentee is that of the patent examiner.

49. See 35 U.S.C. § 102 (2010).

50. See Gregory N. Mandel, *Patently Non-Obvious: Empirical Demonstration that the Hindsight Bias Renders Patent Decisions Irrational*, 67 OHIO ST. L.J. 1391, 1398 (2006).

tors increases computer processor speed and decreases overall physical processor size. Here, Evan can properly reject Ingrid's claims as obvious because Anna teaches a polysilicon gate terminal and Brian teaches a gate terminal length of forty-five nanometers. Furthermore, Brian teaches a motivation to combine the references: decreasing the gate terminal length of a transistor increases the processor speed and decreases overall physical processor size. Therefore, in this instance there exists an explicitly stated motivation that a PHOSITA could look to, and Examiner Evan could cite, in order to combine the prior art references.

However, let us assume *arguendo* that the Brian patent, or any other prior art for that matter, does not explicitly teach that decreasing the gate terminal length increases processor speed or decreases overall physical processor size. Instead, let us assume that a computer processor designer with ordinary skill at the time Ingrid applied for her patent would have known that processor speed increases with a decreasing gate length. Let us further assume that this knowledge is based solely on a decade-old trend of shrinking transistor gate lengths in the processor design field, but that the positive effects of the shrinking had not been explicitly documented or scientifically explained in the prior art. Rather, the ordinary processor designer at the time considered it common sense that shrinking processor gate lengths led to a better-performing processor. If Evan rejects Ingrid's claims based on the combination of Anna and Brian's patents, the motivation to combine would not be based on any readily-available and citable proposition in a piece of prior art. Rather, the glue holding the pieces of prior art together for purposes of the § 103 rejection would consist of the "common sense" of the PHOSITA. After *KSR*, such a motivation would justify an obviousness rejection, so long as Evan clearly laid out his reasoning for using common sense as the glue.<sup>51</sup>

Of course, the *KSR* Court upheld this practice of rejecting claims when common sense or common knowledge of the PHOSITA served as the examiner's cited motivation to combine. This practice is not as new as *KSR* may have made it seem, however. In fact, the

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51. See, e.g., *Perfect Web Techs., Inc. v. InfoUSA, Inc.*, 587 F.3d 1324, 1329 (Fed. Cir. 2009).

USPTO examining corps has a long history of rejecting claims under § 103 based on a motivation to combine or a claim element that does not have an explicit footing in prior art. It is known as the examiner taking “official notice.”<sup>52</sup>

At the outset, it is important to understand that official notice may take two forms in an obviousness rejection. First, an examiner may take official notice that the PHOSITA would have been motivated to combine two prior art references based on a subjective reasoning articulated by the examiner. This, of course, was the case with Examiner Evan’s official notice in the hypothetical above. This article will refer to these instances of official notice, taken to provide a motivation to combine prior art, as “motivational official notice.”

Second, the examiner may take official notice that one of an applicant’s claim elements is well known in the art. For example, in the hypothetical above, if Examiner Evan could not locate a prior art reference that taught a polysilicon transistor gate, he might take official notice that polysilicon is often used as the transistor gate conductor. For purposes of this article, this type of official notice will be called “referential official notice.”

Last, it is important to understand that the difference between a formal examiner invocation of official notice—be it motivational or referential—and an implicit finding of fact by an examiner or court based on common sense or common knowledge of the PHOSITA is truly negligible. Explaining the difference is an exercise of semantics: if an examiner chooses to formally take official notice, he or she places the words “official notice” in an office action; if he or she does not, but does not support his or her finding of fact on an explicit prior art teaching, the result is the same. For clarity, however, this article will call the latter case “quasi-official notice”—a wonderful example of which can be found in the facts of *KSR*, presented above.

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52. See MPEP § 2144.03.

## IV. OFFICIAL NOTICE

## A. MPEP Official Notice Policy

Official notice was developed in an effort to further several practical goals of the USPTO—decreasing patent pendency and the patent backlog, and increasing agency efficiency and flexibility of examiners' analyses.<sup>53</sup> The USPTO's current policy on official notice is found in the Manual of Patent Examining Procedure ("MPEP"), which serves as the prudential guide for USPTO examiners when examining patent applications.<sup>54</sup> In the MPEP, the USPTO conspicuously treats official notice, stating that "[i]n certain circumstances where appropriate, an examiner may take official notice of facts not in the record or rely on 'common knowledge' in making a rejection, however such rejections should be judiciously applied."<sup>55</sup>

The MPEP goes on to define both the substantive and procedural requirements of proper official notice practice.<sup>56</sup> First, the MPEP explains the proper procedure for patent prosecution when the examiner takes official notice in an obviousness rejection. If an examiner does so, "[t]o adequately traverse such a finding, an applicant must specifically point out the supposed errors in the examiner's action, which would include stating why the noticed fact is not considered to be common knowledge or well-known in the art."<sup>57</sup> If the applicant traverses the examiner's claim of official notice, the ball is in the examiner's court to "provide documentary evidence in the next Office action if the rejection is to be maintained."<sup>58</sup> However, if the applicant fails to traverse the examiner's use of official notice "the examiner should clearly indicate in the next Office action that the common knowledge or well-known in the art statement is taken to be

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53. See, e.g., Lance Leonard Barry, *Did You Ever Notice? Official Notice in Rejections*, 81 J. PAT. & TRADEMARK OFF. SOC'Y 129, 130–32 (Feb. 1999); John S. Goetz, *An "Obvious" Misunderstanding: Zurko, Lee and the Death of Official Notice (Part I)*, 86 J. PAT. & TRADEMARK OFF. SOC'Y 150, 154 (Feb. 2004).

54. MPEP § 2144.03.

55. *Id.*

56. See *id.*

57. *Id.*; see also 37 C.F.R. § 1.111(b) (2011).

58. MPEP § 2144.03; see also 37 C.F.R. § 1.104(c)(2) (2011).

admitted prior art because applicant . . . failed to traverse the examiner's assertion of official notice . . . ."<sup>59</sup>

Next, as to substance, the MPEP states:

It would *not* be appropriate for the examiner to take official notice of facts without citing a prior art reference where the facts asserted to be well known are not capable of *instant and unquestionable demonstration* as being well-known. For example, assertions of technical facts in the areas of esoteric technology or specific knowledge of the prior art must always be supported by citation to some reference work recognized as standard in the pertinent art. . . .

*It is never appropriate to rely solely on "common knowledge" in the art without evidentiary support in the record . . . [and] an assessment of basic knowledge and common sense that is not based on any evidence in the record lacks substantial evidence support.*<sup>60</sup>

Furthermore, in its "summary" of proper official notice practice, the MPEP states that "any facts so noticed should be of notorious character and serve only to 'fill in the gaps' in an insubstantial manner which might exist in the evidentiary showing made by the examiner to support a particular ground for rejection."<sup>61</sup> Therefore, if an examiner takes official notice as to common sense or common knowledge of the PHOSITA, there must exist some form of explicit proof in the prior art to support the examiner's assertion of fact.<sup>62</sup>

However, the MPEP also discusses the situation where official notice is taken and it is unsupported by documentary evidence of any kind. The MPEP mandates that, "[i]f such notice is taken, the basis for such reasoning must be set forth explicitly," and, further, that "[t]he examiner must provide specific factual findings predicated on sound technical and scientific reasoning to support his or her conclusion of common knowledge."<sup>63</sup> But this apparent examiner mandate

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59. MPEP § 2144.03.

60. *Id.* (second emphasis added) (citations omitted).

61. *Id.*

62. *See id.*

63. *Id.*

to utilize unsupported iterations of official notice is undermined by the MPEP's admission that such practice is only founded upon "certain older cases."<sup>64</sup> Indeed, the most recent court decision that the MPEP cites to support this practice is *In re Soli*,<sup>65</sup> which was decided by the U.S. Court of Customs and Patent Appeals ("CCPA") nearly twenty years before the creation of the Federal Circuit.<sup>66</sup> Therefore, although the MPEP leaves the window open slightly for unsupported assertions of official notice, the modern validity of this practice is greatly diminished by the lack of recent case law condoning it and the requirement that the examiner set out his or her reasoning with specific findings of fact, which ultimately may require the examiner to resort to a prior art citation.

### B. *Judicial Development of Official Notice*

The current USPTO policy on official notice embodied in the MPEP is the result of a rich history of specific Federal Circuit case law on the subject that has been intermingled with and borrowed from general obviousness cases such as *Graham* and *KSR*. As explained in Part III, the difference between quasi-official notice—as seen in *KSR*—and formal or explicit official notice is truly negligible; the difference being purely a matter of whether the words "official notice" appear in the prosecution history of a particular patent. It is natural, therefore, that the body of official notice case law parallels § 103 jurisprudence in that it has been rather inconsistent over the past half century—at times hinting at a policy favoring judicial deference to unsupported examiner official notice decisions, and at other times demanding that the official notice be based on an underlying prior art teaching in the record.

Like the doctrine of obviousness itself, official notice finds its roots in case law. In 1961, the CCPA decided *In re Knapp-Monarch Co.*,<sup>67</sup> a trademark case that stated that "[j]udicial notice permits

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64. *Id.*

65. 317 F.2d 941 (C.C.P.A. 1963).

66. MPEP § 2144.03. The Court of Appeals for the Federal Circuit was created by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982).

67. 296 F.2d 230 (C.C.P.A. 1961).

proof by evidence to be dispensed with where common knowledge supports the truth of a proposition.”<sup>68</sup> Furthermore, the *Knapp* court explained that

Judicial notice also may be taken of facts ‘though they are neither actually notorious nor bound to be judicially known, *yet they would be capable of such instant and unquestionable demonstration, if desired*, that no party would think of imposing a falsity on the tribunal in the face of an intelligent adversary.’<sup>69</sup>

In 1969, the CCPA expanded its jurisprudence on “judicial notice”—which, in USPTO terms, is essentially an antiquated synonym for official notice—to the patent realm in *In re Bozek*.<sup>70</sup> In *Bozek*, the CCPA upheld an examiner’s rejection, which was based on implicit reasoning from a cited prior art patent that did not “specifically suggest[] the combination” of prior art.<sup>71</sup> The court went further, stating that an examiner can rely “on a conclusion of obviousness ‘from common knowledge and common sense of the person of ordinary skill in the art *without any specific hint or suggestion in a particular reference.*’”<sup>72</sup> Therefore, at the outset, the CCPA did not require that an examiner or the Board of Patent Appeals and Interferences (“BPAI”) base their use of official notice on a citable prior art proposition.

However, a year later in 1970, the court retreated from its *Bozek* position in a seminal official notice case, *In re Ahlert*.<sup>73</sup> After citing a patent to Ronay and referring to a patent to Van Swaal, the BPAI affirmed the examiner’s obviousness rejection, and “took judicial notice of the fact that it is common practice to postheat a weld after the welding operation is completed and held that to apply the heat to heat treat a weld does not distinguish patentably over Ronay, who

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68. *Id.* at 232 (citing WIGMORE ON EVIDENCE Vol. IX, § 2565 (3d ed. 1940)).

69. *Id.* (emphasis added).

70. 416 F.2d 1385 (C.C.P.A. 1969).

71. *Id.* at 1390.

72. *Id.* (emphasis added).

73. 424 F.2d 1088 (C.C.P.A. 1970); *see* MPEP § 2144.03.

applies heat to weld the parts together or Van Swaal, who shows applying heat to a rail to heat treat the rail.”<sup>74</sup>

In upholding the BPAI’s rejection and use of judicial notice, the CCPA in *Ahlert* laid out foundational principles of judicial notice in patent cases.<sup>75</sup> Echoing *Knapp*, the court stated that the facts asserted by official notice must be *instantly available and unquestionable in validity*.<sup>76</sup> Further, the court cautioned that its rule on judicial notice “is not, however, as broad as it first might appear, and [the CCPA] will always construe it narrowly and will regard facts found in such manner with an eye toward narrowing the scope of any conclusions to be drawn therefrom.”<sup>77</sup> Most importantly, the court held that a court or examiner must ultimately cite to a prior art document that sets out the facts underlying the use of official notice.<sup>78</sup>

Over the next thirty years, the Federal Circuit routinely required that reasoning underlying an examiner’s invocation of official notice should be clearly articulated and founded on some objective teaching, but also departed from *Ahlert* in some cases—leaving the door open for more subjective official notice formulations.<sup>79</sup> Specifically, this line of cases reinforced the notion that a motivation to combine references could be “implicit,” or inferred from (1) knowledge of those skilled in the art or (2) from the nature of the problem to be solved<sup>80</sup>—both of which ultimately amount to official notice if used without a citation. For example, in a 1992 decision, the Federal Circuit stated that an examiner may properly establish a motivation to combine prior art references “only by showing some objective teaching in the prior art *or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references*.”<sup>81</sup> Indeed, as one commenter

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74. *In re Ahlert*, 424 F.2d at 1090 (internal quotation marks omitted).

75. *Id.* at 1091–92.

76. *Id.* at 1091.

77. *Id.*

78. *Id.* at 1091–92.

79. *See, e.g., id.*

80. *See, e.g., Pro-Mold & Tool Co., Inc. v. Great Lakes Plastics, Inc.*, 75 F.3d 1568, 1573 (Fed. Cir. 1996).

81. *In re Fritch*, 972 F.2d 1260, 1265 (Fed. Cir. 1992) (emphasis added). Of course, this statement comports with the pre-*KSR* formulation of the TSM test as articulated above. *See* sources cited *supra* note 16.

has noted, “[u]nder Federal Circuit case law [before *KSR*], a decision-maker [could] rely on an implicit suggestion or motivation to combine prior art references—the suggestion or motivation [did] not need to be recorded or documented.”<sup>82</sup> However, in two particular pre-*KSR* opinions in the past decade, *In re Zurko IV*,<sup>83</sup> and *In re Lee*,<sup>84</sup> the Federal Circuit brought the official notice and TSM inquiry squarely in the realm of objectivity.

C. *In re Zurko: Show Us the Evidence*

*In re Zurko IV*, a 2001 Federal Circuit decision, established the proper standard of review for USPTO findings of fact, and was essentially an administrative law decision at its core.<sup>85</sup> Additionally, however, the case involved an unsupported motivation to combine that implicated both motivational and referential official notice, and an unusually lengthy procedural history.<sup>86</sup>

Zurko’s invention was drawn to a computer system that involved “verifying a trusted command using both trusted and untrusted software.”<sup>87</sup> Trusted software is typically more expensive and involves more lines of code than untrusted software, so a user is able to save money and disk space when untrusted software is partially used in the place of trusted software.<sup>88</sup> Specifically, Zurko’s invention allowed the user to communicate with a trusted environment along a trusted communication path by using untrusted software to perform a command parsing step before that command is sent along the trusted path.<sup>89</sup> Additionally, the application claimed that the parsed command was displayed for the user for verification before the system executed the command.<sup>90</sup>

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82. Gregory N. Mandel, *Patently Non-obvious II: Experimental Study on the Hindsight Issue Before the Supreme Court in KSR v. Teleflex*, 9 YALE J.L. & TECH. 1, 29 (2006).

83. *In re Zurko (Zurko IV)*, 258 F.3d 1379 (Fed. Cir. 2001).

84. *In re Lee*, 277 F.3d 1338 (Fed. Cir. 2002).

85. *See Zurko IV*, 258 F.3d at 1384.

86. *Id.*

87. *Id.* at 1382.

88. *Id.*

89. *Id.*

90. *Id.*

The examiner rejected Zurko's claims under § 103 based on the combination of two prior art references: the UNIX operating system and a program called FILER 2.2.<sup>91</sup> The UNIX prior art previously taught the use of trusted and untrusted code in a singular system.<sup>92</sup> The FILER 2.2 reference taught requesting a user to confirm the execution of a potentially dangerous command instruction.<sup>93</sup> The prior art, did not, however, explicitly teach the execution of the command along a trusted path.<sup>94</sup> Instead, in rejecting Zurko's claims, the examiner took quasi-referential official notice, asserting that "it is basic [common] knowledge that communication in trusted environments is performed over trusted paths"—and the BPAI affirmed this finding of fact.<sup>95</sup> As to the motivation to combine the references, the BPAI upheld the examiner's conclusion that such a motivation existed, taking motivational official notice that it "would have been nothing more than good common sense" to combine UNIX, FILER 2.2, and the fact from the examiner's referential official notice.<sup>96</sup>

On appeal to the Federal Circuit in *Zurko I*,<sup>97</sup> the Federal Circuit held that the BPAI's conclusions were clearly erroneous, and reversed the BPAI's rejection.<sup>98</sup> Specifically, the *Zurko I* court took issue with the BPAI's finding that the prior art of record explicitly taught or implied the practice of utilizing a trusted pathway for user command confirmation.<sup>99</sup> After the decision, the USPTO Commissioner requested an en banc Federal Circuit rehearing of the case to determine the proper standard of review, arguing that the Administrative Procedure Act ("APA")<sup>100</sup> mandated that the Federal Circuit must employ the substantial evidence or arbitrary and capricious standard of review.<sup>101</sup> The en banc panel in *Zurko II*, however, held

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91. *In re Zurko (Zurko IV)*, 258 F.3d 1379, 1382 (Fed. Cir. 2001).

92. *Id.*

93. *Id.* at 1382–83.

94. *See id.* at 1383.

95. *Id.*

96. *Id.* at 1383.

97. *In re Zurko (Zurko I)*, 111 F.3d 887 (Fed. Cir. 1997).

98. *Id.* at 889.

99. *Id.*

100. 5 U.S.C. § 706 (2010).

101. *Zurko IV*, 258 F.3d at 1381.

that it had correctly employed review for clear error in *Zurko I*, and affirmed the original panel's decision.<sup>102</sup>

The Commissioner then petitioned the Supreme Court for review, and the Court granted certiorari as to the proper standard of review for BPAI findings at the Federal Circuit.<sup>103</sup> In *Zurko III*,<sup>104</sup> the Supreme Court reversed the Federal Circuit, holding that BPAI decisions must be reviewed under the standards of review contemplated in the APA.<sup>105</sup> In its opinion, the Court drew a distinction between court review of another court's decision and a court reviewing an agency decision—and determined that the APA standards of review clearly governed the latter, and that the clearly erroneous standard governed the former.<sup>106</sup> Importantly, the Court also recognized and spoke to an anomaly that its decision might have created, stating:

An applicant denied a patent can seek review either directly in the Federal Circuit or indirectly by first obtaining direct review in federal district court. The first path will now bring about Federal Circuit court/agency review; the second path might well lead to Federal Circuit court/court review, for the Circuit now reviews Federal District Court factfinding using a "clearly erroneous" standard. . . .

*We are not convinced, however, that the presence of the two paths creates a significant anomaly.* The second path permits the disappointed applicant to present to the court evidence that the applicant did not present to the PTO.<sup>107</sup>

Additionally, the Court emphasized that the clear error and APA standards of review were nearly indistinguishable in practice:

The court/agency standard, as we have said, is somewhat less strict than the court/court standard. But the difference is a subtle one—so fine that . . . we have failed to uncover a sin-

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102. *Id.*

103. *Id.*

104. *Dickinson v. Zurko (Zurko III)*, 527 U.S. 150 (1999).

105. *See id.* at 165.

106. *Id.* at 164.

107. *Id.* (emphasis added) (citations omitted).

gle instance in which a reviewing court conceded that use of one standard rather than the other would in fact have produced a different outcome.<sup>108</sup>

Therefore, although the *Zurko III* court mandated that the Federal Circuit apply an APA standard of review on direct appeals from the BPAI, it acknowledged that the difference in the clearly erroneous and APA standards of review is negligible.<sup>109</sup>

On remand, the Federal Circuit was able to make a final determination as to the USPTO's assertions of fact in their invocations of official notice in *Zurko IV*. However, the court only found it necessary to address the referential official notice in its opinion.<sup>110</sup> As to the BPAI's assertion that the basic knowledge or common sense of the PHOSITA would supply the trusted path teaching, the court held that the finding lacked substantial evidence support, stating:

With respect to core factual findings in a determination of patentability . . . the Board cannot simply reach conclusions based on its own understanding or experience—or on its assessment of what would be basic knowledge or common sense. *Rather, the Board must point to some concrete evidence in the record in support of these findings.* To hold otherwise would render the process of appellate review for substantial evidence on the record a meaningless exercise.<sup>111</sup>

Therefore, the Federal Circuit ultimately reversed the USPTO's assertion of fact, one without a citation to an explicit source, as lacking substantial evidence. However, although the court had now settled that referential official notice must be supported at the USPTO by an explicit teaching in the prior art, the court did not explicitly

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108. *Id.* at 162–63.

109. *See id.* Interestingly, the Court did not mandate which APA standard of review—substantial evidence or arbitrary and capricious—applied to BPAI appeals surrounding findings of fact. Before the Federal Circuit was able to rehear the case on remand from the Supreme Court, the court decided this question in *In re Gartside*, 203 F.3d 1305, 1316 (Fed. Cir. 2000), holding that it would apply substantial evidence review to these findings.

110. *Zurko IV*, 258 F.3d at 1384.

111. *Id.* at 1386 (emphasis added) (citations omitted).

extend the same requirement to instances of motivational official notice until a year later in *In re Lee*.<sup>112</sup>

*D. In re Lee: The Federal Circuit Applies Zurko*

The invention in *In re Lee* was drawn to a method of automatically displaying functions of a display and allowing the user to tweak the display functionality.<sup>113</sup> The examiner cited two pieces of prior art in rejecting the claims, a patent to Nortrup and the Thunderchopper Helicopter Operations Handbook for a video game.<sup>114</sup> However, neither reference mentioned a user adjusting any display or audio functionality, and during the initial prosecution, the examiner did not provide a teaching, suggestion, or motivation to combine the references.<sup>115</sup> However, in the Examiner's Answer at the BPAI, the examiner attempted to remedy this omission, stating that the combination:

[W]ould have been obvious to one of ordinary skill in the art since [Thunderchopper's] demonstration mode is just a programmable feature which can be used in many different devices for providing automatic introduction by adding the proper programming software, and that another motivation would be that the automatic demonstration mode is user friendly and it functions as a tutorial.<sup>116</sup>

The BPAI sided with the examiner, reasoning that "[t]he conclusion of obviousness may be made from common knowledge and common sense of a person of ordinary skill in the art without any specific hint or suggestion in a particular reference."<sup>117</sup>

On appeal at the Federal Circuit, Lee asked for review of the USPTO's findings as to its § 103 rejections. The court found the USPTO's motivation to combine inadequate under the APA—holding that the conclusory justification for the rejection based on a

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112. 277 F.3d 1338 (Fed. Cir. 2002).

113. *Id.* at 1340.

114. *Id.* at 1340–41.

115. *Id.* at 1341.

116. *Id.*

117. *Id.*

“common sense” reasoning did not fulfill the USPTO’s obligation.<sup>118</sup> Indeed, as the court stated, “[c]ommon knowledge and common sense, even if assumed to derive from the agency’s expertise, do not substitute for authority when the law requires authority.”<sup>119</sup>

Ultimately, therefore, *Lee* expanded the Federal Circuit’s holding in *Zurko IV* to motivational official notice—holding the USPTO’s feet to the fire by requiring that, under the APA, a motivation to combine must point to some explicit teaching in the prior art if it is to be upheld as proper. As the court stated, “[t]his factual question of motivation is material to patentability, and could not be resolved on subjective belief and unknown authority.”<sup>120</sup> After *Zurko* and *Lee*, it would seem that objective official notice—and, indeed, possibly official notice in general—would become a remnant of the USPTO’s past. However, the practice remained intact through 2007, and was arguably resurrected with the Supreme Court’s holding in *KSR* and the Federal Circuit’s *KSR* progeny.

#### V. OBVIOUSNESS JURISPRUDENCE AT THE FEDERAL CIRCUIT AFTER *KSR*

After *KSR*, the Federal Circuit, federal district courts, the BPAI at the USPTO, and patent examiners themselves have been left to discern what the “common sense” of a PHOSITA entails practically. As examined above, *KSR* held that common sense could serve as a valid reason to reject a patent under § 103 and satisfy the TSM test. However, now that this paper has thoroughly examined official notice practice, one can conclude that the *KSR* ruling conflicts drastically with the Supreme Court’s interpretation of the APA in *Zurko III*, the Federal Circuit’s *Zurko IV* and *Lee* opinions, the MPEP’s current guidelines, and traditional tenets of official notice practice in cases like *Kubin* and *Oetiker*. Before moving on to examine this conflict further and propose possible solutions to the quandary, it is important that one first becomes familiar with some important Fed-

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118. *In re Lee*, 277 F.3d 1338, 1345 (Fed. Cir. 2002).

119. *Id.* (internal quotation marks omitted).

120. *Id.* at 1343–44.

eral Circuit cases after *KSR* and the current guidelines by which the USPTO abides when determining obviousness under § 103.

*A. Leapfrog and Perfect Web: Expanding Common Sense*

Starting in *Leapfrog Enterprises, Inc. v. Fisher-Price, Inc.*,<sup>121</sup> its first application of the *KSR* standard, the Federal Circuit has emphasized further that the obviousness inquiry and the TSM test are not slaves to explicit prior art teachings. The patent-at-issue in *Leapfrog* was an electronic toy that assisted children in learning phonetically.<sup>122</sup> The invention worked by displaying letters in a particular order and eliciting a sound when certain letters were pressed.<sup>123</sup> Additionally, a processor in the toy communicated with a “reader,” an electronic component that would decipher the identity of the set of letters to the processor.<sup>124</sup> The trial court found that the only feature in the patent-at-issue not found in the prior art was the reader.<sup>125</sup> However, the court also held that the “knowledge of one of ordinary skill in the art” provided the motivation to add a reader to the combination of the invention claimed in the Bevan patent and the SSR.<sup>126</sup>

On appeal to the Federal Circuit, Leapfrog argued that there existed insufficient evidence on the record for the court to find a motivation to combine the Bevan patent, the SSR, and the reader.<sup>127</sup> Naturally, Fisher-Price argued that, after *KSR*, a motivation to combine references did not need to stem from the prior art references.<sup>128</sup> The Federal Circuit agreed with Fisher-Price, applying the “common sense” principle from *KSR* in stating that:

An obviousness determination is not the result of a rigid formula disassociated from the consideration of the facts of a

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121. 485 F.3d 1157 (Fed. Cir. 2007).

122. *Id.* at 1158.

123. *Id.*

124. *Id.*

125. *Id.* at 1162.

126. *Id.* at 1159.

127. *Leapfrog Enters., Inc. v. Fisher-Price, Inc.*, 485 F.3d 1157, 1160 (Fed. Cir. 2007).

128. *Id.*

case. Indeed, the *common sense of those skilled in the art* demonstrates why some combinations would have been obvious where others would not.<sup>129</sup>

The court held that a PHOSITA would have recognized adding a reader would have provided a simpler user experience and would have afforded the claimed invention added marketability to children.<sup>130</sup> In sum, based on a common sense-based motivation to combine prior art teachings—akin to an invocation of motivational official notice—the court agreed that the patent was invalid under § 103.<sup>131</sup>

Over the past couple of years, the court has consistently reaffirmed its *Leapfrog* holding and continued to expand the strength of implicit common sense rationales as valid motivations to combine.<sup>132</sup> Arguably the most aggressive stance on this principle—and the most relevant for the purpose of deciphering the status of current official notice jurisprudence—came in 2009 with the Federal Circuit’s decision in *Perfect Web Technologies, Inc. v. InfoUSA, Inc.*<sup>133</sup> *Perfect Web* involved a Perfect Web patent drawn to a method of emailing bulk messages to certain groups of individuals, assessing the numbers of emails sent, and repeating these steps—sending more emails until a minimum numbers of messages had been sent.<sup>134</sup> The validity of the patent was challenged at the trial court level, where the court determined that the patent’s claims were invalid under § 103.<sup>135</sup> Specifically, the court found that although the step of repeating the email message transmissions was not explicitly taught in the prior art, “the final step is merely the logical result of common sense application of the maxim [to] ‘try, try again.’”<sup>136</sup>

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129. *Id.* at 1161 (emphasis added).

130. *Id.* at 1162.

131. *Id.*

132. *See, e.g.*, *Wyers v. Master Lock Co.*, 616 F.3d 1231, 1245 (Fed. Cir. 2010); *Ball Aerosol & Specialty Container, Inc. v. Limited Brands, Inc.*, 555 F.3d 984, 993 (Fed. Cir. 2009).

133. 587 F.3d 1324 (Fed. Cir. 2009).

134. *Id.* at 1326.

135. *Id.*

136. *Id.* at 1327.

On appeal at the Federal Circuit, Perfect Web challenged the USPTO's quasi-use of referential official notice on the "try, try again" maxim and argued that the PTO did not present a valid motivation to combine to support its rejection.<sup>137</sup> Furthering the Federal Circuit's marked departure from *Zurko* and *Lee*, the court affirmed the district court's rejection, holding that:

[W]hile an analysis of obviousness always depends on evidence that supports the required *Graham* factual findings, it also may include recourse to logic, judgment, and common sense available to the person of ordinary skill *that do not necessarily require explication in any reference or expert opinion.*<sup>138</sup>

Though this holding drastically departed from precedent, the *Perfect Web* court recognized the ambiguity and attempted to address it.<sup>139</sup> Ultimately, however, it sidestepped the difficult issue and claimed that its reasoning was valid because, even in the wake of *Zurko* and *Lee*, "though common knowledge and common sense do not substitute for facts, they may be applied to analysis of the evidence."<sup>140</sup>

The only specificity that the court mandated was that, when invoking common sense in a quasi-official notice manner, all the court or examiner must do is clearly lay out its reasoning, placing no limit on the reasoning's subjectivity. Specifically, the court held that "[t]he analysis that should be made explicit refers not to the teachings in the prior art of a motivation to combine, but to the court's analysis."<sup>141</sup> Therefore, in *Perfect Web*, the Federal Circuit, with the help of *KSR*, reopened the door for myriad common sense rationales—whether they originate at the USPTO in the form of explicit motivational or referential invocations of official notice,<sup>142</sup> quasi-

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137. *Id.* at 1327–28.

138. *Id.* at 1329 (emphasis added).

139. *Perfect Web Techs., Inc. V. InfoUSA, Inc.*, 587 F.3d 1324, 1328–29 (Fed. Cir. 2009).

140. *Id.* (internal quotation marks omitted).

141. *Id.* at 1330 (internal quotation marks omitted).

142. In *In re Gleizer*, 356 Fed. App'x 415 (Fed. Cir. 2009), the Federal Circuit briefly opined on the proper post-*KSR* obviousness inquiry when an examiner expressly invokes official notice. The court's treatment of official notice in

official notice findings, or at the federal district courts in validity litigation.

Partially in response to the ambiguity created by *KSR* and its application in *Perfect Web*, the USPTO published interim guidelines for the examination of patents for obvious subject matter on September 1, 2010.<sup>143</sup> The guidelines recognize the inherent inconsistency between *In re Lee* and *KSR*, and suggest that *Lee* may no longer be a viable holding, “insofar as *Lee* appears to require a strict basis in record evidence as a reason to modify the prior art.”<sup>144</sup> Instead, the guidelines echo language from *Perfect Web* and *Ball Aerosol* which both held that for a court or an examiner to supply a properly “explicit” reasoning simply means that they articulate the common sense, common knowledge, reasoning, inferences, or creative steps that the PHOSITA would have employed to render a particular claim obvious.<sup>145</sup> Additionally, although the guidelines do not explicitly mention official notice practice, as explained above, the doctrines of obviousness and official notice have a fundamentally interwoven relationship, as official notice serves as a still viable means by which an examiner may reject a claim under § 103 based on common sense or common knowledge.

#### B. *The Inherent Contradiction Between KSR and Official Notice*

Several foundational conflicts exist with the post-*KSR* obviousness standard and the stated USPTO official notice policy. On one hand, *Zurko IV* stands for the proposition that all USPTO findings of

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*Gleizer*, however, was unfortunately brief and lacked meaningful bite because it was able to uphold the official notice on procedural grounds—namely, because the applicant did not object to the examiner’s invocation during prosecution. *Id.* at 420. However, it is telling that the court seemingly would have upheld the official notice on the merits, citing *Leapfrog* and stating, “[a]n obviousness determination is not the result of a rigid formula disassociated from the consideration of the facts of a case” and “common sense of those skilled in the art demonstrates why some combinations would have been obvious where others would not.” *Id.* at 420–21. This would seem to reaffirm the notion that, naturally, as general obviousness goes, so goes official notice.

143. Examination Guidelines Update: Developments in the Obviousness Inquiry After *KSR v. Teleflex*, 75 Fed. Reg. 53643 (Sept. 1, 2010).

144. *Id.*

145. See MPEP § 2144.03.

fact, including the existence of a motivation to combine, must be supported by substantial evidence and must point to an explicit teaching in the prior art. On the other hand, *KSR* and its progeny stand for the proposition that such findings of fact are proper absent explicit prior art support. Therein lies the problem as official notice currently stands: is an unsupported assertion of fact by an examiner citing only common knowledge or common sense of the PHOSITA proper, or must there be prior art support?

Though it attempts to address the problem, the MPEP is of no practical help as currently written. The MPEP reiterates that the APA substantial evidence standard applies to examiner invocations of official notice and cites *Zurko IV* on several occasions, stating that “an assessment of basic knowledge and common sense that is not based on any evidence in the record lacks substantial evidence support.”<sup>146</sup> However, the current official notice section of the MPEP does not once cite *KSR* or its progeny, which stand for the polar opposite position on the matter—that in fact no such prior evidence is needed to sustain a determination of obviousness.<sup>147</sup> Therefore, although the USPTO official notice policy seems to ultimately require an underlying prior art document, after *KSR*, it appears no such prior art document is necessary.

Instead, obvious jurisprudence has settled on allowing examiners to reject patent claims on their understanding of what constitutes common knowledge or common sense, so long as they explain their reasoning, no matter how subjective that reasoning may be. Though the USPTO has not spoken directly to this issue as to formal official notice practice, it is natural that such reasoning would be allowed with formal invocations of official notice as well as quasi-official notice situations. As a practical result, it is much easier for an examiner to justify use of official notice after *KSR*, but if he or she were to consult the MPEP on the matter, this conclusion would not seem so plain.

Of course, allowing examiners recourse to subjectivity enhances the values that official notice was created to further: agency efficiency, a reduced patent backlog, and flexibility in analysis. However,

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146. MPEP § 2144.03.

147. *See id.*

these positive justifications for official notice come at a cost of proper agency action as defined in *Zurko* and *Lee* by denying patent applicants a potential property interest without an explanation as to which explicit evidence the agency is relying upon to come to its decision. Therefore, the current quandary surrounding obviousness has a tangible impact on applicants, USPTO patent examiners, district courts, and patent practitioners alike.

## VI. CONCLUSION

As to the ultimate solution to the current doctrinal problem, the USPTO, Congress, or the judiciary could individually attempt to fashion a workable solution. First, as to the USPTO, as proposed in the previous section, the agency could update its MPEP official notice guidelines to more accurately portray the post-*KSR* obviousness landscape. However, this solution would be purely superficial, as the underlying conflict between *Zurko* and *KSR* still exists. Alternatively, Congress could consider a bill that sets out what it deems to be the correct obviousness and official notice procedure to be applied by the USPTO and the courts. However, the likelihood that such a bill would be passed by Congress, let alone be introduced, seems very low given the limited success of similar patent reform bills introduced in the past decade.

This, of course, leaves the judiciary. The Federal Circuit is clear on where it stands on motivations to combine based on common sense and common knowledge—after *Perfect Web*, such findings are clearly proper in the court's opinion. However, the solution to this problem will likely not come from the Federal Circuit. After all, the conflict between *Zurko III* and *KSR* is a conflict between Supreme Court opinions, which calls for a Supreme Court solution. In *KSR*, the Supreme Court failed to properly comprehend the effect of its decision on administrative procedure as it specifically relates to the problem with which it was presented—proper § 103 practice—and unintentionally affected the role of official notice in patent prosecution and litigation that may eventually stem from such prosecution. Therefore, the ultimate solution to the official notice problem lies in the Court granting certiorari on an obviousness case implicating common sense as a motivation to combine and taking *KSR* a step

further. This step would likely require the Court to expressly overrule its *Zurko III* decision and understand that they must properly interpret the APA as it relates to obviousness review.

Alternatively, the Court could take a step back from its deferential stance in *KSR* and require that all determinations of obviousness must ultimately be supported by some explicit teaching in the prior art.

Practically, this solution serves as the best course on which the Court should steer § 103 jurisprudence. The fact of the matter is, if a fact is so well-known as to consider it common knowledge, someone has likely written it down. If it has not been written down, the fact that supports the invention is more than likely deserving of patent protection. To keep the obviousness inquiry in the realm of subjectivity—based on the not-so-common benchmark of common sense—unnecessarily undermines the validity of issued patents and arguably places too much power in the hands of a single examiner, a decision-maker with often insufficient training and expertise to be wholly conversant in the technology that they are examining.

Indeed, as *In re Ahlert* held, and as the current MPEP section on official notice states:

Official notice unsupported by documentary evidence should only be taken by the examiner where the facts asserted to be well-known, or to be common knowledge in the art are capable of instant and unquestionable demonstration as being well-known.<sup>148</sup>

The USPTO should keep the bar high when it comes to official notice invocation and hold its examiners' feet to the fire when it comes to supporting assertions of fact—because without underlying evidence of common knowledge, the agency's action is truly arbitrary.

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148. MPEP § 2144.03.

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