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BEYOND DACA – DEFYING EMPLOYER SANCTIONS THROUGH CIVIL
DISOBEDIENCE

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Beyond DACA – Defying Employer Sanctions Through Civil Disobedience

(working draft)

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__ U.C. DAVIS L.REV. __ (forthcoming 2018)

Introduction

Attorney General Jeff Sessions’s September 5, 2017, announcement that DACA would end on March 5, 2018, was disheartening for the hundreds of thousands of Dreamers that had taken advantage of the program. Their reliance on the program to live without fear of deportation allowed them to lead a semblance of a normal life in the United States. No one had promised that DACA would be permanent, but the past few years had provided hope to many.

While the sense of safety from deportation is clearly the big benefit of DACA, the opportunity to work is a critical component. According to some estimates, approximately 700,000 are employed, performing a wide variety of jobs. They contribute mightily to the U.S. economy. A report, published by progressive advocacy group Center for American Progress and FWD.us, found that repealing the program could cost the U.S. \$460.3 billion in economic output over the next decade, and that contributions to entitlement programs like Medicare and Social Security could drop by \$24.6 billion.¹ The CATO Institute’s message is consistent: “Many Americans believe that the presence of unauthorized immigrants is harmful to the economy and would like to see steps taken to reduce their presence. However, a repeal or roll-back of DACA would harm the economy and cost the U.S. government a significant amount of lost tax revenue.”² The purchasing power of DACA recipients is significant. In a 2017 study, nearly two-thirds of respondents, or 65 percent, reported purchasing their first car. The average cost paid was \$16,469. These large purchases matter in terms of state revenue, as most states collect a percentage of the purchase price in sales tax, along with additional [registration and title fees](#). The data also show that 16 percent of respondents purchased their first home after receiving DACA. Among respondents 25 years and older, this percentage rises to 24 percent. The broader positive economic effects of home purchases include the [creation of jobs](#) and the infusion of [new spending](#) in local economies.³ [expand, e.g., CAP report 10/26/17 State by State Economic Benefits of Passing the Dream Act.]

The fact that DACA recipients—and essentially all Dreamers—have become part of the conscience of the country and a critical part of the economy is illustrated by the strong support for them exhibited by major businesses in the United States. Dozens of CEOs from companies like

¹ Alana Abramson, *Here's How Much Money Rescinding DACA Could Cost the U.S. Economy*, FORTUNE, Sept. 6, 2017.

² *Id.*

³ Tom K. Wong, et al, *DACA Recipients’ Economic and Educational Gains Continue to Grow*, Center for American Progress, Aug. 28, 2017, <https://www.americanprogress.org/issues/immigration/news/2017/08/28/437956/daca-recipients-economic-educational-gains-continue-grow/>

Microsoft, Amazon, Netflix, AT&T, Wells Fargo, Google, and Facebook urged the president to preserve the program.⁴ While he was not specific, Mark Zuckerberg said his immigration advocacy vehicle at Fwd.US will be "doing even more in the weeks ahead to make sure Dreamers have the protections they deserve."⁵ After the Sessions announcement, the CEO of Google, Sundar Pichai, turned his attention to the need for legislation, stating, "Dreamers are our neighbors, our friends and our co-workers. This is their home. Congress needs to act now to #DefendDACA. #WithDreamers."⁶ Over 800 American businesses including GM, Target, and Walmart signed onto a letter in support of the Dreamers.⁷ The U.S. Chamber of Commerce issued a similar statement: "DACA recipients are our friends, neighbors, and co-workers. The Chamber urges Congress to work quickly through the details of a legislative solution that treats these individuals with dignity and fairness. The Chamber stands ready to work with our leaders to ensure that the legislation is consistent with our nation's values and the best interests of our economy."⁸ [Dream Coalition: Harvard President Faust, Apple CEO Tim Cook, Bill de Blasio, Madeleine Albright: "Collectively, we, the Dream Coalition, are committed to using our voices as business, civic, and government leaders to amplify the overwhelming American support for protecting Dreamers."⁹]

Over 100 chief human resource officers of large companies urged members of Congress and the Trump administration to consider in future policymaking the vital role foreign-born workers play in the U.S. economy. The letter, signed by the chief human resource officers of 110 major companies like Merck, GE, HP, IBM and ManpowerGroup notes the importance of foreign-born workers amidst a workforce crisis characterized by six million unfilled job openings. As employers invest a cumulative \$637 billion toward training and equipping the American workforce, foreign-born workers in the meantime help fill workforce gaps.¹⁰

As the March 5 date approached [explain how Congress failed to pass the Dream Act, and as part of the debate, Trump demanded certain tradeoffs, including funding for The Wall, eliminating family-based immigration, eliminating diversity visas, etc.]

Just how committed are these businesses? The big question is what these companies and other employers concerned about their DACA employees will do once the employment authorization documents (EADs) held by DACA recipients begin to expire, assuming that court challenges to DACA termination are not ultimately successful. Will the companies continue to employ individuals who are no longer authorized to work in knowing violation of employer sanctions laws? In response to whether they would lay off DACA recipients after their work permits expire, at least one company, Airbnb, stated "No. We are 100% committed to protecting Dreamers."¹¹ But other

⁴ <http://www.npr.org/sections/thetwo-way/2017/09/05/548686695/250-apple-employees-among-thousands-at-risk-from-daca-cancellation>

⁵ Id.

⁶ Id.

⁷ Daca Time Media Advisory, Oct. 9, 2017.

⁸ U.S. Chamber of Commerce Letter: Thomas J. Donohue, *Clock is Ticking for DACA Solution*, Oct. 2, 2017.

⁹ <http://dev.thecrimson.com/article/2017/10/19/faust-joins-dream-coalition/>

¹⁰ 10/26/17 news reports.

¹¹ (See this article from The Guardian <<https://www.theguardian.com/us-news/2017/sep/07/silicon-valley-executives-dreamers-daca-trump>>).

corporate critics of the DACA termination have been noncommittal on the issue of employing unauthorized workers—at least publicly.¹²

A different way of asking the question is whether employers are willing to stand up for their DACA employees who lose work authorization by continuing to employ them as a matter of principle. Are corporations willing to defy employer sanctions laws as a matter of conscience because their DACA workers deserve dignity and fairness? In other words, are businesses willing to engage in civil disobedience as a matter of moral conviction?

Employer Sanctions Provisions

Federal law making the employment of unauthorized workers were enacted as part of the Immigration Reform and Control Act of 1986 (IRCA). Under INA § 274A, 8 U.S.C. §1324a, employers who “knowingly” hire an unauthorized worker in violation of the law primarily are subject to civil fines. However, employers are subject to criminal penalties when there is a pattern or practice of hiring, recruiting or referring for a fee unauthorized aliens. Employers who violate the law are subject to preclusion from government contracts as well.

An employer who violates the employer sanctions laws is subject to civil and criminal penalties, depending on the circumstances. The primary penalty is for knowingly hiring an unauthorized worker. However, penalties also attach for simply failing to follow the paperwork required, such as neglecting to complete an I-9 form for a new employee, or failing to complete the form correctly.

Civil Fines and Order to Cease and Desist

An employer found to have knowingly hired, or to have knowingly recruited or referred for a fee, an unauthorized worker for employment or to have knowingly continued to employ an unauthorized worker will be ordered to cease and desist from such behavior.¹³ The employer is also subject to civil fines.

Civil fines range from:

- \$250 to \$10,000 for hiring a person not authorized to work,
- \$100 to \$1000 for paperwork violations

The size of the fine is determined by a consideration of a number of factors, including:

1. Size of the business
2. Any history of prior violations
3. The presence of unauthorized aliens in the workforce
4. Seriousness of the offense, and
5. Good faith, or lack thereof, on the part of the employer.

In situations involving civil fines for hiring a person not authorized to work the fine can be:

- \$250 to \$2000 for each unauthorized worker hired for the first violation,
- \$2000 to \$5000 for each unauthorized worker hired for the second violation, and

¹² *Id.*

¹³ 8 C.F.R. § 274a.10(b)(1); *Mester Mfg. Co. v. INS*, 879 F.2d 561 (9th Cir. 1989).

- \$3000 to \$10,000 for each unauthorized worker hired for subsequent violations.¹⁴

Many corporate entities have offices scattered throughout the country that are responsible, fully or partially, for hiring local employees. If one office is guilty of a violation, and subsequently a second office commits a violation, will this be considered a second violation for the entire company or simply the first violation for that particular office? The answer depends on the precise corporate structure and the degree of autonomy under which its subsidiaries operate. For example, if a central office has a field management manual with specific guidelines related to I-9 compliance, coupled with retained power to terminate unauthorized employees and to discipline district managers of employees for IRCA violations, this might suggest that one office's first violation may render a separate office's subsequent violation the entire company's second violation.¹⁵

In September, ICE announced the biggest ever employer sanctions fine of \$95 million. Asplundh Tree Experts, Co., which trims trees and clears brush for power and gas lines across the country, hired employees who provided fake identification documents from 2010 to 2014.¹⁶

Criminal Penalties

Employers who engage in a "pattern or practice" of violating the employer sanctions law are subject to criminal penalties:

- Six months in prison, and/or
- \$3000 for each unauthorized worker hired.¹⁷

Flagrant abuse of IRCA can result in serious criminal penalties. For example, allegations that Tyson Foods smuggled noncitizens to work at processing facilities resulted in multi-count federal indictments, the seeking of prison terms for defendants, and a demand of more than \$100 million to resolve the company's case without criminal consequences.¹⁸ This past November, news reports surfaced that ICE was planning a nationwide raid of an unnamed restaurant chain and charging "harboring" for those who have hired undocumented workers.¹⁹

Deferred Action for Childhood Arrivals

[description of DACA, how it came about, and what it provides, e.g., after the failure to pass the DREAM Act and great political pressure, in 2012 Obama announced the Deferred Action for Childhood Arrivals program in the midst of his re-election campaign. Qualified recipients would be granted two-year permission to remain and two-year employment authorization:

¹⁴ 8 U.S.C. § 1324a(e)(4)(A)(i).

¹⁵ *Furr's/Bishop's Cafeterias, L.P. v. INS*, 976 F.2d 1366 (19th Cir. 1992). [see chapter 9 of IRCA manual for further discussion of the determination of the size of the fine]

¹⁶ Brendan O'Brien, *Tree trimming firm pays biggest fine in U.S. immigration case*, Reuters, Sept. 29, 2017.

¹⁷ 8 U.S.C. § 1324a(f)(1).

¹⁸ Kimberly Greuter, *Six from Tyson due to answer charges in alien smuggling*, The Arkansas Democrat-Gazette, Jan. 24, 2002.

¹⁹ <http://theweek.com/speedreads/738954/ice-reportedly-planning-nationwide-raid-chain-restaurant>

- Under 31 years old as of June 15, 2012;
- First came to the United States before 16th birthday;
- Lived continuously in the United States from June 15, 2007 until the present;
- Physically present in the United States on June 15, 2012 and at the time you apply;
- Came to the United States without documents before June 15, 2012, or lawful status, e.g., visitor's visa, expired as of June 15, 2012;
- Currently studying, or graduated from high school or earned a certificate of completion of high school or GED, or have been honorably discharged from the Coast Guard or military (technical and trade school completion also qualifies)

Program was renewed all the way through the beginning of the Trump Administration.]

Legal Challenges to Trump Termination of DACA

[description of the current legal challenges to Trump/Sessions termination of DACA, including federal court cases in San Francisco, New York, and District of Columbia. Currently, the termination is enjoined and DACA renewals are being processed. Plaintiffs include state governments, DACA recipients, universities, and private employers, in part arguing that revocation of DACA is unconstitutional. The D.C. federal judge is considering whether to allow new DACA applications.]

The Sentiment of Passion on behalf of DACAs

[cite language used by those pushing for Dream Act, e.g, standard narrative: are here without documentation through no fault of their own, have grown up here, have gone to high school/college here, are part of the U.S. fabric, are hard working.]

E.g., <https://www.theodysseyonline.com/dacas-repeal-betrayal-american-principles>

Politicians have forgotten that never-ending kindness of heart, nobility and altruistic desire to better serve society have earned Latinos a special place in their cities and communities. It is therefore not a surprise that entire cities constantly seek to protect them from the detrimental policies that the White House has recently presented. For such policies are a threat not only to immigrants but also to the very identity and heart of the communities to which they belong.

...

There are policy makers that do not seem to understand or value su agradecimiento [how grateful they feel] towards America, the country that restored their hope. While Latinos feel proud of their roots, they celebrate and uphold the nation that adopted them. Since America gave them hope, they seek to reciprocate it every day by being hardworking law-abiding citizens. The trust that hundreds of thousands placed on the Obama administration when it came to the enforcement of DACA prove it. Without a doubt, Trump's violation of their trust on the system is a cruel move that allows for the perpetuation of its failure to the people.

Trump's decision on DACA is by all means against the spirit of the United States, a threat not only to Latinos but to immigrants in general regardless of their countries of birth. The US has always been a nation of immigrants, a country built upon the invaluable support that waves of immigrants

have contributed in every imaginable way. After all, “For more than 200 years, our tradition of welcoming immigrants from around the world has given us a tremendous advantage over other nations. It’s kept us youthful, dynamic, and entrepreneurial. It has shaped our character as a people with limitless possibilities.” Those who refuse to acknowledge the latter and dare to support Trump’s repeal on DACA are undoubtedly betraying the principles that lie at the heart of the nation they claim to love.

Conceptualizing Corporate Civil Disobedience

Clearly, business owners and corporate board members have the duty to follow the law—including employer sanctions laws. [expand, corporate fiduciary duties, etc.]

However, as with individuals, civil disobedience has a role in the business context as well.

In his important piece, *Civil Disobedience in a Business Context: Examining the Social Obligation to Obey Inane Laws* (2010), legal studies scholar Daniel T. Ostas concludes, “Businesspeople do not abandon their conscience simply because they are in a business setting. If the choice to intentionally violate a business regulation is truly a matter of moral principle rather than convenience, then like all forms of civil disobedience, it is to be applauded, not condemned.”²⁰

Relying on John Rawls, Professor Ostas first provides a simple framework for thinking about the moral prerequisites for using “civil disobedience as a part of an organized strategy to change the law.” To be justified, the strategic use of civil disobedience must be “political,” “open,” and “non-violent.” In addition, the disobedients must commit their illegalities openly, drawing attention to their acts and illustrating their willingness to accept their punishment. Consider Ghandi and Martin Luther King. Each appealed to the logic and values of the political system. King, for example, asked American society to rethink its constitutional commitment to equality embraced in the Bill of Rights and other legal texts. Both King and Ghandi conducted their illegalities openly and willingly accepted their penalties. And both embraced principles of non-violence.

Ostas rightfully notes, however, that the Ghandi-King framework might exclude other examples of civil disobedience. For examples secretive acts such as Harriet Tubman’s Underground Railroad or violent acts like the Boston Tea Party were illegal activities taken out of conscience and moral principle that are within the concept of civil disobedience. So pacifists who refuse to register for the draft should fall within the rubric of civil disobedience. And even Rawls recognized Tubman’s form of civil disobedience as “conscientious evasion,” a term referring to an illegal act done for the reasons of conscience and moral principle, but coupled with secrecy. Secret illegalities are to be particularly expected in societies that are largely unjust. And Ostas notes that those acting out of religious motivation are also properly viewed as engaging in civil disobedience even absent political motive.

Turning to the business context, Ostas notes that “As an artificial entity, a corporation itself does not have a ‘conscience;’ it makes its moral judgments through its association with individuals who play various roles of shareholder, board member, executive, and employee. At times these people may elect to conscientiously evade laws that they perceive to be unjust or possibly inane.” The key

²⁰ Daniel T. Ostas, *Civil Disobedience in a Business Context: Examining the Social Obligation to Obey Inane Laws – American Bus. L. J.* -- (2010).

question here, for Ostas, is “whether such behavior is appropriate, and if so, subject to what preconditions.”

Ostas happens to discuss the hiring of undocumented workers as an example to consider in the business context. He acknowledges that some employers may simply employ undocumented workers for economic reasons, which he would not classify as an act of civil disobedience. However, other employers may be doing so for moral reasons.

[S]ome employers may also view the hiring of an [unauthorized] worker as an act of conscientious evasion—that is, the intentional albeit secretive, violation of law for reasons of moral principle. Indeed, some fair-minded employers may legitimately question the wisdom of immigration laws. These employers may note that undocumented workers often take jobs for which it is difficult to find legal workers at reasonable rates and that many [unauthorized] workers have been in the United States for many years and have families to support. In addition, by neglecting to enforce its own employment regulations, the federal government may be signaling to conscientious employers that a violation of these regulations carries relatively little moral stigma. Once the stigma associated with the violation is reduced, some employers may feel ethically free to evade the regulation and risk the fine. If the employer hires the undocumented worker partly on the basis of moral principle, rather than as a mere economic expediency, then the act could be considered conscientious evasion, which in turn, is a form of justifiable civil disobedience.

Ostas asks, “are the hundreds of thousands of employers who knowingly hire [unauthorized] workers . . . properly viewed as modern-day examples of Harriet Tubman, . . . [or are they] mere law breakers, hopelessly corrupt and deserving of moral condemnation[?]” He suggests that maybe such employment is the “driving force behind [unauthorized] immigration,” but [o]n the other hand, [unauthorized] aliens are human beings, often with families to support. Many [unauthorized] workers have been in the United States for many years. Their labor is unabashedly good for the economy, doing many jobs for which it is difficult to find American workers at reasonable wages, and paying tens of billions of dollars each year in state and federal taxes.” The implication of Ostas’ words is that if employers are motivated to hire undocumented workers because the workers “are human beings . . . with families to support [many who] been in the United States for many years . . . paying tens of billions of dollars . . . in taxes,” then that is the basis of a moral, civil disobedience action.

Cynthia Williams warns that most, if not all business regulations must be obeyed. She fears that an alternative view that permits a businessperson to choose among regulations, obeying some while disobeying others, erodes social cohesion and misconceives the social obligations that businesses owe to society. Although Williams generally insists on strict legal compliance, however, she also allows for civil disobedience in some contexts. She notes that unjust laws should not be obeyed. She accepts that there is a hierarchy of laws; some laws demand obedience, some provide choice, while others require breach.

Using Williams’ framework, Ostas argues that the hiring of undocumented workers falls in the second level of this hierarchy.

These laws appear to be highly ambivalent—moral arguments can be advanced both for and against violating these regulations. Whether the business person chooses to violate these

laws may depend on his or her political views and prejudices regarding [unauthorized] immigration. As long as the businessperson chooses to hire (or not to hire) the [unauthorized] worker on the basis of moral principle, then that decision would seem hard to condemn. Of course, if civil disobedience becomes the choice, then the violation needs to occur secretly so as to protect the worker.

I and other immigrant rights activist have long opposed employer sanctions since the law's inception in 1986.²¹ These laws do not address the true "problem" of undocumented immigration which relates to the reasons that people migrate or flee to the United States in the first place. While these laws are labeled "employer sanctions," the workers are the ones who lose--they lose their jobs, when all they are trying to do is feed their families because they could not back home or could not stay back home because of persecution. [Expand from Bacon/Hing article] Also, the workers who lose their jobs are invariably people of color, and as such, the racial effect of employer sanctions is problematic.

The DACA/Dreamer Context

Ostas's discussion of civil disobedience of employer sanctions generally is far broader than that called for in this paper. His discussion is on the hiring of undocumented workers broadly. This article is focused more narrowly on the hiring of DACA recipients whose EADs will be expiring. According to the Pew Hispanic Center, of the 11 million undocumented immigrants in the United States, 8 million are part of the civilian workforce.²² But the number of DACA workers is less than 10 percent of those workers; a broad survey of DACA recipients found that 91 percent are working, which translates to 728,000 of the 800,000 DACA holders.²³

The moral principles for business owners and corporate leaders in the DACA context to engage in civil disobedience also are arguably greater than in the hiring of undocumented workers generally. The Dreamer narrative is well rehearsed—that they should be supported because they are here “through no fault of their own,” essentially absolving them of any culpability while their parents are thrown under the bus. The United States is “the only country they know.”

[Review of different why-we-should-pass the dream act arguments]

Dreamers also are helping to offset America's aging population and declining fertility. An aging population means fewer workers paying taxes to support federal programs like Medicare, Medicaid and Social Security for *U.S. citizens*. Research shows that the average wage for DACA workers is over \$17 an hour. Their median age is 22, meaning most are prime for careers, jobs and incomes for the foreseeable future. Driving out young workers who will pay into the system for many decades is, simply put, a very bad idea.²⁴

Conclusion

²¹ See, e.g., David Bacon and Bill Ong Hing, *The Rise and Fall of Employer Sanctions*, 38 *FORDHAM URB. L.J.* 77-105 (2010).

²² <http://www.pewresearch.org/fact-tank/2017/04/27/5-facts-about-illegal-immigration-in-the-u-s/>

²³ <https://www.americanprogress.org/issues/immigration/news/2017/08/28/437956/daca-recipients-economic-educational-gains-continue-grow/>

²⁴ See notes --, *supra*, and accompanying text re: economic impact.

Businesspeople do not abandon their conscience simply because they are in a business setting. If the choice to intentionally violate a business regulation is truly a matter of moral principle rather than convenience, then like all forms of civil disobedience, that choice is worthy of applause. For example, Madhuri Nemali, a Silicon Valley lawyer who represents immigrants in tech, says that a decision by big firms to continue employing Dreamers “would be a powerful pledge. . . [While it’s] wonderful all the companies have been coming out with statements [of support for Dreamers] but it’s a lot easier to say you’re going to stand by them when there are no consequences.”²⁵ The impact would be more significant if the firms said they would allow Dreamers to stay on the job after DACA expires, in her view, sending the message that “it’s not just your lives on the line. We’re standing by you and also willing to go against the law to take a moral stance.”²⁶

Similarly, if firms were to employ Dreamers who have lost their permission to work, David Leopold former American Immigration Lawyers Association president said, “it would be an incredible statement. It would be unprecedented. The government would have to make a huge decision – are they going to go after major companies or are they going to do the right thing and reinstate DACA?”²⁷

I challenge employers to engage in civil disobedience and to continue to hire Dreamers even after their employment authorization expires. Engaging in corporate civil disobedience would be a bold statement and can prove vital to bringing about a permanent, fair outcome for Dreamers.

[conclusion to be expanded]

OUTSTANDING CONCERNS:

- Employers, such as Airbnb, who would publicly announce their resistance to employer sanctions laws are not simply risking sanctions against themselves, but the targeting of their own unauthorized employees for deportation. Therefore, if employers want to engage in this form of resistance, then isn’t it best to do so quietly, e.g., Harriet Tubman? If so, then what is the impact of the “civil disobedience.”
- As a practical matter, would corporate employers to defy employer sanctions laws? Would a board vote to do this in the face of possible criminal, as well as civil penalties? In the face of a shareholder lawsuit challenging the action? Does it depend on the type of defense that can be waged, e.g., the constitutionality v. moral grounds (unjust or unjust in this context).
- Are there examples currently or historically of employers who defy civil or criminal laws in the face of penalties out of moral conviction? For example, post-*Heart of Atlanta v. United States* (1964) violations of the Civil Rights Act?

²⁵ <<https://www.theguardian.com/us-news/2017/sep/07/silicon-valley-executives-dreamers-daca-trump>>

²⁶ Id.

²⁷ Id.

- Are nonprofit employers likely to act differently? Should they?
- Should employers seek other ways to “get around” the employer sanctions laws by encouraging DACA employees to explore independent contractor arrangements instead? *But see* 8 U.S.C. § 1324a(a)(4) (prevents employers from knowingly using independent contractor arrangements to avoid liability for hiring an unauthorized worker).