2015

Crimmigration Creep: Reframing Executive Action on Immigration

Jayesh Rathod
American University Washington College of Law, jrathod@wcl.american.edu

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I. INTRODUCTION

Over the last year, immigration law scholars have engaged in a productive debate regarding the constitutionality of the Deferred Action for Parents of Americans and Lawful Permanent Residents program ("DAPA"), announced by the Obama Administration in November 2014.[1] In the lead Article penned for this Issue, Professor Hiroshi Motomura persuasively describes how both DAPA and the Deferred Action for Childhood Arrivals program ("DACA"), a predecessor initiative benefiting undocumented youth, wisely utilize executive discretion and promote the rule of law.[2] For the country's undocumented population, the legal frameworks established by the programs are unquestionably transformative: over one million DACA applications have been approved since 2012, and DAPA, if implemented, will lift the fear of removal off the shoulders of millions more.[3]

In this Essay, I seek to build upon existing scholarship relating to

* Professor of Law and Director, Immigrant Justice Clinic, American University Washington College of Law. Thanks to Professor Hiroshi Motomura for inviting me to share my perspective on these topics, and to WCL students Alejandra Aramayo and Kristine Evrard for their editorial and research assistance. I also thank Elizabeth Keyes and Anita Sinha for helpful conversations and feedback during the drafting of this Essay.

1. *See Executive Action on Immigration*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 20, 2014), http://www.uscis.gov/immigrationaction [https://perma.cc/SGE4-U85Z]. The program is alternatively known as "Deferred Action for Parental Accountability." *Id.* U.S. Dep't of Homeland Security Secretary Jeh Johnson issued the original memorandum announcing the program. *See* Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [http://perma.cc/2K3L-CMML] [hereinafter DAPA Memorandum].

2. *See generally* Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1 (2015).

3. *Number of 1-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status: 2012–2015*, U.S. CITIZENSHIP & IMMIGR. SERVS. (June 30, 2015), http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/I821d_performancedata_fy2015_qtr3.pdf [http://perma.cc/37KU-RHXY].

DACA and DAPA, by offering an alternate lens through which to examine the programs. Specifically, I argue that DACA and DAPA, by naming and entrenching the "significant misdemeanor" bar to eligibility, contribute to a concerning expansion of "crimmigration law." To be sure, neither program exists in codified law; nevertheless, the eligibility bars under DACA and DAPA are poised to wreak doctrinal havoc by upending the way particular criminal conduct is treated in the U.S. immigration system. In some respects, the DACA and DAPA bars are more stringent than existing criminal removal grounds, while in other ways they are more lax. Moreover, the executive branch's deployment, *sua sponte*, of a new crimmigration category, represents a notable change in how the branches of government have related to one another in enacting and enforcing crime-related provisions in immigration law. In this respect, DACA and DAPA offer insight into how the plenary immigration power is shared as between the political branches.

I describe, in Part II below, the origins and basic architecture of both DACA and DAPA, noting the criminal bars that the executive branch included for both programs. In particular, I describe the contours of the "significant misdemeanor" bar, named first as part of DACA and reified under the DAPA program. In Part III of the Essay, I offer four critical observations regarding the DACA and DAPA criminal bars. I frame these as "critical observations," as each includes varying levels of description, analysis, and critique. In particular, I suggest that the DACA and DAPA criminal bars: (1) generate normative inconsistency and asymmetry, by treating the same conduct differently, across different aspects of the immigration system, (2) represent a redistribution of power as between the executive and legislative branches of government, relating to the enactment and enforcement of crime-related removal policies, (3) undermine the palliative effect of recent jurisprudence relating to the categorical approach for analyzing crimes and determining collateral consequences, and (4) implicate other policy concerns for the immigration and criminal justice systems at large.

II. DACA, DAPA, AND THEIR CRIMINAL BARS

The criminal bars that are the focus of this Essay have roots in the DACA program, announced and implemented in 2012. DACA, designed as a surrogate for the Development, Relief, and Education for Alien Minors ("DREAM") Act, provides relief from removal for persons lacking lawful status who arrived in the United States prior to their sixteenth birthday, and who meet other eligibility requirements relating to age, residence in the United States, and education or military

service.[4] When DACA was first announced, U.S. Department of Homeland Security ("DHS") Secretary Janet Napolitano clarified that in order to be considered for an exercise of prosecutorial discretion under the program, an applicant must not have "been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise pose[] a threat to national security or public safety."[5] The DHS subsequently clarified that the phrase "multiple misdemeanor offenses" meant "three or more" misdemeanors.[6]

The DACA program marked the first appearance of the phrase "significant misdemeanor" in U.S. immigration law.[7] It appears that the intellectual authors of DACA invented the category, as it appears nowhere in any federal or state statute. The DHS has sought to clarify the contours of the category, by naming specific crimes that are per se significant misdemeanors, and by suggesting guidelines for other crimes that *might* be considered significant misdemeanors.[8] As for the former, the DHS announced that the following offenses would be considered significant misdemeanors, regardless of the sentence imposed: "offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or, driving under the influence . . . ."[9] Beyond these specifically enumerated crimes, the DHS included within the category any offense that carried with it a sentence to serve more than ninety days in custody.[10] Consistent with the discretionary nature of DACA, the DHS further clarified that applicants' criminal records would be evaluated based on the totality of the circumstances, and that other offenses (including those that carried a sentence of less than ninety days) might

4. *See* Memorandum from Janet Napolitano, Sec'y of Homeland Sec., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to The United States as Children (June 15, 2012), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [http://perma.cc/2NZ8-6R96] [hereinafter DACA Memorandum].

5. *Id.* at 1.

6. *Consideration of Deferred Action for Childhood Arrivals*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 3, 2015), http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca [https://perma.cc/KHP2-HYN6].

7. *See, e.g.*, MARIA BALDINI-POTERMIN, IMMIGRATION TRIAL HANDBOOK § 6:123 ("DHS created a new term, 'significant misdemeanor,' for the DACA program. This term does not appear in the Immigration and Nationality Act, 8 U.S.C.A. §§ 1101 et seq.").

8. *Consideration of Deferred Action for Childhood Arrivals, Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVS. (June 15, 2015) http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions [http://perma.cc/6Y6Q-L8PS]. As a threshold matter, the DHS clarified that the "significant misdemeanor" and "three or more misdemeanors" categories captures offenses that are "a misdemeanor as defined by federal law (specifically, one for which the maximum term of imprisonment authorized is one year or less but greater than five days) . . . ." *Id.* Additionally, per DHS guidelines, "[a] minor traffic offense will not be considered a misdemeanor for purposes of this process." *Id.*

9. *Id.*

10. *Id.*

also bar eligibility.[11]

In November 2014, more than two years after DACA, the Obama Administration unveiled the DAPA program, as part of a series of immigration-related executive actions.[12] DAPA was designed to offer a reprieve from deportation for millions of undocumented noncitizens with U.S. citizen or permanent resident children. Specifically, to qualify for DAPA, one must (at a minimum) have resided continuously in the United States since January 1, 2010, and have a U.S. citizen or permanent resident son or daughter, as of November 20, 2014—the date of the program's announcement.[13] For many immigrants and their advocates, DAPA signified an important, albeit imperfect, step forward for an otherwise stalled effort at comprehensive immigration reform. Following the November announcement, several states sued to enjoin the implementation of DAPA, and the program remains paralyzed as litigation moves forward.[14]

DAPA, like DACA, contains eligibility bars relating to criminal convictions. Specifically, when announcing DAPA in November 2014, the Obama Administration barred from consideration those who were classified as an enforcement priority pursuant to a memorandum issued the same day.[15] Included within the memorandum's scheme of priorities, under the rubric of "Priority 2 (misdemeanants and new immigration violators)," are persons convicted of three or more misdemeanor offenses (other than minor traffic offenses and state laws that criminalize undocumented status), and persons convicted of a "significant misdemeanor."[16] Notably, the contours of the "significant misdemeanor" category are precisely the same under DACA and DAPA.[17] In short, the DAPA program has incorporated the same criminal bars that apply to DACA.

Following the issuance of the executive actions and the revised enforcement priorities, the DHS clarified what was meant by offenses relating to "driving under the influence," noting that the state statute of

11. *See id.* This discretion appears to operate only in one direction—to bar more persons from receiving the benefit, and not to the benefit of an applicant with a "significant misdemeanor" or three or more misdemeanors on his or her record. *Consideration of Deferred Action for Childhood Arrivals*, *supra* note 6. Indeed, elsewhere on its website, DHS states affirmatively that persons who trigger the criminal bars "will not be considered for DACA." *Id.*

12. *See* DAPA Memorandum, *supra* note 1.

13. *Executive Action on Immigration*, *supra* note 1.

14. *Understanding Initial Legal Challenges to Immigration Accountability Executive Action*, AM. IMMIGR. COUNCIL http://www.immigrationpolicy.org/just-facts/understanding-initial-legal-challenges-immigration-accountability-executive-action [http://perma.cc/KU95-7XD3] (last updated Nov. 17, 2015).

15. DACA Memorandum, *supra* note 4, at 3–4.

16. *Id.*

17. *Compare Consideration of Deferred Action for Childhood Arrivals, Frequently Asked Questions*, *supra* note 8, *with* DACA Memorandum, *supra* note 4, at 4.

conviction must require the operation of a motor vehicle and a blood alcohol level of .08 or higher.[18] The same guidelines also clarify the definition of "domestic violence" offenses that rise to the level of "significant misdemeanor."[19] Apart from these postings, the DHS has offered no further guidance on how the criminal bars will be interpreted.

III. THE DACA AND DAPA CRIMINAL BARS: FOUR CRITICAL OBSERVATIONS

Over the last few decades, Congress has expanded the crime-related grounds for removal, birthing a complex body of crimmigration law.[20] Congress has attached significance to vaguely named categories of crimes, including crimes involving moral turpitude, aggravated felonies, crimes of violence, and particularly serious crimes; in turn, courts have issued innumerable decisions seeking to define the outer limits of these categories.[21] Given the ubiquity of crime-related bars in immigration law, the invocation of similar restrictions for DACA and

18. *Frequently Asked Questions Relating to Executive Action on Immigration*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Oct. 24, 2015), https://www.ice.gov/immigrationAction/faqs [https://perma.cc/XQE4-7K22]. According to the DHS, a driving under the influence ("DUI") conviction "is a significant misdemeanor if the state statute of conviction: (1) constitutes a misdemeanor as defined by federal law . . . ; (2) requires the operation of a motor vehicle; and (3) requires, as an element of the offense, either a finding of impairment or a blood alcohol content of .08 or higher." *Id.* Notwithstanding these guidelines, in assessing each application on a case-by-case basis, U.S. Immigration and Customs Enforcement ("ICE") further clarified that it would consider factors including "the level of intoxication; whether the individual was operating a commercial vehicle; any additional convictions for alcohol or drug-related DUI offenses; circumstances surrounding the arrest, including presence of children in the vehicle, or harm to persons or property; mitigating factors for the offense at issue, such as the conviction being for a lesser-included DUI offense under state law, and other relevant factors demonstrating that the person is or is not a threat to public safety." *Id.* Note that this information, issued by ICE, clarifies who should be considered an *enforcement priority*, and does not speak to eligibility for DAPA consideration. In other words, an ICE officer may consider mitigating factors, and therefore refrain from apprehending or removing a noncitizen with a DUI offense; that same noncitizen, however, will not be considered for the DACA or DAPA benefit by U.S. Citizenship and Immigration Services. *Id.*

19. *Id.* "The memorandum's definition of domestic violence applies to convictions that are crimes of violence (as defined in section 16 of title 18) for acts of domestic violence regardless of how the state law categorizes them." *Id.* The original enforcement priorities memorandum urges consideration of whether the convicted noncitizen was also a *victim* of domestic violence, which would be "a mitigating factor." Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants at 4 n.1 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [http://perma.cc/VLV3-PVED] [hereinafter Priority Enforcement Memorandum].

20. *See generally* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (coining the term "crimmigration" in a seminal article).

21. 8 U.S.C. §§ 1182(a)(2)(a)(i)(I), 1227(a)(2)(A)(i)(II) (2012) (situating crimes involving moral turpitude as grounds for both exclusion and expulsion); 8 U.S.C. §§ 1101(a)(43), 1227(a)(2)(A)(iii) (2012) (creating a sweeping ground of removal for persons convicted of an "aggravated felony"); 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(E)(i) (2012); 18 U.S.C. § 16 (2012) (imposing immigration consequences for a conviction for a "crime of violence," as defined in Title 18 of the U.S. code); 8 U.S.C. § 1158(b)(2)(A)(ii) (2012) (barring persons convicted of a "particularly serious crime" from applying for certain fear-based relief).

DAPA is unsurprising. But a closer examination of the DACA and DAPA criminal bars, and of the "significant misdemeanor" category in particular, reveals notable differences from prior crimmigration norms.

As described in the introduction, in this second part of the Essay, I offer four critical observations of DACA and DAPA. Specifically, I suggest that the DACA and DAPA criminal bars: (1) generate normative inconsistency and asymmetry, and reveal muddled theoretical foundations, (2) signal a modest redistribution of power, in favor of the executive branch, relating to the enactment and enforcement of crime-related removal policies, (3) sidestep, and thereby undercut recent jurisprudence relating to the categorical approach for analyzing crimes and determining collateral immigration consequences, and (4) implicate other policy concerns for the immigration and criminal justice systems at large.

A. Normative Disorder and Theoretical Incoherence

The DACA and DAPA criminal bars further muddle the landscape of crimmigration law by treating the same conduct differently across various aspects of the immigration system. Such differences already exist in U.S. immigration law; for example, the criminal grounds of inadmissibility capture some conduct that does not trigger deportability, and vice versa.[22] Despite these differences, both sets of criminal grounds are robust and include several shared categories.[23] It is true that Congress has significantly expanded the criminal grounds of deportability in recent years, but the inadmissibility grounds continue to play a critical gatekeeping role at the point of admission, including adjustment of status.[24] The DACA and DAPA eligibility bars add more

22. Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 841 (2007) ("[M]any of the grounds of inadmissibility and deportability . . . are essentially identical. But not all are."). For example, the grounds of deportability include a provision relating to crimes of domestic violence, including protective order violations (8 U.S.C. § 1227(a)(2)(E)(i)); there is no precise parallel in the grounds of inadmissibility. Conversely, the grounds of inadmissibility capture (with a few exceptions), *any* crime involving moral turpitude, including both convictions and others that the noncitizen admits committing. 8 U.S.C. § 1182(a)(2)(A)(i)(I). In contrast, the deportability grounds attach more conditions to its parallel provision, requiring a conviction within five years of admission, and the possibility of a one-year sentence. 8 U.S.C. § 1227(a)(2)(A)(i).

23. For example, both sets of grounds include controlled substance offenses, (*compare* 8 U.S.C. § 1182(a)(2)(A)(i)(II), *with* 8 U.S.C. § 1227(a)(2)(B)) and trafficking offenses (*compare* 8 U.S.C. § 1182(a)(2)(H), *with* 8 U.S.C. § 1227(a)(2)(F)). Additionally, both sets of grounds screen for crimes involving moral turpitude. *Supra* note 21.

24. Cox & Posner, *supra* note 22, at 841. Cox and Posner frame this as a heightened focus on the post-entry conduct of noncitizens. *Id.* They offer several hypotheses for this shift, including concerns about assimilation (including, in some instances, the use of *ex post* screening as a proxy for the more explicit, race-based *ex ante* screening of the past) and the inability to effectively screen at the border. *Id.* at 839–40. *See* Hiroshi Motomura, *Choosing Immigrants, Making Citizens*, 59 STAN. L. REV. 857, 861–62 (2007). Indeed, a singular focus on deportability obscures important post-entry processes, such as adjustment of status, which screen for inadmissibility. *Id.*

confusion to an already complicated scene. What distinguishes the enactment of these bars, however, is the absence of any clear theoretical foundation or examination of how the bars interface with other norms in the immigration system.

The lack of a consistent theory or approach to crime-related bars is troubling in several respects. First, the bars generate normative inconsistencies, by treating the same conduct differently across the immigration system. Likewise, the bars create odd asymmetries, given how similarly situated individuals experience immigration processes. These normative quirks may ripen into an even greater concern, should the beneficiaries of DACA or DAPA be folded into a regularization initiative. Second, and more broadly, the programs' eligibility bars reflect a genuine confusion about the values that should underlie our immigration system—a scattershot approach in which the norms are adopted in an ad hoc fashion, without any clear theoretical grounding.

1. Normative Inconsistency and Asymmetry

DACA and DAPA do not confer an affirmative immigration status upon beneficiaries; rather, the programs simply provide a temporary reprieve from deportation, and conferral of work authorization. Additionally, as structured, the programs do not offer beneficiaries a pathway to lawful permanent residence, let alone citizenship. In short, as executive actions, the programs necessarily operate outside of the architecture of the Immigration and Nationality Act ("INA"). Nevertheless, in the interest of promoting sound policy and doctrinal coherence, it is worth identifying disparities between the DACA and DAPA criminal bars and analogous INA provisions. Moreover, some hold the view that given the size of the group of beneficiaries and their existing ties to the community, the reprieve from removal will eventually be folded into a more formal regularization initiative. In the past, similarly situated individuals have been granted pathways to more secure status.[25] For that reason, and for purposes of argument, DACA and DAPA might be seen as an initial toehold in the quest for *terra firma* of permanent legal status. If DACA and DAPA will operate in that manner, one must examine how the programs would relate to the remainder of the immigration pathway.

25. Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115, 1178 (2015) ("The examples of past nonstatus leading to status include EVD for Cubans, which eventually led to congressional passage of the Cuban Adjustment Act; EVD for Southeast Asians, which led to similar legislation for Indochinese adjustment of status; DED for Chinese students after Tiananmen Square, which was soon supplanted by the Chinese Student Protection Act; and the Family Fairness program, which was replaced by Family Unity . . . Thus, there is reason behind the Dreamers' faith that they might someday get something better. Nonstatus can sometimes be a way station en route to status.").

As an initial matter, how do the DACA and DAPA criminal bars compare to other crime-related provisions in the INA? In some respects, the bars cast a *wider* net than the statutory provisions that bar admission and trigger deportation. A broad swath of misdemeanor offenses that would trigger neither inadmissibility nor deportability preclude consideration under DACA and DAPA. For example, a noncitizen could easily accrue multiple misdemeanor convictions without triggering inadmissibility under INA § 212. Yet, per the DACA and DAPA guidelines, three or more misdemeanors lead to a presumption of ineligibility. Additionally, as described more fully below, a simple driving under the influence ("DUI") offense is not normally classified as a crime involving moral turpitude, and hence would not bar admission.[26] Under the DACA and DAPA guidelines, however, a DUI offense is a "significant misdemeanor" and hence a bar to eligibility.[27]

In other respects, however, the DACA and DAPA provisions are more forgiving. Although the programs bar persons convicted of drug sale and trafficking offenses, they do not bar persons convicted of possessory drug offenses.[28] By contrast, the grounds of inadmissibility and deportability both screen for persons convicted of violation of any law relating to a controlled substance.[29] This includes, with a limited exception, possessory offenses.[30] DACA is also more forgiving in its treatment of expunged convictions: according to U.S. Citizenship and Immigration Services, such convictions will be examined on a case-by-case basis for DACA applicants.[31] By contrast, in other parts of the immigration system, an expungement (under a rehabilitative statute) does not eliminate the immigration consequences of the conviction.[32]

These doctrinal incongruities may generate practical problems, should DACA and DAPA beneficiaries later be placed on a pathway to legalization. For example, imagine a DACA or DAPA recipient who

26. *In re Lopez-Meza*, 22 I&N Dec. 1188, 1194 (B.I.A. 1999).

27. *See generally* Priority Enforcement Memorandum, *supra* note 19.

28. Kathy Brady, *Practice Advisory for Criminal Defenders: New "Deferred Action for Parental Accountability" (DAPA) Immigration Program Announced by President Obama*, IMMIGRANT LEGAL RES. CTR. & NAT'L IMMIGR. PROJECT 4 (2014) ("A misdemeanor conviction for drug *possession* is not necessarily a bar to DAPA. However in some DACA cases some more egregious possession cases were used as the basis for a discretionary denial, even though it was not a bar.").

29. 8 U.S.C. §§ 1182(a)(2)(A)(ii), 1227(a)(2)(B) (2012).

30. *See, e.g.*, 8 U.S.C. § 1227(a)(2)(B)(i) (carving out, as an exception to an otherwise broad deportability ground, "a single offense involving possession for one's own use of 30 grams or less of marijuana").

31. *Consideration of Deferred Action for Childhood Arrivals, Frequently Asked Questions*, *supra* note 8.

32. *See In re Marroquin*, 23 I&N Dec. 705 (B.I.A. 2005). By contrast, the Attorney General in *Marroquin* suggests that a conviction that has been vacated or set aside due to concern regarding the "legal propriety of the original judgment" will no longer carry immigration consequences. *Id.* at 715.

has a conviction for simple possession of thirty-five grams of marijuana. If he later applies for permanent residence, he would likely trigger an inadmissibility bar under INA § 212.[33] Likewise, it seems odd that the programs would exclude persons with multiple misdemeanor convictions—for example, three convictions of disorderly conduct—when such convictions would not bar admission nor lead to deportation. Such persons, who are ineligible for DACA and DAPA, might be left out of a subsequently enacted legalization initiative.

The programs also create confounding asymmetries vis-à-vis comparable immigration processes. Take the case of Alex, an individual who entered the United States without inspection and later marries a U.S. citizen. During the course of her time in the United States, Alex is convicted for DUI, and is therefore ineligible for DACA. Due to her illegal entry, she is unable to obtain legal status through her spouse, and the couple does not qualify for any waivers that would allow Alex to overcome that bar. Although she is in a genuine relationship with a U.S. citizen, and may be contributing in other ways to the community, she is forced to remain in the shadows and cannot access work authorization.

By contrast, Bailey entered the United States on a visitor's visa but overstayed for many years. Like Alex, Bailey marries a U.S. citizen, and has a conviction under the same DUI statute, under analogous circumstances. Bailey's spouse can petition Bailey for permanent residence, notwithstanding his lengthy overstay. Under existing case law, the DUI conviction does not create any inadmissibility issues. Like Alex, Bailey is in a genuine relationship with a U.S. citizen, and is contributing to the local community. Unlike Alex, however, Bailey has a straightforward route to legal status and work authorization. Indeed, Bailey very well could obtain U.S. citizenship in fewer than five years.

Certainly, one could argue that the unlawful entry justifies the differential treatment between Alex and Bailey. Nevertheless, assuming the public safety concerns and positive equities are identical, and that both have violated the immigration laws in some fashion (either by entering unlawfully or overstaying), it is hard to rationalize the differential weight given to the criminal convictions. Indeed, both processes are designed to bring persons within the fold of the community.

33. 8 U.S.C. § 1182(a)(2)(A)(ii); *see also* Kathy Brady, *supra* note 28, at 4 (noting how drug possession offenses can bar efforts to obtain lawful permanent residence through a family member).

2. Theoretical Considerations

The inconsistencies and asymmetries noted above invite consideration of theories of immigration law and membership, and how one conceives of the various steps along the pathway from outsider to insider, from noncitizen to citizen. One might argue that, as one's status in the receiving country becomes more visible, secure, and permanent, the screening criteria should become more rigorous. In other words, those seeking citizenship will face the harshest scrutiny, whereas those just beginning along the pathway of regularization should face a lower standard.

By contrast, others might suggest that the most exacting scrutiny should occur at the initial steps along the pathway— so as to ensure that those who are brought within the fold of the community satisfy a certain level of worthiness. Under this approach, later steps along the pathway are accompanied by equivalent, or lesser forms of scrutiny. Some adherents of this theory posit that the noncitizen's contributions to the receiving country, and the length of their stay, offset negative considerations at later stages along the pathway.

Additionally, one might distinguish membership (i.e., some kind of affirmative status) with tolerance of presence (i.e., the type of reprieve from removal that DACA and DAPA provide). Even in this context, similar questions emerge: should those seeking membership be subjected to higher standards than those seeking tolerance, or vice versa? Does membership require some positive societal contributions, which might balance out (and hence allow for) some quantum of criminal conduct? Are those on the margins of society holders of an implicit license that can be revoked by the government for even the slightest transgression?[34] Are those seeking tolerance of presence getting shuttled into a permanent, second-class status, where movement along a pathway is not necessarily contemplated? If so, are the above-noted inconsistencies inconsequential?

In this short Essay, I do not seek to answer all of these questions, but simply raise them as the types of inquiries that ought to guide policymaking. Unfortunately, the DACA and DAPA criminal bars cannot be assimilated into any coherent normative framework regarding membership or worthiness. In all likelihood, the programs were structured to garner political and public support, with minimal concern for their theoretical underpinnings. While such an approach is understandable, the increasing normative chaos will generate even more

34. HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 30 (2007) ("In short, immigrants are guests to be let in, but only on the condition that they are easily evicted.").

skepticism towards—and put pressure on—an already debilitated system.

B. A Redistribution of Power?

A second critical observation regarding the DACA and DAPA criminal bars relates to the roles of the executive and legislative branches in enacting and enforcing crime-related norms in the immigration system. Traditionally, the two branches have collaborated on crime-related enforcement matters: Congress has outlined the normative content of criminal removal categories, while the executive has sought to enforce those laws, exercising discretion given limited resources.[35] The affirmative creation of the "significant misdemeanor" category is generally consistent with this practice, but also signals a greater use of inherent executive authority in dictating the content of crimmigration law. The expressive and potentially transformative power of this category renders it worthy of further consideration.

Over the years, Congress has dictated the criteria for the types of noncitizens who should be denied admission or expelled from the United States because of criminal conduct. This role is what Adam Cox and Cristina Rodriguez have dubbed the "front-end screening authority," which Congress has traditionally enjoyed.[36] Consistent with this approach, the President has wielded little power over such front-end decisions regarding screening criteria. As Cox and Rodriguez note, however, the President does still wield considerable influence on the "back end," given limited enforcement resources. Indeed, in the space between an expansive and detailed code put forth by Congress (which renders large numbers of noncitizens removable), and the reality of limited resources, the President wields considerable screening power.[37]

Cox and Rodriguez describe this as a "de facto delegation of power," which allows the President to shape immigration policy by deciding who to remove and over whom to exercise discretion.[38] And the DACA and DAPA programs epitomize this type of substantive prioritization. Among the millions of noncitizens who are removable because of unlawful entries or overstays, the Executive has made a policy decision regarding who is worthy of insulation from removal. The DACA and DAPA criminal bars likewise reflect substantive policy decisions.

35. *See, e.g.*, Priority Enforcement Memo, *supra* note 19.
36. Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 464–65 (2009).
37. *Id.* at 463–64.
38. *Id.* at 465, 511.

I would suggest two reasons for why this particular exercise of Presidential power is unique. First, the DACA and DAPA programs represent the first time the executive branch has affirmatively coined a crimmigration category, rather than (1) relying on categories established by Congress, or (2) directing enforcement to specifically named crimes. While the DACA and DAPA programs did clarify the contours of the "significant misdemeanor" category, the expressive power of this category is significant. By naming a new category, the President is signaling the unworthiness of a large new class of persons, and is extending the reach of crimmigration law, bringing it more squarely (and explicitly) within the world of misdemeanor convictions. Additionally, by relying upon a broadly worded category, the executive has opened the door for the inclusion of other crimes that may, over time, trigger concerns. In this regard, the growth of the aggravated felony category is a cautionary tale.[39] Finally, a specifically named category will, over time, undoubtedly develop a particular resonance and normalcy in immigration-related discourse. It would therefore be unsurprising to see, at some point in the future, federal regulations or even legislation in Congress invoking the "significant misdemeanor" category.

A second reason why this exercise of Presidential power is notable is precisely because the substantive policy decisions reflected in the eligibility criteria *conflict* with some of the norms enacted by Congress. As described above, in some respects the President's screening criteria are harsher than existing crimmigration norms, while in other respects, they are more forgiving. In setting out the criteria for DAPA and DACA, the Executive was almost certainly aware of the differences between its own substantive crimmigration priorities and those named by Congress. The President's bold assertion of a competing set of norms is noteworthy, and may reflect a more affirmative vocalization of priorities in the face of legislative inaction. For example, the preoccupation with DUI offenses, which is notable in the DACA and DAPA eligibility bars, was also incorporated into an Executive-backed immigration reform bill, which stalled in the House of Representatives in 2013.[40] Regardless of the specific motivation, the President's actions

39. *See* Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1758–59 (2013) (describing the expansion of the aggravated felony category, and the accompanying bars to relief).

40. *See* Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3702 (2013) (proposing to add DUI-related grounds of inadmissibility and deportability). DUI offenses committed by noncitizens have long captured the public consciousness and had a particular resonance in social and political discourse. *See generally* Jayesh M. Rathod, *Distilling Americans: The Legacy of Prohibition on U.S. Immigration Law*, 51 HOUS. L. REV. 781 (2014).

represent a modest, but noteworthy reshuffling of power between the political branches.

C. Undermining the Palliative Effect of Case Law

A third observation regarding the crime-related bars in DACA and DAPA is their insulation from recent case law, which has sought to soften the harsh immigration consequences of certain convictions. As discretionary executive announcements, which are untethered from specific statutory provisions, DACA and DAPA sidestep the categorical approach, which has become a dominant mode of analysis in determining the consequences to attach to criminal convictions. The programs also obscure long-standing case law, which has suggested that simple DUI offenses should not trigger removal.[41]

In a pair of recent decisions—*Moncrieffe v. Holder*[42] and *Descamps v. United States*[43]— the Supreme Court reiterated the primacy of the categorical approach in determining whether to assign a collateral consequence to a criminal conviction.[44] Given the broad wording of many criminal statutes, and the possibility of persons being convicted for conduct that is not morally reprehensible (or broader than the relevant federal definition), the categorical approach ensures that immigration consequences do not attach unless the conduct is clearly of a type proscribed by Congress. The modified categorical approach allows for consideration of a limited universe of documents to determine whether the conviction was, in fact, of the type meant to trigger a collateral consequence.[45]

In the crime-related bars that govern DACA and DAPA, there is little consideration for the careful statutory analysis contemplated by *Moncrieffe* and *Descamps.* Because the programs are effectively an act of administrative grace—and do not require agency officers to discern Congressional intent—the case for the categorical approach is on shaky footing.[46] But absent the categorical approach, the programs are likely to produce unintended and inequitable outcomes. Per the DACA and DAPA guidelines, for example, a noncitizen convicted of burglary is presumptively ineligible for deferred action under the programs. Yet *Descamps* itself was a case about a broadly worded California burglary

41. *See, e.g.*, *In re Lopez-Meza*, 22 I&N Dec. 1188, 1194 (B.I.A. 1999).
42. 133 S. Ct. 1678 (2013).
43. 133 S. Ct. 2276 (2013).
44. *See generally Moncrieffe*, 133 S. Ct. 1678; *Descamps*, 133 S. Ct. 2276.
45. *Descamps*, 133 S. Ct. at 2285.
46. *See* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1688–95 (2011) (detailing a long history of immigration cases in which the categorical approach is applied as a means of staying true to Congressional intent).

statute, and the possibility that the underlying conduct may be broader than the generic definition of burglary, which contemplates some act of breaking and entering.[47] Therefore, it is possible for a noncitizen to be convicted under a burglary statute, and therefore be denied the possibility to apply for DACA or DAPA, based on conduct that one does not normally associate with "burglary."

Although not specifically required, the DHS might consider formally adopting the categorical approach as part of DACA and future DAPA adjudication. Alina Das has outlined some of the norms advanced by use of the categorical approach in immigration cases, including several applicable to the DACA and DAPA context.[48] The categorical approach would promote uniformity in decision making, and would also afford noncitizens a degree of predictability regarding the immigration consequences of their criminal convictions.[49] This predictability also implies consistency in how convictions are treated for different immigration purposes. Das also notes the importance of efficiency, although that imperative may be less defensible, given that DACA and DAPA adjudications are meant to be individualized determinations.[50] Indeed, while there is significant merit to the categorical approach, the executive branch will have to harmonize the categorical approach with its overall insistence on case-by-case assessments.[51]

The judicial interpretation of driving under the influence offers a distinct example of how DACA and DAPA have sidestepped the effect of case law.[52] As noted above, DUI convictions will typically bar eligibility for DACA and DAPA. Meanwhile, courts have held that simple (i.e., non-aggravated) DUI convictions are neither crimes involving moral turpitude[53] nor crimes of violence (and therefore not aggravated felonies).[54] Put another way, courts that have examined DUI statutes and considered the underlying conduct have decided that noncitizen simple DUI offenders should *not* suffer congressionally prescribed collateral consequences because of the DUI. By elevating

47. *Descamps*, 133 S. Ct. at 2286.
48. Das, *supra* note 46.
49. *Id.* at 1733–38.
50. *Id.* at 1738–41.
51. *See, e.g.*, *Texas v. United States*, 787 F.3d 733, 759–67 (5th Cir. 2015). Whether the DACA and DAPA determinations are discretionary, case-by-case assessments, as opposed to a rule" subject to the Administrative Procedures Act, is a core issue in the ongoing litigation relating to DAPA. *Id.*
52. *See* Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 306 ("[I]n some respects DACA imposed categorical restrictions on eligibility that are harsher than the existing statute, for instance by treating simple DUI offenses as qualifying crimes.").
53. *In re Lopez-Meza*, 22 I&N Dec. 1188, 1194 (B.I.A. 1999).
54. *Leocal v. Ashcroft*, 543 U.S. 1, 1 (2004).

once more the consequences associated with DUI offenses, the executive branch has expressed a substantive priority, with little regard for the "worthiness" guidelines demarcated by Congress and the judiciary.

D. Systemic Considerations

The DACA and DAPA criminal bars have a broader spillover effect on the operations of the immigration and criminal justice systems. This final set of observations examines how these bars impact the work of criminal defense attorneys, and how they solidify troubling trends relating to the criminalization of immigrants.

In addition to the normative confusion generated within the area of immigration law, the DACA and DAPA bars also complicate the work of criminal defense attorneys, who, per *Padilla v. Kentucky*,[55] must navigate the terrain of immigration consequences of criminal convictions.[56] The entrenchment of the new categories, including "significant misdemeanor," is consistent with recent trends relating to expanded immigration consequences for relatively minor criminal convictions.[57] The bars add a complicated overlay to an already tricky analysis for criminal defense attorneys.

Also, by casting the crimmigration net so broadly, and by reaching deeper in the world of misdemeanors, the executive actions reify some of the most troubling features of the criminal-immigration nexus. Studies have repeatedly shown that youth of color, including immigrants, are disproportionately targeted by police for relatively minor offenses, even though immigrants are less likely to commit crimes.[58] Under this framework, the effect of discriminatory policing and profiling, especially for relatively minor offenses, is magnified through the creation of new crimmigration norms. These programs provide little space for consideration of how immigrant communities of color are affected by policing, and how those convictions should be treated in the immigration system.

Another impact of the DACA and DAPA bars, and the accompanying expansion of criminal enforcement priorities, is to make even smaller the group of immigrants deemed worthy by our

55. 559 U.S. 356 (2010).

56. *See generally* Padilla v. Kentucky, 559 U.S. 356 (2010).

57. *See, e.g.*, Cade, *supra* note 39, at 1758–62 (describing how minor crimes can trigger a vast net of immigration consequences and bars to relief).

58. Allegra McLeod, *The U.S. Criminal-Immigration Convergence and its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 167–68 (2012); *see also* Ilya Somin, *Immigration and Crime*, WASH. POST, July 14, 2015, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/14/immigration-and-crime/ [https://perma.cc/KXZ3-LQ68] (citing numerous studies showing "that immigrants have lower crime rates than natives").

immigration norms. As Elizabeth Keyes has noted, immigration norms and processes often dichotomize noncitizens into "good" and "bad" immigrants.[59] As the requirements for acceptability get stricter with the expansion of crimmigration categories, otherwise worthy immigrants who have made positive social contributions find themselves struggling to meet impossibly high standards of acceptability. Some of these persons may have membership claims that rival the equities of permanent residents or even citizens.[60]

Finally, the criminal-immigration system often reflects broader societal views regarding approaches to punishment. As Juliet Stumpf has noted, the growth of crimmigration law in the 1990s and 2000s mirrored a theoretical shift away from rehabilitation, and towards conceptions of retribution and deterrence.[61] In recent years, as greater attention is paid to inequities in the criminal system, calls for systemic reform have grown in strength, including a reversal of mass incarceration.[62] Yet thus far, those broader calls have not begun to reshape the criminalization of immigrants.[63] While the criminalization of immigrants is a broad and complex phenomenon, there is a narrative dissonance between these ever-morphing bars, and the Obama Administration's focus on criminal justice reform.

IV. CONCLUSION

DACA and DAPA are poised to have a transformative effect on the lives of millions of noncitizens. For those who have fought vigorously for reform in Congress, the programs are a small, but important step forward. At the same time, the crime-related bars in DACA and DAPA deserve careful scrutiny, because of what they signal for the normative evolution of immigration law, for the plenary power, and for the criminal justice and immigration systems at large. While the debate regarding the legality of the programs has captured much of the scholarly attention, the critical observations presented in this Essay reveal additional layers of complexity that are worthy of study and discussion.

59. Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 226–27 (2012).

60. McLeod, *supra* note 58, at 143.

61. Stumpf, *supra* note 20, at 403–04.

62. *See, e.g.*, David Hudson, *President Obama: "Our Criminal Justice System Isn't as Smart as It Should Be,"* WHITE HOUSE BLOG (July 15, 2015 1:12 PM), https://www.whitehouse.gov/blog/2015/07/15/president-obama-our-criminal-justice-system-isnt-smart-it-should-be [http://perma.cc/6AEM-KH6M].

63. Anita Sinha, *Ending Mass Incarceration, but not for Immigrants: A Tale of Two Policies*, HUFFINGTON POST (July 27, 2015, 5:41 PM), http://www.huffingtonpost.com/anita-sinha/ending-mass-incarceration-but-not-for-immigrants_b_7874750.html [http://perma.cc/9LJA-HY4G].