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# Deferred Action: Considering What is Lost

Elizabeth Keyes

*University of Baltimore School of Law*, [ekeyes@ubalt.edu](mailto:ekeyes@ubalt.edu)

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# Deferred Action: Considering What is Lost

Elizabeth Keyes\*

## I. INTRODUCTION

This response to Professor Motomura considers what is lost through the elaboration of formally defined boundaries around prosecutorial discretion. Professor Motomura and others in this Issue rightly extol the many benefits of the President's November 2014 executive actions. While I share the view that those benefits are considerable, I believe a full accounting requires us to consider what gets lost in this process, including identification of the immigrants in the limbo space between the actions' prospective beneficiaries at the one end and those who are priorities for removal on the other. This Essay focuses on the cost that comes from the loss of a different kind of discretion in immigration law, where discretionary authority can act as a corrective measure at the edges of rules, where defined edges bump up against immigrants in limbo.

Discretion is always an elusive concept: "interstitial," and like the hole in a doughnut, as Professor Dan Kanstroom has written—defined more by what is around it than by the space itself.<sup>1</sup> The less defined edges of that space are, the more that space is full of possibility. The malleability of this space generally cuts against the values of transparency and accountability that are rightly lauded by many of the scholars in this symposium Issue. Individualized discretion, guided generally by policy interests and preferences, and not subject to carefully drawn limits and clearly defined edges, is indeed anathema to those values—and yet it serves an important purpose. The discretion available at the law's margins constitutes a vital means to correct the errors that inevitably happen at the law's edges, where even the best

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\* Elizabeth Keyes, Assistant Professor, Director of the Immigrant Rights Clinic, University of Baltimore School of Law. J.D., Georgetown University Law Center; M.P.A., Princeton University; B.A., Carleton College. The author wishes to thank Hiroshi Motomura and the editors of the *Washburn Law Journal*, especially Destiny Bounds, for the invitation to participate in this symposium, and she thanks Dan Kanstroom, Jayesh Rathod, and Anita Sinha for their helpful comments as this draft evolved. All errors are her own.

1. Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703 (1997).

rules do an imperfect job of capturing the world's complexity.<sup>2</sup> This kind of remedial, equitable discretion is a kind of discretion that has been steadily whittled down over the past twenty-five years in immigration law.

With these recent executive actions, the discretionary space available for immigrants to make an affirmative case for consideration has dwindled to near nothingness—a phenomenon that should worry advocates whose clients do not fit within the brightly-lined box set up for the immigrants deemed most deserving of immigration relief. Meanwhile, the individualized discretion that remains within the executive actions points emphatically and uniquely toward removal: even those eligible for the relief may, as a discretionary matter, be denied, and even those who do not fit into the enforcement priorities may be prioritized anyway, discretionarily. This places the executive actions in a long series of forms of immigration relief that add discretion, not as a corrective to embrace immigrants, but as yet another hurdle for immigrants to overcome.

Part II of this Essay begins with a brief consideration of what discretion means in immigration law, and then turns in Part III to the three zones, now clearly delineated, that the executive actions created: the immigrants who are decisively in, decisively out, and decisively neither. Part IV considers the value of what may be lost with the executive actions, and concedes that the number of people benefiting from the executive actions far outstrips the number of people who might have made affirmative cases for discretion in prior eras. This Part also, however, compares the actions with the loss two decades ago of another zone of discretion in immigration law, Judicial Recommendations Against Deportation (“JRADs”), a loss that seemed unimportant at that time, but which is broadly regretted today. Part V looks at the ways that “old fashioned” deferred action—an equitable, loosely defined zone of discretion that preceded the iterations that this symposium focuses upon in its pre-DACA and DAPA format—will be under tremendous pressure from the new executive actions, and concludes that we need to be careful about what we give up for the sake of a status which has tremendous immediate usefulness, but which is temporary, and which may consume resources and political energy better dedicated to lasting durable reform.

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2. A law prohibiting theft of bread is a good law, for example, but readers and fans of *Les Misérables* wish Inspector Javert used discretion with that rule as applied to Jean Valjean. Students staying in their dormitories at night during dangerous times is another excellent rule, but *Harry Potter* readers generally appreciate Professor McGonagall's use of discretion in enforcing these rules more than they appreciate Dolores Umbridge's faithful upholding of the rule.

## II. DISCRETION, BRIEFLY

Deferred action is a form of prosecutorial discretion, but its nature is changing as it shifts from the loosely defined “old fashioned” deferred action into carefully-drawn Deferred Action for Childhood Arrivals (“DACA”) and Deferred Action for Parents of Americans and LPRs (“DAPA”).<sup>3</sup> Dan Kanstroom developed an important typology of discretion twenty years ago that remains valuable and insightful today to understand this shift.<sup>4</sup> Referring to Ronald Dworkin’s work, he described discretion as being “the hole in the doughnut”—a hole which “does not exist except as an area left open by a surrounding belt of restriction.”<sup>5</sup> Phil Torrey, of Harvard’s Immigration and Refugee Clinic, discusses another image of the elusive concept:

Discretion has been described as a “flexible shock absorber.” It gives judges authority to administer justice that reflects the specific circumstances of an individual case. When exercised properly, discretion produces a fair result in accordance with the intent of lawmakers.<sup>6</sup>

Kanstroom found discretion within immigration law in numerous places, from formally delegated discretion (delegated from Congress to the Executive), to heavily individualized discretion (found in individual case adjudications), and his analysis of these and more forms of discretion integrated the sometimes outlying field of immigration law with overarching conceptions of discretion in the law.<sup>7</sup>

Of most interest to me in this Essay is the discretion Kanstroom termed “residual” discretion.<sup>8</sup> Residual discretion exists in the space where statutes and rules have not made all outcomes fully pre-determined, whether through broadly written rules or use of words that required significant further interpretation.<sup>9</sup> Residual discretion is not a blank slate for rewriting laws, but rather a tool of leniency that adjudicators can deploy where a rote reading of a rule seems to create an inequitable result. The small and declining availability of such discretion in immigration law has been rued by many scholars, from the harsh mandatory detention provision<sup>10</sup> to the removal of discretionary

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3. See Part IV., *infra*.

4. Kanstroom, *supra* note 1.

5. *Id.* at 711.

6. Philip L. Torrey, *The Erosion of Judicial Discretion in Crime-Based Removal Proceedings*, 14-02 *Immigr. Briefings* 1 (2014) (quoting Daniel K. Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the “Rule” of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161, 162 (2007)).

7. Kanstroom, *supra* note 1.

8. *Id.* at 717-27.

9. “When exercised ‘properly,’ discretion, on this view, means the *residue* of rule-based legal practice; that which cannot be accounted for under the ‘core’ system of law which is primarily seen as one of definable rules which seek to govern abstractly and in advance of a particular dispute.” Kanstroom, *supra* note 1, at 719.

10. See Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration*

waivers for lawful permanent residents facing crime-based removal.<sup>11</sup> Deferred action used to be an excellent example of residual discretion, but the transparency and clarity of the executive actions shrinks this residual space radically.

### III. THE BORDERS AROUND LIMBO

The November 2014 memos clearly defined two important sets of immigrants—those able to benefit from deferred action and those who constituted enforcement priorities. Over-simplifying greatly, the former are beneficiaries of the Development, Relief, and Education for Alien Minors Act (“DREAMers”) and parents of U.S. citizens and permanent residents,<sup>12</sup> and the latter are named as threats to public safety and recent or significant immigration violators.<sup>13</sup> This Part will look at the function of discretion for each, before turning to the unnamed third group, comprising the millions of immigrants who are neither “in” nor “out.”

#### A. *In: The Beneficiaries of the New Deferred Action*

With DACA and DAPA, deferred action now has substantive meaning, with a set of clear criteria defining who *is* and who *is not* eligible for the status. The eligibility requirements for each program differ, but contain bright-line criteria such as age at entry, status of qualifying relative, length of time in the United States, and so forth—criteria that have little to no ambiguity, and thus help create the bright line surrounding the category.

Interestingly, both DACA and DAPA also retain a discretionary element that *narrows* the space within the zone of eligibility.<sup>14</sup> The discretion that remains is the discretion to deny applicants who meet all eligibility requirements to the letter, not the discretion to grant in case of missing one or more eligibility requirements, such as someone who

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*Detention*, 65 HASTINGS L.J. 363 (2014).

11. See Maritza I. Reyes, *Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion in the Removal of Lawful Permanent Residents*, 84 TEMP. L. REV. 637, 658 (2012).

12. 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://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [http://perma.cc/2K3L-CMML] [hereinafter DAPA Memorandum].

13. See Memorandum from Jeh Charles Johnson, Sec’y of Homeland Sec., on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf) [http://perma.cc/VLV3-PVED] [hereinafter Priority Enforcement Memorandum].

14. DAPA Memorandum, *supra* note 12, at 5 (“[I]mmigration officers will be provided with specific eligibility criteria for deferred action, but the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis.”).

entered a month past his sixteenth birthday (in the case of DACA), or a parent of a U.S. Citizen who falls weeks short of the length of U.S. physical presence required.<sup>15</sup> This residual discretion softens the bright line somewhat, but in a negative direction for the potential beneficiaries: discretion can only be used to take the benefit away, not to bestow it.

Roughly five million people are eligible for DACA or DAPA, according to the Migration Policy Institute.<sup>16</sup> The actual number of recipients of deferred action through these programs is likely to be somewhat, or perhaps significantly, lower. Experience with past legalization programs—which offered considerably greater long-term benefits—and with the original DACA, shows that a significant percentage of those eligible are unlikely to apply. Eligible participants may not apply because of financial reasons (a major factor in the 1986 legalization),<sup>17</sup> or fear of the uncertain deferred action status (a factor with DACA, where fees were also a factor).<sup>18</sup> Another percentage, probably very small, will be eligible but denied for discretionary reasons.<sup>19</sup>

### *B. Out: Trying to Define the Most Undesirable Immigrants*

At the other end of the now clear priorities are those for whom removal will be much more likely—the top two priorities announced in the November 2014 memo establishing the Priority Enforcement Program (“PEP”). PEP concerns itself with immigrants who have any of a series of crime-related convictions (aggravated felony, state felony or gang-related convictions, three or more misdemeanor convictions, or a single significant misdemeanor conviction), those suspected of terrorism, and those with recent immigration violations (since January 1, 2014).<sup>20</sup> The Migration Policy Institute estimates that these priorities

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15. Professor Wadhia’s contribution to this Issue notes how these denials “continued to flow.” See Shoba Sivaprasad Wadhia, *The President and Deportation: DACA, DAPA, and the Sources and Limits of Executive Authority*, 55 WASHBURN L.J. 189, 195 (2015).

16. MPI Releases Detailed Data Profiles of Unauthorized Immigrants and Estimates of Deferred Action Populations for Top U.S. Counties, MIGRATION POL’Y INST., (Jan. 15, 2015), <http://www.migrationpolicy.org/news/mpi-releases-detailed-county-profiles-unauthorized-immigrants-and-estimates-deferred-action> [<http://perma.cc/GV38-RFNK>] [hereinafter “MPI Data Profiles”].

17. See Betsy Cooper & Kevin O’Neil, *Lessons From the Immigration Reform and Control Act of 1986*, MIGRATION POL’Y INST., (Aug. 2005), <http://www.migrationpolicy.org/research/lessons-immigration-reform-and-control-act-1986> [<http://perma.cc/G7K3-8TNJ>].

18. See generally, Elizabeth Keyes, *Race and Immigration, Then and Now: How the Shift to ‘Worthiness’ Undermines the 1965 Immigration Law’s Civil Rights Goals*, 57 HOWARD L.J. 900 (2014).

19. No statistics are yet available, but through informal polls of immigration attorneys, thus far no one who has received a discretionary denial has been informed of the reason for that denial. The National Immigration Project is developing a report on this phenomenon, but it has not yet been published.

20. Priority Enforcement Memorandum, *supra* note 13.

capture approximately thirteen percent of the undocumented population, which would comprise roughly 1.5 million people.<sup>21</sup>

While all of this may sound entirely safe from critique, the rhetoric overstates the value of what it captures.<sup>22</sup> First, it is vital to note how these categories over-encompass those groups who have disproportionate contact with the criminal justice system, including immigrants of color.<sup>23</sup> Second, these priorities also focus on the families (especially children) who arrived from Central America seeking refuge in 2014. It is almost certainly true within this group of 1.5 million people that there are many sympathetic cases—often involving vulnerable children or past-offenders who have shown significant rehabilitation. But the clarity of this “out” box removes any such equities from consideration.

Furthermore, Immigration and Customs Enforcement (“ICE”) has been clear that while its resources are directed to identifying and removing those within the first two priorities, it retains discretion to remove others “of interest.”<sup>24</sup> This discretion is a perfect counterpoint to that residual discretion left with DACA/DAPA: it is the discretion to *add* to the group of excluded. And of course, the discretion in this context also points in the direction of removability. Where DACA and DAPA create an initial set of people seemingly eligible for inclusion, and then discretionarily ejects some from that group, PEP creates an initial set of people prioritized for exclusion, and then discretionarily adds to the group.

### C. *Limbo: The Lost Middle*

Definable only by *not* being in either of these two groups are an estimated 4.5 million undocumented residents of the United States.<sup>25</sup> We know they lack serious criminal convictions, and we know they either do not have U.S. citizen or lawful permanent resident (“LPR”)

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21. MPI Data Profiles, *supra* note 16.

22. I have critiqued the easy reliance on overly-simplified and often misleading narratives of “good” and “bad” immigrants in my earlier work. See generally 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 (2012). For a deep analysis of the specific ways in which terminology in immigration law suffers from inaccuracy to the detriment of immigrants, see Emily Torstveit Ngara, *Aliens, Aggravated Felons and Worse: When Words Breed Fear and Fear Breeds Injustice*, 11 STAN. J.C.R. & C.L. (forthcoming 2016).

23. See Jason A. Cade, *The Plea Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751 (2013); Elizabeth Keyes, *Defining American: The Dream Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101 (2013).

24. Priority Enforcement Memorandum, *supra* note 13.

25. This estimate draws on the widely-used figure of 11 million undocumented immigrants in the United States. With 5 million benefiting from DAPA or DACA, and 1.5 million falling into enforcement priorities, that leaves 4.5 million in limbo. As noted above, because fewer than 5 million are likely to actually benefit from DAPA or DACA, the limbo population is probably greater than this—but I will conservatively leave the estimate at 4.5 million.

children, or have not lived long enough in the United States to qualify for DACA or DAPA. What we know affirmatively about them is far less clear, except that they likely range across a broad spectrum of nationalities and levels of ties to the United States through employment, children in U.S. schools, U.S. citizen relatives other than children, and so forth.

Since the boxes of those who are “in” or “out” both have policy justifications (whether one agrees with those justifications or not), one logical conclusion is that perhaps the limbo zone that holds those who are neither in nor out is equally justifiable. Yet at the edges of the limbo zone we can perceive what the loss of individualized discretion means. Legal philosopher H.L.A. Hart understood that even the most ambitious bright-line rules needed to leave space for issues that can only be “appreciated and settled when they arise in a concrete case.”<sup>26</sup> In that spirit, and to put forward a more affirmative view of who those in limbo are, rather than who they are not, I offer the following brief concrete case:

Miguel<sup>27</sup> came legally to the United States from Brazil at age 17. The day after he arrived, he set to work as day laborer outside a large home construction store, starting a pattern of working 10 hour days for as many days as he could find work. Despite the physical demands of the work, he also made his way to a GED registration center, and began studying for his GED in the evenings and at Saturday classes—taking two buses each way to do so. Education was (and remains) the single most important thing to Miguel, and after getting his GED he enrolled in community college, all the while working for his cousin. His initial visa had long since expired, so Miguel had become part of the U.S. undocumented population. He did so well with his community college courses that a four-year university offered him an academic scholarship to help him complete his bachelor’s degree, which he did—*summa cum laude*. From there, a full scholarship to a prestigious graduate program followed.

With no criminal convictions, Miguel is not a priority for removal. Yet he does not qualify for any form of relief under the November 2012 executive actions announced by President Obama. He has no child (therefore not DAPA eligible) and came a year too late to qualify for DACA. When he recently applied for “old-fashioned” deferred action, DHS denied his application.<sup>28</sup>

Miguel is among the 4.5 million in limbo. So is the construction worker who has been here since 2003, who lives with his American girlfriend, and works two jobs, but has not had a child because he wants to be more economically stable first. Or the home health-care aide

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26. Kanstroom, *supra* note 1, at 722 (quoting H.L.A. Hart, *THE CONCEPT OF LAW* 127 (1961)).

27. Miguel’s story is real; I have only changed his name and country of origin.

28. See generally Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 AM. U. L. REV. 1285 (2015). Deferred action as it has existed in the law since the 1970s, but not constrained by the eligibility requirements of DAPA or DACA. *Id.*



whose U visa application has been caught in a lengthy agency backlog, who is struggling to support her two non-LPR children. Or the grandmother who brought her grandson away from gang violence in Honduras in 2013—although she has a U.S. citizen daughter, she has not been here long enough to qualify for DAPA. The stories go on and on, and are fairly typical of the clients I know who fall into this immigration limbo, a limbo with now starkly clear borders. Indeed, very few of my clients qualify for either program, and the existence of DACA/DAPA shrinks the discretionary space to make an effective case for any of these people whose compelling equities might have made for effective deferred action cases in the past.

DACA/DAPA certainly overlaps with and captures many of the attributes that we value in our immigration policy (as defined by the laws themselves, and the conversations and debates around reform which exhorted that the immigrants be law-abiding, with an enduring presence in the country, and strong connections to the community).<sup>29</sup> But it is by no means clear that someone who happens to have a U.S. citizen child captures the more complicated set of variables that make up the desired immigrant population. Indeed, if Miguel had a child instead of focusing on his education, he would be DAPA eligible, but does society only value him with a child, and not with his educational excellence? Surely not. Are all parents necessarily the embodiment of immigrants we want to stay? Again, surely not (although DAPA can alternately be seen as a policy response to the needs of the citizen and lawful permanent resident *children*, not to their parents). America has long valued family ties in setting immigration priorities, but not exclusively, and certainly not exclusively the parent-child tie, important though it is.<sup>30</sup> As the only game in town for the undocumented population, DACA and DAPA powerfully state whose relief is more urgent, and whose is not. And if these new executive actions either take the pressure off broader reform *or* set up a framework for more durable reform in the future, this problem of under- and over-exclusivity will become even more problematic.

Furthermore, while some individuals in removal proceedings could point to murkier enforcement priorities to justify a request for deferred action (something that can be granted only if it is of value to the government, as in the case of someone whose removal proceeding or

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29. See generally, HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006). Professor Motomura has previously written about how immigration laws over the years have variously captured these and other values and visions society has for immigrants. *Id.*

30. Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1243, 1298 (2013) Angela Banks has explored the limits of citizenship as a proxy for connection and commitment to the United States, calling it “an imperfect proxy.” *Id.*

actual removal would require governmental resources) now, individuals who fall outside those two priorities are very clearly *not* priorities for removal, and therefore ICE has no incentive to agree to requests for deferred action.<sup>31</sup> Advocates are concerned that their clients who have been renewing the work permits they had been receiving for years under deferred action will now be denied those work permits in the future since, despite being removable, they are no longer priorities for removal.<sup>32</sup>

#### IV. DEFERRED ACTION UNDER PRESSURE

DACA and DAPA do not replace “old-fashioned” deferred action—the deferred action that has been utilized for at least four decades—yet their existence may radically change deferred action’s availability in practice, because the executive actions have considerable expressive power. The actions communicate that the Administration’s *preferred* recipients of discretion are the people eligible for DACA and DAPA, and by implication, others are less preferred, or perhaps entirely undesired.

Shoba Sivaprasad Wadhia has written, “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.”<sup>33</sup> Denials of deferred action have always been unreviewable; bureaucratically this makes denial fairly painless.<sup>34</sup> Enforcement bias and workloads within DHS may also tip officials toward denial, as Jason Cade has demonstrated for prosecutorial discretion generally, of which deferred action is a very specific sub-part.<sup>35</sup> Despite these pressures, prior to the executive actions, ICE approved just under half of the roughly seven hundred applications for deferred action that it processed—a very reasonable percentage for a discretionary remedy.<sup>36</sup>

This possibility of a grant of deferred action still exists in theory. For one small subgroup of the 5.5 million in limbo, they will likely

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31. One local ICE office confirmed this at a lunch discussion between ERO officers and AILA chapter members in Baltimore, July 30, 2015 (on file with author).

32. *Id.* Jason Cade notes that this limbo zone actually constitutes another zone of discretion—the discretion not to enforce the zone members’ removal. Jason A. Cade, *Enforcing Immigration Equity*, 84 *FORDHAM L. REV.* 661 (2015). This is true, and the zone consequently benefits from better treatment than those in the “out” box, targeted for deportation. Nonetheless, the ability of any individual member of this limbo zone to seek a discretionary improvement in their status—the deferred action discussed in the following section—is sharply limited.

33. Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 *U.N.H.L. REV.* 1, 7 (2012) (emphasis added).

34. Shoba Sivaprasad Wadhia, *My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE*, 27 *GEO. IMMIGR. L.J.* 345, 348 (2013).

35. Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 *TUL. L. REV.* 1, 46–54 (2014).

36. *Id.*

succeed: those in removal proceedings whose cases are administratively closed while they have applications pending (such as for asylum, cancellation of removal, or other forms of relief). Yet, small as the discretionary space for individual deferred action was before, there is reason to fear that for most of the 5.5 million in limbo, that small space is under even greater pressure and now likely to shrink further. Unless advocates push for full use of the old-fashioned deferred action, to remind officials that this power still exists, a government official may be cautious and hesitant to go beyond the expressly stated preferences found in DACA and DAPA.

As noted above, even those who fit *within* the DACA and DAPA lines may be denied as a matter of discretion, which communicates that this deferred action status is one that should be given in a limited, cautious way. Immigrants like Miguel might have been able to put forward a compelling claim for deferred action in the pre-2012 era, but if their situations fall beyond the lines set by DACA and DAPA, government officials have an easy basis for denial that is, again, an entirely safe decision for them to make because it is not reviewable.<sup>37</sup>

Beyond the explicit preferences stated with DACA and DAPA, the executive actions fit within the historical trend toward discretion as an extra hurdle for immigrants to clear, instead of discretion being a point of access. Congress famously removed much of the delegated discretion through the 1990s, stripping courts of review powers, eliminating judicial ability to adjust outcomes in compelling cases, mandating detention, removing waivers of removal, and so forth. Indeed, where discretion continued within the statute, its expressive purpose was very clearly to *limit* relief—for example, in asylum, or in cancellation of removal—the judge’s discretion is an additional hurdle for applicants, not a way for a judge to make up for some deficiency in the applicant’s ability to meet the other statutory requirements. In commenting on changes over time, Professor Kanstroom quotes Kenneth Davis as saying, “The underlying scheme of the Act is to avoid conferring legal rights on aliens.”<sup>38</sup> With such forces arrayed against the use of discretion, reasserting its value is going to become ever more important for immigrant advocates.

## V. WHY THIS MATTERS

A fair critique of this Essay is that this lost discretion only matters as a theoretical issue. After all, deferred action in the pre-2014 era of

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37. The real Miguel’s case was, indeed, denied.

38. Kanstroom, *supra* note 1, at 752 (quoting 1 KENNETH C. DAVIS, ADMINISTRATIVE. L. TREATISE § 6 (2d ed. 1979)).

less definition and less clarity occupied a statistically tiny place in immigration law.<sup>39</sup> Professor Wadhia has noted how, to the extent we can know the statistics with any certainty, only several hundred people benefited from deferred action in a typical year.<sup>40</sup> Weighing a few hundred people against the millions who will benefit from DACA and DAPA, it is enough to make this Essay seem spectacularly ungrateful.

And yet, something important *is* being lost, beyond even the humanitarian concern we might have for many of the immigrants in the limbo space.<sup>41</sup> While deferred action was under-utilized in the pre-DACA and DAPA era, it represented the possibility of equitable relief in an otherwise highly regulated system, and it is a loss we may rue in the future. Here the history of JRADs may be instructive. The JRAD history begins with an acknowledged need for discretion in a harsh system, continues through a period of uneven use of the discretionary power, and is followed by elimination of the power.<sup>42</sup> The JRAD history ends with regret for its absence.

JRADs offered the sentencing judge in criminal court the ability to determine whether the individual *should* (as a matter of discretion) be deported.<sup>43</sup> As the 1917 legislative history explains:

When the alien is before the judge charged with a crime and the time for sentence comes, necessarily the question of whether he shall be deported or not must be presented to the court, and when all the facts are before him, and both sides have been heard by the court, that is the time when that important matter should be decided.<sup>44</sup>

This is a prime example of individualized discretion, unfettered by the kinds of criteria we see with DACA or DAPA. The JRAD definition cites no criteria, and has only one later-added exclusion (JRADs were made unavailable for narcotics convictions).<sup>45</sup> Instead, it focuses on the procedure of judicial decision-making to recommend against deportation after putting interested parties (immigration authorities, the prosecutor, and so forth) on notice so that they might

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39. See, Shoba Sivaprasad Wadhia, *My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE*, 27 GEO. IMMIGR. L.J. 345 (2013).

40. *Id.*

41. This limbo matters all the more because legislative immigration reform efforts have indefinitely stalled, which means DAPA and DACA are the only significant option available for addressing the needs of the undocumented population.

42. *Supra* Part I.

43. See Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131 (2002).

44. *Id.* at 1131 (quoting 53 Cong. Rec. 5171 (1916) (statement of Rep. Hayes) (speaking about the Immigration Act of 1917)).

45. Narcotic Control Act of 1956, Pub. L. No. 84-728, ch. 629, § 301(b), (c), 70 Stat. 651 (July 25, 1956). See generally Torrey, *supra* note 6. This exclusion was added to the JRAD provision in 1956, and shows yet another example of immigration amendments limiting discretion over time, confirming the view of Dan Kanstroom and Kenneth Davis that the underlying scheme points toward removal.

weigh in.<sup>46</sup> Thus, like pre-2014 deferred action, we see a broad authority with minimal substantive guidance.

The provision was little known, and relatively seldom invoked, as Margaret Taylor and Ronald Wright have shown.<sup>47</sup> Their 2002 article, which argued for a merger between criminal and immigration sentencing, looked at this JRAD history in great detail.<sup>48</sup> They note how, for much of its existence since 1917, JRADs operated in a context where deportations of immigrants for crime-related reasons were very low, and therefore the need for JRADs was lower.<sup>49</sup> The authors note that, “[p]erhaps the most notable feature of JRADs was the extent to which ‘the existence of this remedy and its tremendous ameliorating effect . . . was neither widely known nor understood.’ ”<sup>50</sup> Much like pre-2014 deferred action, then, this was a provision that had relatively little real-world impact.

In 1990, after seventy-three years in the law, Congress removed the provision allowing for JRADs.<sup>51</sup> This removal was an unheralded moment in immigration law at the time, and the provision disappeared without a trace of legislative history explaining its departure.<sup>52</sup> Perhaps its under-use contributed to this silence; it was a tree that did not fall in a forest, making it irrelevant whether we could hear it or not. It is this irrelevance that I had in mind as I considered the sheer numbers of

46. Taylor & Wright, *supra* note 43, at 1143 (“Former 8 U.S.C. § 1251(b)(2)(1988) read as follows: ‘The provisions of subsection (a)(4) [the moral turpitude ground] respecting the deportation of an alien convicted of a crime or crimes shall not apply . . . (2) if the court sentencing such aliens for such crimes shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter.’ ”) (quoting 8 U.S.C. § 1251(b)(2) (1988), *repealed by* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978).

47. Taylor & Wright, *supra* note 43. The level of usage varied considerably by jurisdiction, however. Jason A. Cade, *Return of the JRAD*, 90 N.Y.U. L. REV. ONLINE 25 (2015).

48. Taylor & Wright, *supra* note 43. While beyond the scope of this Essay, their argument is extremely interesting:

The government would benefit if the sentencing judge functioned as an immigration judge because the sentencing investigation would provide a reliable way to identify more deportable offenders. A merger of sentencing and immigration determinations would also yield less duplication of resources, quicker deportation, and—notably—lower detention costs. Deportable offenders would also benefit from quicker resolution of their claims, shorter detentions, the institutionalized use of prosecutorial discretion for immigration decisions, the presence of a neutral judge, and the provision of counsel and the other procedural protections of the criminal system.

*Id.* at 1132–33. The idea is worth revisiting, with integration of the substantial critical race critiques that have been written in the interim about the ways the criminal justice system works to the detriment of, in particular, immigrants of color.

49. *Id.* at 1149–50. They write, “Fewer than one thousand noncitizen offenders were deported each year for most of the period that JRADs were available. With this level of enforcement, the JRAD option was not widely known among criminal defense attorneys.” *Id.*

50. *Id.* at 1148 (quoting DAN KESSELBRENNER AND LORY ROSENBERG, IMMIGRATION LAW AND CRIMES, App. G-4 (Norton Tooby updating ed., 2001)).

51. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

52. Taylor & Wright, *supra* note 43, at 1150–51.

DACA and DAPA eligible people as compared to the limited use of deferred action in the pre-DACA and DAPA era.

However, in hindsight, as the 1990s dramatically increased the intersection between the criminal justice system and immigration enforcement, the departure of JRADs has been rued.<sup>53</sup> Now scholars see it as an underutilized discretionary tool whose usefulness would have boomed in the over-criminalized post-1996 era.<sup>54</sup> As advocates grapple with the fate of 4.5 million or more immigrants in limbo post-2014, it is possible that we will similarly regret the narrowing, and functional elimination, of the tool of deferred action.

## VI. CONCLUSION

This Essay has attempted to provide a counterpoint to the strong value, so powerfully set forth by Professor Motomura and others in this Issue, of establishing more transparent criteria for the exercise of discretion. There is no denying the enormous increase in numbers of people who will benefit from the more clearly promulgated exercise of discretion, and I share my fellow authors' views of the value of clarity. As a practicing lawyer with more tools in her immigration toolbox, I also look forward to finally providing relief to at least a few of my clients who have not had effective ways through the immigration system to date. These clients are the ones who are "in," for whom the clarity of lines around prosecutorial discretion is wholly positive.

Yet, stories like Miguel's hint at one cost of brightening the lines chosen around DACA and DAPA. The residual discretion available for immigrants like Miguel is under intense pressure following the executive actions, and it is an important, valuable, and rare space within the immigration law. The loss matters for these immigrants all the more because legislative immigration reform efforts have indefinitely stalled, which means DACA and DAPA are the only significant option available for addressing the needs of the undocumented population. In an age where, now, the paths to immigration status are so circumscribed, narrow, and easily lost, it is an even sharper cost to narrow this interstitial land where people like Miguel—true heirs to America's

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53. *Id.* See also Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1762 (2013); 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, 308 (2012) ("Criminal justice actors can make deportability decisions today, but they can act in favor of removal only."); Torrey *supra* note 6.

54. Taylor and Wright call for a return, with modifications, of the JRAD provision as a way of achieving their merger goals. Taylor & Wright, *supra* note 43, at 1175–76; see also Cade, *supra* note 47 (calling for "nonstatutory JRADs"); Stephen Lee, *De Facto Immigration Courts*, 101 CAL. L. REV. 553, 598 (2013) ("Although a fuller treatment of this issue is better left for another day, the Court's reference to JRADs raises an intriguing alternative to the current prosecutor-centered world of de facto immigration courts.").

immigration mythology—could have found their way.

There may also be a political cost. Deferred action is nobody's favorite immigration status—indeed, it is more of a “non-status status,” and while it delivers employment authorization, it leads to nothing more durable. Immigrants may be rightly thrilled to receive employment authorization, but they often find that the temporariness of it makes employers unwilling to hire them, fearing that they will be hiring someone who needs to be dismissed a year, or two, or three down the road. In the meantime, it does not provide any basis for them to seek reunification with children or other close family members they have often left behind.

Durable immigration status is still the goal, but immigration reform, when it happens, appears to be on an increasingly elongated timeframe. Despite that, DACA and DAPA (when they are ultimately permitted to go forward) may create a sense of relief that we have done something about the problem, which could soften the winds in the sails of the already slow immigration reform boat. Advocates and scholars can and should celebrate what these programs do accomplish, but we must ultimately demand something much better than the deal we are getting: immigration reform and the restoration of some degree of discretion at the points in the law where well-defined rules meet the individuals who show those rules' limitations.