

## Introduction

Envision a young man named Roman who is brought to the United States as a toddler, grows up in an all-American household along the Eastern Shore, completes his schooling and attends college, and marries his high school sweetheart, a U.S. citizen. Certain marks on Roman's record, such as a criminal conviction many years previous, are sufficient to make him deportable from the United States and leave him with no avenue for appeal or protection.

In the past twenty years, immigration laws have been shaped to leave people like Roman without options to reside in the United States lawfully with their families. These laws have classified particular misbehaviors as "deportable" offenses since the eighteenth century.<sup>1</sup> However, the existence of an immigration system that deprives judges of an opportunity to weigh positive equities such as a marriage to a U.S. citizen, rehabilitation, or meaningful contributions to a family or community is more contemporary, and has created a humanitarian crisis that demands a robust prosecutorial discretion policy. Even without such a crisis, the use of prosecutorial discretion to protect people from removal in compelling cases is critical.

"Prosecutorial discretion" refers to a decision by a government employee or attorney or the immigration agency (as opposed to a judge) to abstain from enforcing the immigration laws against a person or group of persons. In the immigration context, the decision to exercise prosecutorial discretion favorably is pivotal for the individual because such discretion functions as a form of protection from removal, though the immigration "status" conferred is itself tenuous. A prosecutorial discretion grant is also important to an agency seeking to focus its priorities on the "truly dangerous" in order to conserve resources and to recognize that some individuals with exceptional qualities lack a legal way to remain in the United States.

Beginning in late 2010, the Department of Homeland Security (DHS)

published a medley of memoranda to outline its civil enforcement “priorities” and also identify the various factors that U.S. Immigration and Customs Enforcement (ICE) employees and attorneys should consider in deciding whether prosecutorial discretion is appropriate. In the wake of stalled congressional reforms and an election year, prosecutorial discretion surfaced as an attractive government tool to deal with non-citizens with strong equities who lack a legal immigration status or eligibility for formal relief by a judge.

Public interest over prosecutorial discretion peaked in June 2012 when President Barack Obama announced a policy termed Deferred Action for Childhood Arrivals, or DACA.<sup>2</sup> DACA is a sort of deferred action that itself is a form of prosecutorial discretion in immigration law. DACA has enabled thousands of young people to work, study, and drive in the United States with dignity and without the constant fear of arrest and possible deportation.<sup>3</sup> Critics labeled the memoranda on prosecutorial discretion and the DACA program in particular as excessive and politically motivated. Whether or not prosecutorial discretion has earned visibility for political reasons, understanding prosecutorial discretion and the important role it plays in U.S. immigration law is essential.

My preoccupation with prosecutorial discretion began when I was a twenty-two-year-old law student at Georgetown University Law Center and then a law clerk for the late Michael Maggio, a prominent immigration lawyer with a small firm in downtown Washington, D.C. As a law clerk and later attorney at Maggio Kattar P.C., I worked on the cases of many worthy individuals who were not eligible for benefits under current immigration law and faced deportation. The stories of my clients and my desire to protect them from harm or deportation, keep their family together, or obtain a visa based on their exceptional talents were overwhelming. My most striking cases involved clients like Roman whose only prayer was prosecutorial discretion. I handled only a few such cases, but they were life changing and both tested my capacity to obtain prosecutorial discretion to protect a deserving person from deportation and highlighted the powerlessness I felt operating inside a broken immigration legal system.

Following the attacks of September 11, 2001, I evolved from a zealous attorney for noncitizens faced with complex issues to a legislative lawyer

influencing immigration policy in front of the “political” branches, advocates, and affected communities. Amid the hours spent inside my office drafting comments in response to a new agency rule, analyzing the latest big bill on immigration reform, or facilitating a meeting among the interested stakeholders and government officials, I gradually learned how much political reality shapes progress on immigration. In the decade after 9/11, agency officials and policymakers were loath to use “prosecutorial discretion” or related tools to focus resources on high priorities and instead preferred to enforce the immigration law at all costs. I was conscious of the need to educate the immigration agency about the tool of prosecutorial discretion, and the heavy dose of political will required before the agency would pronounce and implement a policy on such discretion even with this education.

My interest in prosecutorial discretion is also personal. I was the first child born to my parents in the United States. Early in life, I absorbed sharp ideas about equal opportunity and social justice. I am the daughter of immigrant parents who personify the American Dream and instilled the pursuit of excellence in their children; I am also a wife and the mother of two small children born in the United States. My family relationships and opportunities to pursue education and a fulfilling career have created a happiness that I believe every person deserves. Cumulatively, these experiences have confirmed my belief that any person who has aspired to build or sustain a productive life in the United States must be protected or at least measured by the government before an immigration charge is brought or executed against him or her.

I am grateful to have the opportunity to produce a book that is essential to the discourse on immigration law and policy—the first to comprehensively describe the history, theory, and application of prosecutorial discretion in the immigration arena. This book examines how prosecutorial discretion interacts with the resource constraints of the agencies and the humanitarian circumstances faced by immigrants who lack a legal way to reside in the United States. Ultimately, I advocate for a bolder standard on prosecutorial discretion, greater mechanisms for accountability when such standards are ignored, improved transparency about the cases involving prosecutorial discretion, and recognition of “deferred action” in the law as a formal benefit. As this book goes to print, the administration expects to announce a prosecutorial discretion

policy that could in fact align with or enhance the ideas proposed in chapter 8.

This book is divided into eight chapters. Chapter 1 offers a necessary introduction to the structure of the immigration process and a short history of the overhaul of the immigration agencies following 9/11. This chapter not only provides a background to the jargon that permeates the chapters that follow but also illustrates why prosecutorial discretion matters and how it fits into the overall immigration framework.

Chapter 2 provides details on a famous case involving prosecutorial discretion, the deportation case of John Lennon and the efforts undertaken by his attorney, Leon Wildes, to encourage the immigration agency to publish its policies about prosecutorial discretion. The Lennon case is significant because it triggered the publication of the immigration agency's first guidance on "deferred action," a form of prosecutorial discretion that has been used as a remedy for individuals facing compelling circumstances for many years. This chapter also summarizes early guidance on prosecutorial discretion issued by the immigration agency.

Chapter 3 explains how immigration prosecutorial discretion is related to the criminal system by defining criminal prosecutorial discretion and identifying the points at which prosecutorial discretion is exercised in the modern criminal system and examining how immigration prosecutorial discretion compares to that in the criminal system. The use of prosecutorial discretion in the criminal justice system has been widely cited by the agency and courts to describe immigration prosecutorial discretion.

Chapter 4 provides a detailed analysis of "deferred action," one of the most precious forms of prosecutorial discretion. It also details how victims of domestic violence, sexual assault, and other crimes have long used deferred action as a tool for protection from deportation. Finally, to satisfy the readers who love numbers, this chapter scrutinizes data provided by the immigration agencies regarding deferred action, and underscores how deferred action operates like a formal resolution.

Chapter 5 examines the role of prosecutorial discretion in immigration matters during the Obama administration, summarizes related policies during this time period and the events that led to the DACA program, and considers why prosecutorial discretion was both

visible and divisive among legislators, policymakers, and immigration advocates during this time. Finally, this chapter examines how the absence of legislative action on immigration provoked support for prosecutorial discretion.

Chapter 6 examines the immigration agency's historical position against judicial review over immigration prosecutorial discretion decisions and the philosophy behind judicial review. This chapter describes the standards outlined in the Administrative Procedure Act and Immigration and Nationality Act for judicial review of agency actions and applies these standards to a portion of federal circuit court decisions involving administrative discretion. This chapter illustrates that non-citizens possibly do have a right to challenge a prosecutorial discretion decision in federal court.

Chapter 7 considers the degree to which the immigration agency (and DHS in particular) has publicized information about its prosecutorial discretion programs, and my personal journey in seeking statistics and trends in prosecutorial discretion decisions from the agency. As this chapter explains, transparency in prosecutorial discretion matters because it improves the possibility that justice will be served for people whose roots and presence are in the United States and promotes other administrative law values like consistency and acceptability to the public.

Chapter 8 provides recommendations for improving prosecutorial discretion in the immigration system. It also highlights the limitations of prosecutorial discretion in solving immigration problems that demand a legislative solution.

This book is limited to discussing DHS's exercise of prosecutorial discretion and does not discuss other immigration adjudications before DHS or the Executive Office for Immigration Review. Notably, many scholars have written extensively about immigration adjudications in these contexts.<sup>4</sup> While the focus of this book is on the important role of prosecutorial discretion in immigration law, I want to underscore my view that broader legislative reforms are necessary in the immigration system. Prosecutorial discretion itself is a limited benefit that by its nature is aimed at decision making on a case-by-case basis in light of broader policy decisions about where to focus resources. Given the sheer size of the unauthorized immigrant population in the United

States, prosecutorial discretion is not the most effective long-term tool because while broad exercises of prosecutorial discretion have historically enabled large numbers of the unauthorized population to reside in “limbo” inside the United States, the affected individuals have remained vulnerable to future removal and in many cases have been without permission to travel or work or the ability to live with dignity. Moreover, when DHS’s exercise of prosecutorial discretion results in the nonenforcement of the immigration laws against millions of unauthorized immigrants, public criticism is sharpened.

Legalizing unauthorized noncitizens working and residing in the United States by creating legal avenues to regularize their status is more effectively achieved through legislative reforms and is a subject of much debate by members of Congress, the administration, mainstream and ethnic media, labor unions, civil rights groups, economists, and faith-based groups, among others.<sup>5</sup> On June 27, 2013, the U.S. Senate passed a “comprehensive” immigration bill that among other provisions would provide a path to citizenship for the majority of the undocumented population, allow noncitizens to work and travel with a new temporary legal immigration status, modernize the family-based and employment-based immigration system by reducing the delays that have separated family members and delayed workers from being employed, and improve protections for children and the mentally disabled. It remains to be seen whether a similar bill will pass in the House, what might happen when the House and Senate go to “conference,” and whether a comprehensive immigration reform bill will become law, but prospects are grim as this book goes to print.

Even with broad statutory reforms, the role of immigration prosecutorial discretion is critical to ensuring that individuals with compelling equities and desirable qualities are protected from removal, while individuals who present true dangers to the community or national security are targeted for removal. I hope this book provokes reasoned discussion about where prosecutorial discretion fits within the larger structure of immigration law and policy and why it matters even if Congress passes comprehensive immigration reform.