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# Remarks on Prosecutorial Discretion and Immigration

Shoba S. Wadhia

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## Transcript

# Remarks on Prosecutorial Discretion and Immigration

Shoba Sivaprasad Wadhia\*

I realize I'm the second to the last panel before the end of the day and reception, so I will do my best to keep you energized around the topic of prosecutorial discretion and immigration.<sup>1</sup> I want to thank the *Dickinson Law Review*, Doris, Michael, and everyone who made this event possible. It's really been seamless from my vantage point, and I know that that involves a lot of behind-the-scenes work.

I want to share a few preliminary notes, knowing that some of this room may be more informed about discretion and the criminal justice system as opposed to how it functions in the immigration space. My disclaimer is that I am not a criminal law scholar, and so I am really coming to you with this issue as an immigration scholar.

The Department of Homeland Security (DHS) is a cabinet-level agency in the executive branch. I will be using the word DHS more than once in my remarks today, and it is units within DHS that play the role of prosecutor in the immigration space.

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\* Samuel Weiss Faculty Scholar, Clinical Professor of Law, Penn State Law; Founder and Director, Center for Immigrants' Rights Clinic.

1. This is a transcript of a presentation Professor Wadhia gave at the *Dickinson Law Review's* Symposium on March 15, 2019. The transcript was lightly edited by Professor Wadhia and *Law Review* staff to improve readability.

In fact, there is more than one agency that has the prosecutorial role. Those agencies include Citizenship and Immigration Services, Customs Border Protection, and ICE or Immigration Customs Enforcement. In fact, all three of these agencies have the authority to draw up and issue charging documents.<sup>2</sup>

Immigration is largely a civil system,<sup>3</sup> but I don't want to leave you with the impression that it never commingles with the criminal justice system. It is commingled in a few ways. For example, certain criminal conduct can have immigration consequences that are priorities for DHS.

Second, there are certain actions or activities that are themselves federal crimes. Predominantly those include unlawful entry, which is a misdemeanor, and unlawful reentry, which is a felony crime. It is in my view an over-prosecuted crime in our criminal justice system, and it also has severe immigration consequences.

When thinking about criminal prosecutorial discretion, we consider: do we need to file a reentry charge against somebody who has a U.S. citizen family, who has roots in the United States, and who is married to the same?

What is prosecutorial discretion in immigration law? It refers to the choice, as I mentioned earlier, made by the agency—in this case, the Department of Homeland Security—about whether to exercise the full scope or any part of immigration law against a person or a group of persons.<sup>4</sup>

This type of prosecutorial discretion can be exercised invisibly, right? It could be a choice I might make as an officer to not arrest someone, to not interrogate someone, or to not put someone in jail. But forms of discretion also operate affirmatively, like the choice to grant a stay of deportation to someone who has been ordered removed or the choice to grant a form of prosecutorial discretion known as deferred action.

We heard earlier that prosecutorial discretion is complicated because of the good and bad and in between. But it's also complicated in immigration because there is a menu of tools that consti-

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2. See e.g., CTR. FOR IMMIGRANTS' RIGHTS, PENN STATE, THE DICKINSON SCH. OF LAW, TO FILE OR NOT TO FILE A NOTICE OF APPEAL: IMPROVING THE GOVERNMENT'S USE OF PROSECUTORIAL DISCRETION (2013), <http://bit.ly/2U11bue> [<https://perma.cc/25MY-ZSQC>].

3. See AM. IMMIGRATION COUNCIL, TWO SYSTEMS OF JUSTICE 2 (2013), <http://bit.ly/2KxEO3a> [<https://perma.cc/2Z4U-DQRF>] (“Since the late 1800s, the Supreme Court has maintained that deportation is a ‘civil’ rather than ‘criminal’ sanction . . . .”); see also *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893).

4. See Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 243–46 (2010).

tute prosecutorial discretion. There are more than one dozen types of prosecutorial discretion in immigration law.<sup>5</sup>

So, when can prosecutorial discretion be exercised? Like in the criminal process and maybe even more, it could be exercised at multiple stages of enforcement. That might include pre-interrogation, pre-arrest, detention before trial, after trial, or after an order of removal has been entered. There are multiple stages during which the prosecutor might exercise discretion, and the opportunities shrink once the person has been placed in removal proceedings before a judge.

Why? Because the judges, who are employees of the Justice Department, have full jurisdiction over an individual once that person can be placed in removal proceedings. That is one reason why the prosecutorial opportunities shrink for the ICE attorney once a person is in removal proceedings.

How do I come to this issue? Twenty years ago, I worked on these cases and was fascinated by the power of prosecutorial discretion. Fascinated by this idea: that someone who is in my office, who has no relief available to him or her under the immigration law, who has compelling evidence, who has ties to the United States, may be able to be here in what I call “immigration purgatory.”

You don’t pursue prosecutorial discretion when you have a client who is eligible for some more durable relief, like asylum or cancellation of removal. So, that’s another important piece. It’s the stories of my own clients and this power that seems both invisible and invincible that drew me to want to write and research about this area for the last decade plus.

So, what is the theory of prosecutorial discretion in immigration law? One theory, which I would say is similar to the criminal justice system, is economic. There are limited resources. One guideline from 2011 teaches us that the government has resources to deport about 400,000 or less than four percent of the 11.2 million people living in the United States without papers,<sup>6</sup> and I’m not even including those green card holders who may also be deportable in the United States.

Choices have to be made—who are you going to target for removal and who are you going to place on the back burner? Like

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5. Shoba Sivaprasad Wadhia, *Immigration Enforcement and the Future of Discretion*, 23 ROGER WILLIAMS U. L. REV. 353, 354–55 (2018).

6. See Memorandum from John Morton, Dir., U.S. Dep’t of Homeland Sec., on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens 1 (Mar. 2, 2011), <http://bit.ly/2P7G1yC> [<https://perma.cc/URC4-4NUF>].

criminal prosecutors, they're not going to prosecute everyone who fishes without a license. Why? Because there are bigger fish to fry. This concept really exists in immigration law too, pun intended.

This second dimension, which is a little bit broader or more complex in contrast to the criminal system, for why we have prosecutorial discretion in immigration is humanitarian. There has long been an element of compassion and humanitarian factors that drive who will be protected from enforcement or deportation as a matter of prosecutorial discretion.

In one of my FOIA adventures that lasted years with many agencies, I uncovered thousands of case files involving people who had been treated favorably as a matter of prosecutorial discretion, and the data was elusive at best, not only because of the shield held over the data by our own government but also because the government did not track a lot of this information.<sup>7</sup>

In fact, in one FOIA request that ended up in a lawsuit with ICE over data for deferred action, ICE stipulated that it never even tracked deferred action cases before fiscal year 2012. This is quite striking if you think about the fact that prosecutorial discretion operated in the immigration system for decades.

So, how do you really know that, Professor Wadhia? Well, I know this in part because of the data and the years that are coded along with the case files I received. But I also know it because of a man named Leon Wildes who is the lawyer for the famous Beatle John Lennon. In fact, you could even say that prosecutorial discretion in immigration law starts with the Beatles.

John Lennon was in deportation proceedings, and his lawyer was sure that there was some type of policy known as deferred action, then called nonpriority status, that shielded people from deportation. The old INS, Immigration and Naturalization Service, said: *We don't do that. That program doesn't exist.*

Mr. Wildes sued, and he was involved in a multi-year FOIA lawsuit wanting data to use to advocate for his client John Lennon. Eventually he uncovered 1,843 case files involving deferred action cases, largely in the 1960s and 1970s. These were case files where even individuals who had criminal histories, drug crimes, and so on, were still treated favorably largely for humanitarian reasons.<sup>8</sup> There was a time in immigration history when having a criminal

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7. Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 AM. U. L. REV. 101, 109 n.35 (2015).

8. See Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 SAN DIEGO L. REV. 42, 52 (1976).

history was not fatal to getting a favorable grant of prosecutorial discretion because of this humanitarian dimension.

Is prosecutorial discretion in immigration legal? That's a question I get asked every other day. It is in part rooted in the U.S. Constitution. We heard earlier about the Take Care clause. I read the Take Care clause<sup>9</sup> as translating to walking and chewing gum at the same time, right? There is an obligation by the President to enforce the laws of the United States, but to also use discretion. In fact, the case, *Heckler v. Cheney*,<sup>10</sup> includes a passage about how the symbol of the Take Care clause is really about enforcement and discretion, and that principle really applies to the immigration space.

I alluded earlier to a congressional delegation as well. The Immigration and Nationality Act (INA),<sup>11</sup> which has been compared second in complication to the U.S. Tax Code,<sup>12</sup> is a beast and a beast I fell in love with in law school and maybe some of you did too.

Section 103 of the Immigration and Nationality Act delegates to the Secretary of Homeland Security the power and authorization to enforce immigration and make choices about immigration.<sup>13</sup> To me, that is clear statutory authority for who has the authority to use discretion as a matter of prosecutorial discretion.

We also have other sections of the INA that talk about prosecutorial discretion. Section 242(g) precludes judicial review for three specific acts of prosecutorial discretion: the choice to start proceedings, to adjudicate cases, or to execute removal orders.<sup>14</sup>

We have another statute that tells us that Congress must set priorities, and I'll talk about prioritization in a few minutes. There are other legal authorities; let's go to a Ronald Reagan-era regulation. At 8 C.F.R. § 274a.12(c)(14), this is a regulatory section that furnishes work authorization for certain people granted deferred action if they can show economic necessity.<sup>15</sup>

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9. U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed . . .”).

10. *Heckler v. Chaney*, 470 U.S. 821 (1985).

11. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

12. Internal Revenue Code, 26 U.S.C. §§ 1–9834 (2018).

13. 8 U.S.C. § 1103 (2018).

14. *Id.* § 1252(g).

15. See 8 C.F.R. § 274a.12(c)(14) (2018) (“An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment . . .”).

Deferred action, again, is part of our system for a very long time, and the underlying regulation that gives the authority for agencies to give a work permit to somebody granted deferred action is more than 30 years old. It also validates that deferred action or prosecutorial discretion more broadly is a real thing.

The final legal authority I will identify is guidance documents, because all of you administrative lawyers know that guidance documents sometimes operate as law. In fact, a lot of immigration law relies and subsists on guidance documents.

There have been many administrations that have issued guidance documents on prosecutorial discretion policy. One of the earliest documents was authored by the former INS Commissioner Sam Bernsen in 1976. He laid out a multipage treatise on exactly how prosecutorial discretion should be used and applied in immigration cases and in favor of exercising that discretion as early in the process as possible.<sup>16</sup>

Now, fast forward to the year 2000; the former INS Commissioner Doris Meissner issued a prosecutorial discretion policy that may be of a particular interest to this audience, or part of this audience, because she relied on criminal law principles. She actually cited to the U.S. Attorneys' Manual.<sup>17</sup> She cited to the "substantial federal interest standard," and she made the case, and had the narrative, that like with criminal law, choices have to be made by immigration officers about who to target for enforcement and who to treat favorable as a matter of prosecutorial discretion.<sup>18</sup> That gave you a flavor of how prosecutorial discretion was used in previous administrations.

Let us fast forward to the time of Trump. What does prosecutorial discretion look like in the time of Trump? On January 25, 2017, the Trump Administration, the White House specifically, issued two executive orders on immigration enforcement. One dealing with enforcement on the interior.<sup>19</sup> The second dealing with enforcement at the border.<sup>20</sup>

Within those documents, the Administration listed what the priorities were. We need priorities, right? Because without the

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16. See Memorandum from Sam Bernsen, Gen. Counsel, Immigration & Naturalization Serv., on Legal Opinion Regarding Service Exercise of Prosecutorial Discretion (July 15, 1976), <http://bit.ly/2Ufj65c> [<https://perma.cc/Z5SN-MSJJ>].

17. See Memorandum from Doris Meissner, Comm'r, Immigration & Naturalization Serv., on Exercising Prosecutorial Discretion 2 (Nov. 17, 2000), <http://bit.ly/2v3x5AY> [<https://perma.cc/ATH2-3GCW>].

18. See *id.* at 4–10.

19. Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).

20. Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 25, 2017).

ability to set priorities, we can't decide who is going to be targeted for removal and who is going to be placed on the back burner. This list includes some priorities similar to previous administrations, like being convicted of a felony or being convicted of a criminal offense, but it's more expansive. It includes being convicted of any criminal offense. It includes having a crime that is unresolved. It includes committing acts that constitute a chargeable offense, also known as jaywalking in some jurisdictions. I would say if I were to give you the most novel change on the actual list of priorities by this Administration, it would include anybody who has a removal order.

The reason I want to single out this population is that there are thousands of people living in the United States peacefully with old removal orders with or without an old criminal history. They have for over a decade plus built their lives in the United States. You might be thinking: *Wait a minute. Where were they all this time? Why are they surfacing now as a priority?*

Well, they were under a type of prosecutorial discretion. There are many types of discretion that can be exercised once you've been ordered removed. Three more known forms include an order of supervision, deferred action, and a stay of deportation. In fact, the first prosecutorial discretion case I handled over 20 years ago involved two individuals who had really compelling equities and who were eventually able to get stays of deportation and orders of supervision.

It is heartbreaking. Because if we tell the story of family separation, there are a lot of ways to tell that story, not just from the footage we saw at the border over the summer<sup>21</sup> but also with travel bans separating families and also with people with removal orders being targeted. If they are no longer protected under prosecutorial discretion, they are literally being targeted and deported and separated from families that they have built largely here in the United States.

My clinic was at a jail in Pennsylvania earlier this week meeting with somebody who is a green card holder, who has lived here for over two decades, who has U.S. citizen kids, who suffered loss of his own family members, a lot of compelling circumstances, and an old removal order; they are now being targeted for deportation. That was just a very local example of how people in our own community are being targeted.

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21. See Editorial Bd., Opinion, *The Continuing Tragedy of the Separated Children*, N.Y. TIMES (Aug. 30, 2018), <https://nyti.ms/2MEi1Ff> [<https://perma.cc/F7YJ-NZ47>].



Other ways that the Trump Administration has changed prosecutorial discretion, or modified it, is by deleting certain previous guidance documents. A very breathtaking line in the executive order by the Trump Administration and the implementing guidance is that all existing conflicting guidance, memoranda, and policy are hereby rescinded.<sup>22</sup> By doing that, what was removed were all of the humanitarian factors listed in the previous guidance documents about how to handle prosecutorial discretion, and other instances where favorable humanitarian-based prosecutorial discretion was alive.

Another piece we need to look at when we think about prosecutorial discretion in immigration law is location. Where does enforcement happen? The choice to not enforce immigration law in a certain physical area, for example, is a prosecutorial discretion decision. Existing guidance teaches us that immigration should not enforce immigration law as a general matter in sensitive locations. This would include schools, places of worship, and hospitals. That policy, which is still in theory on paper, is a prosecutorial discretion policy in a sense. We can broaden that conversation about physical locations, right? You think about the increase in workplace raids and other enforcement actions in the United States under this Administration.

I want to say enforcement actions are not new to this Administration. In fact, we had a large-scale enforcement action in State College, Pennsylvania in 2014 on several restaurants. But I think what's different, at least from my vantage point, is the publicity that's being given to these enforcement actions without any consideration of some of the collateral factors, like the individuals who are deported or to the humanitarian factors.

Even with the George W. Bush Administration, I was in D.C. working as a lobbyist at the time. We had very intentional conversations about the humanitarian factors that should be considered during and after an enforcement action so that individuals with compelling equities would be treated favorably.

I cannot end this talk without talking about DACA.<sup>23</sup> I mentioned it a little based on a question from one of you on sharing

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22. Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,801 (Jan. 25, 2017) (“The Secretary shall review agency regulations, policies, and procedures for consistency with this order and, if required, publish for notice and comment proposed regulations rescinding or revising any regulations inconsistent with this order . . .”).

23. “DACA” refers to one of the Obama Administration’s “deferred action” programs: Deferred Action for Childhood Arrivals. See Memorandum from Janet Napolitano, Sec’y of Homeland Sec., on Exercising Prosecutorial Discretion with

information and maybe where that information goes.<sup>24</sup> DACA is really an illustration of a larger prosecutorial discretion policy. It has been a gateway for about 800,000 people in the United States, roughly 6,000 people in the state of Pennsylvania. Many even attend our Penn State and Commonwealth campuses. Many DACA recipients attend or have attended law schools across the United States.

DACA recipients are really in some ways an American success story. They have contributed extraordinarily to the educational space, to the economic space. Yet on September 5, 2017, the former Attorney General announced that DACA would end.<sup>25</sup> He called DACA recipients “illegal aliens.”<sup>26</sup> He called the policy itself extra statutory and unconstitutional. In my view, his speech was dehumanizing and also erroneous about immigration law and the authority for a policy like DACA.

In full disclosure, I’ve led quite a few efforts on behalf of legal scholars, in briefs, and as an expert witness in the litigation surrounding DACA.

The courts, at least so far, seem to have agreed that the choice to end DACA was a mistake of law, as a matter of administrative law. The reason why you see a little bit of a revival, at least for people who already have DACA status and who are continuing to be able to renew their DACA status, is because of litigation. Litigation saying that “DHS, you can give me a reason but the reason you’re giving me is arbitrary and the choice that you use and the basis you gave to end the DACA policy was a mistake of law.” That’s sort of what is keeping DACA alive now but still giving so much uncertainty to the DACA population.

A lesser-known prosecutorial discretion policy I want to mention, since the end is imminent, is something called “DED” or Deferred Enforced Departure. This is a policy that is inherent in the President’s authority.<sup>27</sup> You won’t see it in any written form. There is no statutory basis for it, and it is usually country specific, based on the conditions of that particular country.

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Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://bit.ly/2meSuUv> [<https://perma.cc/7D9C-JETP>].

24. Professor Wadhia is referring to a question asked during an earlier panel discussion.

25. See Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), <https://nyti.ms/2eAVjdL> [<https://perma.cc/HSE8-UZPR>].

26. *Id.*

27. See *Deferred Enforced Departure*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://bit.ly/2IifdUD> [<https://perma.cc/9N6J-BQYV>].

Currently Liberia nationals are the only population that have DED. DED's end was announced last year, and the expiration date is March 31, 2019.<sup>28</sup> I want to stress the fact that any Liberian DED holder has been living in the United States for decades. Many have U.S. citizen children as well as parents who might also have DED.

So where do we go from here? First, we need real priorities. We need those priorities to be followed. My own view is that a criminal history alone should never be fatal to a prosecutorial discretion grant. I have long argued, long before the Obama Administration, that the humanitarian component of prosecutorial discretion must always inform who we are going to target during enforcement and who we are going to place on the back burner.

Sometimes I'll get asked, *Well, what about legislation? Don't we just need comprehensive immigration reform? Isn't that why we're in the middle of this huge humanitarian crisis? That might be part of the puzzle, right?* We have a good number of people who have been in the United States for a long time. In fact, two-thirds of the undocumented population living in the United States has been here for over a decade. It's a long period of time and for many they built up equities while in the United States, and so they might identify as Americans too.

I think for a segment of the undocumented population, legislative reform is the way to go. But we will always need prosecutorial discretion. Even with comprehensive immigration reform, people will fall through the cracks. There will be unintended consequences. No legislative reform is going to create a silver bullet for every single person who shouldn't be deported or deserves to be protected if only temporarily.

So, I'm going to end there. I hope I kept you awake, and I look forward to your questions.

AUDIENCE MEMBER 1: How did it go from a discretionary question to basically an error of law with respect to DACA? I can see arguing a case as a use of discretion. But how did it work more into an error of law?

PROFESSOR WADHIA: That's a great question. Because the trigger for creating DACA is an apple and the outcome from the litigation is an orange.

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28. See Memorandum on Deferred Enforced Departure for Liberians, 2016 DAILY COMP. PRES. DOC. 641 (Sept. 28, 2016). On March 28, 2019, the Trump Administration extended the "wind down" period for DED by 12 months. See Memorandum on Extension of Deferred Enforced Departure for Liberians, 2019 DAILY COMP. PRES. DOC. 185 (Mar. 28, 2019).

Let's talk about the apple. The apple is we have this long history of discretion and there is evidence to show that people who have equities, like coming to the United States at a young age, living here, thriving and being educated, are some of the factors that we might use to grant discretion favorably.

So, DACA is announced. It is 100 percent a prosecutorial discretion policy. It does not result in any type of legal status, and it's not a statute. It does not create an independent pathway to a green card. How it ended up being revived under a different legal principle is based on the explanation given by the Administration for why it was ending DACA.

The explanation given by the Administration was not, *We don't like this policy, and we just want to get rid of it*, or—I don't agree with this position—*We want to prioritize people who have DACA for enforcement because they're low-hanging fruit and they don't have an immigration status*.

The Administration took the route of saying DACA was unlawful, that it violated the statute. It did a run around Congress, and it violated the Constitution. Period. No explanation, no discussion. At the other end, 105 immigration scholars have said, *Here are all the legal authorities that give a basis for DACA*.<sup>29</sup>

My view is they were really stuck on calling DACA a mistake of law and so the courts turned around and said, *Your explanation is arbitrary; you didn't give us a real reason, and the reason itself was a mistake of law*. So, the APA actually ended up being the baseline for reviving DACA.

AUDIENCE MEMBER 2: Does prosecutorial discretion have any role to play in asylum applications?

PROFESSOR WADHIA: Another great question. One preliminary point I was going to make at the beginning is that discretion with a capital "D" is a very big world in immigration law and maybe in other law spaces too. This entire time we've only been talking about prosecutorial discretion. But discretion is exercised in so many different ways via statute and immigration law.

Asylum is rooted in the immigration statute, and that code that I said was second in complication to the U.S. Tax Code actually has explicit language that was codified in 1980 with the Refugee Act<sup>30</sup> that says that any person could apply for asylum and could physi-

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29. See Letter from 105 Immigration Scholars to President Donald J. Trump (Aug. 14, 2017), <http://bit.ly/2KEXTIM> [<https://perma.cc/X9DT-SVWP>].

30. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

cally come to the United States regardless of how they entered. That is why you have this whole debacle with asylum, turning away people who are apprehended in between ports of entry as opposed to presenting themselves at the port of entry.

The statute, in my opinion, is crystal clear that both groups have the ability to apply for asylum. Now, I have to show a few things in order to qualify. I have to meet the legal definition of a refugee, which is defined as somebody who has suffered persecution or faces persecution in the future because of race, religion, nationality, political opinion, or membership in the social world.<sup>31</sup> Still, no discretion; we're just looking at elements that have to be met as a matter of law.

The language of the statute does say that the Attorney General may grant asylum. So, in that sense, it's not prosecutorial discretion, but there is a discretionary component to asylum. Meaning, it is possible for someone to meet all the qualifications for asylum but still be denied, as a matter of discretion, under the statute.

The caselaw teaches us that this happens pretty rarely because the seminal caselaw teaches us that, as a matter of law, all but the most adverse factors should be outweighed by the persecution or harm this person faces in the future. We have a very enlightened interpretation of discretion in the asylum space.

AUDIENCE MEMBER 2: If you're denied asylum, then you're subject to removal.

PROFESSOR WADHIA: If you are denied asylum, a couple of things can happen. There are other types of remedies available which might be a little beyond the scope of this topic, but there are some other statutory remedies to be overturned that are mandatory. Depending on the level of fear you have or the level of harm you would suffer in your own country, you may still have some type of durable relief.

But to the question of prosecutorial discretion, I think that somebody who has a weak or a semi-strong asylum case but is ultimately denied should not be the first person we choose to deport, right? A number of things could happen that way. For instance, what if an immigration judge grants someone asylum? The ICE attorney can choose not to appeal, right?

The choice not to appeal a positive asylum grant is actually a form of prosecutorial discretion. It's another way we can think of the different ways prosecutorial discretion can be used in different stages of the process.

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31. See U.S.C. § 1101(a)(42) (2018).

AUDIENCE MEMBER 3: You have given a couple of examples that us newbies outside this area of law hear a lot. You hear about someone who has been here for decades. They have citizen children. They have ties to the community. They're actively contributing, but they have some negative immigration status.

What does it take to get that person to become a citizen? Is there something legally in the way? If they came forward and applied for citizenship, is ICE going to show up at their front door and drag them out?

PROFESSOR WADHIA: Thank you for that question. There is a lot packed up in that question. For some number of people who have lived in the United States for a decade or more who have U.S. citizen children, they're not necessarily going to be eligible for citizenship today or for a very long time.

It is a myth that if you have a U.S. citizen child, you too can become a citizen. Well, maybe that will happen, but that citizen child has to be 21 years old before having the ability to sponsor the parent.

Babies are not sponsoring their parents for a green card. And you have to first have a green card, usually for at least five years, before you can apply for citizenship. So, let's say someone has been sponsored by their 21-plus-years-old U.S. citizen child. Maybe they're 50 or 60 now, and then they have no criminal history that would make them inadmissible, and they eventually are able to get a green card.

Five years later, whether to apply for citizenship will be determinant on whether they can afford to pay for the prohibitive cost of applying, whether they have any type of other history that they are unaware of or that was not identified earlier by immigration, and/or whether they are from a country where they feel a type of loyalty, or there is a rule where they must renounce their citizenship there.

In terms of what's available, by and large, there is not a lot available under the existing legal framework in contrast to the growing number of people who live in the United States without status who have all of these equities. There is one remedy called "cancellation of removal" which applies to people who are not green card holders, who can show ten years physical presence, who have no criminal history, and can show exceptional and extremely unusual hardship to a U.S. citizen or green card holder's spouse, parent, or child upon removal.

That exceptional and extremely unusual hardship standard is exceptional and extremely unusual. There are 4,000 grants like that available each year. So, if you think about the millions more of

people who we might want to protect, that's what we have to have a conversation about: legislative reform.

What a legislative solutions looks like is beyond the scope of my remarks, but one point is clear: Prosecutorial discretion does and will continue to play an important role in our immigration system. How that discretion is exercised matters.