

"When there are more than 11 million people eligible for deportation, something is seriously wrong with our immigration system and our enforcement system, but Congress has so far refused to legislate and advance immigration reform. This inaction forces enforcement agencies to prioritize and make choices about whom they will deport first and whose deportation they will defer so that we can focus on removing those who pose a risk to our public safety. This book makes an important contribution to our understanding of this basic truth in American law and immigration policy. The fact that this issue is at the center of the debate over immigration reform right now because the House of Representatives refuses to reform the current system, makes this work timely and incredibly helpful for scholars, students, policymakers, and leaders."

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Washington Square  
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Wadhia

BEYOND DEPORTATION



# BEYOND DEPORTATION

The Role of Prosecutorial Discretion  
in Immigration Cases

Shoba Sivaprasad Wadhia

WITH A FOREWORD BY LEON WILDES





*Beyond Deportation* is the first book to comprehensively describe the history, theory, and application of prosecutorial discretion in immigration law. It provides a rich history of the role of prosecutorial discretion in the immigration system and unveils the powerful role it plays in protecting individuals from deportation and saving the government resources. Shoba Sivaprasad Wadhia draws on her years of experience as an immigration attorney, policy leader, and law professor to advocate for bolder standards 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.



SHOBA SIVAPRASAD WADHIA is Samuel Weiss Faculty Scholar and Director of the Center for Immigrants’ Rights at Penn State Law.

LEON WILDES is Founder and Senior Partner of the New York–based immigration law firm Wildes & Weinberg P.C.

*In the*  
CITIZENSHIP AND MIGRATION  
IN THE AMERICAS  
*Series*

About the cover: Facing imminent deportation back to his native Guatemala for a criminal conviction, Ronald Zetino is visited by his young son and wife at the Mira Loma Detention Center in Lancaster, California. Photo courtesy of Steven Rubin. Design by Adam B. Bohannon.

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Shoba Sivaprasad Wadhia

## Beyond Deportation

*The Role of Prosecutorial Discretion in  
Immigration Cases*

Shoba Sivaprasad Wadhia

*With a Foreword by Leon Wildes*



NEW YORK UNIVERSITY PRESS

New York and London

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## FOREWORD

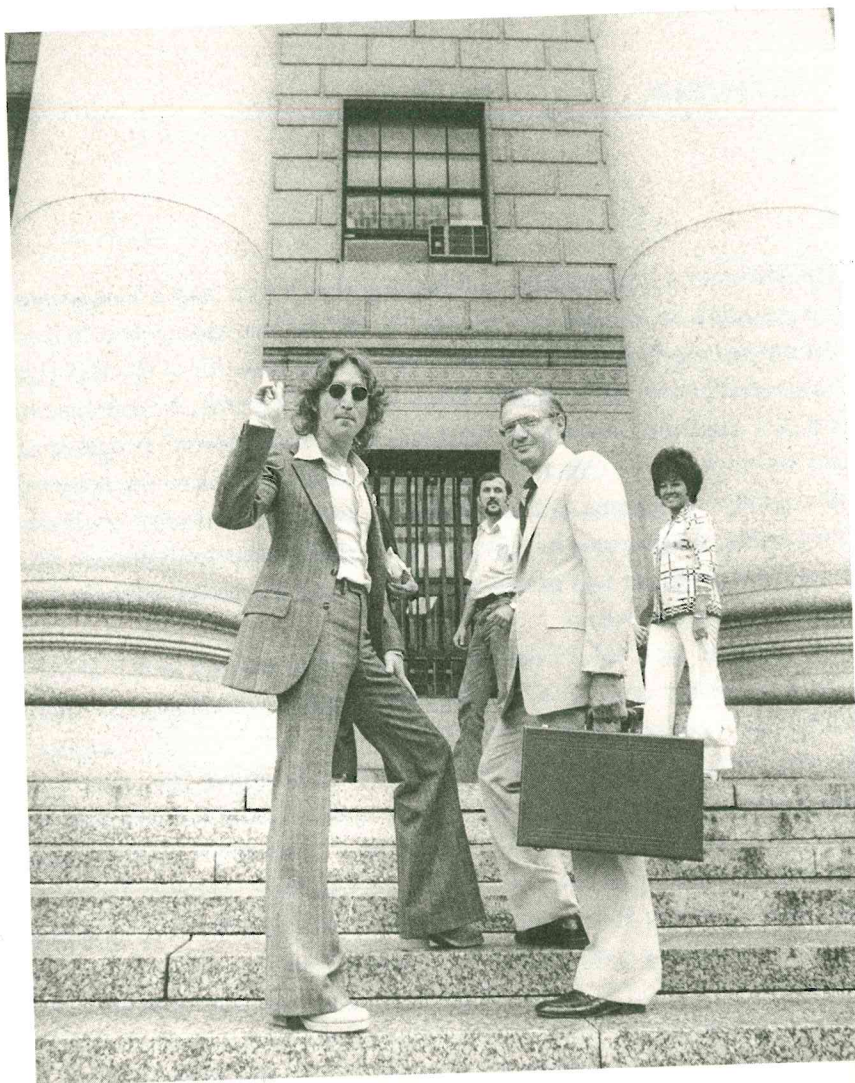
The INS had a long tradition of denying that it ever had a humanitarian program to benefit noncitizens. In official bar association liaison committee meetings with the New York district director of the INS that I attended before 1972, District Director Peter Esperdy, in response to a direct question, denied the existence of a "nonpriority" program or any other policy by which the INS might defer or decline the removal of eligible noncitizens. Although district directors had been routinely forwarding meritorious hardship cases to regional commissioners, this beneficial program was practiced *sub rosa* and was never publicly discussed or acknowledged.

In August 1971, John Lennon and Yoko Ono arrived in the United States on visitor visas. They retained me in January 1972 to assist them with their immigration problem. Yoko had an eight-year-old daughter, Kyoko, whose father, Yoko's former American husband Tony Cox, had absconded with her several years earlier and the child was nowhere to be found. John and Yoko had just secured a court order for the child's temporary custody in the U.S. district court in Saint Thomas, U.S. Virgin Islands, where Yoko and Tony had divorced, and the court granted Kyoko's temporary custody to her and John. Tony Cox then filed a new custody proceeding in Texas, where Yoko and John also appeared and secured a temporary custody order from that court as well. But once again, Tony Cox absconded with the child and needed to be located.

I approached the INS district director, Sol Marks, and requested an extension of stay to permit the Lennons to find Kyoko and secure her custody, which I felt was the strongest reason for an extension of stay I had ever heard. Upon checking with the Office of the INS Commissioner, Marks granted only a one-month extension and issued a warning that my clients "had better leave."

Unknown to us at the time, the commissioner had received a letter from Senator Strom Thurmond representing the Internal Security





Former Beatle John Lennon, left, with his attorney Leon Wildes, right. Photo courtesy of Leon Wildes.

Subcommittee of the Senate Judiciary Committee, advising that John Lennon's presence in the United States could be detrimental to President Richard Nixon's reelection plans. Lennon, who had an immense impact on young people, had been discouraging young Americans from serving in Vietnam, and the upcoming November election was to be

the first time in U.S. history that eighteen-to-twenty-year-olds would be permitted to vote. This information was shared with District Director Marks and soon resulted in the institution of harsh deportation proceedings against John and Yoko as overstayed visitors. The INS assumed that Lennon would have no choice but to leave or be deported, since his old British marijuana conviction would leave him no other choice.

During the deportation proceedings and thereafter, District Director Marks was continuously interviewed in the media. As the official voice of the INS, he continuously claimed that "I am an enforcement officer and I have an obligation to remove *every* illegal alien. John Lennon is not being treated differently from any other illegal alien."

The case lasted five years. Among the steps that I took on Lennon's behalf was the filing of a federal action under the Freedom of Information Act. I demanded documentation of the INS "nonpriority" program, later known as "deferred action." Eventually, I secured a copy of the provision of law, in an unpublished INS Operation Instruction, as well as copies of 1,843 approved nonpriority cases. I published the provision and analyzed the cases in a series of articles on deferred action published in the *San Diego Law Review*. With John's encouragement, I was anxious to publicize my discovery and analyze the basis upon which the INS had exercised its prosecutorial discretion in past years. In addition, I learned that no nonpriority request had been made in the Lennon case itself. I felt that John and Yoko's plight merited prosecutorial discretion.

The New York U.S. attorney wrote to Federal Judge Owen and suggested that it was appropriate for the INS to consider an application for nonpriority classification for John Lennon. He also instructed that no INS officer previously involved with the case be allowed to participate. I drafted the nonpriority request, which was filed and processed through the Office of the Commissioner of Immigration, using the same procedure as the nearly two thousand similar cases. My application was granted, and thus John Lennon was granted nonpriority status. Two weeks later, he was granted lawful permanent resident status by an order of the Second Circuit Court of Appeals, notwithstanding his marijuana conviction, in 1976.

Imagine my gratification upon meeting Shoba Sivaprasad Wadhia, a talented young lawyer and professor who had taken up my favorite cause where I had left off. I was pleased as well when I later learned



that she was producing a book essential to this vital area of developing law and policy. Her book capably examines prosecutorial discretion as it applies in the immigration context, its relation to prosecutorial discretion in the criminal process, the precise details of “deferred action,” how it has been applied by the Obama administration, particularly in respect to its expanded use to assist young people, and the technical effect of judicial review and the Administrative Procedure Act in this area. She also outlines her efforts in securing and publicizing prosecutorial discretion programs and her recommendations for improving prosecutorial discretion in the immigration system. I am proud to say that I consider this work to be a major contribution to this vital area of developing law.

The U.S. government managed to deport about four hundred thousand unauthorized noncitizens in its most productive year, constituting less than 4 percent of the total unauthorized population in the United States. To accomplish its huge task, the immigration authorities must prioritize the use of government facilities and personnel and properly aim their limited resources at the highest priorities, assuming as well that their vital work is carried out with appropriate humanitarianism and professional skill. Wadhia’s volume is a valuable contribution to our nation’s admirable efforts to accomplish this noble task.

Leon Wildes

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Adjunct Professor Emeritus, Benjamin N. Cardozo School of Law  
Past National President American Immigration Lawyers Association

## ACKNOWLEDGMENTS

I send my deepest appreciation to Michael A. Olivas, who inspired me to write this book and who has supported me unconditionally, beginning even before this book project was born. After reviewing my articles on prosecutorial discretion, Professor Olivas encouraged me to reflect on and refine those articles to produce a book. In an all too generous email, Professor Olivas noted, “I am in your debt, more than I even knew, and your work on the various [prosecutorial discretion] issues is inspiring. We are all lucky to have someone as careful and thorough as you doing this kind of work, so we all can learn. I hope you will stitch all these pieces into a book-length manuscript, which would advance the cause and your own work much more than having a series of articles in various places. You are three-fourths of the way there now.”

I am grateful for the support of Leon Wildes, who gave his blessing for this book and who graciously agreed to author the foreword. In particular, I will remember the day Mr. Wildes and I spent together in his New York office and at the Fig & Olive for a long lunch, fully engaged in conversation about John Lennon’s case, the evolution of my book, and the personal events and family that have brought and continue to bring meaning to our lives.

I truly appreciate the support and assistance from Clara Platter, Dorothea S. Halliday, Deborah Gershenowitz, and Constance Grace of New York University Press for managing the editing process that began with a book proposal and ended on a book shelf. I also thank Ediberto Román, general editor of the press’s *Citizenship and Migration in the Americas* series, for his generous support and the anonymous peer reviewers whose feedback on my proposal and manuscript improved this book.

I am thankful for the past and current mentors who have shaped me professionally. I am grateful to T. Alexander Aleinikoff for accepting me as his research assistant in 1997 and later connecting me to the late