

Book Review

Immigration Judges and U.S. Asylum Policy. By Banks Miller, Linda Camp Keith and Jennifer Holmes. Philadelphia, PA: University of Pennsylvania, 2015. 238 pages. \$69.95.

Lives in the Balance: Asylum Adjudication by the Department of Homeland Security. By Andrew I. Schoenholtz, Philip G. Shrag and Jaya Ramji-Nogales. New York: New York University Press, 2014. xv, 271 pages. \$50.00.

Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases. By Shoba Sivaprasad Wadhia. New York: New York University Press, 2015. xv, 232 pages. \$55.00.

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These three books address the complexities of decision making regarding refugees, asylum seekers, and irregular migrants who, in their efforts to reach the United States, grapple with limited acceptance and stereotypes. Such stereotypes and social rejection often find expression in political rhetoric and public opinion among citizens in the host states who sometimes blame immigrants for societal ills such as job loss and crime and, in so doing, call for their rejection and consequent deportation. These books examine how the process of deciding whether to deport is made in the context of the US legal system.

While *Immigration Judges and U.S. Asylum Policy* aims at providing a clearer understanding of how immigration judges decide asylum cases, especially in the face of claims that such decisions are largely arbitrary, *Lives in the Balance* engages asylum determination specifically by the US Department of Homeland Security (DHS). *Beyond Deportation*, on the other hand, examines the issue of prosecutorial discretion, a term that captures “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” (1).

These three books come together around the issue of decision making regarding asylum seekers, although they explore that process through attention to different state departments saddled with such responsibilities. Miller et al.’s book, for example, advances understandings of immigration judges’ behavior concerning decisions on asylum claims while Schoenholtz et al.’s and Wadhia’s books engage political behavior in the context of DHS. Collectively, these books draw migration scholars’ attention to state practice. The enormity and multitude of the issues they raise, and their overall implications for international human rights law, will add much to academic debates over the determination of asylum and/or immigration status claims.

The thesis advanced in *Immigration Judges and U.S. Asylum Policy* is this: Immigration judges’ decisions are highly conditional processes which respond to multiple influences, some of which are outside policy-makers’ control. As the book clearly shows, immigration judges’ decisions reflect their ideological basis and conditions, which may not be legally controlled, as these are purely subjective factors. In developing this argument, the book makes a fundamental contribution to understandings of US asylum policy. Its stated aim is to provide a clearer explanation of how immigration judges decide asylum cases in the wider context of controversies over these decisions and of crushing caseloads, limited support, and a lack of independence from the US Department of Justice. The book offers a rigorous examination of the adjudication of immigration judges, as opposed to aggregate trends across courts. In this way, it tries to understand how immigration judges make decisions on individual cases before them and the factors that bear on such decisions.

Miller et al. argue that immigration judges have weaker tenure protections as compared to Federal Article III judges and some state judges and, as a result, are less insulated and more likely to be susceptible to the influences of local conditions. The authors contend that extralegal factors such as material and security concerns may be paramount in decision making and dependent upon immigration judges' policy and political leanings. By applying a cognitive model of integrating expectations in terms of judicial behavior, Miller et al.'s book expands understandings of the local context in which immigration judges operate. This understanding is highly relevant, given concerns that the protection demanded from international refugee norms remains under attack. It is here that the book stands out in the wider literature on international migration. Its audience includes migration scholars, practitioners, and policy-makers focused on judicial behavior. The authors' reliance on complex data, however, may restrict its use by asylum seekers, which is perhaps the book's main weakness.

Nonetheless, *Immigration Judges and U.S. Asylum Policy's* most significant innovation is its creation of a measurement of ideology for immigration judges — a specific method of measuring a judge's policy disposition. The book concludes that immigration judges' decision making is a highly conditional process that responds to multiple influences that are outside their control but that shape who gets asylum in the United States. It examines in detail the actual decision-making process of immigration judges, offering an incredibly rigorous statistical analysis of such decisions concerning US asylum policy.

Schoenholtz et al.'s book, *Lives in the Balance*, explores the outcome of thousands of asylum claims as decided by US state institutions from 1996 to 2009. Understanding these outcomes, it argues, is fundamental to understanding political behavior in international migration law. The book contributes to growing work on

the “culture of disbelief” (where asylum claimants are disbelieved until believed), a prevalent issue among state institutions tasked with handling asylum applications. It approaches these difficult issues about who is allowed to stay and who is forced to leave in a systematic way, analyzing the steps and roles played by each department within the asylum determination process through quantitative and qualitative methodologies. In doing so, the authors restrict their analysis to affirmative asylum cases (where a foreign national physically present in the United States may apply for asylum by completing Form I-589) handled by DHS. They develop the argument that the decision to grant asylum is dependent on the frontline officer who conducts the interview, thereby emphasizing his/her importance in the asylum decision-making process. Significantly, the authors nuance the argument that a successful asylum claim depends largely on whether the applicant's country is a human rights abuser and whether the applicant's testimony is credible, situating these hypothetical predictions *inter alia* on the issuance of guidelines and the “tightened evidentiary standards for grant of asylum” (102).

Lives in the Balance concludes that asylum adjudication by DHS works fairly well and that grant rates correspond to the statutory standard for asylum. The book also emphasizes, however, that asylum claims are granted more often to those fleeing the most abusive human rights situations. It finds that asylum officers rely on a lack of credibility in rejecting asylum claims, but the book leaves unanswered the question of how these officers reach such decisions. Nonetheless, its painstaking investigation of the rejections from certain nationalities illuminates the complexity of these decisions. The book's finding that grant rates of asylum claims in every regional office depend on the disposition of individual officers, making it appear as a game of chance, will be of great concern to policy-makers, advocates, practitioners, and asylum claimants themselves.

Finally, *Beyond Deportation* examines the issue of prosecutorial discretion, asking how these discretions are exercised and under what conditions. In answering these questions, the book examines how prosecutorial discretion interacts with the resource constraints of government agencies alongside immigrants' humanitarian circumstances. It expands understandings of how "deferred action," a significant form of prosecutorial discretions, is employed by non-citizens as a protective tool from deportation. In doing so, the author examines the degree to which the immigration agency, particularly DHS, publishes information about its prosecutorial discretion programs, a question with implications for transparency, consistency, and acceptability to the public.

This book's primary insight for the study of international migration is its attempt to analyze the use of prosecutorial discretions to distinguish between those who may be protected from removal given their strong equities (private and family life considerations in the United States such as having US citizen children, a loving marriage with a US citizen, good moral character, or being a victim of domestic violence or natural disaster) and those who present true danger to the community or are removed because of public-interest considerations. It argues that certain prosecutorial discretions as exercised by DHS should be subject to judicial review under standards established by law. Prominent among these is the finding that the "Operation Instructions" of the Immigration and Naturalization Service (now the US Citizenship and Immigration Services under DHS) may confer a "substantive benefit upon the alien, rather than

setting up administrative convenience" such as a deferred action, which technically provides a substantive benefit rather than a discretionary act (Wadhia 2015, 87). This is arguably one of the book's strongest and most innovative findings and will be of immense importance to irregular immigrants, advocates, policy-makers, and academic researchers. In addition, Wadhia's book illuminates the transparency challenges that the evocation of prosecutorial discretions encounters in the face of enforcement priorities.

The book concludes that DHS guidelines on prosecutorial discretion lack adequate information about methods available to officers prior to the application of a "Notice to Appear," a charging document that informs non-citizens of charges being used for removal and filed with an immigration court or post-removal proceedings. In essence, Wadhia finds, challenges abound, as enforcement priorities remain a mirage, leaving the question of who should or should not be targeted for enforcement unanswered by this book.

In distilling the debates raised by these three books, one thing stands out: Decision making has a multiplier effect on the expulsion and exclusion of non-citizens, whether they are refugees, asylum seekers, or irregular migrants. This is particularly so as judicial behavior has a bearing on political behavior, and vice versa, a subject that is now gaining momentum in the wider literature. These books collectively contribute to understandings of immigration law's creation, interpretation, and enforcement in the United States vis-à-vis the normative standards of international human rights obligations.