Global Migration

Global Migration and International Law

People Without a Country

What Is Crimmigration Law?

ALSO IN THIS ISSUE:

Perspectives on Environmental Migration
Learning Gateways
Teaching Legal Docs
Law Review
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Global Migration
In recent years, news of the Syrian refugee crisis, punctuated by viral images of 3-year old Alan Kurdi and 5-year old Omran Daqneesh, has been part of the social consciousness and dominated headlines. Immigration policies in Europe, and recent actions in the United States, have caused controversy and generated much debate and discussion. International movements, including the United Nation’s #IBelong campaign to address statelessness and the recent Mexican #elmigranteesundo (the migrant is a gift) campaign to raise awareness of the benefits of immigration, have helped to shed light on more issues in a very public and social way. It is with these ideas and images in mind that this issue of Insights explores migration around the world and the role that law plays in influencing human movement and settlement.

The issue opens with Temple University law professor Jaya Ramji-Nogales discussing the system of international law that recognizes refugees, including its limitations, and the modern challenges it faces. A second feature article by Brownen Manby, an international expert on human rights, considers what it means to be “stateless” and the relationship between migration and that very significant legal status. The United Nations has committed to ending statelessness by 2024 (#IBelong), and Manby explains why this is an important international initiative. The final feature article, by Cesar Hernandez, introduces readers to “crimmigration,” or the intersection of immigration law with matters related to criminal justice, and how this relationship has changed over time. Two Learning Gateways features offer teaching connections to current events related to these issues.

In Perspectives, experts offer some ideas on how we might think about migration precipitated by environmental changes or crises, one of the “frontiers” of international human rights law not yet settled. In Teaching Legal Docs, Insights looks at the travel visa. To round out the issue, legal scholar David Hudson analyzes how a recent U.S. Supreme Court decision dealing with due process and the presumption of innocence could have implications for future cases. Finally, at the end of this issue, an expanded What’s Online? feature offers resources for those who teach immigrant, refugee, and undocumented students, as well as resources for learning more and teaching about the issue.

Please remember that an issue of Insights is never complete without a visit to www.insightsmagazine.org for additional resources, materials, and useful links to primary source documents and ready handouts. As always, there are opportunities to e-mail us about the issue. We value your input and look forward to your comments.

Best wishes for a safe and energizing summer,

Tiffany Middleton
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Global Migration and International Law

by Jaya Ramji-Nogales

For the past few years, stories about migrants have dominated news headlines. From Syrians fleeing across the Mediterranean Sea in rickety boats to Central Americans undertaking treacherous desert journeys, stories of migrants seeking protection, freedom, and economic security abound. How receiving countries should treat these migrants is a question of great controversy, and one that has arguably won and lost elections around the world. International law provides some answers to this question, though its responses are neither as thorough nor as effective as one might hope.

International refugee law, which comes from powerful binding treaties, protects a narrow subset of migrants who meet its strict, and somewhat outdated, definition. That treaty law has little to say about the process by which refugees are determined to meet its definition. Most scholars of refugee law agree that the definition itself needs updating, but the process of changing the definition is long and risky, as it could end up restricting rather than expanding the group of migrants eligible for protection.

One key concept that is missing from contemporary migration law is the idea of safe transit. Currently, many migrants must risk death and submit themselves to financial and sometimes physical exploitation to gain entry into a country in which they can seek protection. This does not make sense for the migrants, who pay enormous sums of money to undertake these risky journeys—that is, if they are lucky and capable enough to be able to leave their home country. The absence of safe transit also does not make sense for host states, who receive migrants based on geographic proximity rather than carefully considered policy reasons, such as protecting the vulnerable or bringing in skilled workers.

A History of Refugee Law

The concept of asylum, or protecting the stranger fleeing persecution, dates back at least to ancient Greece and has roots in the Koran and the Old Testament. In recent history, most scholars would point to the 1951 United Nations Convention Relating to the Status of Refugees as the cornerstone of international refugee law. Though there were earlier efforts, through the League of Nations and the United Nations, to create an international refugee definition, the Refugee Convention was the first successful attempt to do so. The Refugee Convention is now one of the most widely adopted human rights treaties; 148 of 193 member states of the Unit-
ed Nations have bound themselves to uphold the provisions of this law.

The Refugee Definition

Drafted in the wake of the Second World War, the Convention responded to the situation of Jewish refugees after the Holocaust and also aimed to protect political dissidents fleeing the Soviet Union. It defines a refugee as a person with a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion [who] is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.¹

There are several important aspects to this definition. First, the refugee must have left the country in which she fears persecution; crossing an international border is a preliminary requirement. In a similar vein, the refugee must be unable or unwilling to seek protection from her country of nationality. Refugee law was created to enable the international community to protect those who do not have a country to protect them. This approach reflects the structure of international law more generally, allocating the primary responsibility for rights protection with the country of nationality and stepping in only when that country cannot or will not protect its citizens.

Notably, the definition does not require that the refugee establish conclusively that she will be persecuted on return to her home country, but rather that she has a well-founded fear of persecution. The United States Supreme Court has interpreted this requirement to mean that a person with a 10% chance of persecution should be considered a refugee.² The definition of persecution is constantly evolving as wrongdoers invent new forms of harm. In a nutshell, persecution is harm that falls somewhere on a spectrum exceeding “mere harassment” but including acts short of a threat to life or freedom. Persecution can take many different forms, including severe economic harm and acts that the perpetrator believes will be
The definition of persecution is constantly evolving as wrongdoers invent new forms of harm. In a nutshell, persecution is harm that falls somewhere on a spectrum exceeding “mere harassment” but including acts short of a threat to life or freedom.

In 1984, the principle of non-refoulement was extended to protect individuals fleeing torture through the United Nations Convention Against Torture and Cruel, Inhuman, or Degrading Treatment or Punishment. That treaty prohibits countries from returning an individual who would face severe pain or suffering, whether physical or mental, [intentionally inflicted to obtain] information or a confession, [to punish, intimidate, or coerce him or for any discriminatory reason], [at the hands of or] with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include beneficial to the refugee, such as forced “conversion” of LGBTQ individuals or female genital mutilation.

The key to the definition is being able to fit into one of the five grounds for persecution. Political opinion is one of the most common grounds; individuals such as Nelson Mandela who face imprisonment and other harms for expressing their political beliefs would fall into this category, which also includes less well-known political activists. Religion is another often-cited basis for persecution; Jews fleeing Nazi Germany are an example of religious refugees. Race and nationality are less commonly used but might include groups such as the ethnic Chinese in Indonesia. The particular social group ground was designed to be expansive and has been interpreted to include categories that might not have been recognized in 1951, such as sexual orientation and domestic violence. This category is still evolving through court decisions.

For individuals who meet this definition, the Refugee Convention further requires that countries who have signed onto the treaty may not “expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories” where she fears persecution.\(^3\) (There are exceptions for individuals who pose a serious threat to national security or public order.) This rule is known as the international legal principle of non-refoulement.
pain or suffering arising only from, inherent in or incidental to lawful sanctions.4

The Convention Against Torture is adopted even more widely than the Refugee Convention; 162 of 193 United Nations member states have bound themselves to obey the treaty. In one way, the definition is more inclusive than the Refugee Convention definition, as it requires only that the applicant demonstrate a risk of harm; it does not require establishing that the harm is due to membership in one of the five categories. In another way, the definition is less inclusive than the Refugee Convention definition, as it requires the applicant establish that a government official took part in or at least agreed to the harm. In any case, the addition of the Convention Against Torture expands the principle of non-refoulement.

Asylum Seekers and Refugees: What’s the Difference?

An individual who meets the refugee definition technically becomes a refugee as soon as she leaves her country of nationality—as soon as she steps foot across an international border. This theoretical categorization does not do the refugee much good in the abstract, however. In order to obtain protection in the form of lawful immigration status, a refugee must be recognized as a refugee by a host country. In the United States, this can happen in two ways, as an asylum seeker or as a refugee.

An asylum seeker is an individual who arrives at a border of the United States or enters the United States and asks for refugee protection. If she is within the United States, she may seek asylum affirmatively, filing a claim while they have lawful immigration status or before being apprehended by the Department of Homeland Security. Affirmative asylum seekers present their case to a specially trained asylum officer at one of eight asylum offices around the country. Applicants who are not granted asylum at the asylum office may appeal their case to an immigration court, which is part of the Department of Justice. Asylum seekers who do not have lawful immigration status and are apprehended by the Department of Homeland Security before applying for asylum must file their claim defensively, meaning that they start out in immigration court; they don’t get the chance to present their case to an asylum officer.

Learning Gateways

Should the United States Accept More Syrian Refugees?

Students analyze a political cartoon to consider the United States’ role in the ongoing Syrian refugee crisis and then review resources to discuss the role of the United States in historical refugee crises.

Discussion Questions
1. What is happening in the cartoon? What characters are represented?
2. Have you seen or read news stories about the story that is represented here?
3. What legal processes did the refugees in the cartoon follow to be resettled in the United States?
4. What is the tone of the cartoon? What message do you think the cartoonist is trying to convey? What indicators do you see to support this?
5. Do you agree with the cartoonist’s message? Why?

Resources for Extended Discussion
The following videos offer brief, engaging discussions of what a refugee is, how that status is different from “migrant” or “asylum seeker,” and explores the process that refugees entering the United States must complete before resettling.

- “What Does it Mean to be a Refugee?”, by Benedetta Berti and Evelien Borgman, TED-Ed, June 16, 2016
  https://www.youtube.com/watch?v=25bwiSikRsl

- “Screening Syrian Refugees,” narrated by Jeh Johnson, attn:, November 24, 2015
  https://www.youtube.com/watch?v=aQUixQ6TFZc

The following articles and charts provide additional background on the current refugee crisis and historical refugee crises. Discussion might explore data related to the current refugee crisis, where refugees in the United States come from and where they resettle, and how Americans’ attitudes about refugee resettlement have changed (or not) over time.

- “Syrian Refugees in the United States,” by Jie Zong and Jeanne Batalova, Migration Policy Institute, January 12, 2017
  http://www.migrationpolicy.org/article/syrian-refugees-united-states

  http://www.pewresearch.org/fact-tank/2017/01/30/key-facts-about-refugees-to-the-u-s/

Learning Targets
- Analyze a political cartoon as a primary source, including evaluating an argument.
- Consider the United States’ role in the contemporary Syrian Refugee Crisis.

Standards Connections

National Civics Standards
9. Understands the importance of Americans sharing and supporting certain values, beliefs, and principles of American constitutional democracy.
11. Understands the role of diversity in American life and the importance of shared values, political beliefs, and civic beliefs in an increasingly diverse American society.

Common Core State Standards
CCSS.ELA-Literacy. RH.11-12.2. Determine the central ideas or information of a primary or secondary source; provide an accurate summary that makes clear the relationships among the key details and ideas.


GRADES: 9–12
DURATION: 20 minutes
Materials
Available at www.insightsmagazine.org
Finally, asylum seekers without proper documents who are caught close to the border less than two weeks after they entered are placed into what’s called “expedited removal.” The border patrol officer who apprehends the asylum seeker must ask four questions designed to determine whether the applicant has a fear of returning home. If she does express a fear of return, the border patrol officer sends her to an asylum officer for a “credible fear” interview, in which the officer determines whether she has a plausible asylum claim. If so, she is sent to immigration court to present her asylum claim; if not, she may appeal to an immigration judge but likely faces deportation.

For all asylum seekers, if they lose their case in immigration court, they can appeal to the Board of Immigration Appeals, which is also part of the Department of Justice. If the asylum seeker loses before the Board, she can appeal to the federal Courts of Appeals, moving their adjudication process for the first time out of the executive branch into the judicial branch. Asylum seekers who lose in the federal Court of Appeals may appeal to the United States Supreme Court, but such cases are rarely granted.

Refugees, in contrast, undergo a determination process abroad. These are individuals who have fled their country of nationality and landed in a third country. Refugees are often confined to refugee camps while they await what is known as a “durable solution”—in essence, a permanent home. The United Nations High Commissioner for Refugees undertakes the initial determination of whether the individual meets the refugee definition. If she does, for a very fortunate few, the UNHCR will refer their case to the United States or another refugee resettlement country. A refugee officer from the Department of Homeland Security will then travel to the refugee camp to interview the refugee and her family to ensure that she meets the refugee definition.

At this stage, refugees undergo extensive background checks to ensure that they do not pose a national security risk. This process, which can take from eighteen months to two years, involves three biometric checks through Department of Homeland Security databases as well as the databases of the Department of Defense and the FBI. Refugees also undergo two to three biographic checks, again through the DHS system as well as the Department of State and the National Counterterrorism Center. Refugees face the most extensive security check process of any immigrant coming to the United States.

While these specific processes are unique to the United States, most countries that have signed onto the Refugee Convention have an asylum process.
claims processed before they travel to their host country, enabling the creation of safe transit systems.

The second problem is the limited definition of a refugee. Many news sources distinguish between refugees and economic migrants, implying or explicitly arguing that the latter should not be allowed to migrate. This strict approach assumes that there is a clear and substantial difference between individuals who move to seek protection and those who seek employment. But the line between refugees and economic migrants is often not that clear. Remember that international refugee law constructs strict categories of migrants, some of whom are eligible for lawful status because they fall within these legal boundaries. Yet there are migrants who don’t fit within any of those categories who suffer serious harm and need protection, such as individuals fleeing civil war or widespread gang violence. And refugees, as the drafters of the Refugee Convention recognized, need to work in order to support themselves and their families. People do not fit easily into boxes, especially when those boxes do not map accurately onto their lived experience.

In short, international refugee law faces serious challenges in the contemporary world. The underlying idea of assisting those who are fleeing harm should be upheld, but it may be time to revisit both the definition and the process of refugee protection.


Global Migration and International Refugee Law

How does all of this relate back to the topic of global migration? Though refugee law and the principle of *refoulement* have played an important role in protecting many individuals from serious harm, they are increasingly unable to address contemporary migration flows. Where does this problem come from? Why is refugee law inadequate in the modern era? The answer to these questions returns to concepts discussed in the introduction to this article.

There are at least two fundamental shortcomings of refugee law in managing global migration. The first, as you may have guessed, is the absence of safe transit as a right or even as a concept. Only a few fortunate refugees—in 2015, 107,100 of 16.1 million total refugees in the world—will be able to avail themselves of resettlement. The rest face the choice of languishing in refugee camps, most of which offer inadequate housing, sanitation, and nutrition, not to mention severely limited educational and employment opportunities, or making their way to a country in which they can seek asylum. Unsurprisingly, many choose the latter, but must take exceedingly dangerous journeys to arrive at the borders of those countries. A more effective global legal system might enable refugees to have their

Discussion Questions

1. Why do you think the international community works to protect asylum seekers and refugees? What reasons might a country have for signing on to an international refugee convention?
2. Do you think refugees have a right to safe transit? What would that right entail? What benefits would it have for the refugees and their host countries?
3. What is the distinction between refugees and economic migrants? Do you think economic migrants should be offered certain legal protections? What might be appropriate?

Few would deny that environmental factors can have important consequences for human mobility. This is most obvious in the case of disasters. Thus, Hurricane Katrina (2005) displaced about one million persons in the entire Gulf Coast region of the United States. It had a lasting impact on the population of the city of New Orleans, almost all of whose 455,000 inhabitants were at least temporarily displaced. Many residents were displaced for one year or longer or indeed had permanently settled elsewhere. In 2015, the city's population was only 80% of its pre-disaster size. While the relationship between disasters and (forced) mobility seems relatively straightforward, the exact ways that less-drastic environmental events, such as drought, land degradation, desertification, or sea level rise, influence migration and mobility are far less clear. However, in both instances, law is an important part in responding to migration and mobility related to adverse changes in the environment. To what extent migration law is relevant, however, can be questioned.

Before we go into the implications of the nexus of environment and migration in terms of migration policy, some further clarifications of the nature of this nexus are warranted. The two scenarios described above are described in the relevant academic and policy debates as “environmentally induced migration” and “environmentally induced displacement,” respectively. The former refers to the broader phenomenon and situations where environmental factors are key but not the only factors in migration decisions. The latter category characterises forced forms of mobility primarily engendered by environmental change. Hurricane Katrina, a rapid-onset event, is an example for such environmentally induced displacement. Here people flee (or are moved by governments) to avoid loss of life, physical harm, or as a response to the destruction of livelihoods. As in the case of Hurricane Katrina, the bulk of such movement occurs within international borders, although sometimes disasters also displace people across international borders. By contrast, environmentally induced migration is construed by and large as a voluntary decision in connection to slow-onset environmental events such as drought, desertification, land degradation, or sea level rise. Both categories of environmentally related mobility can be related to climate change: As far as we know, climate change is likely to be responsible for both the increased frequency and severity of slow-onset events (such as droughts) as well as of rapid-onset events (such as flooding and storms). Importantly, apart from environmentally induced displacement and migration, where environmental factors can be directly shown to lead to migration, adverse environmental changes can also have more indirect impacts on migration and mobility, for example, when recurrent droughts negatively affect a country's agricultural production and its wider economy, those employed in rural agricultural jobs tend to migrate.
to the cities and impact urban unemployment, which may in turn generate further mobility as a result of economic decline caused by environmental factors in a context of economies highly dependent on the agricultural sector—but not necessarily by those directly affected by them.

But what are the implications of this complex relationship between adverse environmental change and environment migration law? As should have become clear from the above, the main legal responses to environmental change and migration are in fact outside migration law. As most of environmentally related mobility—both more “voluntary” migration and displacement takes places within international borders—it is largely a domestic issue involving a diverse body of relevant laws. This said, the UN Guiding Principles on Internal Displacement do provide guidance to individual states and international actors (and in the African context, the Kampala Convention provides a binding legal framework of how to address internal displacement). In a cross-border perspective, environmentally induced displacement is relevant only insofar as it may generate particular protection needs and thus claims to residency, since for all other legal admission channels the eligibility to be admitted under such channels (for example, the family stream) is the main criterion and any other reasons a particular person may have to migrate is considered irrelevant.

However, “international protection on environmental grounds,” as one may call it, is a gap under international law—it is not regulated. This said, an international initiative, the so-called Nansen Initiative initiated by Switzerland and Norway in 2012, has examined practices and needs as regards cross-border displacement on environmental grounds, based on extensive consultations in different world regions. Its work is continued through the somewhat broader Disaster Displacement Platform launched in 2015.

While the relationship between disasters and (forced) mobility seems relatively straightforward, the exact ways that less-drastic environmental events, such as drought, land degradation, desertification, or sea level rise, influence migration and mobility are far less clear.

In a similar vein, another international initiative on Migrants in Countries in Crisis has issued guidelines for situations when migrants are caught by a crisis in a destination country, including natural disasters.

However, given the lack of international regulation, the key players in this field are national governments. Some indeed have provisions that allow them to (temporarily) admit nonnationals coming from an area affected by a disaster abroad, such as the temporary protection status existing in the United States or comparable provisions existing in some European Union countries. In all cases such provisions only apply to persons who otherwise would have to leave the territory, i.e., for a relatively residual category.

The overall picture thus is one of a lack of legal frameworks for “environmental migrants,” including citizens of small island states threatened by sea level rise. While some measures would indeed require considerable political will (such as a relocation programme for citizens of said small islands) which is unlikely to materialise in the current political climate), other measures would be much more practical and limited, such as providing visa extensions to persons stranded because of environmental events (such as in response to the eruption of the Icelandic volcano Eyjafjallajokull and the related “ash cloud” crisis in 2010), with other measures—such as protection from expulsion or indeed residence for persons from countries or regions affected by environmental disasters. Such measures, we would suggest, are feasible. Importantly, however, responses under migration law can only be a (small) part of effective responses to the nexus of adverse environmental change and migration, whose focus must lie outside migration law.


Albert Kraler and Marion Noack are both researchers at the International Centre for Migration Policy Development.
When President Donald Trump announced he would withdraw the United States from the Paris Agreement on climate change, it captured the world’s attention and was a shock to the system. But the response—from the international community and other nations to states, cities, companies, and communities—to redouble their commitments to address climate change shows how mutually reinforcing action by local, national, and international players is essential to long-term legal and governance efforts for problems such as climate change and related displacement. Just as an ecosystem should be resilient to unexpected shocks, so must governance approaches so that they can withstand a crisis such as the U.S. withdrawal.

The challenges of climate change displacement are numerous, ranging from the scale of the problem to questions of causation and responsibility to the need to create frameworks that can deal with both acute, immediate impacts (such as hurricanes) and long-term, gradual effects (such as slow-onset desertification). The law often fixates on causation, wanting to know who should be held directly and primarily responsible in a court of law. Displacement, however, is often multicausal, with conflict, economics, and environmental impacts contributing to dislocation. Instead of getting bogged down in complexities around causation debates, the international community should act with urgency and focus on affected communities and their rights and needs as a starting point for action. It should be enough to get things going to say that humans have contributed to climate change, and climate change is contributing to the displacement.

There is good reason to act now and center affected communities in any legal and governance response: the immediacy of the problem for some groups and the impact that inaction will have on the scale of climate change-related displacement over time. From 2013 to 2015, a state-led international process called the Nansen Initiative studied the issue, highlighting the immensity of problem; in the Nansen Initiative’s Protection Agenda, it concluded that “[between 2008 and 2014,] an annual average of 22.5 million people was displaced by weather- and climate-related hazards. Others have to move because of the effects of sea level rise, desertification or environmental degradation.” The Protection Agenda, which was endorsed by 109 delegations, continued: “Looking to the future, there is high agreement among scientists that climate change, in combination with other factors, is projected to increase displacement in the future.”

Any long-term framework will require a layered, integrated governance approach—a web—that encourages action and experimentation to identify good practice rather than solely focusing on legal obligations that may be enforced in a court or through an international convention. Legal obligations should be part of the eventual landscape, but waiting for consensus on them internationally would be a mistake. A follow-up process to the Nansen Initiative’s Protection Agenda, known as the Platform on Disaster Displacement, has embraced a web of governance approach and will work through 2019 “towards enhanced cooperation, coordination and action in order to improve the protection of disaster displaced persons.”

Addressing climate change displacement requires that state actors at local, national, regional, and international levels develop laws and policies built on human rights and humanitarian principles as well as refugee protection. Just as importantly, however, it is clear that the displacement problem is too large to depend on government alone. Industry and communities themselves must be part of the governance equation that reduces vulnerability, increases resilience, and prepares for planned relocation when necessary. Trump’s withdrawal from the Paris Agreement is certainly a setback, but it has focused the world’s attention—and with that attention comes the chance for new ideas and solutions to emerge and take hold that can serve the planet well in the decades to come.

1. Final Agenda, Nansen Initiative, page I.
2. Final Agenda, Nansen Initiative, page I.
4. Final Agenda, Nansen Initiative, page II–III.

Tyler Giannini is a professor of law and codirector of Harvard Law School’s Human Rights Program and its International Human Rights Clinic.
People Without a Country: The State of Statelessness

by Bronwen Manby

Mikhail Sebastian was born in the Soviet republic of Azerbaijan, of parents who traced their origins to the neighbouring country of Armenia. He moved to Houston, Texas, in 1995 on a still-valid Soviet passport as an assistant to a businessman. He applied for asylum, based on fear of persecution as a gay man in Azerbaijan. His application was rejected by the immigration authorities. U.S. officials arrested Sebastian and tried to deport him. However, his Soviet passport had expired, while the Azerbaijan embassy rejected his application for an Azerbaijan passport, as did Armenia and Russia. Since there was no country that would accept him, he was released with a renewable work permit but in legal limbo as regards his long-term status in the United States. In 2011, he travelled to American Samoa on vacation; but on arriving to board his flight to return to the United States, he was told that he could not legally enter the country. For more than a year he was stuck in Samoa, until finally, he was given a humanitarian permit to return but no right to work. Only in 2014 was he finally granted refugee status, giving him a secure legal status and a path to American citizenship.

Tatianna Lesnikova was born an ethnic Russian in the Soviet republic of Ukraine. Her older son had been committed to a mental hospital in 1989, at aged 16, for criticizing the government. In 1992, she feared that she might suffer a similar fate at the hands of the newly independent Ukrainian government. She fled to the United States with her younger son David, 15, entering the country on their old Soviet passports, and applied for asylum. The application was rejected. Ten years of appeals followed, with a yearly work permit allowing her to eke out a living as a piano teacher. In 2002, the final appeal failed and U.S. authorities attempted to deport her. They found that they could not: neither Ukraine nor Russia would recognize her as a citizen. After three months in detention, Tatianna and her son were released into a legal limbo. David eventually married a U.S. citizen and managed to naturalize as American. Tatianna was given an annually renewable work permit, but no permanent status.
Miliyon was born in Ethiopia as an Ethiopian citizen. His father came from the northern part of Ethiopia, which, in 1992, separated from Ethiopia to become the new state of Eritrea. The Ethiopian government deported Miliyon's father, a former Ethiopian government official, to Eritrea after conflict between Ethiopia and Eritrea broke out in the late 1990s over the border demarcation. When Miliyon protested the move, security officials detained and beat him before stripping him of citizenship on the grounds that he was an Eritrean. His mother urged him to leave and set him up with a smuggler and fake Ethiopian travel documents, which he used to get a U.S. visa. Once in the United States, he applied for asylum but was rejected. He remained in the country with no legal status or work permit. Both Ethiopia and Eritrea have denied him recognition as a citizen. He lives in expectation of being detained as an “irregular migrant”; which, paradoxically, might assist him. Generally, after six months in detention with no possibility of being deported, he could be released with a work permit, although no permanent status in the United States.

Mikhail, Tatianna, and Miliyon are among the estimated 4,000 people who are stateless in the United States. None of them have a country that recognizes them as a citizen; there is nowhere to which they can be deported because no country agrees that they belong there. Their stories show how serious the consequences can be of being stateless: stateless people are vulnerable to arrest and deportation or to (sometimes indefinite) immigration detention if they cannot be deported. Stateless people, in the United States and elsewhere, are often denied access to basic services, including not only public services such as health care or education, but even employment in the private sector or the ability to open a bank account. Of course, they can often not travel freely, even within a country, let alone across international borders, because they lack identity documents.
When People Become Stateless

The cases of Mikhail, Tatianna, and Miliyon also illustrate one of the most common situations when people become stateless, which is when a new country splits away from an existing one (such as Eritrea from Ethiopia) or an empire breaks up (such as the Soviet Union), and people who find themselves with connections on both sides of new borders—or who are perceived to be on the “wrong” side of the border for people of their ethnicity or religion—are rejected by the new political authorities in both places.

In one way, however, the three are not typical of stateless people, in that they are migrants in another country. Most stateless people are living in the place that they were born and have always lived; some of them in the same place that parents and grandparents were also born. The United States, at least, avoids this situation because of its legal rule of birthright citizenship: a person born in the United States automatically acquires American citizenship at birth. Many countries, however, give few or no rights based on birth on their soil, instead applying rules that are based purely on descent from a parent who is a citizen. At least 26 countries around the world restrict access to citizenship still further, through laws that discriminate on the basis of sex and provide no or limited rights to mothers to transmit citizenship to their children.¹

In a country such as Cyprus, for example, to be a citizen automatically from birth, one of your parents must be a citizen. There is not even an exception for abandoned infants of unknown parents (“foundlings”), who in most countries are presumed to be citizens. In Lebanon, citizenship is only transmitted through the father, and children have no rights to acquire citizenship from their mothers or men from their Lebanese wives. Children of unknown parents or whose parents’ citizenship is unknown are presumed to be Lebanese according to the letter of the law, but in practice they struggle to be recognised. Many people who are descended from ancestors who were resident in Lebanon at the breakup of the Ottoman Empire following the end of the First World War are still not recognised as Lebanese.²

These restrictive laws are, surprisingly, not unusual. In international law, there are only quite limited
rules governing the ability of states to decide who they want to recognise as a citizen.

**History of Rules of Nationality**

The rules on nationality first developed during the nineteenth century, as European empires expanded, and also as European states and the United States disputed questions of jurisdiction over people and companies. At this time, nationality (the term most often used in international law for what is called “citizenship” in the United States) was completely a matter of state sovereignty, and the main concerns were that it should be clear which state had that sovereignty. Dual nationality was discouraged, but also statelessness: it needed to be clear which state had jurisdiction over a person—not so much so that person could exercise his rights (a woman was assumed to follow the citizenship of her father or husband), but so that the state could call on him for military service or other obligations, or so that the state could protect the commercial interests of national businesses operating abroad. The first multilateral treaty on nationality, the Hague Convention of 1930 was designed to avoid conflicts of interest of national businesses operating abroad. The first multilateral treaty on nationality, the Hague Convention of 1930 was designed to avoid conflicts of interest of national businesses operating abroad. The first multilateral treaty on nationality, the Hague Convention of 1930 was designed to avoid conflicts of interest of national businesses operating abroad. The first multilateral treaty on nationality, the Hague Convention of 1930 was designed to avoid conflicts of interest. 

It was only after the Second World War that nationality began to be seen as the right of an individual that should not be arbitrarily taken away. The Nazi laws denationalising German Jews brought home the extent to which citizenship was, in Hannah Arendt’s formulation, “the right to have rights.” The Universal Declaration of Human Rights, adopted in 1948 and the foundation of the international human rights regime today, states in Article 15 that “everyone has the right to a nationality,” and that “no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.” In 1954, the Convention relating to the Status of Stateless Persons defined a stateless person as someone who is “not considered as a national by any state under the operation of its law” and created obligations on states that ratified it to protect stateless persons in a similar way to refugees.

The human rights treaties that followed from the 1960s emphasized the rights of children, in particular, to acquire a nationality and prohibited discrimination in transmission of nationality on the grounds of sex between spouses and from parents to children. But it was still not clear in many cases which particular country had the obligation to provide nationality to any specific person.

The only international treaty that establishes an obligation to grant nationality in some circumstances is the 1961 Convention on the Reduction of Statelessness, which requires states to grant nationality to a person born in their territory if that person would “otherwise be stateless” (subject to very limited conditions). However, the 1961 Convention has a relatively low number of states signing up for its obligations, though these numbers have increased in recent years.

**Statelessness Today**

The continuing discretion given to states in national laws—as well as the reality of global migration, conflict, and changing borders—means that it is increasingly possible for people to fall between the gaps and end up stateless. For example, a Nepali woman working as a migrant worker in Saudi Arabia who is raped by her employer has no right to transmit her nationality to that child as a woman. Under Saudi law, a child born out of wedlock does not acquire the father’s nationality, and birth in Saudi Arabia does not give the child any rights. The child is stateless. A child born of Cuban parents outside Cuba does not automatically acquire his or her parents’ citizenship, and there are strict conditions attached to doing so. If the country of birth doesn’t give the child any rights, the child is very likely to remain stateless. The children of Syrian refugees born in other countries cannot acquire the nationality of their mothers under Syrian law. If the Syrian father is dead or missing, acquisition of the father’s nationality depends on the birth being registered, as well as the marriage and the father’s death, in accordance with Syrian law. If the child is lucky enough to be born and grow up in a country that provides the child with a right to its nationality in such circumstances, then the child may grow up with the ability to live a full life, even as a refugee. If not, the child may forever be condemned to legal invisibility.

In other cases, statelessness is created as a result of discriminatory application of the law as much as the law itself. For example, many Roma (Gypsy) people living in eastern Europe, especially the countries that were created out of the former Yugoslavia, find themselves denied citizenship. They may have theoretical entitlement to citizenship but because they have historically faced discrimination from the authorities, they lack the documents to prove it, including birth registration.

Even if a country has adopted laws that establish the minimum protection required under the 1961 Convention to grant citizenship to a child born there who is otherwise stateless, this may leave many without a legal status in practice. This protection requires the parents of a child to prove a negative, to prove that the child cannot acquire the citizenship(s) of his or her parents. Most often, when a person is stateless, it is asserted by the state where they were born or live that the person is “really” from another country and has that nationality. Indeed, since many countries allow for indefinite transmission of nationality to children born outside their borders over many generations, it is almost impossible for a person from one of those countries actually to be stateless under a literal interpretation.
tried, children who are stateless may be prevented from attending school, especially beyond primary school, or denied access to state-provided health care, even basic childhood immunisations. Sometimes, stateless people are at least recognized as legal residents and are issued identity documents accordingly, but often they have no state-issued documents at all, leaving them unable to earn a living except illegally—or even to buy a SIM card for a mobile phone.

This sort of exclusion from rights granted to citizens can of course also be true of children or adults who are in another country without an official permit to be there. But statelessness is different from irregular migration status. Most stateless people have not left the country where they have been born and grew up; and most irregular migrants, even those who have lost all their documents or had them destroyed or confiscated (for example, by traffickers), are not stateless. If they are arrested by immigration officials and presented to the consular officials of the country where they came from, they are recognised as nationals of that country, given travel documents, and deported. This may be devastating for them and their families, but it is not the same as not even having the possibility of being deported, of living forever without a secure legal status in any country at all.

Campaign to End Statelessness

In 2014, the UN High Commissioner for Refugees (UNHCR) launched the #IBelong campaign to eradicate statelessness within 10 years. The agency’s official estimate was that there were “at least 10 million” stateless people in the world at that time, but it acknowledged that the real number is unknown. Because stateless people are usually undocumented, they are by definition uncounted; very few countries have a procedure to identify stateless persons and provide them with protection. In addition, many poorer countries in Asia
and Africa have a large number of people with no documents at all, not even a birth certificate, whose status as citizen or non-citizen is unclear. Paradoxically, the campaign to eradicate statelessness may reveal even more people to be stateless—not because there are more in reality, but because there is greater effort to seek out those facing exclusion from society on such grounds.

UNHCR's #IBelong campaign has a ten-point action plan to end statelessness. The first action is to resolve major situations of statelessness—among them the Rohingya; but also, for example, the status of former citizens of the Soviet Union (like Mikhail and Tatiana) who find themselves unrecognized by any of the successor states or the case of many cross-border or nomadic ethnic groups in Africa. The action plan also calls for legal protections to ensure that no child is born stateless (including protection for foundlings and for children born in the territory who are otherwise stateless), an end to gender discrimination in transmission of nationality, and prevention of arbitrary denial or deprivation of nationality. The agency has adopted a series of briefing papers on “good practices” to reduce statelessness through such actions. The actions include:

1. Resolve existing major situations of statelessness
2. Ensure that no child is born stateless
3. Remove gender discrimination from nationality laws
4. Prevent denial, loss, or deprivation of nationality on discriminatory grounds
5. Prevent statelessness in the cases of state succession
6. Grant protection status to stateless migrants and facilitate their naturalization
7. Ensure birth registration for the prevention of statelessness
8. Issue nationality documentation to those with entitlement to it
9. Accede to the United Nations Statelessness Conventions
10. Improve quantitative and qualitative data on stateless populations

One reason why the campaign has become so necessary is the increasing demands across the world for us all to identify ourselves at every turn; not having a recognized citizenship greatly increases the risk of not having formal identification papers. Although the United States is among those countries that do not have a requirement to hold a national identity card, this is increasingly rare. And even in the United States, the need to prove identity and legal presence in the country is becoming more pervasive. Because the United States provides citizenship based on birth on its soil, it has a relatively low number of stateless persons; but because of that right, the question of proof becomes even more important.

Universal birth registration is promoted by the UNHCR action plan as one of the main protections against statelessness, whatever the basis of a country's laws. In the United States it is especially critical to ensure that the constitutional rights of children born in the country are respected.

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2. Information on national citizenship laws available at the EUDO Citizenship Observatory website http://eudo-citizenship.eu/country-profiles (soon to be renamed GlobalCit).
3. For the story of a Cuban girl born in South Africa, see the video by Lawyers for Human Rights, available at https://www.youtube.com/watch?v=sh5keCYPHyM.
4. See the online toolkit produced by the Institute on Statelessness and Inclusion and the Norwegian Refugee Council, available at http://www.statelessness.org/.
Visas

by Tiffany Middleton

As Phileas Fogg set out to travel the globe in *Around the World in 80 Days*, he repeatedly sought, procured, and presented visas, or his “visaed passport.” The necessity for lawful travel documents was not absent from author Jules Verne’s imagination in the nineteenth century. A “visa,” which has Latin origins meaning “paper that has been seen,” is a conditional authorization issued by a country to visitors wishing to enter the country. A visa does not guarantee entry, but simply permission to enter. It’s often connected to a passport, either electronically or by a sticker or stamp inside a passport, and processed by customs officials upon attempted entry into the issuing country. Here “Teaching Legal Docs” will provide an overview of types of visas, examine how they are used, and explore what features they have.

A Network of International Policies

Visa policies, which became most popular after World War I, are important factors for influencing international travel and tourism. They also ensure national security and control immigration. Policies are determined by a network of formal agreements between nations. An estimated two-thirds of countries around the world require certain visitors to obtain visas before entering their borders. The World Tourism Organization, observing that visa requirements have relaxed over time, declared in 2015 that we live in one of the most “open” times in history. Some scholars suggest that visa policies “shape the geopolitical architecture of the planet” or can be “proxies for good international relationships.” In other words, if countries share a positive relationship, chances are visa policies will be less strict for travelers from both countries.

In the United States, visas are issued by the U.S. Department of State or U.S. embassies or consulates abroad—the executive branch of U.S. government. While visa policy is controlled by the executive branch, the legislative branch, Congress, also plays a role in shaping particular aspects of visa policy, such as visa waiver programs.

When Do You Need to Obtain a Visa?

Typically, visas are necessary when trying to enter another country and often depend on the length of the planned visit. The United States, for example, may not require a visitor to obtain a visa unless their stay extends past 90 days. Kyrgyzstan requires a visa for American travelers whose stay will extend past 60 days. A Philippine traveler heading to Nicaragua, for any length of time, however, must obtain a visa upon arrival in the country. Each country has specific policies with regard to travelers from specific other countries. Some countries demand visa applications before a traveler attempts to make the trip. Other countries will issue visas onsite as a traveler arrives at a customs station along the border of the country. Countries may require visa applicants to submit to photographs or fingerprinting, share medical records, or prove income. Slovakia, for example, demands that American visitors applying for visas show proof of medical insurance and “funds of $50 per person per day.” Canada examines criminal records, including misdemeanors and alcohol-related driving offenses. The United States requires international travelers to submit visa applications 30 days in advance of arrival into the country and complete an in-person interview at an American embassy or consulate.

Assorted Types and Limitations

Currently, the United States issues over 50 different types of visas to certain foreign visitors. They are organized by both length of stay and immigrant and nonimmigrant categories. “Short stay” visas, for example, might be granted to specific workers, such as athletes or artists, or to individuals seeking medical care, or refugees. “Long stay” visas might be issued to students, journalists, long-term residents, or refugees who have been granted asylum. An “immigrant” visa may be issued to someone marrying a U.S. citizen in the United States. There are also “diplomatic visas,” which are official documents issued to diplomats visiting the United States.

Visas typically put restrictions on visits or visitors. They might limit the length of the visit, prohibit the visitor from working in the country, or limit the traveler to visiting certain locations within the country. Visas may be single use or multiuse. All countries that require visas for entry have a variety of types of visas and potential limitations to visa-holders, so travelers must select appropriate designations based on their planned visits.

Visa Documents … or No Documents

Some visas are traditional physical documents and will include security features, but paper visas are increasingly rare in this technological era. Many
Visas are inserts that are added into passports in the form of additional pages or stickers. These have many of the same security features as modern paper visas—embossing, watermarks, holographic text or images, bleeding ink, and raised text, for example. Other visas are electronic and not physically connected to a passport but appear when a passport is scanned by a customs agent. A visa to enter one country might be written in a particular language. Greece issued visas written in French into the 1990s, for example, because French was the language most recognized for diplomatic purposes in the nineteenth and twentieth centuries.

Typically, a visa will include the name of the issuing country and the place of issuance, a photo of the traveler, including biometric information, passport information, the reason for and length of the planned visit, and any visa-specific restrictions or guidelines. There might also be a notation or sticker reflecting payment of any visa fees. Visa fees vary from country to country, and each country sets their own pricing policies. A German visa might cost an American traveler $65, while an American visa might cost a traveler $160, for example. Visas also include official seals of the issuing country and possibly an authorizing signature.

It is important to understand that each country has specific policies in place, so American travelers planning to visit other countries should check the policies of those countries in advance of a visit to ensure that visa protocols are followed correctly. If a visit requires a visa, travelers might observe how the visa is delivered—paper, sticker, electronic—and what type of information is included to gain a better understanding of this very ordinary but highly legal aspect of international travel.

Visa-Free Travel

Many countries have visa-free travel relationships with other countries that allow their residents to enter the country under certain terms without obtaining a visa. The United States currently has visa-free travel arrangements with 174 other countries around the world. Often, under the terms of the arrangement, American travelers are obligated to secure visas only if a planned visit will extend beyond 90 days. It effectively leads to visa-free travel for tourists and other persons planning shorter visits.

Approximately 38 countries are part of the United States’ Visa Waiver Program, which Congress introduced in 1996 in order to encourage international tourism to the United States. In order for a country to be part of the Visa Waiver Program, the country must offer visa-free travel to U.S. travelers. The United States ranks third (alongside Denmark, Finland, Italy, and Spain) in the world for visa-free travel access for its citizens.

If the United States offers visa-free travel to residents of a country, there is an expectation of reciprocity. In other words, American travelers should receive the same visa-free travel benefits in that country. This principle of reciprocity has been the crux of diplomatic tensions between the United States and other countries in recent U.S. history.

In 2008, when the United States debated installing missile defense sites in Poland, the fact that Polish citizens did not enjoy visa-free travel to the United States became a point of contention. In 2017, the European Parliament voted to rescind visa-free travel for Americans after the United States failed to lift visa requirements for certain European Union nationals. Ultimately, the European Commission, which manages day-to-day business of the European Union, agreed not to rescind visa-free travel for Americans, lest the action inspire the United States to reciprocate by making travel for EU residents to the United States more of a hassle.

A Lasting Travel Document

From Phileas Fogg in the nineteenth century to travelers today, visas have proven to be long-standing, and almost universal, travel documents. They are significant legal documents, whether they appear in document, sticker, or electronic form, and convey a basic set of information to both the issuing country and the country of destination for the international traveler. Jules Verne might be struck by the visa-free travel policies and the vast international web of policies that govern the entire system, but the concept and the complexity of it all surely would not be lost on him.
Historically, criminal law and immigration law have operated as separate spheres. On the one hand, people who are not United States citizens were subjected to federal laws determining who is admitted into the country and who is excluded. If the government learns that a migrant who is in the United States has violated some provision of immigration law, federal immigration officials initiate the process of forcible removal from the United States. On the other hand, anyone accused of having committed a crime is apprehended by police officers, put through the criminal justice system, and, if convicted, punished. This is true of United States citizens as it is of people who are not United States citizens. For most of the nation’s history, people were punished according to the laws enacted by legislatures, but they were punished identically regardless of citizenship status.

Beginning in the mid-1980s, the stark separation between criminal law and immigration law shifted quickly and dramatically. Two centuries into the nation’s life, the gap between these areas of law began to blur. Today, it is often hard to explain where the criminal justice system ends and the immigration process begins. The single most common type of crime prosecuted in federal courts is about immigration. Meanwhile, people facing the possibility of removal from the United States are frequently locked behind steel doors and surrounded by barbed wire.

This is crimmigration law. In the groundbreaking article coining the term, Juliet Stumpf, a professor at Lewis & Clark University Law School, noted that the division between criminal law and immigration law “has grown indistinct” such that the two “are merely nominally separate.” Since the 2006 publication of Stumpf’s article, crimmigration law has expanded. Today, it can be thought of as having three features. First, it is easier than ever for the federal government to exclude or deport (legally referred to as “removal”) a migrant from the United States. Second, the criminal justice system has increasingly become focused on immigration activity. Third, law enforcement agencies and prosecutors have tailored their enforcement tactics to raise the stakes of a person’s status as a migrant.

Immigration-related Consequences of Conviction
Legal proceedings in which removal is decided are treated by law as nothing more than administrative hearings in which a federal government employee decides whether a particular person merits permission to enter into or remain in the United States. These hearings take place in immigration courts operated by the Justice Department. They are presided over by immigration judges who work for the attorney general, not the federal judiciary. Time and again, the United States Supreme Court has concluded that forcible removal from the country is not punishment. These conclusions about the legal character of immigration law mean that there is no right to appointed counsel in immigration court. Other features associated with legal proceedings in the United States are also absent. There is no right to confront witnesses, no protection against self-incrimination, no presumption of innocence, and only
an exceedingly limited ability to toss out evidence obtained by illegal law enforcement activity.

Until the last decades of the twentieth century, few people were removed from the United States due to involvement in criminal activity. For the 92 years from 1892 to 1984, only 14,287 people were excluded from the country because of criminal activity. During that same period, 56,669 were deported for that reason. In total, 70,956 people experienced some immigration consequence during this span because of criminal activity. By contrast, in 2013 alone, the Immigration and Customs Enforcement agency (ICE) reported removing 216,810 people with a criminal conviction on their record. Put another way, there were more than three times as many people removed from the United States due to criminal activity in 2013 alone than in most of the twentieth century combined.

The quarter-million people removed annually due to a criminal activity are a diverse bunch. Some are lawful permanent residents. As people who are entitled to live and work in the United States indefinitely so long as they comply with immigration law requirements, they are the most privileged type of migrant. Others are people with permission to come here temporarily—say students enrolled in an academic program. Still others lack the federal government’s authorization to be here.

More significantly, the type of crime these individuals commit varies dramatically. To be sure, some commit the most heinous of actions. Most, however, do not. In 2013, for example, fully 31% of the 216,810 people removed with a criminal record had been convicted of nothing worse than a federal immigration crime (usually entering the United States without the federal government’s permission, one of two commonly prosecuted federal crimes). Another 16% had been convicted of drug crimes. Though some of these include major drug trafficking offenses, most involve simple possession of small amounts of drugs. In effect, most involved the kind of drug activity that is now legal in 26 states plus the District of Columbia.

The next most common category of crime that got people into immigration law troubles in 2013 was motor-vehicle traffic offenses. Clocking in at 15% of the total, traffic offenses still outnumbered assault crimes, which accounted for 10% of criminal removals.

**Migrants in the Criminal Justice System**

By linking removal to criminal convictions, modern immigration law turns the criminal courtroom into the most important scene for determining whether a person is likely to be allowed to remain in the United States. In a groundbreaking 2010 decision, *Padilla v. Kentucky*, the United States Supreme Court acknowledged the changed landscape of immigration law. “[R]ecent
changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it ‘most difficult’ to divorce the penalty from the conviction in the deportation context.”

The Supreme Court’s Padilla decision launched a vigorous evolution within the criminal justice system. The Sixth Amendment to the United States Constitution ensures that anyone charged with a jailable offense who is too poor to hire an attorney be provided with one at the government’s expense. The idea behind what has become a foundational feature of the United States’ conceptualization of justice is that no person should lose their liberty or life out of sheer poverty. As the Supreme Court put it in an earlier landmark decision about the right-to-counsel, Gideon v. Wainwright, “in our adversary system of criminal justice, any person [hauled] into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”

With an attorney by their side guaranteed and with modern immigration law's emphasis on criminal conduct to decide removal, criminal defense attorneys play an outsized role in determining the fate of their migrant clients. For that reason, the Padilla Court concluded that the Sixth Amendment requires that criminal defense attorneys advise their clients who are not United States citizens about the immigration-related consequences of conviction. This is true no matter what criminal accusation a defendant faces and regardless whether the criminal proceeding involves state or federal law.

While some criminal defense attorneys find themselves obligated to consider the immigration consequences of a client's predicament, others find themselves defending migrants who are facing criminal charges for immigration-related activity. Indeed, the vast majority of new criminal cases filed in federal courts nationwide target people who commit immigration crimes. In 2012, for example, federal courts completed 92,345 immigration crime prosecutions. The next most often prosecuted category of crime that year, drug offenses, numbered fewer than 40,000 prosecutions. Four years later, both numbers had dropped, but the trend had not shifted. There were 68,314 immigration crime prosecutions and less than 24,000 drug crime prosecutions in 2016. The bulk of federal immigration crime prosecutions are for illegal entry and illegal reentry. The former punishes those entering the United States without the federal government’s permission. The latter targets doing that after having previously been removed. Though both crimes have been part of federal law since 1929, neither was used frequently until the last years of President George W. Bush’s second term. Federal prosecutors continued this trend under President Obama.

The federal government has not been alone in ratcheting up the consequences for migrants caught up in the criminal justice system. Several states have done their part as well. None has been more prominent than Arizona. In 2010, Arizona’s attempts to increase the consequences of immigration violations nudged it into international prominence when Governor Jan Brewer signed into law Senate Bill 1070, commonly described as the “show-me-your-papers” act. Protracted litigation quickly ensued, leading the federal government to take the unusual step of suing the state. Eventually the United States Supreme Court weighed in, concluding that much of S.B. 1070 violates the U.S. Constitution. The sole challenged provision left standing, however, was the much-derided section authorizing police officers to investigate the immigration status of any person lawfully detained, stopped, or arrested. The Court warned that though the law is not necessarily unconstitutional, it could easily be applied unconstitutionally if, for example, it served as an excuse to detain solely to ask about immigration status or if it were applied discriminatorily.

In a variety of ways, numerous states followed Arizona’s lead,
thrusting their criminal law enforcement powers directly into immigration law policing. Alabama, for example, created a state agency charged with overseeing immigration law enforcement efforts. California criminalizes the use of fraudulent citizenship documents. In recent months, legislators in approximately two dozen states have introduced legislation to expand the role of local police in detaining people on behalf of federal officials.

Enforcement Tactics
Crimmigration law’s final feature concerns the unique or uniquely harsh law enforcement methods used against migrants. With so many people being prosecuted for immigration-related crimes, it should come as no surprise that the number of migrants imprisoned is also substantial. Every year, roughly half-a-million people are imprisoned due to an immigration law violation. ICE alone detains approximately 400,000 migrants annually who are waiting to learn whether they will be allowed to remain in the United States. Another division of the federal government, the Justice Department’s United States Marshals Service, detains tens of thousands more people who are awaiting prosecution for an immigration crime. As the agency responsible for detaining everyone facing a federal criminal prosecution and unable to get released on bail, in 2013 the Marshals Service took into its custody 97,982 suspected immigration crime offenders. That year, it held 28,323 people charged with a federal drug crime, the next most common reason for pretrial detention. Almost all immigration crime defendants will be convicted. When that occurs, they are transferred into the custody of the Bureau of Prisons, another Justice Department wing. In recent years, the BOP has held approximately 20,000 convicted immigration offenders every day.

Often, migrants pushed through the criminal justice system are stripped of procedural protections that emblematize traditional criminal proceedings. The notion that every defendant is entitled to a day in court, for example, presumes an opportunity to receive a judge’s full attention. Indeed, Rule 11 of the Federal Rules of Criminal Procedure, a set of mandatory instructions by which federal criminal cases function, demands that a judge “must address the defendant personally in open court” before accepting a guilty plea. For many migrants facing immigration crime accusations, that requirement has been severely undercut by a quick-adjudication mechanism called Operation Streamline. Under that initiative, federal prosecutors work with federal courts to quickly process large numbers of immigration crime cases. Dozens of defendants are presented to a federal judge simultaneously. Some reports indicate that as many as 100 immigration crime defendants will be brought before a federal judge at the same time. Judges then review the criminal process with defendants, asking them a series of questions intended to gauge whether they understand what is happening. Though federal judges are required to engage in this colloquy with all defendants (state judges follow similar routines), it is unheard of outside of the context of federal immigration crime cases for judges to regularly engage in en masse plea hearings.

Anyone who speaks to large audiences can guess the downside of en masse hearings. A speaker who presents a question to a room full of people is likely to receive some response. Understanding who said what and who said nothing, however, is next to impossible. As the United States Court of Appeals for the Ninth Circuit explained when reviewing a legal challenge to Operation Streamline, all a judge is likely to hear is “an indistinct murmur or medley of yeses.” This is poor practice in most public-speaking contexts. When it comes to criminal proceedings, however, the questions that a judge asks can form the foundation for a conviction and punishment. For that reason, to be labeled a federal convict requires more precision when it comes to all crimes except those related to immigration.

Crimmigration Law’s Future
As deeply as crimmigration law has become embedded in contemporary law and law enforcement, it remains in its infancy. Only three decades into its evolution, it is difficult to know whether crimmigration law will remain a standard feature of the United States legal system. Without question, signs suggest that crimmigration law is likely to expand, not contract, in the immediate future. Early into the Trump administration, top officials have repeatedly expressed a desire to focus the immigration court system’s focus on people with criminal histories, prosecute more federal immigration crimes, expand the federal government’s detention capacity, and enlarge federal cooperation with state and local governments interested in helping identify and apprehend suspected immigration law violators.
Learning Gateways

Immigration Detainers, the Constitution, and Sanctuary Cities

Students learn about the 2014 case of Miranda-Olivares v. Clackamas County, in which a federal court in Oregon ruled that a county jail holding a woman beyond the terms of her criminal sentence due to a federal immigration detainer violated her Fourth Amendment rights. Students explore excerpts from the court opinion and a federal immigration detainer form as primary sources and discuss the connections between the detainers and sanctuary cities.

Learning Targets
• Read and analyze a case study and excerpts from a court opinion.
• Analyze a government document as a primary source.
• Consider the relationship between immigration detainers and individual rights guaranteed under the U.S. Constitution.
• Consider the role that immigration detainers might affect actions by local law enforcement officials in “sanctuary cities.”

Standards Connections
National Civics Standards
11. Understands the role of diversity in American life and the importance of shared values, political beliefs, and civic beliefs in an increasingly diverse American society.
17. Understands issues concerning the relationship between state and local governments and the national government and issues pertaining to representation at all three levels of government.
18. Understands the role and importance of law in the American constitutional system and issues regarding the judicial protection of individual rights.

Common Core State Standards
CCSS.ELA-Literacy. RH.11-12.2. Determine the central ideas or information of a primary or secondary source; provide an accurate summary that makes clear the relationships among the key details and ideas.


GRADES: 9–12
DURATION: One class period

Materials
Available at www.insightsmagazine.org
• Handout 1: Miranda-Olivares v. Clackamas County Facts of the Case
• Handout 2: Immigration detainer form (DHS Form I-247)
• Handout 3: Miranda-Olivares v. Clackamas County Court Opinion

PART 1: Miranda-Olivares v. Clackamas County Case Study

Procedure
Ask students to read Handout 1: Miranda-Olivares v. Clackamas County Facts of the Case, either out loud or individually. Explain any terms that students may not understand.

Explain that the case is from a U.S. District Court in Oregon, not the U.S. Supreme Court.

Ask students to discuss the case:
• What happened to Maria Miranda-Olivares? What might be included on a timeline of her story?
• What is the relationship between the federal and state government in this case? How do they act in response to, or independently of, one another?
• Do you think Maria was treated fairly? Why or why not?

Share with students Handout 2: Immigration detainer form (DHS Form I-247). Ask students to study the form, and explain that this is the form that the Clackamas County Jail received on March 15, 2012. Explain any terms that students may not understand.

Ask students to discuss the form:
• What do you observe about the form? Who is supposed to complete it? What is the purpose of the check boxes? Why do you think it includes languages other than English?
• What do you think the abbreviations “U.S.C.” and “C.F.R.” on the form mean?
• Do you think that law enforcement officials who receive the form are required to comply? Why or why not? What indicators on the form support your opinion?

Explain to students that the question of whether the actions outlined on the form are required is one that the court considered in this case.

Ask students to read Handout 3: Miranda-Olivares v. Clackamas County Court Opinion, either out loud or individually. Explain any terms that students may not understand.
Miranda-Olivares v. Clackamas County (Oregon)

Handout 1

Facts of the Case
On March 14, 2012, Maria Miranda-Olivares was arrested for violating a restraining order and booked into Clackamas County jail. The officers in Clackamas County did not know Maria’s immigration status, as Oregon had laws in place that prohibited inquiring about anyone’s immigration status. The county did have a policy, however, of notifying the United States Immigration and Customs Enforcement (ICE) office every time a foreign-born person was brought to the jail under arrest. The next day, on March 15, 2012, the jail received an immigration detainer form from ICE, instructing the jail to hold Miranda-Olivares “for a period not to exceed 48 hours.” The form indicated that the U.S. Department of Homeland Security (DHS) had “initiated an investigation to determine whether [Maria] is subject to removal from the United States.” The form did not include any further explanation of or basis for the investigation and did not include an arrest warrant. On March 29, 2012, Maria pled guilty to the charges against her during a court hearing. She was sentenced to time already served and probation and became eligible for release. The county jail, however, held Maria for 19 hours past her release time, until March 30, 2012, because of the instructions in the immigration detainer.

Arguments
Maria challenged her confinement by the county jail, specifically the 19 hours past her release time. She argued that the confinement violated her Fourteenth Amendment right to due process, her Fourth Amendment protections against unlawful searches and seizures, and an Oregon law against unlawful imprisonment.

Officials in Clackamas County argued that the confinement was lawful and mandatory, based on the federal law, which empowers any authorized immigration officer to issue an immigration detainer notice to “any other Federal, State, or local law enforcement agency.” County officials argued that they could not be held liable for enforcing mandatory federal law.

Handout 2

Handout 3

Court Opinion
U.S. Magistrate Judge Janice Stewart of the U.S. District Court in Portland, Oregon, issued the opinion. The court ruled first that the immigration detainer notice is not “mandatory,” as the county argued. The court reasoned that the detainer is a “lawful request,” not mandatory, or a requirement. The court also reasoned that in asking county officials to “detain” Maria, the DNS did not mandate jail time, but simply “requests compliance in detaining suspected aliens.”

Regarding Maria’s claim that the confinement violated her Fourteenth Amendment rights to due process, the court ruled against her, in favor of the county. The court reasoned that, to meet a lawful standard of a due process violation, Maria needed to prove that the county’s actions were “arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.” In this case, the court reasoned, the county’s actions did not meet that standard. “Even though the County’s interpretation is wrong,” wrote Judge Stewart, “it is not necessarily unreasonable.”

The court then ruled in Maria’s favor on her claim that the county violated her Fourth Amendment rights. Judge Stewart concluded, “upon resolution of her state charges, the County no longer had probable cause to justify her detention,” and “the continued detention exceeded the scope of the jail’s lawful authority over [Maria, and] constituted a new arrest, ... under the Fourth Amendment.” Arrests under the Fourth Amendment must be based on probable cause, the court ruled. “Absent probable cause, that detention was unlawful.”

PART 2: Immigration Detainers and Sanctuary Cities

Ask students to return to the question of whether law enforcement officials are required to comply with the instructions on the immigration detainer form.

Explain that not all local law enforcement officials in the United States regard the instructions on the form as requirements, and this has been part of the national conversation about the actions of “sanctuary cities.”

• What does the word “sanctuary” mean? How might a city be a sanctuary?

• How might local law enforcement officials’ interpretation of the instructions on the immigration detainer form contribute to a city being a sanctuary?

• What did the court rule in Miranda-Olivares v. Clackamas County in the question of whether the immigration detainer form instructions are required? Do you agree or disagree with the court’s interpretation?

• How might the ruling in Miranda-Olivares v. Clackamas County affect “sanctuary cities”? What about cities that are not “sanctuary cities”?

Handout 4
In a victory for due process and the presumption of innocence, the U.S. Supreme Court invalidated a Colorado law that imposed high hurdles for individuals with overturned convictions to get back money for fees, court costs, and restitution exacted from the individuals by the state. The Colorado law, in the words of Justice Ruth Bader Ginsburg in *Nelson v. Colorado*, “offends the Fourteenth Amendment’s guarantee of due process.”

### Facts and Procedural History

The case involved two defendants convicted of sexual offenses—Shannon Nelson and Louis Alonzo Madden. Nelson was convicted in 2006 of five charges related to sexual assaults allegedly committed against her children. The trial court sentenced her to 20 years to life and ordered that she pay court costs, fees, and restitution. She paid a total of $702.10 in fees and restitution.

The Colorado Court of Appeals reversed her conviction, finding that a prosecution witness was improperly presented as an expert witness. The state tried Nelson again, but a jury acquitted her of all charges. Nelson filed a motion for a refund of the monies she had paid in costs, fees, and restitution. She paid a total of $702.10 in fees and restitution.

The Colorado Court of Appeals reversed her conviction, finding that a prosecution witness was improperly presented as an expert witness. The state tried Nelson again, but a jury acquitted her of all charges.

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Madden was convicted in 2005 of attempting to patronize a prostituted child and attempted sexual assault. In addition to a prison term, Madden had to pay various court costs, fees, and restitution. Madden paid more than $4,000 in fees.

On direct appeal, the Colorado Court of Appeals reversed his attempted patronizing conviction but upheld his conviction for attempted assault. However, during a state postconviction proceeding, his attempted assault charge was vacated. The prosecutor chose not to retry the case.

Madden moved for a refund of the monies he had paid but did not file under the Colorado Exoneration Act. A trial court denied the request. The Colorado Court of Appeals reversed, finding that any monies paid must be tied to a valid conviction. The state appealed to the Colorado Supreme Court, which reversed and ruled that Madden was not entitled to a refund of the monies.

Nelson and Madden sought Supreme Court review, challenging the constitutionality of Colorado’s scheme, which provides that defendants whose convictions are no longer valid can only recover monies if they prove by clear and convincing evidence that they are actually innocent.

### Court’s Decision

Nelson and Madden contended that the Colorado Exoneration Act infringed on their rights to procedural due process. The concept of procedural due process means that before the state negatively impacts one’s life, liberty, or property interests, they must provide fundamentally fair procedures. Nelson and Madden argued that the Colorado scheme was fundamentally unfair because it twisted the concept of the presumption of innocence on its head.

### Majority Opinion

Justice Ruth Bader Ginsburg authored the Court’s majority opinion. She reasoned that the proper standard to evaluate the Colorado Exoneration Act was the balancing test from *Mathews v. Eldridge* (1976). In *Mathews*, the Court evaluated whether an individual receiving Social Security disability benefits had a procedural due process right to a hearing before his benefits were terminated. The Court concluded that an individual was not entitled to such an evidentiary hearing and upheld the procedures.

The importance of the *Mathews* decision is the Court’s three-part test often used to evaluate whether a government law or regulation comports with procedural due process. That test requires courts to evaluate (a) the private interest affected; (b) the risk of erroneous deprivation of the interest; and (c) the governmental interest at stake.
On the first prong, the private interest involved was of the highest order. Nelson and Madden had an interest in obtaining their monies and being protected by the most elementary of American legal concepts—the presumption of innocence. Justice Ginsburg noted that the presumption of innocence “lies at the foundation of our criminal law.” If a criminal conviction is overturned, then a defendant once again is entitled to the presumption of innocence.

On the second prong—erroneous deprivation—Justice Ginsburg again struck the balance in favor of Nelson and Madden. The state of Colorado argued that the defendants can obtain their monies through the Exoneration Act by showing by clear and convincing evidence that they were actually innocent.

However, Ginsburg explained: “But to get their money back, defendants should not be saddled with any proof burden. Instead, ... they are entitled to be presumed innocent.”

On the third prong—the state’s interest—Ginsburg determined that the state “has no interest in withholding from Nelson and Madden money to which the State currently has zero claim of right.”

In summary, Ginsburg concluded:

Colorado’s scheme fails due process measurement because defendants’ interest in regaining their funds is high, the risk of erroneous deprivation of those funds under the Exoneration Act is unacceptable, and the State has shown no countervailing interests in retaining the amounts in question.

Concurring Opinion
Justice Samuel Alito authored a concurring opinion. He agreed with the Court’s final result but disagreed with the Court using the balancing test from Mathews v. Eldridge (1976). Instead, Alito wrote that the proper framework for evaluating the constitutionality of the law came from Medina v. California (1992). In Medina, the Court invalidated a rule that required a defendant to prove by a preponderance of the evidence that he was incompetent to stand trial. Under a Medina analysis, a governmental procedure is constitutional unless it offends principles of justice rooted in the traditions and conscience of a people.

Alito reasoned that Medina should apply over Mathews because Medina was a criminal case and Mathews was a civil case. Alito wrote that “we should pause before applying [the Mathews] balancing test in matters of state criminal procedure.”

Applying Medina, Alito reasoned that the Colorado scheme violates due process because “American law has long recognized that when an individual is obligated by a civil judgment to pay money to the opposing party and that judgment is later reversed, the money should generally be repaid.” He added that the Colorado law disregards historical practice and offends basic notions of justice and fairness.

Dissenting Opinion
The lone dissenting voice in this case came from Justice Clarence Thomas, who is certainly unafraid to stake out his own constitutional vision. Thomas said that both the majority and concurring opinions failed to ask an important first question—“whether [Nelson and Madden] can show a substantive entitlement to a return of the money they paid pursuant to criminal convictions that were later reversed or vacated.”

According to Thomas, Nelson and Madden cannot prevail on a procedural due process claim because they cannot show that they had been deprived of a protected property interest. According to Justice Thomas, “it is the Exoneration Act alone which defines the scope of the substantive entitlement.”

Conclusion
The Court’s decision has much intuitive appeal. If a person’s conviction has been invalidated, it seems only fair for them to be able to regain the monies they lost as a result of the conviction. After all, the presumption of innocence is a venerated principle in the American legal system. The Institute of Justice wrote in its amicus brief to the Court: “Applying the presumption of innocence, this should be an easy case. All individuals have the right to be secure in their property unless and until the government obtains a valid conviction in a court of law.”

The question of what test to use divided the majority and concurring opinions. While the majority of the Court chose to adopt the balancing test from Mathews, a civil case, Justice Alito made a compelling case for the adoption of the standard from the criminal procedural case of Medina v. California.

Perhaps the most important question moving forward is whether the Court’s decision in Nelson v. Colorado will have any impact on civil asset forfeiture schemes. Jacob Sullen with Reason magazine explains: “The parallels with civil asset forfeiture are pretty clear. In both cases, the government takes someone’s property based on allegations of criminal activity, and in both cases the owners are forced to prove their innocence if they want to get their property back.”

David L. Hudson Jr. is a First Amendment expert and law professor who serves as First Amendment Ombudsman for the Newseum Institute’s First Amendment Center. He has written numerous articles and books, including Let the Students Speak: A History of the Fight for Free Expression in American Schools (Beacon Press, 2011).
Resources for Educators: Migration, Immigration, and Refugees

Immigrant and Refugee Children: A Guide for Educators and School Support Staff
Joint publication from United We Dream, the National Immigrant Law Center, First Focus, and the American Federation of Teachers that is quite comprehensive. Includes facts, guidelines for talking to students and parents about immigration raids, understanding rights, and sample materials for using with students, parents, and community leaders.

5 Questions Educators Are Asking
An EdJustice feature from the National Education Association and the National Immigrant Law Center that discusses how to answer student questions about immigration, immigrant rights, and potential immigration raids.
http://educationvotes.nea.org/2017/02/21/5-questions-educators-asking-ice-raids-supporting-immigrant-youth/

Teaching Tolerance: Guide for Educators of Refugee and Immigrant Children
Includes quick facts about undocumented students, immigration FAQs, and ways to organize different resolutions or activities in your own community or school district.

Immigration: Protecting Our Students
Community page from the American Federation of Teachers that offers information about immigration and deportation, student and parent rights, testimonies from immigrant youth, and links to teaching resources.
https://www.aft.org/our-community/immigration

Fact Sheet for Families and School Staff
Printable handout from the American Civil Liberties Union that outlines U.S. Department of Homeland Security protocols for conducting immigration-related activities in sensitive locations, such as schools and churches.

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All of the lessons, handouts, and more from this issue are available in one location. Go get them!

Dive Deeper—
Find links and articles and teaching resources related to global migration.

Learn More about International Initiatives—
The United Nations wants to end statelessness by 2024, and the Nansen Initiative is developing guidelines to protect people displaced by environmental disasters, to name a few.

We Need Your Feedback!
Insights is changing for Fall 2017, transitioning from a subscription print magazine to a free digital publication. Please tell us what you value most in Insights and share any comments in our 10-question survey.

Link to new resources from the ABA Division for Public Education:

Understanding Executive Orders
One site devoted to executive orders—their construction, legal status, legal challenges—and how to discuss them in the classroom. http://ambar.org/executiveorders

Constitutional Institutes for Teachers: The Fourteenth Amendment
Free professional development program for Chicago-area high school teachers that will explore the Fourteenth Amendment. Apply today! www.ambar.org/teachlaw

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The U.S. Constitution provides a framework for a government with separated powers that work to check and balance one another each day. Within each power, there are additional checks and protections. *Insights* will explore how this constitutional blueprint for separated powers, federalism, and checks and balances provide a foundation for the rule of law.