

Purgatory: In-between Violence and Immigration Policy



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Editor's note: David Schlinkert is a doctoral student at Arizona State University. He recently traveled to Florence Detention Center to observe an asylum court proceeding for one of his immigration policy classes.

Around three dozen individuals awaited a legal decision regarding their immigration or asylum status. Some were without legal representation, including Miguel.

Miguel (not his real name) entered the courtroom with an interpreter, but no attorney.

Miguel came across as poised and mentally tough for a young man in his early 20s, yet his right leg visibly shook from nerves as he awaited a decision on his asylum claim.

Dark-green scrubs hung loosely on his skinny 100-pound frame. His long, unkempt and uneven facial hair tells but a hint of his untold tale, a dangerous 2,600-mile journey to the United States.

When the judge asked him about why he came to the United States, Miguel said that gang members threatened to kill him if he did not sell and move drugs. He said they demanded he work for them in order to pay off a debt owed by one of his family members. Fearing for his life, and unable to go to police for help due to widespread governmental corruption, Miguel felt like he had no choice but to come to the United States and seek asylum.

After finishing his story, Miguel took a deep breath followed by a sharp sigh. Miguel told the judge (through the interpreter) that he had decided to end his asylum claim, opting for deportation back to Guatemala.

After such a long, expensive and perilous trek, why would Miguel suddenly want to return to a place where gang members are waiting to kill him?

His decision may not be as sudden or unusual as one might think.

Miguel is one of over 5,000 individuals being held in immigrant detention centers around the state. His case represents but one of the 9,823 immigration cases pending last month in Arizona.¹

“Population levels at federally contracted shelters for migrant children have quietly shot up more than fivefold since last summer ... reaching a total of 12,800 in September,” according to *The New York Times*.²



To better understand Miguel’s situation and the national debate over immigration practices in the United States, one must first understand the difference between immigration *law* and immigration *policy*.

Immigration *law* is inherently complicated, but several recent *policy* changes have altered the landscape of protections for people fleeing violent circumstances in their home countries to the United States.

Immigration Law

An asylum seeker is someone whose request for sanctuary has yet to be processed.³ They are people who are persecuted in their home country because of their race, religion, nationality, membership in a particular social group, or political opinion.⁴ They often flee under duress, immediate risk or emergency – due to violence and war.

Under U.S. and international law, they are to be viewed and treated differently than immigrants, who make a conscious decision to move to a foreign country oftentimes in search of a better life via improved employment.

It's also important to understand that people who come to the U.S.-Mexico border and request asylum have not committed any crime. They apply for protection under asylum laws, and if it is determined they meet the criteria covered under the United Nation's 1951 convention, they may have the opportunity to become lawful permanent residents and eventually citizens.

But what about those immigrants who do not seek asylum in the U.S. and simply enter illegally or overstay their visa? By law, they also are not criminals. They have committed a civil offense, similar to a speeding violation or misdemeanor.

Ironically, undocumented immigrants and asylum seekers in the United States would enjoy constitutional protections under the Fourth, Fifth and Sixth amendments if immigration proceedings were criminal cases, not civil. Under criminal law, they would have full due-process protections such as rights to evidence concerning their case and the right to an attorney regardless of their ability to pay.

Yet, because asylum seekers and undocumented immigrants are recognized and treated as civil cases, they do not have such protections – despite being subject to detention and even deportation from the U.S.

Civil versus criminal prosecution of undocumented immigrants is just one idiosyncrasy in the complex field of U.S. immigration law. Another key distinction is that the immigration courts are housed under the executive branch of government within the Department of Justice instead of the legislative branch. This fact can have a significant consequence: Agencies, not judges, control the interpretation of the congressional statutes, with the courts only intervening in the narrowest of cases.

Immigration Policy

The most recent and well-known policy change was the separation of children from their parents or guardians in U.S. detention centers. But, there also have been several less-publicized changes that will have long-term consequences on the well-being of vulnerable immigrants and the United States' international image:

- Removal proceedings (deportations) are now targeting all undocumented immigrants not just those with criminal records.
 - Border enforcement is important but mass deportations are costly. Funding spent on deporting a farmworker who does not pose any risk to public safety instead could be used to deport an undocumented immigration with criminal behavior.
- Immigration courts have curtailed immigrants' ability to post bond, making it more difficult for an attorney to represent an immigrant during the bond stage of their case. The result: Immigrants may stay in detention centers longer, increasing costs.

- The Department of Justice is exerting more control over immigration judges' schedules, which limits a judge's ability to find solutions that work for immigrants who do not pose a risk.
 - This adds to the present backlog of court cases. Some judges are retiring from the overly burdened immigration system, saying they feel like the executive branch is pushing them into making hasty, one-sided decisions.⁵
 - Judges concerned about time restraints imposed on them by the Justice Department may not spend the necessary time inquiring into the individual's unique claim, and instead opt for the easier route of denying the asylum claim without proper vetting.⁶
- The immigration court system is holding additional statements or comments that go beyond that of a credible fear of violence or persecution against asylum seekers during their application process.
 - Nicholas Bustamante, a law student who represents asylum seekers through Arizona State University's Immigration Clinic, said: "I had a client that was in fear for their life, but he also told his judge that if he were to be admitted to the U.S. that he would like to further his education, and ultimately his asylum application was denied." Bustamante believes that the individual's desire to further his education was part of the reason his asylum claim was denied.

Whether an asylum seeker is represented in court appears to often impact the outcome of the case. If an asylum seeker is not represented by an attorney, 91 percent of such cases are denied asylum.⁷ Decisions also appear to reflect in part the [personal perspective that the judge brings to the bench](#).⁸



Furthermore, there have been [accusations of widespread abuse in detention centers](#),⁹ evidenced by the Immigration and Custom Enforcement's (ICE) 2017 request to delete records pertaining to abuse, sexual assault and death of immigrants in its custody.¹⁰

Arizona's Response

Why should Arizonans care about the lack of legal representation and long-term detention of asylum seekers, immigrants and children if immigration law and policy changes are being made at the federal level, not at the state level?

Dr. Evelyn Cruz, director of the Sandra Day O'Connor's College of Law's Immigration Law and Policy Clinic at Arizona State University, explains it this way:

"Where a society goes with their immigration policy is dependent on how they see that immigrant population fitting into their economy and society. And since SB1070 (Arizona's 2010 show-me-your-papers state legislation, most of which was struck down by the U.S. Supreme Court), there has been a realization that more often than not immigrants are interwoven into our society and our economy. Immigrants can be a foundation for economic growth, so it is important to ensure their civil rights are protected so they can feel a part of our community and invest their effort in the betterment of us all."

Others like Jessica Vaughan, director of policy studies at the Center for Immigration Studies, argue that the new zero-tolerance policies deter additional immigrants from coming to the United States to request asylum and keep immigrants from getting to stay in the U.S. with "a generic or frivolous claim to fear in their home country."¹¹

In the end, Miguel may have voluntarily ended his asylum quest and decided to return to Guatemala because he became homesick. Or maybe he convinced himself that he could somehow escape danger if he went back to a different part of Guatemala. Or perhaps he wants to come back to the U.S. someday and does not want a deportation on his record, which may prevent him from doing so.

But there is another real and distinct possibility: What if Miguel chose the risk of violence in his native country over the seemingly endless time he might spend in detention centers in the U.S. immigration system?

According to Cruz: "An asylum claim can be a very long fight, and if an asylum seeker does not have hope (via legal counsel and/or a family member who is a U.S. citizen that can act as their sponsor), they can be sitting in detention for many years."

For many asylum seekers, that purgatory may seem more like an eternity, and the detention stay more like a prison sentence than any prospect or promise of safety and freedom.

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