

# Limán Public Interest Workshop

## BORDERS

Fall 2012 Syllabus

**Mondays, 6:10-8 pm, room 124**

Hope Metcalf, Director, Limán Public Interest Program

Nina Rabin, Senior Limán Fellow in Residence

Judith Resnik, Arthur Limán Professor of Law

Sia Sanneh, Senior Limán Fellow in Residence

Lucas Guttentag, Robina Foundation Distinguished Senior Research Scholar in Law

Student Conveners: Linda Evarts, Aaron Littman, Sofia Nelson, Josh Rosenthal, Alyssa Work

All readings available at <http://www.law.yale.edu/intellecтуallife/workshopsyllabus.htm>

The Workshop explores the concept of “borders” and how, in various contexts, law, political orders, and social movements construct, invoke, rely on, and relax borders. Our plan is to explore the idea of borders, its relationship to territorial and jurisdictional borders, and its impact on relationships among individuals, communities, and states. Because civil/criminal, administrative/judicial, and federal/state systems of adjudication and enforcement seek to regulate individuals and borders, we will consider such delineations, particularly as they relate to past, current, and proposed immigration policies. Borders also provide a lens through which to consider how certain groups – women, juveniles, the mentally ill, members of certain communities identified by religion or ethnicity – can be made vulnerable and how law can render their situations peripheral, literally or figuratively. We will also address how areas of regulation – family, criminal, employment, benefits, housing, and immigration – interact. Throughout, we will consider what role the idea of sovereignty plays. Auditors and visitors are welcome, with permission of the instructors.

### **Requirements and Readings:** 2 units/credit fail

This Workshop is a two credit ungraded course. We meet weekly; preparation and attendance at these discussions is required for credit. If you need to miss a class, please be in touch with the professors in advance of the meeting. Students missing more than two sessions without permission will not receive credit.

Readings will be available on the Liman Public Interest Program's website: <http://www.law.yale.edu/intellectuallife/workshopsyllabus.htm>. In addition, at least six times during the semester, students must post on "Inside Yale" a one-page reflection on readings -- due NO LATER than 9 a.m. on the Monday mornings of the workshop and circulated to the class. Please email your reflections as well to Hope Metcalf, Nina Rabin, Judith Resnik, Sia Sanneh, and Lucas Guttentag. The purpose of writing is to encourage you to begin the conversations before class as you think about the relationship among readings. Further, failing to turn in the six reading reflections **on time** will result in not receiving credit. Below is an outline of the sessions that, as always, may change.

### **September 10      The Idea of Borders in American Law**

This first session introduces some of the themes of the semester. We begin by looking at questions inside American law. As you read, consider what work the category of citizenship does. What claims might non-citizens have on the body politic? What is the relevance of border crossing without permission?

**Conveners:** Hope Metcalf, Nina Rabin

**Readings:**

*Ambach v. Norwick*, 411 U.S. 68 (1979) (excerpted)

*Plyler v. Doe*, 457 U.S. 202 (1982) (excerpted)

Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. OF POL. 251 (1987)

The White House, Office of the Press Secretary, Remarks by the President on Immigration (June 15, 2012)

### **September 24      Puzzles of Citizenship, Membership, and Residency**

We continue to puzzle over the meaning of citizenry and the idea of a nation-state. How do groups come to see themselves as part of a polity and what role do exclusion and borders play? What claims might citizens have on states? And states on citizens? Should citizenship be conceived as singular or as a kind of affiliation that can be had with more than one country? And how does a focus on citizenship affect "others"?

**Conveners:** Judith Resnik, Patrick Weil and Sofia Nelson

**Readings:**

Benedict Anderson, *IMAGINED COMMUNITIES* 4-7, 134-47, 150-54, 204-06 (1991)

Patrick Weil, *From Conditional to Secured and Sovereign: The New Strategic Link between the Citizen and the Nation-State in a Globalized World*, 9 I•CON 615 (2011) Seyla Benhabib, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS* 1-21 (Cambridge Univ. Press, 2004)

## **October 1 Migration: Border-Crossing for Employment**

People move—both with and without documentation—to work in countries in which they are not citizens. Why do countries invite non-residents to come to work, and what treatment might be accorded to such workers? Below are examples of U.S. law, creating preferences for certain kinds of workers, able to enter lawfully. Yet, that workforce is one segment, joining citizen labor and undocumented migrant labor. To what extent do, and should, workplace rights vary depending on migrant/citizenship status? How does law balance – and how should it – the interests in economic development (and harvesting crops) with rules against unlawful entry? What does it mean to be a “guest”? How are sanctions distributed? Would you alter the current regimes and if so, how?

**Conveners:** Nina Rabin and Joshua Rosenthal

### **Readings:**

#### **Composing a Labor Force**

Bureau of Labor Statistics, *Foreign Born Workers: Labor Force Characteristics—2011* (May 24, 2012)

United States Department of State Bureau of Consular Affairs, *Immigrant Numbers for September 2012*, 48 VISA BULLETIN 1 (Aug. 9, 2012)

#### **Sanctions, Disincentives, and Rights**

*Unlawful Employment of Aliens*, 8 U.S.C.A. § 1324a

*Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002)

Human Rights Watch, *Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment*, 1-10, 95 (2012), available at [http://www.hrw.org/sites/default/files/reports/us0512ForUpload\\_1.pdf](http://www.hrw.org/sites/default/files/reports/us0512ForUpload_1.pdf)

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, U.N.T.S., vol. 2220, Doc. A/RES/45/158 (entered into force 1 July 2003)

#### **“Guest” Workers**

Philip L. Martin & Michael S. Teitelbaum, *The Mirage of Mexican Guest Workers*, 80 FOREIGN AFFAIRS 117-31 (2001)

President George W. Bush, *President Bush Proposes New Temporary Worker Program: Remarks by the President on Immigration Policy* (Jan 7, 2004)

Jennifer Gordon, *Workers without Borders*, The New York Times (3/10/09)

## **October 15 Gender, Migration, and Mobilities**

What roles have gender, race, ethnicity, class, and age played in the discussions thus far? Are citizens and migrants conceptualized as individuals, members of households, wage workers? Once gender becomes a category of analysis, do the topics or claims change? Consider how the responses below fit within conventions of “gender-coding” – i.e., locating women in terms of their vulnerability and in their households—and whether other ways of engendering migration theory and practice are possible.

**Conveners:** Judith Resnik, Nina Rabin and Linda Evarts

**Readings:**

Seyla Benhabib & Judith Resnik, *Citizenship and Migration Theory Engendered*, in MIGRATIONS AND MOBILITIES: CITIZENSHIP, BORDERS, AND GENDER 1-4 (co-editors Seyla Benhabib & Judith Resnik, New York University Press, 2009) [hereinafter MIGRATIONS AND MOBILITIES]

Linda Bosniak, *Citizenship, Non-Citizenship and the Transnationalization of Domestic Work*, in MIGRATION AND MOBILITIES 127-156

Cecilia Menjivar and Olivia Salcido, *Gendered Paths to Legal Citizenship: The Case of Latin-American Immigrants in Phoenix, Arizona*, 46 L. & SOC. REV. 335 - 368 (2012)

Talia Inlender, *Status Quo or Sixth Ground: Adjudicating Gender Asylum Claims*, in MIGRATIONS AND MOBILITIES 356-379

*Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084 (9th Cir. 2000)

Optional: Nina Rabin, *At the Border between Public and Private: U.S. Immigration Policy for Victims of Domestic Violence*, 6 LAW & ETHICS HUM. RTS. \_\_\_ (forthcoming 2012)

**October 22                    Layers of Authority in a Federation: Sanctions and Sanctuary**

This session considers the interplay between the American system of federalism and the establishment and enforcement of boundaries between citizens and non-citizens. What is the respective authority of the executive, Congress, and the courts? When, doctrinally speaking, is state (or local) legislation on or regulation of immigration preempted? Are there other factors that seem to explain, in practice, when state or local policy is preempted by federal policy? What range of choices – to both include and exclude – is available to states and localities? Setting aside the strictures of the Court's precedent, when should preemption occur? What are the benefits and disadvantages of a uniform nationwide policy, and of intranational variation? Does – and should – preemption have an inclusionary or exclusionary bent, or is it a value-neutral procedural bar to state or local legislation or regulation?

**Conveners:** Judith Resnik and Aaron Littman

**Readings:**

**The State of the Law**

*Arizona v. United States*, 132 S.Ct. 2492 (2012)

*Martinez v. Regents of Univ. of Cal.*, 241 P.3d 855 (Cal. 2010)

**Examples of State and Local Autonomy**

General Order 06-02, New Haven Department of Police Service (2006)

Connecticut DREAM Act, Public Act 11-43, codified as CONN. GEN. STAT. 10a-29 (2011)

Maura Dolan, *Justice Department Opposes Illegal Immigrant's Bid to Practice Law*, L.A. TIMES, Aug. 12, 2012

Dana Mulhauser, *Not Bloody Guilty*, LEGAL AFF., Nov.-Dec. 2005

### **Federal Discretion and State Authority in Conflict: Deferred Action for DREAMers**

Secretary Janet Napolitano, Memorandum Regarding the Exercise of Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012)

Governor Janet Brewer, Executive Order 2012-06, Reaffirming Intent of Arizona Law in Response to the Federal Government's Deferred Action Program (Aug. 15, 2012)

### **The Stakes: Alternative Views of Preemption**

Lucas Guttentag, *Discrimination, Preemption, and Arizona's Immigration Law: A Broader View*, 65 STAN. L. REV. ONLINE 1 (Jun. 18, 2012)

Cristina Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008)

## **November 5 Crime and Migration**

In this class, we will consider the relationship between crime and migration. We will discuss the treatment of noncitizens in the criminal justice system, the extent to which immigration violations are and should be treated as criminal violations, and the degree to which the form and function of our immigration and criminal justice systems are separate versus intertwined.

As you read, it may be helpful to consider two sets of questions. A first set of questions relate to the criminal prosecution of immigration violations. Should living in the country without legal status be a crime? Why is it currently a civil, not a criminal violation? Why is illegal entry, in contrast, a crime? Should it be a crime? If it is a crime, is it more or less blameworthy than other crimes?

A second set of questions focus on criminal prosecution of immigrants for criminal violations unrelated to their immigration status. Should non-citizens who commit crimes be treated differently than citizens? What is the current relationship between deportation and criminal conduct, and how, if at all, do you think it should be changed? How should individuals alleged to be in violation of immigration laws be treated? What are the consequences, positive or negative, of coordinating criminal and immigration enforcement efforts?

**Conveners:** Nina Rabin and Sofia Nelson

**Readings:**

### **What is Happening on the Ground: The Criminal Prosecution of Immigration Violations and of Immigrants**

8 U.S.C. § 1325 (unlawful entry) and 8 U.S.C. § 1326 (unlawful re-entry)

David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 163-89 (2012)

Optional: Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restrictions and Deportation Policy in the United States, 1921-1965*, 21 LAW & HIST. REV. 69 (2003)

**Padilla v. Kentucky: the Collateral Consequences of Criminal Convictions for Immigrants**

*Padilla v. Kentucky*, 559 U.S. 130 S. Ct. 1473 (2010) (syllabus only)

Linda Greenhouse, *Across the Border, Over the Line*, N.Y. TIMES, April 8, 2010

Immigrant Defense Project, Immigration Consequences of Crimes Summary Checklist

**Understanding the Convergence of Crime and Immigration and its Results**

Ingrid Eagly, *Prosecuting Immigration*, 104 Nw. U. L. Rev. 1281, 1281-91, 1337-59 (2010)

**Justifying and Challenging the Convergence of Crime and Immigration**

Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and its Possible Undoing*, 49 Am. Crim. L. Rev. 105, 105-112, 125-156 (2012)

Peter Schuck, Op-Ed, *Do Not Go Directly to Jail*, N.Y. TIMES, Dec. 6, 2010 at A33

**November 12 Regularizing, Legalizing, and Amnesty**

If we assume that a country may control its borders, prevent entry of at least some people, and expel those who enter illegally, what should be done about irregular migrants? If some irregular migrants are to be regularized, on what basis should they be allowed to stay while others are forced to leave? Should it matter if the migrant entered illegally initially or was authorized to enter? If she was authorized to enter, should it matter if she became irregular by staying past the date of required departure or by violating her status? Should the nature of the violation matter?

What kinds of people are privileged and what kinds are disadvantaged by different systems and rules? To what extent, if at all, should decisions about regularization and deportation be influenced by the character of migrants' home countries—the economic, political, and social contexts, colonial history, etc.—or the home country's relation with the receiving country? Does the receiving country's system for admitting immigrants lawfully affect what a regularization system can or should look like? Should a system of regularization and deportation allow for some discretion in its administration, and if so, who should exercise that discretion? Turning from the theoretical to the practical, what can and should the United States do about irregular migrants within its borders today?

**Conveners:** Lucas Guttentag and Linda Evarts

**Readings:**

**Balancing Competing Interests**

Joseph H. Carens, *The Case for Amnesty*, Bos. REV. (2009)

Selected Responses to Carens, New Democracy Forum (2009):

Carol M. Swain, *Apply Compassion Offered Illegal Immigrants to the Most Vulnerable Citizens*;

Peter H. Schuck, *In Moral Argument, the Details Matter*; Rainer Baubock, *There is a Mismatch between Citizens' Moral Intuitions and Their Political Views*;

Rogers M. Smith, *A More Conservative Proposal Has a Better Chance of Succeeding*;  
Jean Bethke Elshtain, *The Sheer Length of Stay is Not by Itself Decisive*;  
Roberto Suro, *Compromised Rights are Never Acceptable*;  
Joseph H. Carens, *The Balance of Competing Moral Considerations Falls Clearly on the Side of Rolling Amnesty (Responding to Critiques)*

### **Considering Migrants' Countries of Origin**

Brenda Wilson, *Developing Countries See Health Care 'Brain Drain'*, NPR (Nov. 3, 2005)  
Randal C. Archibold, *Gangs' Truce Buys El Salvador a Tenuous Peace*, N.Y. TIMES, (Aug. 27, 2012)

### **The United States in Focus**

*2011 Yearbook of Immigration Statistics*, Office of Immigration Statistics, Dept. of Homeland Sec., (2012)

### **Exploring Alternatives**

Demetrios G. Papademetriou & Madeleine Sumption, *Rethinking Points Systems and Employer-Selected Immigration*, Migration Policy Institute (2011)  
Kate Brick, *Regularizations in the European Union: The Contentious Policy Tool*, Migration Policy Institute (2011)  
Richard A. Boswell, *Crafting Amnesty with Traditional Tools: Registration and Cancellation*, HARV. J. LEGIS. (2010)

### **Discretion and Practical Limitations**

*DREAM Act: Summary*, National Immigration Law Center (May 2011)  
Excerpts from the Republican Primary Election Debate 2012  
*Transcript of President Obama's Speech on Immigration Policy*, N.Y. TIMES (June 15, 2012)

## **November 26 Migrant Detention**

For what reasons are non-citizens detained, and under what authority? What does immigration detention look like? Who, how many, where, and for how long? What restrictions does the law place on immigration detention? What are the tradeoffs between detention, deportation, and allowing individuals to remain at liberty in the community? What – if any – are the alternatives to detention?

**Conveners:** Hope Metcalf, Sia Sanneh and Aaron Littman

**Readings:**

**The Bounds of Immigration Detention: Who can be detained, and for how long?**

*Zadvydas v. Davis*, 533 U.S. 678 (2001)

*Demore v. Kim*, 538 U.S. 510, 513-31, 540-76 (2003)

## **The Map and Math of Immigration Detention**

*Lost in Detention*, PUB. BROAD. SERV., Oct. 18, 2011,

<http://www.pbs.org/wgbh/pages/frontline/lost-in-detention>

NAT'L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION 1-8 (Aug. 2011),

available at <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf>

## **Administering Immigration Detention**

ALISON SISKIN, CONG. RESEARCH SERV., RL32369, IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES (2012), available at <http://www.fas.org/irp/crs/RL32369.pdf>

## **Alternatives to Immigration Detention**

IMMIGRANT RIGHTS CLINIC, RUTGERS SCH. OF LAW-NEWARK, FREED BUT NOT FREE 1-19 (2012),

available at <https://afsc.org/sites/afsc.civicactions.net/files/documents/freedbutnotfree.pdf>

## **December 3 Conditions of Detention**

This class focuses on the conditions of confinement, once migrants are detained. Should the experience of detention be different for a person accused of or convicted of a crime as contrasted with a person alleged to have crossed borders unlawfully? As you read about the serious concerns about the conditions of confinement for immigrant detainees that have been documented in recent years, consider why efforts at reform have proven so difficult to achieve. What are the most promising pathways to reform? What are the most significant barriers?

**Conveners:** Hope Metcalf, Nina Rabin and Alyssa Work

### **Readings:**

#### **Current Conditions: Overview, Standards, and Stakeholders**

Dora Schriro, Director of the Office of Detention Policy and Planning, Dep't of Homeland Security, *Immigration Detention Overview and Recommendations* (Oct. 6, 2009)

Immigration and Customs Enforcement, *Performance-Based National Detention Standards* (2011)

Laura Wides Munoz and Garance Burke, *Immigrants prove big business for prison companies*, Associated Press (published in USA Today, salon.com, and many other news outlets) (August 2, 2012)

#### **Criticisms of the Detention System**

Human Rights First, *Jails and Jumpsuits: Transforming the US Immigration Detention System – A Two Year Review* (2011)

Testimony of Jessica M. Vaughan, Policy Director, Center for Immigration Studies, Congressional Hearing before the Subcommittee on Immigration Policy and Enforcement of the Committee on the Judiciary, House of Representatives, 112<sup>th</sup> Congress: *"Holiday on ICE: The U.S. Department of Homeland Security's New Immigration Detention Standards"* (March 28, 2012).



### **Considering Reform Efforts**

*Minnecci v. Pollard*, 132 S.Ct. 617 (2012)

*Hui v. Castaneda*, 130 S.Ct. 1845 (2010)

American Bar Association, Civil Immigration Detention Standards (August 2012)

Sam Dolnick, *As Escapees Stream Out, a Penal Business Thrives*, N.Y. TIMES,  
June 17, 2012

Margaret Talbot, *The Lost Children*, THE NEW YORKER (Mar. 3, 2008)

### **December 10      The Role of Lawyers**

Under current U.S. law, respondents in immigration hearings have a right to have the assistance of counsel, but not to the appointment of government-funded counsel. This session will explore the nature of the adjudication in the immigration context to understand the role of lawyers. Should there be a right to counsel in immigration proceedings, or in certain kinds of proceedings? Does establishing a right to counsel in certain contexts (e.g. for immigrants with limited mental capacity) complicate advocacy for a more general right to counsel in removal hearings?

Short of a right to appointed counsel and recognizing that unrepresentative immigrants are at a disadvantage in removal proceedings, what solutions are available to remedy that disadvantage? In a world of limited budgets, where should the Departments of Homeland Security and/or Department of Justice devote resources? What should be the priorities of advocacy groups?

**Conveners:** Hope Metcalf, Nina Rabin and Josh Rosenthal

#### **Readings:**

##### **Legal and Empirical Backdrop**

8 U.S.C. § 1229a (alien's rights in removal proceedings)

*Turner v. Rogers*, 131 S.Ct. 2507 (2011)

New York Immigration Representation Study, *Accessing Justice: Availability and Adequacy of Counsel in Immigration Proceedings* (2011)

Florence Project, Self-Representation Information Provided to Detainees,

<http://www.firrp.org/resources/prose/>

##### **Inside Removal Proceedings: A Due Process Right to Counsel for Certain Immigrants? For All Immigrants?**

New York Immigration Representation Study, *Accessing Justice II: A Model for Providing Counsel to New York Immigrants in Removal Proceedings* (2012)

*Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010)

*Franco-Gonzales v. Holder* (brief in support of summary judgment) (C.D. Cal. filed Aug. 2, (2010)

### **Outside Removal Proceedings: Prosecutorial Discretion and *Padilla***

Joan Friedland, Immigration Policy Center, *Falling Through the Cracks: How Gaps in ICE's Prosecutorial Discretion Policies Affect Immigrants Without Representation* (2012)

Alice Clapman, *Petty Offenses, Drastic Consequences: Toward A Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585-98 (2011)

### **Problems of Competence**

Allegra McLeod & Magaret McKeown, *The Counsel Conundrum: Effective Representation in Immigration Proceedings*, in REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM (Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, eds., N.Y.U. Press 2011)

*Matter of Vitaglione* (BIA May 6, 2011) (unpub.)

### ***Gideon* and Criminal Defendants**

JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL: REPORT OF THE NATIONAL RIGHT TO COUNSEL COMMITTEE (Constitution Project, April 2009)

## **December 13                      Administering and Judging: Immigration "Courts"**

This session considers the structures of adjudication in immigration decisionmaking. What values currently predominate in our system of immigration adjudication? How does immigration adjudication compare to other systems of mass adjudication (such as Social Security, the Veterans Administration, and mass torts)? Are there issues that are particular to the immigration context that make such comparisons inapt?

Further, consider the structure of decisionmaking now, and the allocation between life-tenured judges and individuals working within the immigration agencies. What is the current role of Article III courts in immigration adjudication? What kinds of cases, at what level of decisionmaking, ought life-tenured judges hear? Do arguments about generalist v. specialized judges affect your views?

**Conveners:** Lucas Guttentag, Judith Resnik and Alyssa Work

### **Readings:**

#### **Background**

American Bar Association, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, Summary of Findings and Recommendations, ES5-ES15 (Feb. 2010)

#### **Inconsistencies in Adjudication and Judicial Review**

Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295-305, 325-339 (2007)  
*Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir. 2005)

Judith Resnik, "In Abstentia"—*Reading Reinhardt: The Work of Constructing Legal Virtue*, 120 YALE L. J. 539, 542-546 (2010)

**Proposals for Structural Reform**

Stephen Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L. REV. 1636, 1636-1641, 1676-1688 (2010)

Jeffrey S. Wolfe, *Civil Justice Reform and Social Security Adjudications*, 64 ADMIN. L. REV. 369, 382-85, 423-28 (2012)

**Legislative Proposals Altering Federal Jurisdiction**

Lucas Guttentag, *Statutory Restrictions and Constitutional Rights*, 74 INTERPRETER RELEASES 245 (1997)

Immigration Litigation Reduction Act, Chairman's Mark, §§701- 703, 707-16 (2006)

Letters to Senator Arlen Specter from Law School Deans and Scholars (March 14, 2006)