

A close-up, high-contrast photograph of a pair of scales of justice. The scales are dark, possibly black or dark wood, and are set against a light, textured background. The central pillar and the two pans are clearly visible, with the pans hanging from a horizontal beam. The lighting creates strong shadows and highlights, emphasizing the metallic or wooden texture of the scales.

**THE SYSTEM
WORKS AS
DESIGNED**

**Immigration Law, Courts,
and Consequences**

**OHIO IMMIGRANT
ALLIANCE**

The System Works As Designed Immigration Law, Courts, and Consequences

March 2024

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Executive Summary

This report is based on the experiences of immigrants, lawyers, and immigration court observers, as well as external research. “The System Works as Designed” reveals how U.S. immigration laws, and the courts themselves, were planted on a foundation of white supremacy, power imbalance, and coercive control. For those reasons, they fail to protect human dignity and lives on a daily basis.

While the operations of the immigration courts have frequently been ignored, their outcomes could not be more consequential to immigrants and their loved ones. This report lifts the curtain.

Racism in Immigration Law and Policies

It is clear from the congressional record, and laws themselves, that the Chinese Exclusion Act, Undesirable Aliens Act, Immigration and Nationality Acts of 1924 and 1952, and other laws played on racial and ethnic stereotypes to limit mobility and long-term settlement of non-white immigrants.

The Immigration and Nationality Act of 1965 attempted to address some imbalances, but the Illegal Immigration Reform and Immigrant Responsibility Act basically broke the already contradictory set of laws, making them a landmine for immigrants attempting to seek safety or build new lives here. The REAL ID Act and other post-9/11 laws and policies tightened the vise.

Policy choices made by presidents from every modern administration have attempted to coerce, repress, and reject migration, a basic human survival act, instead of building safe paths people can use.

Death Penalty Consequences, Traffic Court Rules

The U.S. immigration courts were designed to offer the illusion of justice, while failing the people they purport to protect. Dysfunctional elements include:

A quasi-judicial structure that answers to the U.S. Attorney General in the Executive Branch and is not an independent judiciary; is blatantly influenced by ideology; and promotes quantity over quality decision making.

Power imbalances, such as the fact that the government is represented by attorneys 100% of the time, while immigrants often argue their cases without a legal guide. Detained immigrants are forced to “attend” their hearings via grainy video feed, while judges and counsel are together in courtrooms miles away. Yet immigration judges frequently deny requests for expert witnesses to appear remotely, citing challenges with communication and credibility. The deck is stacked.

Also, by detaining someone in jail for the duration of their civil immigration case, the government makes it harder for them to get a lawyer to help. The government is also using the psychological, financial, and physical toll of detention to try to break someone's spirits and get them to give up.

Subjective “credibility determinations,” rife for bias and abuse. A case can be denied based on a judge's *feeling* about the immigrant's testimony, not facts. This is the barn door through which all manner of ignorance, bias, and ideology storm in.

Legal landmines make it harder for people who qualify for asylum to receive it, such as the one-year filing deadline; illogical definition of material support to terrorism; and the Biden asylum ban.

Differing standards of accuracy. Immigrants may be furnished interpreters who speak the wrong dialect. Judges and DHS attorneys may make inaccurate statements about an individual's evidence or the political conditions of their country. The hearing transcripts can be riddled with gaps instead of key facts. Yet life-altering decisions are made based on this record, and an immigrant has little to no opportunity to object, correct, or explain.

Consider the experience of M.D. a Black Mauritanian man seeking asylum in the U.S. after the late 1980s/early 1990s genocide. An immigration judge questioned his credibility because M.D. did not provide “evidence” that he is Black and Fulani, a persecuted group in Mauritania. M.D. addressed the court, speaking in Fulani, and said, “I am the evidence. I speak Fulani and I am Black.”

The English transcript of M.D.'s hearing is riddled with “(unintelligible)” in place of the names of relatives and locations where important events, such as the murder of his father, took place. There was an interpreter in the room who could have spelled the words out to make the record more accurate and credible. Instead, the record shows big holes in place of material facts, while M.D. was accused of not providing “proof” that he is Black, deemed not credible, denied asylum.

In another case, a Black man seeking asylum was found “not credible” because his interpreter first used the word “canoe” when describing his method of escape, and later said “little boat.” But in his language and, one can argue, in common English, they are the same thing.

Situations like these, memorialized in the case record, are carried into the appeals process where rehearings typically do not take place, compounding the injustices of these mistakes.

PART ONE - Racism in Immigration Law and Policies

In the United States, children are taught a romanticized version of the country's origin story: people came here from other countries with "nothing," worked hard, and achieved their "American dream." But the first "immigrants" to the U.S. were European colonizers who caused the near-extinction of Native people, and brought other people from Africa to work for them as slaves. If we aspire to an anti-racist future, we have to acknowledge the country's true origins, and address the racism embedded in society, laws, and policies.

In this paper, we examine some U.S. immigration laws and structures—particularly the immigration courts—to that end. This is not an exhaustive examination of racism in U.S. immigration law and policy. But it reveals, through real-life experiences and observation, that the U.S. immigration courts were fashioned on a foundation of white supremacy, power imbalance, and coercive control.

"The System Works As Designed: Immigration Law, Courts, and Consequences" shows that this quasi-judicial structure—filled with legal landmines and subjective standards open to bias, underpinned by political ideology instead of impartiality—is failing the people they purport to protect. This is the third in a series of reports and analyses conducted by the Ohio Immigrant Alliance (OHIA) into the experiences of Black immigrants in U.S. immigration courts. The final research project, "Behind Closed Doors: Black Migrants and the Hidden Injustices of US Immigration Courts," will be published in Spring 2024.

Prior publications: "Dystopia, Then Deportation" summarizes insights and recommendations from a strategy session co-hosted by OHIA, the Mauritanian Network for Human Rights in US, and Cameroon Advocacy Network at the Ford Foundation Center for Social Justice in 2023.¹ "Diaspora Dynamics" is an annotated bibliography of over eighty studies into the lives of Black migrants in the U.S., published between 1925 and 2023.² Both reports were principally authored by Nana Afua Y. Brantuo, Ph.D, Founder and Principal of Diaspora Praxis LLC.

¹ Brantuo, N. (2024). Dystopia, Then Deportation: Post-Event Insights and Items. *Ohio Immigrant Alliance*. <https://illusionofjustice.org/read/project-one-h346n-lw4y6>

² Brantuo, N. & Abukar, I. (2024). Diaspora Dynamics: An Annotated Bibliography of Black Migrants' and Immigrants Experiences in the U.S. Ohio Immigrant Alliance. <https://illusionofjustice.org/read/project-two-whqpe-az3yd>

19th and 20th Century Laws Sift and Control Immigrants

Racism has inspired, and been intentionally embedded in, U.S. immigration law since the creation of what we now know as the United States of America.

Laws were crafted to allow wealthy, educated, and “white” immigrants to enter the country, while limiting the number of “other” immigrants and their rights herein.

In 1890, the U.S. House of Representatives Committee on Immigration and Naturalization declared the “intent of our immigration laws is not to restrict immigration, but to sift it, to separate the desirable from the undesirable immigrants, and to permit only those to land on our shores who have certain physical and moral qualities.”³ In 1907, another congressional commission “adopted the racist pseudoscience of eugenics as its guide for immigration policy,” according to UCLA historians Astghik Hairapetian and Hiroshi Motomura.⁴

The Immigration and Nationality Acts of 1924 and 1952 codified “national origins quotas” to further shape the face of U.S. immigration.⁵ The quotas indexed future immigration to a meager percentage of the U.S.’ current population of immigrants from a given country.⁶ This effectively limited immigration overall, and specifically repressed immigration from Asia, Africa, and Eastern and Southern Europe.

³ Hairapetian, Astghik & Hiroshi Motomura. (2023). Anti-AAPI Racism in Immigration and Criminal Law. *UCLA Asian American Studies Center*.
https://www.aasc.ucla.edu/aapipolicy/summit2022/reports_feb10/Motomura_report.pdf

⁴ Ibid.

⁵ Colloquially, the word “quota” implies a target or goal number, but in immigration law quotas are used as an upper limit.

⁶ Office of the Historian. (2019). *Milestones: 1945–1952 - Office of the Historian*. State.gov.
<https://history.state.gov/milestones/1945-1952/immigration-act>

With laws like the Chinese Exclusion Act and the Undesirable Aliens Act, Congress did not even bother to hide its racial animus with more benign bill names, as is the modern practice.⁷

But limiting the number of immigrants from non-white, non-Christian backgrounds wasn't the only goal of U.S. social policy. After slavery was made illegal, the privileged class diversified its labor force. People born in other countries, who were eager to work and could make it to the U.S. on their own—such as those born in Mexico who could walk across a land border—became attractive employees.

Because the privileged class also wrote or influenced people who wrote the laws, they were able to build a structure of immigration controls and hold power over the new migrant workforce.

In 1929, Congress passed a law designating the act of entering the U.S. without a visa a misdemeanor criminal offense, and re-entering the U.S. after a deportation a felony, two provisions that remain in force today.⁸ These sections of the Undesirable Aliens Act were a compromise between Nativists, who did not want people from Mexico to enter the United States at all, because they would “dilute the racial purity” of the country, and agribusiness representatives, who wanted people from Mexico to work in the U.S. but not have legal rights.⁹

The “compromise” gave authorities a tool to hold over immigrant workers' heads: if you want to earn money in the U.S., you must do so without complaint. Otherwise, you may be charged with a crime and sent to federal prison, before eventually returning to your families months, or even years, later. A businessman from Texas said

⁷ The term “alien” dates back to the 1798 Alien and Sedition Acts, which restricted access to U.S. citizenship and facilitated the imprisonment and deportation of “aliens.” According to some scholars, the continued use of the terms “alien” and “illegal alien” has helped to isolate and dehumanize migrants. Legislation has been introduced to remove those terms from the law, but not passed. President Joe Biden issued an executive order requiring immigration agencies to stop using the terms in favor of “noncitizen,” but U.S. code continues to reflect this antiquated and marginalizing term. See <https://guides.loc.gov/alien-and-sedition-acts>, <https://news.unm.edu/news/alien-tracking-its-story-throughout-immigration-history>, and <https://www.justice.gov/eoir/book/file/1415216/download>.

⁸ Zweifach Paul, B., Korberg, A., Berse, F., Layerenza, M., O', R., & Paul, D. (n.d.). BRIEF FOR PROFESSORS KELLY LYTLE HERNÁNDEZ, MAE NGAI, AND INGRID EAGLY AS AMICI CURIAE SUPPORTING RESPONDENT. Retrieved February 26, 2024, from https://www.supremecourt.gov/DocketPDF/20/20-437/173626/20210331173526991_20-437%20Amici%20Brief.pdf

⁹ Ibid.

bluntly: “If we could not control the Mexicans and they would take this country it would be better to keep them out, but we can and do control them.”¹⁰

Other U.S. immigration laws used racial stereotypes to provide agencies with tools for exclusion and control. To this day, immigration and naturalization applications ask whether an applicant has engaged—or intends to engage in—prostitution.¹¹ This so-called prohibition on “lewd and immoral behavior,” from the 1875 Page Act, reinforced racist stereotypes about Asian women’s sexual behavior as an excuse to deny them immigration opportunities in the United States.¹²

The Changing Face of U.S. Immigration: 1965-1990

Fast forwarding some decades, the Civil Rights movement of the 1960s enhanced domestic civil rights for racially-marginalized people in the U.S., and altered U.S. immigration policy. The Immigration and Nationality Act of 1965, also known as the Hart-Celler Act, attempted to remove racial discrimination from U.S. immigration law by replacing the “national origins quotas” with paths to immigrate based on family or employer sponsorship.

Fifty years after the law’s passage, the Migration Policy Institute wrote that the Hart-Celler Act, “literally changed the face of America.”¹³ In 1960, people of white, European descent (non-Hispanic) comprised 85% of the U.S. population, and 11% of U.S. Americans identified as Black.¹⁴ By 2020, the share of the U.S. population identifying as white, European descent (non-Hispanic) shrank to 58%. The percentage identifying as Black increased slightly, to 12.4%.

¹⁰ Ibid.

¹¹ See <https://www.uscis.gov/sites/default/files/document/forms/n-400.pdf> and <https://www.uscis.gov/sites/default/files/document/forms/i-485.pdf>

¹² Hairapetian, A., & Motomura, H. (2023). *ANTI-AAPI RACISM IN IMMIGRATION AND CRIMINAL LAW*. https://www.aasc.ucla.edu/aapipolicy/summit2022/reports_feb10/Motomura_report.pdf

¹³ Chishti, M., Hipsman, F., & Ball, I. (2017). Fifty Years On, the 1965 Immigration and Nationality Act Continues to Reshape the United States. Migration Policy Institute. <https://www.migrationpolicy.org/article/fifty-years-1965-immigration-and-nationality-act-continues-reshape-united-states>

¹⁴ Tamir, C. (2021). *The Growing Diversity of Black America*. Pew Research Center’s Social & Demographic Trends Project. <https://www.pewresearch.org/social-trends/2021/03/25/the-growing-diversity-of-black-america/>

The Immigration Act of 1965 changed the racial and ethnic composition of the entire country. The largest change occurred among people with roots in Latin America (from three percent in 1960 to 19% in 2020) and Asia (from less than one percent in 1960 to six percent in 2020), as well as multiracial Americans (10% in 2020).

The number of Black people born in other countries to the U.S. nearly doubled between 2000-2019, from 2.4 million to 4.6 million people.¹⁵ This never would have been possible without the Hart-Celler Act.

The Immigration Act of 1990 created the “diversity” visa program to expand upon the demographic equity initiated by Hart-Cellar. Each year, up to 55,000 people can win an immigrant visa (or permission to come to and live in the United States permanently) if they are citizens of an eligible country, complete a multi-step application process, and have quite a bit of luck.¹⁶ Millions apply each year. Administered through a lottery by the Department of State, the purpose of the diversity visa program is to increase immigration from countries with low rates of resettlement in the United States and “diversify” the U.S. immigrant population.¹⁷

During the program’s early years, most immigrants who “won” the lottery came from European countries. Over time, the majority shifted to people from Africa.¹⁸ In recent years, the diversity visa lottery has been a target of conservative administrations and legislators. Former President Trump’s Muslim and African bans and diversity visa

¹⁵Ibid.

¹⁶ U.S. Department of State. (2024). *Diversity Visa Instructions*. Travel.state.gov; U.S. Department of State.
<https://travel.state.gov/content/travel/en/us-visas/immigrate/diversity-visa-program-entry/diversity-visa-instructions.html>

¹⁷ What is the Diversity Visa Program? 5 Things to Know. (2022). FWD.us.
<https://www.fwd.us/news/diversity-visa-program/>

¹⁸ Ibid.

“passport rule” crushed the hopes of thousands of people who had applied for and won the lottery, but were barred from receiving their visas.¹⁹

With race being a social rather than biological construct, the definition of who society views to be “white” changes over time. But one thing remains constant: people in power promote stereotypes to control racialized groups, enforce marginalization, and justify these groups’ exclusion from advancement. And despite its flaws, the diversity visa program is one of the few immigration pathways that immigrants from Africa can generally access.

Clinton-Era Stereotypes Stoked Fear and Anxiety

In the late 1980s and 1990s, the explicit racial bias in politics was being replaced by a thinly disguised racial code. Public policy continued to prioritize safety and opportunity for white, middle and upper class people, while people of color were targeted as “the problem.” Congress played on the public’s fear of violent crime, terrorism, and economic scarcity, blaming so-called “aliens,” “superpredators,”²⁰ “welfare queens,”²¹ and “Muslim terrorists”²² for all social ills and passing regressive laws.

Fear provokes a “fight or flight” response in the human mind and is an effective strategy to turn people against each other. The era’s rhetoric, laws, and policies had excruciatingly harmful repercussions on Muslims and people of color, whether

¹⁹ According to State Department data, tens of thousands of applicants for immigrant visas – including diversity visa applicants – were refused visas in fiscal years 2017, 2018 and 2019 under the Trump administration’s policy. See <https://travel.state.gov/content/travel/en/us-visas/immigrate/diversity-visa-program-entry/diversity-visa-program-statistics.html>; <https://www.cnn.com/2021/02/28/politics/diversity-visa-lottery-winners-trump-ban/index.html>; <https://www.aclu.org/news/immigrants-rights/broken-promises-trump-era-travel-bans-keep-thousands-trapped-in-limbo>; and <https://www.law.georgetown.edu/icap/our-press-releases/court-tosses-out-trump-era-passport-rule-for-diversity-visa-applicants/#:~:text=The%20Department%20of%20State%20%E2%80%9Cpassport,from%20countries%20where%20passports%20are.>

²⁰ Equal Justice Initiative. (2014). *The Superpredator Myth, 20 Years Later*. Equal Justice Initiative. <https://eji.org/news/superpredator-myth-20-years-later/>

²¹ Brockell, G. (2019). *She was stereotyped as “the welfare queen.” The truth was more disturbing, a new book says*. Washington Post. <https://www.washingtonpost.com/history/2019/05/21/she-was-stereotyped-welfare-queen-truth-was-more-disturbing-new-book-says/>

²² *Terrorism* · Clinton Digital Library. (n.d.). <https://clinton.presidentiallibraries.us/terrorism>

immigrant or native-born. The goal was, once again, perpetuation of race-based power dynamics through marginalization and control.

For example, the “War on Drugs”—a hangover from the 1980s—incarcerated more Black people, for longer periods of time, than white drug users and sellers.²³ After the September 11, 2001 terrorist attacks, U.S. agencies engaged targeted, surveilled, maligned, and excluded Muslim, Arab, and Sikh people based only on their faith and heritage, not evidence of wrongdoing.²⁴ The deleterious effects of these programs are still being felt, and challenged legally, today.

But the Oklahoma City bombing and Columbine High School massacre—two of the most notorious domestic terrorist acts of the 1990s—were carried out by white men. If anyone could be considered a “superpredator,” it would be serial killers Jeffrey Dahmer and Gary Ray Bowles.²⁵ And the “Central Park 5”—a group of Black and Latine teenagers used as the “poster children” for “superpredators” and accused and convicted of a heinous crime, are now the “Exonerated 5,” but lost years of freedom in prison.²⁶

People born in other countries, referred to as “aliens” in the law and some public discourse, were a clear target. Congressman Lamar Smith (R-TX) led an effort to include people he called “scammers,” “criminal aliens,” and “terrorists” in Congress’ assault on the poor—with serious assists from President Bill Clinton, Democratic Senators Dianne Feinstein and Chuck Schumer, among others.

²³ Vagins, D., & McCurdy, J. (2006). *Cracks in the System: 20 Years of the Unjust Federal Crack Cocaine Law*. American Civil Liberties Union.
<https://www.aclu.org/documents/cracks-system-20-years-unjust-federal-crack-cocaine-law>

²⁴ For examples see
<https://www.pbs.org/newshour/nation/post-9-11-surveillance-has-left-a-generation-of-muslim-americans-in-a-shadow-of-distrust-and-fear#:~:text=Many%20law%20enforcement%20agencies%20launched.Qaeda%E2%80%9D%20or%20%E2%80%9Cjihad.%E2%80%9D;>
<https://www.aclu.org/documents/factsheet-nypd-muslim-surveillance-program>; and
<https://time.com/6097712/muslim-american-surveillance-supreme-court-sept-11/>.

²⁵ Avery, D. (2019). *Final Words of Florida Inmate Executed for Killing Six Gay Men*. Newsweek.
<https://www.newsweek.com/gary-bowles-serial-killer-executed-1456014>

²⁶ Hinton, E. (2019). “When They See Us” Shows a Case’s Impact on U.S. Policy. The Atlantic; The Atlantic.
<https://www.theatlantic.com/entertainment/archive/2019/06/when-they-see-us-shows-cases-impact-us-policy/590779/>

Provisions in the Violent Crime Control and Law Enforcement Act (a.k.a “the crime bill”), the Personal Responsibility and Work Opportunity Act, the Anti-Terrorism and Effective Death Penalty Act, and the Illegal Immigration Reform and Immigrant Responsibility Act made it significantly easier to deny entry to, detain, and deport immigrants, including lawful permanent residents, as well as pushing immigrants and their children outside the social safety net.

In an essay evaluating the influence of the 1990s “crime politics” on U.S. immigration law, Patricia Macias-Rojas explains that the Anti-Terrorism and Effective Death Penalty Act “fused ‘counterterrorism’ measures targeting Arab and Muslim immigrant communities in the United States with domestic crime bills disproportionately impacting Blacks and Latinos in the criminal justice system, and ‘criminal alien deportation’ provisions directly affecting mostly Latin American and Caribbean immigrants caught in the drug war.”²⁷

Presidents George W. Bush, Barack Obama, Donald Trump, and Joe Biden followed this bipartisan “tough on crime” playbook—with some acknowledgement that, for example, the disparity in sentencing for crimes involving crack versus powder cocaine was potentially biased.

Michelle Alexander writes:²⁸

President Bill Clinton, who publicly aligned himself with the black community and black leaders, escalated a racially discriminatory drug war in part to avoid being cast by conservatives as “soft on crime.” Similarly, President Obama publicly preached values of inclusion and compassion toward immigrants, yet he escalated the mass detention and deportation of noncitizens.

Still, there is never an acknowledgment about white drug users’ role in providing the “demand” for this “supply.” Nor is there awareness about how U.S. culture and policy bury trauma, sustain dependency on substances, limit financial opportunities for people in certain communities, and undermine the health of all residents.

²⁷ Macías-Rojas, P. (2018). Immigration and the War on Crime: Law and Order Politics and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. *Journal on Migration and Human Security*, 6(1), 1–25. <https://doi.org/10.1177/233150241800600101>

²⁸ Alexander, M. (2020, January 17). Opinion | The Injustice of This Moment Is Not an “Aberration.” *The New York Times*. <https://www.nytimes.com/2020/01/17/opinion/sunday/michelle-alexander-new-jim-crow.html>

The Deportation Pipeline

The Immigration and Nationality Act, the statutory home of the nation's immigration laws, is codified in Title 8, Chapter 12 of the United States Code. The federal government has exclusive jurisdiction over implementing U.S. immigration laws. However, conduct prohibited under other federal, state, and local laws can impact someone's eligibility to gain, or maintain, legal immigration status from the federal government. And the 1996 immigration laws dramatically expanded the number and types of reasons people could be excluded from immigration status.

In recent years, state and local police have become more involved in helping to enforce federal civil laws. This, in turn, has caused some immigrants to fear any contact with the police, including when they are victims of or witnesses to crime.²⁹

Federal, state, and local policies have also created a feeder system for the deportation pipeline. If state or local police come into contact with someone the suspect may be an immigrant, whether that person has been accused of a crime or not, they routinely call Immigration and Customs Enforcement or the Border Patrol to check on their "status."

Some police officers even engage proactively in their own immigration law investigations, despite being on shaky constitutional grounds when committing for pretextual arrests and warrantless detentions.³⁰ And that is how the deportation pipeline is primed.

All modern presidential administrations, regardless of party, have prioritized deporting immigrants with criminal convictions. Political campaign rhetoric considers them an "easy target." But it is well established that the criminal legal system is racially unjust. As we will see later in this report, the immigration legal system also has its own systemic problems.

Racism embedded in the criminal legal system carries over into the immigration court system. For immigrants, punishment does not end with their prison sentences, but continues on within the removal process. Grappling with their case in "civil"

²⁹ Tramonte, L. (2011). *Debunking the Myth of "Sanctuary Cities."* American Immigration Council. <https://www.americanimmigrationcouncil.org/research/debunking-myth-sanctuary-cities>

³⁰ *When Traffic Cops Become Part of Immigration Enforcement, Civil Rights Violations Are Almost Inevitable* | ACLU. (2016). American Civil Liberties Union. <https://www.aclu.org/news/immigrants-rights/when-traffic-cops-become-part-immigration>

immigration court, they face additional hurdles, such as the “aggravated felony” bar that prevent them from qualifying for most forms of immigration relief.

Immigration Policy Feeds Mass Incarceration

Many people think of Ellis Island as the gateway to freedom in the United States, but it was actually this country’s first immigration detention center, established in 1892.³¹ Similarly, on the West coast, immigrants were detained on Angel Island in San Francisco Bay starting in 1910.³²

The people passing through Ellis Island from 1892 to 1954 were primarily European.³³ In 1907, only 10% of the people entering the United States at Ellis Island were detained. On Angel Island, a large majority of people entering the United States were Asian. In 1913, 38% of people entering the country via Angel Island were detained.³⁴ The disparity in incarceration rates shows that race has always been part of immigration detention decisions.

The internment camps used against Japanese Americans is another heinous example of racialized incarceration. In the 1940’s, President Franklin D. Roosevelt ordered the U.S. Army to detain more than 120,000 people in the U.S. with Japanese heritage, including 70,000 U.S. citizens.³⁵ Some people interned at these “camps” were told they were taken there for their own protection. The National Archives has recorded some of their stories. “If we were put there for our protection,” asked one man interviewed

³¹ Goldman, E. (2000). *Immigration and Deportation at Ellis Island* | *American Experience* | PBS. Pbs.org.

<https://www.pbs.org/wgbh/americanexperience/features/goldman-immigration-and-deportation-ellis-island/>

³² *Freedom for Immigrants*. (2014). Freedom for Immigrants. <https://www.freedomforimmigrants.org/detention-timeline>

³³ See

<https://teacher.scholastic.com/activities/immigration/tour/stop1.htm#:~:text=About%2012%20million%20immigrants%20would.Poles%2C%20Serbs%2C%20and%20Turks> and https://shec.ashp.cuny.edu/files/original/immigrants-by-nationality-and-gender_1edd0b2484.pdf

³⁴ García Hernández, César Cuauhtémoc. *Migrating to Prison: America's Obsession with Locking Up Immigrants*. The New Press, 2019.

³⁵ *Executive Order 9066: Resulting in Japanese-American Internment (1942)*. (2021). National Archives; The U.S. National Archives and Records Administration. <https://www.archives.gov/milestone-documents/executive-order-9066>

for the historical record, “why were the guns at the guard towers pointed inward, instead of outward?”³⁶

President Ronald Reagan dramatically expanded the use of immigration detention in the 1980s, when large numbers of people from Haiti, Cuba, and Central America—fleeing war and dictatorships—sought safety in the United States. Combined with the nascent “War on Drugs,” this created a more militarized border environment.³⁷

³⁶ National Archives. (2016, August 15). *Japanese-American Internment during World War II*. National Archives; The U.S. National Archives and Records Administration. <https://www.archives.gov/education/lessons/japanese-relocation#background>

³⁷ “A Short History of Immigration Detention.” *Freedom for Immigrants*, <https://www.freedomforimmigrants.org/detention-timeline>.

The Reagan administration knew that detaining Haitians and Black Cubans “could create an appearance of ‘concentration camps’ filled largely by blacks,” but that did not convince them to make a different choice.³⁸ During this time, companies began receiving government contracts to run private immigration jails, leading to the multimillion-dollar industry that exists today.³⁹ Waves of migration of Black immigrants from Haiti in the 1980’s and 1990’s birthed the mass detention system as we know it.⁴⁰

In the early 2000’s, the newly-formed Department of Homeland Security (“DHS”) under President George W. Bush adopted an immigration control strategy called “prevention by deterrence,” meaning that DHS and other agencies would make the consequences of arriving at the border and requesting asylum so unpleasant that “no one would want to do it.”⁴¹ This policy eventually became Operation Streamline, which ramped up prosecutions of people attempting to cross the border, using the laws enacted in 1929.

³⁸ Tramonte, Lynn. *U.S. House of Representatives Committee on the Judiciary Subcommittee on Immigration and Citizenship. Ohio Immigrant Alliance*, 20 Jan. 2022, <http://ohioimmigrant.org/wp-content/uploads/2022/01/OHIA-Statement-HJC-01202022.pdf>. (quoting Ghosh, Smita. “How Migrant Detention Became American Policy.” *The Washington Post*, 19 July 2019, <https://www.washingtonpost.com/outlook/2019/07/19/how-migrant-detention-became-american-policy/>. Accessed 5 Feb. 2023.)

³⁹ “A Short History of Immigration Detention.” *Freedom for Immigrants*, <https://www.freedomforimmigrants.org/detention-timeline.>; Cho, Eunice. “More of the Same: Private Prison Corporations and Immigration Detention Under the Biden Administration.” *American Civil Liberties Union*, 5 Oct. 2021, <https://www.aclu.org/news/immigrants-rights/more-of-the-same-private-prison-corporations-and-immigration-detention-under-the-biden-administration>.

⁴⁰ How the Haitian refugee crisis led to the indefinite detention of immigrants. (2018). *The Washington Post*. <https://www.washingtonpost.com/news/made-by-history/wp/2018/04/09/how-the-haitian-refugee-crisis-led-to-the-indefinite-detention-of-immigrants/>

⁴¹ Dickerson, C. (2022). *An American Catastrophe*. The Atlantic. <https://www.theatlantic.com/magazine/archive/2022/09/trump-administration-family-separation-policy-immigration/670604/>

The Dragnet Beyond Detention: The Muslim “Registry”

President George W. Bush’s immigration legacy includes implementing many measures that treated Muslims in the United States like threats simply because of their faith. The National Security Entry-Exit Registration System (“NSEERS”), a program created by the Bush Department of Justice (“DOJ”), is one of them—and a clear example of policy based on explicit racism and Islamophobia.

NSEERS was a blunt attempt to track Arab and Muslim noncitizens after the acts of September 11, 2001. The Bush DOJ required men and boys living in the U.S., who were born in a list of specified Arab and/or Muslim-majority countries, to come to a government office, “register,” and be screened for ties to “terrorist” groups.

Attorney General John Ashcroft was less than subtle when he announced the program:

In this new war, our enemy's platoons infiltrate our borders, quietly blending in with visiting tourists, students, and workers. They move unnoticed through our cities, neighborhoods, and public spaces. They wear no uniforms. Their camouflage is not forest green, but rather it is the color of common street clothing. Their tactics rely on evading recognition at the border and escaping detection within the United States. Their terrorist mission is to defeat America, destroy our values and kill innocent people.⁴²

Take, for instance, the experience of writer and poet Justine El-Khazen and her husband. Because Justine’s husband (who wishes to remain anonymous) was born in Lebanon, one of the “NSEERS” countries, he was forced to participate in the registry.⁴³ What followed were years of surveillance and harassment by the CIA, ICE, and New York Police Department—including an arrest based on zero evidence. This happened because Justine’s husband had complied with the U.S. government and participated in the program.

⁴² #06-05-02: *Announcing the National Security Entrance and Exit Registration System*. (n.d.). www.justice.gov.
<https://www.justice.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm>

⁴³ El-Khazen, Justine (2023). “Failed Unions: Arab Americans were the test cases for mass surveillance and we let it happen.” *Tablet Magazine*.
<https://www.tabletmag.com/sections/news/articles/failed-unions>

He was eventually granted a green card, but their marriage crumbled. Justine writes: “When he told me just a few months after we divorced that he’d had a ‘small heart attack,’ I didn’t need to ask why. I knew America had broken his heart.”⁴⁴

NSEERS registered more than 90,000 people and identified zero “terrorists.”⁴⁵ But it did result in 14,000 people being sent to immigration courts to face and challenge their potential deportation. People who tried to comply with the government’s demand were being targeted for alleged paperwork violations—not terrorism, as the Attorney General first claimed.⁴⁶

Twenty years after NSEERS was conceived and failed, families are still dealing with its fallout. Justine El-Khazen points out that it had a bigger goal. “[NSEERS was] never just about restricting immigration or preventing terrorism. In targeting Arab men like my husband, the U.S. government used a vulnerable population to test out the systems of mass surveillance and data collection that would later be routinely applied to all American citizens. That was the real story, but it’s one that has barely been told.”⁴⁷

From Obama “Deporter-In-Chief,” to an Entire Trump Presidency Defined by Racism

In 2009, the first year of the Obama administration, federal immigration enforcement focused less on racial profiling and more on mass deportation. The new administration's theory was that directing its executive branch agencies to take a “tough” approach on immigration would entice Republican lawmakers to work with

⁴⁴ Ibid.

⁴⁵ *National Security Entry-Exit Registration System (NSEERS) Freedom of Information Act (FOIA) Request*. (n.d.). Center for Constitutional Rights. <https://ccrjustice.org/home/what-we-do/our-cases/national-security-entry-exit-registration-system-nseers-freedom>

⁴⁶ Sivaprasad Wadhia, S. (2022, March 1). Regarding a Hearing on “Discrimination and the Civil Rights of the Muslim, Arab, and South Asian American Communities.” U.S. House of Representatives. <https://docs.house.gov/meetings/JU/JU10/20220301/114438/HMTG-117-JU10-Wstate-WadhiaS-20220301.pdf>

⁴⁷ El-Khazen, Justine (2023).

Democrats on a broad-scale immigration bill that legalized long-term U.S. residents—the same people the Obama administration was trying to deport.⁴⁸

If the logic seems a bit illogical, it was. The plan didn't play out as hoped, and President Obama's immigration legacy was marred by a distinct nickname: "Deporter-In-Chief," due to the high number of deportations carried out during his administration due to deliberate policy choices.⁴⁹

One of the most positive achievements from President Obama's tenure as president is the creation of the Deferred Action for Childhood Arrivals ("DACA") program in 2012. However, this policy only came due to a sustained pressure campaign by future DACA recipients. After it became clear that the administration was facing waning enthusiasm among Latine and some core Democratic voters, the Obama administration acted.

Then came Donald J. Trump. Both the Trump campaign and presidency were defined by racism; preserving white male power was the sole policy priority. Trump set the tone from the first minutes of the campaign, with the infamous lines: "When Mexico sends its people, they're not sending their best. They're sending people that have lots of problems, and they're bringing those problems with us [sic]. They're bringing drugs, they're bringing crime, they're rapists. And some, I assume, are good people."⁵⁰

From the Muslim and African ban to "shithole countries" and the "China virus," President Trump maligned almost every race and region of the world in his four years as president. The slogan "Make America Great Again" was widely read as "Make America White Again"—by both Trump supporters and detractors.

⁴⁸ Peralta, E. (2014). *National Council Of La Raza Dubs Obama "Deporter-In-Chief."* National Public Radio.

<https://www.npr.org/sections/thetwo-way/2014/03/04/285907255/national-council-of-la-raza-dubs-obama-deporter-in-chief>

⁴⁹ Pierce, S. (2017). *The Obama Record on Deportations: Deporter in Chief or Not?* Migrationpolicy.org. <https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not>

⁵⁰ Gabbatt, A. (2019). *Golden escalator ride: the surreal day Trump kicked off his bid for president.* The Guardian. <https://www.theguardian.com/us-news/2019/jun/13/donald-trump-presidential-campaign-speech-eye-witness-memories>

During both the Obama and Trump administrations, immigration detention grew exponentially both as a result of changing immigration policy but also the successful lobbying efforts of the prison industry, which had been experiencing losses in profit due to efforts to decarcerate and reform criminal sentencing. These lobbyists argued for the use of private prison facilities to detain migrants, earning lucrative government contracts.

Focus on the Family: Multiple Administrations Use Migrants' Love for their Children as a Tool

Both the Obama and Trump administrations attempted to use parents' love for their children—the very reason many choose to leave dangerous situations and seek safety in the U.S.—to repress immigration and immigrants. For the Obama administration, it was “family detention”—literally incarcerating families as a group while they awaited the outcome of their asylum cases.⁵¹ The Trump administration adopted its infamous “Zero Tolerance” policy, separating thousands of children from their parents, an unspeakably cruel approach that galvanized a movement of people not previously involved in immigration battles but outraged at the latest low.⁵²

During the first three years of the Trump administration, the already behemoth immigration jail system expanded by over 50%. Throughout FY 2019, an average of 50,000 people were detained by ICE (56,000 at its highest). This number only includes ICE detention centers; add those detained by CBP and the number of immigrants incarcerated for so-called “civil” reasons reached an astonishing 80,000. This averaged out to 12,206 people detained per day, 39 of whom died between the years 2017-2020 because of the inhumane conditions within these facilities. Twelve died by suicide. These deaths resulted from abuse, subpar healthcare, “inappropriate use of solitary confinement,” and inadequate or no mental healthcare.⁵³

⁵¹ Dickerson, C. (2022).

⁵² Ibid and Flaherty, Anne. “Origins of family separation issue stretch back many years.” (2021). Associated Press.
<https://apnews.com/article/immigration-north-america-laws-george-w-bush-politics-26b88518310f47018b724e200b28e88f>

⁵³ Cho, E. H., Tidwell Cullen, T., & Long, C. (2020). *Justice-Free Zones: U.S. Immigration Detention Under the Trump Administration*. American Civil Liberties Union (ACLU). Retrieved February 5, 2023, from <https://www.aclu.org/report/justice-free-zones-us-immigration-detention-under-trump-administrati-on>

Subpar medical care—doctors with disciplinary histories; ill-equipped medical centers; and delayed or non-existent treatment—killed many people who should not have been in jail at all. A medical staff member at the Richwood Correctional Center said that if someone broke a bone and needed to see an outside doctor, it could get fixed “within a week.”⁵⁴ At the Irwin County Detention Center in Ocilla, Georgia detained women were forced to undergo unnecessary hysterectomies without their consent.⁵⁵

Significant, negative developments have plagued the Biden administration’s handling of immigration thus far, including the infamous abuse of Haitian and African migrants in Del Rio,⁵⁶ Texas; the continuation of Title 42 border policy;⁵⁷ and the disparate treatment of migrants from certain countries, such as Ukraine, compared to those from other nations in crisis.⁵⁸ And as of January 2024, almost 38,000 people were detained by ICE.⁵⁹

For more about immigration actions during the Obama, Trump, and Biden administrations, as well as the response from incarcerated immigrants who bravely

⁵⁴ Ibid.

⁵⁵ Dickerson, C., Wessler, S. F., & Jordan, M. (2020). “Immigrants Say They Were Pressured Into Unneeded Surgeries.” The New York Times. <https://www.nytimes.com/2020/09/29/us/ice-hysterectomies-surgeries-georgia.html>

⁵⁶ *BEYOND THE BRIDGE DOCUMENTED HUMAN RIGHTS ABUSES AND CIVIL RIGHTS VIOLATIONS AGAINST HAITIAN MIGRANTS IN THE DEL RIO, TEXAS ENCAMPMENT* ART BY BOUSIKO. (2022). RFK Human Rights and Haitian Bridge Alliance. <https://rfkhr.imgix.net/asset/Del-Rio-Report.pdf>

⁵⁷ NPR. (2023). *Biden Administration Ends Title 42. What Now?* NPR; NPR. <https://www.npr.org/2023/05/12/1175865631/biden-administration-ends-title-42-what-now>

⁵⁸ *Uniting for Ukraine | Homeland Security*. (n.d.). Wwww.dhs.gov. <https://www.dhs.gov/ukraine> and Biden welcomes Ukrainian refugees, neglects Afghans, critics say. (2022). *Washington Post*. <https://www.washingtonpost.com/national-security/2022/04/28/biden-refugees-ukraine-afghanistan/>

⁵⁹ “Immigration Detention Primer Immigration Detention Quick Facts.” *Transactional Records Access Clearinghouse* (TRAC), <https://trac.syr.edu/immigration/quickfacts/#:~:text=Immigration%20and%20Customs%20Enforcement%20held,as%20of%20November%2020%2C%202022.&text=20%2C730%20out%20of%2030%2C001%E2%80%94or,minor%20offenses%2C%20including%20traffic%20violations.>

spoke up, read “Broken Hope: Deportation and the Road Home” by Lynn Tramonte and Suma Setty.⁶⁰

Digital Detention: The “New Frontier”

In 2023, the African Bureau for Immigration and Social Affairs (“ABISA”) published a report from people living under U.S. government surveillance while their immigration cases proceeded.⁶¹ In government parlance, the program is called “Alternatives to Detention,” where people with pending immigration cases can avoid physical incarceration by agreeing to surveillance by immigration agents. To the people who experience this, it is more like digital detention than freedom. Wearing ankle monitors and waiting anxiously at home for hours to receive a call from a government official can be dehumanizing, exhausting, and totally unnecessary.

One man described how wearing an ankle monitor affected him psychologically. “I’m not [even] talking about how it hurt my foot, but people running away from me was even more hurtful.... I worked for two days, then they saw the ankle monitor and paid me on the spot, and let me go and said I would not work there anymore. It hurt me a lot.” He was also rejected when trying to find a house. On top of that, the monitor is “heavy” and “started cramping his leg.”

During cold Ohio winters, people are forced to cut slits in their boots to accommodate the bulky ankle “bracelet.”

According to the ABISA report, people under digital detention experience “immense anxiety” waiting for notification that their communications have been received by ICE; severe and ongoing pain due to the weight of the ankle monitor; shame and embarrassment; sleeping problems; and difficulties obtaining jobs and housing. Importantly, the feelings of anxiety and uncertainty are ever-present even though an individual is in full compliance with the monitoring program.

⁶⁰ Tramonte, L., & Setty, S. (2023). *Broken Hope: Deportation and the Road Home*. Anacaona. <https://static1.squarespace.com/static/6322009f6fe84e61df6f351a/t/65cbd45aba18b379c54ef653/1707856989377/BROKEN+HOPE+February+2024+Update-compressed.pdf>

⁶¹ *Online Flipbook*. (n.d.). Heyzine.com. Retrieved March 3, 2024, from <https://heyzine.com/flip-book/756fdd9bd6.html#page/1>

But what is all of the monitoring for? If someone is showing up regularly to their check-in meetings and hearings, what is the rationale for constant surveillance? There's a psychological strategy at play called "coercive control." Coercive control is an act or a pattern of threats, humiliations, intimidations, and other abuse that is used to harm, punish, or frighten their targets.⁶²

As with physical incarceration, the psychological harms of digital jail are part of the government's strategy to keep people feeling worried and off-balance. This induces them to "perform" worse before judges and immigration officers,⁶³ and in some cases decide to give up and return to their countries of origin.

⁶² Women's Aid. (2018). *Coercive control - Womens Aid*. Womens Aid; womens aid. <https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/coercive-control/>

⁶³ Bridget Marie Haas. (2023). *Suspended Lives*. Univ of California Press.

PART TWO - Immigration Court: Death Penalty Consequences, Traffic Court Rules

Just as racism is embedded in the law, it is part and parcel of the structures for implementing the law. The agencies charged with keeping people out of the country and carrying out deportations—the U.S. Border Patrol, an agency of Customs and Border Protection (“CBP”), and Immigration and Customs Enforcement (“ICE”)—have massive and ever-growing budgets. The section that manages immigration and citizenship applications, U.S. Citizenship and Immigration Services (“USCIS”), is funded by user fees alone.⁶⁴

Americans are more familiar with the activities of the U.S Border Patrol and ICE now, after the Trump years, than they were before. But the U.S. immigration court system has remained mostly under the radar screen. The operations of immigration courts are equally as consequential—and frequently disturbing—as those of the Border Patrol and ICE.

The United States immigration court system is composed of two judicial bodies: immigration courts in cities around the country, and a federal Board of Immigration Appeals (“BIA”) in Falls Church, Virginia.⁶⁵ Immigration courts and the BIA are housed under the Executive Office for Immigration Review (“EOIR”), an agency of the DOJ.⁶⁶ There are 650 Immigration Judges (“IJs”) in 69 immigration courts across the U.S.⁶⁷

DHS has the legal authority to charge people with violations of immigration law, by filing a case with the immigration court and asking the IJ for an “order of removal.” These are considered “civil” rather than “criminal” cases.

⁶⁴ Under separation of powers, Congress is responsible for funding the federal government, but the President sets out a budget request. Regardless of which party had control of Congress and the White House, this lopsided immigration funding arrangement remained constant.

⁶⁵ “Fact Sheet: Immigration Courts.” National Immigration Forum. (2018). <https://immigrationforum.org/article/fact-sheet-immigration-courts/>.

⁶⁶ “Observing Immigration Court Hearings.” *The United States Department of Justice*. (2022). <https://www.justice.gov/eoir/observing-immigration-court-hearings>.

⁶⁷ Office, U. S. G. A. (2022). *U.S. Immigration Courts See a Significant and Growing Backlog* | U.S. GAO. <https://www.gao.gov/blog/u.s.-immigration-courts-see-significant-and-growing-backlog#:~:text=Staffing%20and%20management%20challenges>

The IJ decides whether to grant DHS the authorization to deport someone, or grant that person asylum or some other legal status, through formal—but “quasi-judicial”—court hearings.⁶⁸ IJs are supposed to “advise noncitizens of their legal rights, hear testimony, make credibility findings and rulings on the admissibility of evidence, entertain legal arguments, adjudicate waivers and applications for relief, make factual findings and legal rulings, and issue final orders of removal.”⁶⁹

If deportation is the outcome of an immigration court case, the IJ issues a “removal order” that authorizes DHS to remove/deport the person from the United States—unless the person appeals their case to the Board of Immigration Appeals.⁷⁰ If a person appeals their case and loses at all levels of appeal, their removal order becomes final and they may be deported.

The immigration courts are housed under the Department of Justice; they are not independent courts. Immigration Judges are not independent jurists, but employees of the Attorney General who is responsible for evaluating their performance, easing or adding to their administrative burden, and telling them how to rule in cases through a process called “certification.”

In theory, immigration law is “civil” in nature, but in reality, immigration courts operate like criminal courts in many respects, and *without* safeguards like the right to legal counsel. Immigration court hearings are adversarial, meaning that one party is acting in opposition to another, and hearings include some of the same elements as criminal trials, like direct and cross examination. And although deportation (also known as “removal”) is not a criminal sentence, in legal terms, it can have life-long and devastating impacts including permanent family separation, persecution and torture, or even death.

⁶⁸ “Immigration Judge.” *USAJOBS*, <https://www.usajobs.gov/job/702744600>.

⁶⁹ National Immigration Forum. (2018).

⁷⁰ “Immigration Court Primer.” *TRAC Immigration*, https://trac.syr.edu/immigration/quickfacts/about_eoir.html.

Dana Leigh Marks, a retired Immigration Judge and former President of the National Association of Immigration Judges, describes the immigration court system as “death penalty cases heard in traffic court settings.”⁷¹ Beyond the deficiency of due process embedded in the laws, multiple structural factors allow bias and dysfunction to creep into the immigration courtroom, leading to unjust deportations.

Navigating the U.S. immigration system is like a dangerous maze. Criteria for who should be barred from entering the country (e.g. “grounds of inadmissibility”) and removed or deported (“grounds of removability”) are highly convoluted, challenging for even trained legal professionals to understand. One misstep, however innocent, can have permanent and irreversible repercussions for an applicant.

The posture of many immigration processes is antagonistic towards the applicant, or person seeking permission to remain in the U.S. For example, the application form for lawful permanent residency⁷² asks eighty-nine questions to determine whether someone is eligible for a green card, or not. Only one question asks about positive attributes. Question sixty-seven invites the applicant to list their “certifications, licenses, and skills.” The other eighty-eight questions focus on conduct that could make the person ineligible for a green card, such as human trafficking, drug trafficking, participating in the Holocaust, prostitution, and polygamy.

The share of the application devoted to “reasons to deny” is grossly disproportionate to the “reasons to grant.” Even if an applicant overcomes the hurdles and is granted a green card, their answers to these confusing, often overlapping questions can be used against them down the line. Immigration processes can take many years, and sometimes decades. Memories may fade, but the government’s database never forgets. Immigration agents have been known to use information contained in prior applications against people, however innocent the inconsistency,

In another example of insurmountable obstacles, U.S. immigration law seeks to exclude people who have engaged in or supported the commission of terrorist acts. However, over the past few decades, expanding definitions of “terrorism” have led to

⁷¹ Leigh Marks, Dana. “Immigration Judge: Death Penalty Cases in a Traffic Court Setting.” CNN. (2014). <https://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/index.html>. Accessed 20 Feb. 2023.

⁷² *Application to Register Permanent Residence or Adjust Status*. (n.d.). <https://www.uscis.gov/sites/default/files/document/forms/i-485.pdf>

absurd consequences, and situations where the very victims of terrorism are barred from entry under these so-called “terrorism” exclusions.

According to Human Rights First:

Any refugee who ever fought against the military forces of an established government is being deemed a “terrorist.” The fact that some of these refugees were actually fighting alongside U.S. forces shows how far removed the immigration law’s “terrorist” labels have become from actual national security concerns. Refugees who voluntarily helped any group that used armed force are suffering the same fate— regardless of who or what the group’s targets were and regardless of whether the assistance the refugee provided had any logical connection to violence.⁷³

Behind Closed Doors: Jennifer’s Experience

The Ohio Immigrant Alliance interviewed immigrant and immigration attorneys about challenges Black immigrants face in U.S. immigration court, and how to improve their experiences and outcomes.

One of the attorneys we interviewed, who we will refer to as Jennifer to protect her anonymity, has been practicing immigration law since 2004. Jennifer runs her own legal practice, where she has largely represented Latin American and African immigrants. We asked about her personal experiences in immigration court, with a focus on experiences representing Black immigrants. Jennifer highlighted how systemic problems combine with anti-Black racism in U.S. immigration court to exacerbate the challenges faced by Black immigrants.

She emphasized the prevalence of under qualified judges making monumental decisions, outside of their expertise. In one example, Jennifer recalled facing “a judge that ... didn’t know that Cote d’Ivoire is Ivory Coast.”

Black immigrants in the U.S. face challenges upon their first interactions with the legal system. Jennifer estimated that 30-45% of her cases begin in the USCIS Asylum Office, where her clients had to overcome a credibility determination before she even interacts with them. This determination impacts how their testimony will be treated throughout the rest of the asylum process. She described a finding of “not credible” as akin to a “scarlet letter.”

⁷³ *Denial and Delay The Impact of the Immigration Law’s “Terrorism Bars” on Asylum Seekers and Refugees in the United States.* (2009). Human Rights First.

<https://humanrightsfirst.org/wp-content/uploads/2022/12/HRF-Denial-and-Delay-Terrorism-Bars-2009.pdf>

Jennifer believes that this subjective determination is especially harmful to Black immigrants and they are “found not credible when they should be found credible ... at my higher percentage rates.” This is not limited to the USCIS Asylum Office but extends to immigration judges who deliberately confuse African immigrants with their questions and pick apart their cases.

Jennifer does not think this is accidental. She said, “They’re from countries where they’ve been tortured ... they have scars all over their body, and they should win asylum unless they’re found not credible.” Immigration judges and government attorneys look to discredit immigrants and their witnesses during cross-examinations, in ways she described as “egregious,” “unfair,” and “biased.”

Another obstacle in immigration court that can be especially problematic for African immigrants is a lack of qualified interpreters. Jennifer explained that for clients who speak languages like Fulani or Wolof, common in West Africa, “the interpreters are terrible.”

Lastly, Jennifer noticed a lack of clarity in the photos taken for photo IDs of her Black clients. This can make it impossible for them to get work authorization cards when the photos are not accepted.

In terms of solutions to ensure a better system and the protection of due process for Black immigrants, Jennifer believes a major overhaul is necessary, starting with the judges and government attorneys, some of whom are holdovers from the Trump administration. She suggested organizations like the American Immigration Lawyers Association (AILA) or Black immigration organizations could be helpful in developing strategies to improve the system, if given access.

Factors like under qualified judges, attorneys, and interpreters; the subjectivity of credibility determinations; and unusable photo IDs make attorneys like Jennifer realize that when they have an African client, “There is a much steeper hill to climb to win the case.”

Primer on Possible Outcomes in Immigration Court

Before delving into various ways the Immigration Courts were designed to fail, let’s understand a bit more about how the courts work.

In an immigration court case, the Department of Homeland Security (“DHS”) seeks to prove that the person before them is removable (deportable), and to obtain an order permitting the removal of the person from the U.S. The immigrant is called a “respondent,” which is similar to being the “defendant” in criminal court. The immigrant is “responding to” allegations against them made by DHS. The respondent

is entitled to both mount a defense to prevent their removal from the U.S. and request “relief” from deportation. Immigration court decisions can take various forms, including the following.⁷⁴

Asylum. Asylum is a form of relief granted to people who “fear persecution in their home country” and cannot safely live there anymore.⁷⁵ Some people seeking asylum come to the U.S. after an inciting incident or set of incidents. Others request asylum after having lived in the U.S. for a while, due to changes in their countries of origin that make it dangerous for them to return.

An asylum seeker has to file an application within one year of entering the U.S., with limited exceptions. Missing this strict deadline is one of the reasons an Immigration Judge will deny asylum and issue a removal order.

People whose notices to appear were filed with an immigration court and are placed into removal proceedings can apply for defensive asylum. It is “defensive” because they are proposing asylum as an alternative to the government’s charges, which would lead to deportation. This asylum application is filed with the immigration court, and the Immigration Judge will hold a hearing to consider the applicant’s request for asylum. The person may or may not be detained in immigration jail for the duration of their court case.

“Affirmative asylum” is available to those who have not already been placed in removal proceedings, or who are unaccompanied minors regardless of whether they are in removal proceedings. People applying for affirmative asylum send their applications to USCIS and are interviewed by an asylum officer from that agency, not an immigration court. They are not detained during the application process.

If the USCIS officer grants the person’s request for asylum, she is allowed to remain in the United States without risk of deportation, work, obtain a Social Security card, travel overseas, and bring certain family members, like a spouse or child, to the United States. One year after an individual is granted asylum, she can apply for a green card and become a legal permanent resident. Four years after that, she is eligible to apply for U.S. citizenship.⁷⁶

⁷⁴ “The Removal System of the United States: An Overview.” *American Immigration Council*. (2022). <https://www.americanimmigrationcouncil.org/research/removal-system-united-states-overview>.

⁷⁵ “The Asylum Process.” *Transactional Records Access Clearinghouse (TRAC)*, (2006). <https://trac.syr.edu/immigration/reports/159/>.

⁷⁶ “Asylum in the United States.” *American Immigration Council*, 16 Aug. 2020, <https://www.americanimmigrationcouncil.org/research/asylum-united-states>.

If the USCIS denies asylum, they will most likely refer the case to an immigration court to begin the process of deportation. There, the immigrant has another opportunity to explain why they qualify for asylum, but for reasons we will explain below, that is exceedingly difficult to get.

The individual may be put into removal proceedings before the immigration court through issuance of a Notice to Appear. Once in removal proceedings, the person can refile her asylum application, this time as a defense to the government's goal of deportation.⁷⁷

There are five bases of fear of persecution on which someone can assert an asylum claim: "race, religion, nationality, membership in a particular social group, or political opinion." In order to succeed, the applicant must show that they have a "well-founded fear of persecution" based on one of these specific reasons.

If an Immigration Judge denies asylum and enters a removal order, the individual can be deported. She does have the right to appeal to the Board of Immigration Appeals, and beyond that, to federal circuit courts of appeals, but their scopes of review are limited by law.

Cancellation of Removal. If an IJ approves a request for "cancellation of removal," she is terminating removal proceedings and allowing the applicant to get lawful permanent residency (commonly, a "green card").

There are two kinds of cancellation of removal: (1) cancellation for Lawful Permanent Residents ("LPRs"); (2) cancellation for non-LPRs. Some LPRs are placed in removal proceedings on account of criminal convictions, even involving non-violent offenses. To qualify for LPR cancellation, the applicant must have had lawful permanent residency for over five years, resided continuously in the U.S. for seven years, and not been convicted of an aggravated felony.⁷⁸

With non-LPR cancellation, an applicant must be a continuous resident of the U.S. for at least ten years, show good moral character, and not be convicted of any crimes described in the INA in order to obtain "non-LPR cancellation of removal."⁷⁹ Additionally, they must show that a member of her immediate family would

⁷⁷ Ibid.

⁷⁸ Boswell, Richard A. "Chapter 2: Inadmissibility, Deportability, Waivers, and Relief from Removal." *Essentials of Immigration Law*, 5th ed., American Immigration Lawyers Association, Washington, DC, 2020, pp. 31-92.

⁷⁹ INA § 240A(b)(1)

experience undue hardship if they were to be deported, and that this family member is currently a U.S. citizen or LPR.⁸⁰

Withholding of Removal (“Withholding”). If an Immigration Judge denies asylum, he does have the option of granting the individual a lesser form of immigration relief known as “withholding of removal,” which is also harder to get than asylum in many ways.

In Fiscal Year 2023, Justice Department immigration courts issued nearly first-time 500,000 decisions, and nearly half (47%) were deportation orders. Only 9% of cases ended in a grant of asylum or other immigration relief; withholding of removal was granted in less than 1% of all cases.⁸¹

To be granted withholding of removal, an applicant must show that her safety or life would “more likely than not” be threatened if deported to her country of nationality.⁸² This is, of course, harder to prove than the “well-founded fear of persecution” standard for asylum. Still, withholding can be granted to someone who is denied asylum because of factors unrelated to her status as a refugee, and is still in imminent danger of harm if deported.

Under withholding of removal, the individual is protected from deportation only to her country of origin, and only until conditions improve and the U.S government decides to reinstate her removal order.⁸³ Someone granted withholding *can* be deported to another country that agrees to accept her.⁸⁴ During her time in the US, she may apply for a work permit, but cannot travel internationally or sponsor relatives for immigration.⁸⁵ She also cannot obtain lawful permanent residency, even if qualified under another provision of law, unless she obtains a waiver.

⁸⁰ Boswell, Richard A. (2020).

⁸¹ Straut-Eppsteiner, H. (2024). *FY2023 Immigration Court Data: Case Outcomes*. Congressional Research Service. <https://crsreports.congress.gov/product/pdf/IN/IN12318>

⁸² Boswell, Richard A. “Chapter 3: Protection from Harm.” *Essentials of Immigration Law*, 5th ed., American Immigration Lawyers Association, Washington, DC, 2020, pp. 93–116.

⁸³ Ibid.

⁸⁴ 6. *Withholding of Removal*. (n.d.). Immigration Equality. <https://immigratonequality.org/asylum/asylum-manual/immigration-basics-withholding-of-removal/> and *The Difference Between Asylum and Withholding of Removal*. (2020). American Immigration Council. <https://www.americanimmigrationcouncil.org/research/asylum-withholding-of-removal>

⁸⁵ Ibid.

Asylum status confers much more stability upon the individual than withholding. With asylum, one can automatically work in the U.S.; apply for lawful permanent residency; sponsor relatives to immigrate; and travel abroad. A person granted asylum cannot be deported absent a change in her status, such as being convicted of a criminal offense that makes her removable, navigating a new immigration court case, and subsequently being ordered deported by an immigration judge.

While it is rare for the government to actively try to deport someone granted withholding of removal, it does happen. In 2017, twenty-one people with withholding of removal were deported to a country that was not their own, less than 2% of people granted withholding that year.⁸⁶

Withholding is a true limbo status, though better than being sent back to certain death.

Protection Under the Convention Against Torture (“CAT”). The Convention Against Torture (“CAT”) is an international human rights convention that “impose[s] an absolute prohibition” on the deportation of someone who would likely be the the victim of torture in her country of origin. A person looking for relief under CAT “must establish that it is more likely than not that he or she will be tortured.”⁸⁷ CAT may be available to those who are denied asylum and other forms of relief.

Like withholding of removal, protection under CAT is not a permanent form of immigration relief. If the U.S. government finds that the threat of torture no longer exists or is not likely to occur, it can restart removal proceedings.⁸⁸ An individual granted relief under CAT can also be deported from the U.S. and sent to a third country, where the threat of torture does not exist, if such a country agrees to take her in.⁸⁹

CAT relief does come with limited benefits. The individual can apply for work authorization, but cannot adjust her status to LPR, travel abroad, or sponsor family members.⁹⁰

⁸⁶ Ibid.

⁸⁷ 8 CFR § 208.17

⁸⁸ Boswell, Richard A. “Chapter 3: Protection from Harm.” *Essentials of Immigration Law*, 5th ed., American Immigration Lawyers Association, Washington, DC, 2020, pp. 93–116.

⁸⁹ “7. Relief Under CAT.” *Immigration Equality*, <https://immigrationequality.org/asylum/asylum-manual/immigration-basics-relief-under-cat/#:~:text=Relief%20under%20the%20Convention%20Against,not%20by%20an%20Asylum%20Officer.>

⁹⁰ Ibid.

Order of Removal (Deportation Order). An Immigration Judge can issue an order of removal for a person they believe should be deported from the United States. That person has thirty days to file an appeal of the Immigration Judge’s decision; if thirty days pass without an appeal, the order of removal becomes final. A final removal order authorizes the individual’s deportation and bars a person from returning to the United States for a period of years, or in some cases permanently.

Voluntary Departure. “Voluntary Departure” is a bit of a misnomer, as it is a court-ordered instruction to depart the U.S. in order to avoid receiving a removal order. If an IJ grants “Voluntary Departure,” she is giving an individual who has been deemed removable (deportable) a certain amount of time to leave the U.S. on her own, to avoid receiving a formal removal order. Voluntary departure preserves certain options that someone could potentially take advantage of in the future, especially if they have pending applications for immigration status.

For instance, an individual with a removal order cannot reenter the U.S. for up to ten years. If she does reenter before ten years are up, without authorization, she could be subject to civil and criminal penalties. Someone who voluntarily departs is not subject to the same bar to reentry.⁹¹

Additionally, because there will not be a removal order on the individual’s record, voluntary departure potentially provides someone the opportunity to apply for a visa to return to the U.S. after she returns to her native country, if she qualifies for one. Family members of the person who voluntarily departed can request the government allow her to reenter the United States legally.⁹² However, voluntary departure is not an option in every immigration court case (for example, if a person has an aggravated felony conviction or is deemed a security risk).

Appeals. After the Immigration Judge renders a decision, the “losing” party can file an appeal with the Board of Immigration Appeals (“BIA”), an administrative “court” housed in the Department of Justice. The purpose of the BIA is to “[decide] appeals through paper reviews.” This means the BIA does not conduct its own hearings like immigration courts do. Board members instead review the original immigration court record, including recordings and transcripts of hearings. The BIA hears oral arguments in extremely rare cases. Most BIA decisions are binding nationwide on Immigration Judges and DHS officers and, as a result, many BIA decisions shape immigration law in a practical sense.

⁹¹ “8. Voluntary Departure.” *Immigration Equality*, <https://immigrationequality.org/asylum/asylum-manual/immigration-basics-voluntary-departure/>.

⁹² “Do You Just Want to Go Home?” *United States Department of Justice*, 2022, <https://www.justice.gov/eoir/page/file/1480811/download>.

If someone loses their case at the BIA, they can appeal to the federal Court of Appeals with jurisdiction over her state, but the courts of appeals have limited authority to reverse lower court decisions.

No Guaranteed Right to Counsel

If you are charged with a crime in the U.S., you have the right to legal representation under the Sixth Amendment to the U.S. Constitution.⁹³ If you cannot afford to hire a lawyer on your own, the government will appoint one for you. Access to counsel is a bedrock principle in our democracy.

But immigration court cases are technically “civil” proceedings, not criminal cases, and defendants are *permitted*, but not *entitled to*, legal representation. This means that if a person cannot afford to hire a lawyer, they will most likely have to argue their immigration case on their own—without understanding the intricacies of the law, the rules of the court, the procedures to follow, and possibly even the language of record

According to Transactional Records Access Clearinghouse (“TRAC”), between 1996 and 2024, only 44% of people in immigration court had lawyers.⁹⁴ Yet the U.S. government is always represented in immigration court 100% of the time. Therefore, it should come as no surprise that immigrants with legal representation are ten times more likely to get a favorable outcome in court compared to those without, according to various studies.⁹⁵

The representation crisis has only grown worse in recent years. Whereas immigrants in California have a 50% representation rate overall, in cases filed recently, the odds of representation drop to 13.5%. In New York, immigrants have been represented in 47% of court cases. But for newer cases, the odds of representation are just 14%. Idaho has the lowest representation rate in the nation. Historically, 11% of immigrants

⁹³ *The Right to Counsel: How It Affects You* | *United States Courts*. (n.d.). [Www.uscourts.gov. https://www.uscourts.gov/news/2023/07/11/right-counsel-how-it-affects-you](https://www.uscourts.gov/news/2023/07/11/right-counsel-how-it-affects-you)

⁹⁴ *Outcomes of Immigration Court Proceedings*. (n.d.). [Trac.syr.edu. https://trac.syr.edu/phptools/immigration/closure/](https://trac.syr.edu/phptools/immigration/closure/)

⁹⁵ Berberich, Karen; Chen, Annie; and Tucker, Emily. “The Case for Universal Representation.” *Vera Institute of Justice*, 2018, <https://www.vera.org/advancing-universal-representation-toolkit/the-case-for-universal-representation-1>.

there had lawyers. In the most recent cases, less than one percent are accompanied by counsel.⁹⁶

The Honorable Robert A. Katzmann, U.S. Court of Appeals for the Second Circuit, speaks powerfully about the need for expanded representation in immigration court.⁹⁷ He has seen the consequences of poor or no initial representation in his work as an appellate judge. Addressing the Bar of the City of New York, Katzmann said:

What is filed and what is said [in immigration court] have enduring effects. Immigration Judges will often make findings of adverse credibility based on the disparity between the two. Oftentimes, the reviewing appellate judge, who is constrained at the time the case comes before her, is left with the feeling that if only the immigrant had secured adequate representation at the outset, the outcome might have been different. For the immigrant who is ultimately deported, the consequences of faulty representation are devastating....

As an appellate judge, immigration cases tend to come before me in a legally circumscribed context. A judge's role is to review the administrative record and decision; the Court is largely constrained to defer to the agency's ruling, absent legal error or lack of substantial evidence supporting the decision. What record is made by the immigrant, therefore, and what legal points are preserved for review in the record are critical to the outcome, especially where the alien has the burden of coming forward with evidence and the burden of proof of entitlement to status or relief. *Even if a judge would have ruled differently in the first instance, he or she has no authority to do so.* [emphasis added]

Immigration representation is challenging and expensive. Asylum cases can take hundreds of hours to prepare, and most attorneys bill clients by the hour. Often, the people with the most tragic cases have the fewest financial and social resources to hire an attorney. If they cannot secure help from the limited number of nonprofit or pro bono lawyers available, they will be out of luck. Put differently, in many instances Immigration Judges are ordering the deportation of people who may qualify to stay in the United States, simply because those people cannot afford to pay a lawyer to demonstrate, through evidence and argumentation, that they qualify for relief.

⁹⁶ *Individuals in Immigration Court by Their Address*. (n.d.). Trac.syr.edu.
<https://trac.syr.edu/phptools/immigration/addressrep/>

⁹⁷ Katzmann, R. A. (2007). *The Legal Profession and the Unmet Needs of the Immigrant Poor*. NYC Bar.
<https://www.nycbar.org/pdf/report/marden9.pdf>

“Civil” Immigration Jail—Coercion and Control

Civil Cases Under “Criminal” Conditions

Immigration is the one of the only civil legal schemes that permits the government to incarcerate individuals in a *criminal* jail while their cases are pending in a *civil* court. Not every immigrant is detained during their hearing process, but those who are are at a distinct disadvantage. The use of detention in immigration law is not only cruel and inhumane, but counterproductive—if the goal is a fair proceeding.

For example, in federal tax policy, if someone makes a mistake in filing their tax return, or fails to pay taxes for which they are liable, the Internal Revenue Service (“IRS”) will generally charge them with a civil tax violation (unless fraud or “evasion” are determined). The goal is tax compliance, i.e. ensuring that the taxpayer follows the law and pays what she owes the government. Jailing the taxpayer would be counter to achieving the government's goal, as it would reduce the taxpayer's ability to pay off her debt.

Instead of incarcerating her, the IRS will send her notices about how to resolve the violation, and work with the delinquent taxpayer to establish a payment plan. If the person continues to fail to pay what is owed, the IRS will issue penalty fines.

As Peter L. Markowitz explains in “A New Paradigm for Humane and Effective Immigration Enforcement,” civil immigration law enforcement could also be oriented toward compliance rather than punishment, and deliver much more humane and logical results.⁹⁸ Yet tens of thousands of people every year are forced to try to retain a lawyer, locate evidence, and work with legal counsel to prepare for their immigration hearings behind bars, with all of the attendant constraints on exercising freedom and being in community that jail includes.⁹⁹

Jail as State-Sanctioned Torture

Incarceration—depriving a human being of liberty and placing them in harsh, challenging living conditions—is an extreme act. Under the Geneva Convention of

⁹⁸ Markowitz, P. L. (2020). *A New Paradigm for Humane and Effective Immigration Enforcement*. Center for American Progress.

<https://www.americanprogress.org/article/new-paradigm-humane-effective-immigration-enforcement/>

⁹⁹ *TRAC Immigration - Comprehensive, independent, and nonpartisan information about immigration enforcement*. (n.d.). Trac.syr.edu.

https://trac.syr.edu/immigration/detentionstats/pop_agen_table.html

1949, Part IV, which the United States ratified, “civil” immigration detention should only be used “if the security of the Detaining Power makes it absolutely necessary.”¹⁰⁰

The United States also ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention Against Torture”), which commits the government to taking “effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”¹⁰¹

In Article 1, Part 1, torture is defined as:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Center for Victims of Torture and many other experts have identified numerous ways in which U.S. immigration detention itself is a form of torture.¹⁰² Examples include solitary confinement, lack of appropriate medical care and treatment, the failure to prevent sexual abuse inside jails, and using the threat of prolonged incarceration to coerce an immigrant into giving up their case and accepting deportation.

¹⁰⁰ *Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.* (1949). [Icrc.org; International Humanitarian Law Databases.](https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949?activeTab=undefined)

¹⁰¹ United Nations. (1984). *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.* OHCHR. <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading#:~:text=For%20the%20purposes%20of%20this>

¹⁰² *Immigration Detention may Constitute Torture & Ill-Treatment.* (2021). The Center for Victims of Torture. <https://www.cvt.org/EndDetention2>

The body of evidence that demonstrates how immigration jail constitutes torture is ever-growing. Inadequate or non-existent medical care in immigration jail resulted in the deaths of Boubacar Bah, Hiu Lui Ng, Francisco Castaneda,¹⁰³ Nebane Abienwi,¹⁰⁴ and many others.¹⁰⁵ Trans people are frequently subjected to sexual abuse, solitary confinement, humiliating treatment, and medical neglect in immigration jail, conduct that resulted in the deaths of Roxsana Hernandez,¹⁰⁶ Joana Medina Leon,¹⁰⁷ and Victoria Arellano,¹⁰⁸ and others

In the International Journal of Transgender Health, researches write that the “dehumanization, abuse, and transphobia in detention incurred psychological

¹⁰³ Bernstein, N. (2008). *Ill and in Pain, Detainee Dies in U.S. Hands*. The New York Times. <https://www.nytimes.com/2008/08/13/nyregion/13detain.html>

¹⁰⁴ Penney, J. (2020, February 25). *How Medical Negligence at the US Border Killed an Immigrant Father*. *Www.thenation.com*. <https://www.thenation.com/article/world/ice-death-negligence/>

¹⁰⁵ Kim, E. K. (2020, September 24). House report: Medical neglect, falsified records harmed detained immigrants. Roll Call. <https://rollcall.com/2020/09/24/house-report-medical-neglect-falsified-records-harmed-detained-immigrants/>; The Trump Administration’s Mistreatment of Detained Immigrants: Deaths and Deficient Medical Care by For-Profit Detention Contractors Prepared for Chairwoman Carolyn B. Maloney and Chairman Jamie Raskin Staff Report Committee on Oversight and Reform and Subcommittee on Civil Rights and Civil Liberties U.S. House of Representatives September 2020 [oversight.house.gov](https://oversightdemocrats.house.gov/sites/democrats.oversight.house.gov/files/2020-09-24.%20Staff%20Report%20on%20ICE%20Contractors.pdf). (2020). <https://oversightdemocrats.house.gov/sites/democrats.oversight.house.gov/files/2020-09-24.%20Staff%20Report%20on%20ICE%20Contractors.pdf>

¹⁰⁶ Independent Autopsy of Transgender Asylum Seeker Who Died in ICE Custody Shows Signs of Abuse. (2018). *The New York Times*. <https://www.nytimes.com/2018/11/27/us/trans-woman-roxsana-hernandez-ice-autopsy.html>

¹⁰⁷ Nast, C. (2019). *“Devastated and Outraged, But Not Surprised”*: Another Trans Woman Dies Following ICE Custody. *Them*. <https://www.them.us/story/johana-medina-leon-death>

¹⁰⁸ Victoria Arellano. (2019, August 13). Making Queer History. <https://www.makingqueerhistory.com/articles/2019/8/13/victoria-arellano>

sequelae on participants including trauma, anxiety and depression, suicidal ideation, and a preference to self-deport.”¹⁰⁹

Human Rights Watch documented dozens of incidents of abuse and violence waged by U.S. immigration officials and guards, against people from Cameroon who were incarcerated while seeking asylum in the U.S.¹¹⁰ They also identified more than a dozen cases of people who were denied asylum in the U.S. immigration courts and then tortured upon being returned to Cameroon, proving their fear of persecution was beyond “well-founded.”¹¹¹

Goura Ndiaye was deported from Ohio to Mauritania with his hip completely unattached from his body due to gross medical neglect by ICE and CoreCivic.¹¹² The Morrow County Jail lost its ICE contract after it ignored warnings from immigrants about infectious disease protocols, and the entire facility became COVID-19-positive.¹¹³ In an order issued in the legal challenge against Morrow County, *Prieto v. Adducci*, Federal Judge Sarah D. Morrison wrote: “Through inadequate testing, inadequate observation, and inadequate isolation strategies, Morrow allowed its infection numbers to soar exponentially, and now every detainee in the large and

¹⁰⁹ Minero LP, Domínguez S. Jr, Budge SL, Salcedo B. Latinx trans immigrants' survival of torture in U.S. detention: A qualitative investigation of the psychological impact of abuse and mistreatment. *Int J Transgend Health*. 2021 Jul 19;23(1-2):36-59. doi: 10.1080/26895269.2021.1938779. PMID: 35496655; PMCID: PMC9045414.

¹¹⁰ Human Rights Watch. (2022). *“How Can You Throw Us Back?”: Asylum Seekers Abused in the US and Deported to Harm in Cameroon*. Human Rights Watch. <https://www.hrw.org/report/2022/02/10/how-can-you-throw-us-back/asylum-seekers-abused-us-and-deported-harm-cameroon>

¹¹¹ Ibid.

¹¹² Echavarri, F., & Lanard, N. (2020). *After 20 years in the US, I was suddenly deported to a country that still has slavery*. Mother Jones. <https://www.motherjones.com/politics/2020/10/immigration-trump-miller-election-2020-deported/>

¹¹³ Whitmire, L. (2020). *Report: 100% of Morrow County jail inmates had COVID-19*. Mansfield News Journal. <https://www.mansfieldnewsjournal.com/story/news/2020/06/08/report-all-morrow-county-ice-jail-inmates-ohio-coronavirus-covid-19-immigration-customs-enforcement/5317798002/>

small dormitories has been infected. This reckless, out-of-control spread of infection is constitutionally unacceptable.”¹¹⁴

Judge Morrison, a Trump-appointee, ordered the release of people detained by ICE who were at heightened risk of death due to COVID-19. But this came too late for Oscar Lopez.¹¹⁵ ICE released him just days before the Morrow County Jail became a COVID hotspot. He spent eighteen months in detention, but spent only a few days with his family before dying of COVID-19.

Dystopian (and Logistical) Nightmares

Incarceration takes a toll on immigrants and their family members—financially, psychologically, and physically.¹¹⁶ It adds logistical barriers to what is already a challenging feat: obtaining legal counsel, locating evidence, and preparing yourself mentally for important immigration hearings. Immigration detention is another thumb on the scale in favor of the government, and a prime example of how the system was designed to offer the illusion of justice, without providing it.

It is exponentially harder for people in detention to obtain legal counsel than people who are not incarcerated. Of 16,221 detained immigrants with open cases, only 32% (5,195) had representation, according to TRAC’s most recent data.¹¹⁷ Of nearly 1 million people who have pending cases and are represented in court, more than 808,000 (81%) had never been detained.¹¹⁸

Most people in ICE jail must rely on family and friends to pay for phone/video calls, food, clothing, personal items, and legal fees; track down documents and other evidence, and identify and hire an immigration attorney. Detention centers are often in far-flung corners of a state, making in-person visits difficult and more expensive, due to the extra costs and time spent traveling and waiting to speak with clients.

Detention makes it harder for attorneys and clients to communicate in other ways, too. Attorneys may not be able to speak with their client privately on the phone, through videoconferencing, or in person, and a clients’ phone and computer access

¹¹⁴ Morrison, S. D., & Vascura, C. M. (2020). *IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION* .

<https://www.courthousenews.com/wp-content/uploads/2020/05/ICE-release-order.pdf>

¹¹⁵ Glaun, D. (2020). *How ICE Data Undercounts COVID-19 Victims*. FRONTLINE.

<https://www.pbs.org/wgbh/frontline/article/how-ice-data-undercounts-covid-19-victims/>

¹¹⁶ Tramonte and Setty, 2023.

¹¹⁷ *Immigration Court Backlog*. (n.d.). Trac.syr.edu. <https://trac.syr.edu/phptools/immigration/backlog/>

¹¹⁸ Ibid.

may be restricted by the jail.¹¹⁹ Some jails do not allow attorneys to bring phones in when interviewing their clients, much less computers. This means vital notes in the fact-gathering process must be taken down on paper.

Because there is no fixed timeframe in most immigration cases, a person can be incarcerated indefinitely. This makes the threat of prolonged detention a useful weapon for ICE and the immigration court. ICE knows the psychological and financial toll incarceration has on people. They frequently use the prospect of never-ending detention to coerce individuals into signing documents to accept deportation, rather than continuing to fight their cases from behind bars.¹²⁰

Grainy Video “Hearings” Impossible to Understand

Although most people attend immigration court in person, those who are detained are usually forced to “attend” their hearings virtually, sometimes still dressed in their jail attire. This presents many problems including poor Internet connections, interpretation and other communication difficulties, and the prejudicial presentation of the respondent in “jail” clothing.

Immigration Judges do not let most witnesses appear in court remotely, reportedly due to the difficulty of establishing a connection with someone through a video feed. However, incarcerated immigrants are routinely put in this position when presenting their own cases. The result is misunderstanding and inaccurate credibility determinations from judges.

It is little wonder that detained people are more likely to be deported than people who are not detained.¹²¹ This fact is not lost on ICE, thereby incentivising the agency’s use of incarceration to win cases.

¹¹⁹ Tramonte, Lynn. *U.S. House of Representatives Committee on the Judiciary Subcommittee on Immigration and Citizenship. Ohio Immigrant Alliance*, 20 Jan. 2022, <http://ohioimmigrant.org/wp-content/uploads/2022/01/OHIA-Statement-HJC-01202022.pdf>.

¹²⁰ The ACLU and other advocates have received reports for several years that ICE agents in Bakersfield have unlawfully coerced immigrants to sign deportation documents. Agents’ tactics include deceit and threats and the use of force resulting in injury. <https://www.aclunc.org/blog/ice-strong-arms-immigrants-signing-deportation-documents#:~:text=The%20ACLU%20and%20other%20advocates.of%20force%20resulting%20in%20injury;> [https://www.theguardian.com/us-news/2020/oct/22/us-ice-officers-allegedly-used-torture-to-make-africans-sign-own-deportation-orders;](https://www.theguardian.com/us-news/2020/oct/22/us-ice-officers-allegedly-used-torture-to-make-africans-sign-own-deportation-orders) <https://thehill.com/latino/402848-migrant-parents-ice-officers-intimidated-us-into-signing-forms-to-abandon-right-to/>

¹²¹ “Featured Issue: Use of Video Teleconferences During Immigration Hearings.” *American Immigration Lawyers Association*, 2022, <https://www.aila.org/infonet/video-teleconferences-immigration-hearings>.

No-Bonds and High Bonds

Another structural factor that works against immigrants, including those with strong cases, is the way ICE and Immigration Judges handle immigration bonds. ICE has the authority to release someone without a bond, but they often decline to do so. The question of a person's freedom then goes to the Immigration Judge, although some immigrants are not even entitled to a bond hearing.¹²²

Unlike bail in the criminal system, where a person can pay a percentage of the court-ordered amount and be released, an immigration bond must be paid fully before freedom is obtained. So even when an Immigration Judge orders a bond, release may still be out of financial reach for the immigrant wishing to leave detention.

During the first nine months of Fiscal Year (“FY”) 2023, 31% of bond requests were granted by an Immigration Judge.¹²³ There is a large disparity in which nationalities are granted bonds, as well as in the bond amount. For example, in FY 2018, Indian nationals had an 87% bond approval rate, and the highest median bond amount (\$17,000). On the other end of the spectrum, Cuban nationals had only a 15% bond approval rate, with a median bond of \$4,000. RAICES TX found that bonds paid for Haitian immigrants averaged \$16,700, 54% higher than the \$10,500 average bond.¹²⁴

Even though the required minimum amount is \$1,500, the government is charging detained people—most of whom are also impoverished—exorbitant sums of money that would be difficult for many families to pay. Moreover, this money can be tied up for years due to the current backlog in immigration court cases. It is only returned to the payer after conclusion of the case.

The statistics for Ohio are even grimmer. According to data published by Syracuse University's Transactional Access Records Clearinghouse (TRAC), between 2017—when the Trump administration brought new judges to the Cleveland court—and 2021, the

¹²² Some immigrants who are detained by ICE are not eligible for bond because they are “mandatorily detained.” INA § 236(c) requires the detention of aliens removable on specified criminal or terrorism-related grounds. These grounds include, for example, crimes involving moral turpitude, drug crimes, aggravated felonies, and membership in a terrorist organization. See <https://crsreports.congress.gov/product/pdf/IF/IF11343>

¹²³ *Detained Immigrants Seeking Release on Bond Have Widely Different Outcomes – Overall Bond Grant Rates Have Dropped.* (n.d.). Trac.syr.edu. Retrieved March 3, 2024, from <https://trac.syr.edu/reports/722/>

¹²⁴ “BlackImmigrantLivesAreUnderAttack,” RAICES, 2020, <https://www.raicestexas.org/2020/07/22/black-immigrant-lives-are-under-attack/>

bond approval rate fell from 63% to 18%.¹²⁵ The national average was 31%. During this same time, the median bond amount rose from \$5,000 to \$11,000, making Cleveland the fourth most-expensive immigration court in the country.

Behind Closed Doors: Issoufou, Idrissa, and Emmanuel's Experience

Issoufou Lembaine, Idrissa Kiema, and Emmanuel's Sebo escaped certain death in Burkina Faso; their entire families, including children, were killed. Seeking asylum in the U.S., they ended up in an Ohio immigration jail while their cases advanced. Their court hearings were crowded with supporters from the community, whereas the men were forced to "appear" remotely from the jail.

The men had an excellent pro bono lawyer and the judge agreed to grant them bonds. But the amount—\$15,000 each—could have been \$1 million to these men. "When we heard the amount of money we need to pay to get out, we lost hope. We didn't have any money in our pockets," said Lembane.¹²⁶

Incredibly, AMIS, Catholic Charities Diocese of Cleveland, and Cleveland Jobs With Justice were able to raise \$45,000 so the men could be free. But most people in their situation do not have that opportunity. More typically, they would be forced to make the difficult decision of whether to continue to pursue their immigration cases and potentially remain incarcerated for years, or give up and agree to be deported.

Subjective "Credibility" Determinations

In immigration cases, the defendant is allowed to provide her own testimony and the testimony of witnesses, in addition to documentary evidence that proves her claims. But Immigration Judges have broad discretion to analyze a defendant or witness' "credibility," which can make or break a case. To be granted asylum, an applicant must meet very specific legal standards, and be found to be "credible" by the Immigration Judge (or Asylum Officer, if the case is being reviewed at USCIS, rather than an immigration court).

Because Immigration Judges have full discretion to decide whether they find someone "credible" or not, this is a key place where ignorance and bias can creep in. IJs may

¹²⁵ Cheng, Y. (2021). *Ohio's high immigration bonds pose challenges to cash-strapped detainees*. The Columbus Dispatch. <https://www.dispatch.com/story/news/2021/09/23/asylum-seekers-receive-high-bonds-ohio-immigration-court-ohio-detainees/5788065001/>

¹²⁶ Ibid.

not be familiar with the religious, cultural, and linguistic backgrounds of each person that comes before them in court.

For example, Muslims raised with the values of humility and discretion may find it difficult, if not impossible, to speak negatively about someone—even someone who harmed them—in a court. Numerous studies have documented the often traumatic experiences and resulting mental health impacts of the refugee, asylum seeker, and migrant experiences, which can directly impact how a person testifies and behaves in court.¹²⁷

An individual can be deemed “not credible” if the IJ finds “inconsistencies” in his narrative testimony or in between testimony and written evidence. But the Judge may identify “inconsistencies” where there are none. For example, one man was found “not credible” because his interpreter used the word “canoe” in one sentence, when describing his method of escape over the Senegal River, and “little boat” in another sentence.¹²⁸

Some IJs have found that defendants who get confused about dates, or have a more expansive view of who is their “brother” and an “uncle” are not credible when, in fact, they are telling their story as best they can. In some cultures, dates are not important and would have to be memorized. A person’s concept of “family” and who is a “family member” may be different from U.S. norms.

An applicant can also be deemed not credible if his demeanor in court is different from what the IJ expects it to be, depending on their personal experience. But people exhibit trauma in different ways. Some IJs assume that a person has not suffered trauma if they do not show deep sadness when describing their experiences, or fail to mention certain details in court—often due to embarrassment, memory loss, or some other valid reason.¹²⁹

¹²⁷ Marković, M., Aleksandra Bobić, & Živanović, M. Z. (2023). The effects of traumatic experiences during transit and pushback on the mental health of refugees, asylum seekers, and migrants. *European Journal of Psychotraumatology*, 14(1). <https://doi.org/10.1080/20008066.2022.2163064>

¹²⁸ King, D. (2023). *Guilty until proven innocent*. Columbus Dispatch. <https://www.dispatch.com/story/news/politics/2023/07/13/guilty-until-proven-innocent-advocates-say-immigration-court-is-racist-black-african-immigrants/69629480007/>

¹²⁹ Beazley, D. (2024). *Understanding the impact of trauma on witness testimony*. Nationalmagazine.ca. <https://nationalmagazine.ca/en-ca/articles/law/in-depth/2024/understanding-the-impact-of-trauma-on-witness-testimony>

Trying to manage one's behavior in court to be found credible is a high stakes dilemma—one that determines whether an asylum applicant is granted protection or is returned to her country of persecution.

Sitting before a robed judge—with a stranger typing every word they say into the record, being interrogated by a government attorney and potentially unable to privately consult with their own lawyer during the hearing—would be intimidating to anyone. Imagine now a person who is still learning English and terrified of being sent back to a place they fled. They may be there alone, without a lawyer to advise them.

Immigration Judges order the deportation of people like this every day—not because their cases are fraudulent, but because it can be practically impossible to overcome the hurdle of subjective credibility.

The credibility conundrum is only worsened when the migrant is detained and forced to represent herself via videoconferencing, which often has poor video and sound quality and makes it exceedingly difficult to understand and communicate.¹³⁰

Once an Immigration Judge has decided a person is “not credible,” that determination follows the person throughout the appeals process, even though it may have been made based on lack of information, failed understanding, or cultural or religious bias on the part of the Immigration Judge.¹³¹

Many lawyers practicing in immigration court have said that it feels like Immigration Judges assume everyone who comes into their courtroom is lying, and it's on the immigrant and their attorney to prove otherwise. It can appear to advocates as

¹³⁰ Tramonte, Lynn. *U.S. House of Representatives Committee on the Judiciary Subcommittee on Immigration and Citizenship. Ohio Immigrant Alliance*, 20 Jan. 2022, <http://ohioimmigrant.org/wp-content/uploads/2022/01/OHIA-Statement-HJC-01202022.pdf>.

¹³¹ “Credible Fear Cases Completed and Referrals for Credible Fear Interview.” *Department of Homeland Security*, 12 Dec. 2022, <https://www.dhs.gov/immigration-statistics/readingroom/RFA/credible-fear-cases-interview>.

though Immigration Judges are looking for any reason to deny a case, rather than starting with an open mind.¹³²

Behind Closed Doors: Bill's Experience

Bill, an immigration attorney, is deeply connected to immigration law through his career and his family. Before law school, he taught English as a second language (ESL) courses in rural Ohio, where he encountered many students from Mexico who were facing immigration legal issues. Their need for Spanish-speaking attorneys was one of the main reasons he decided to pursue law as a career. Not only did Bill form a close connection with Ohio immigrants during his time teaching, but his partner is from Mexico and endured his own immigration nightmare, including a period of detention. Bill offered insights into the struggles he has observed his clients face, and the Ohio Immigrant Alliance asked him about the experiences of his Black clients specifically.

When asked if his clients have been treated fairly in immigration court, Bill responded in the negative. "There is this fundamental unfairness built into the system," he said. One factor that contributes to this is the fact that the court system is politicized, with the appointments of judges who are former prosecutors. According to Bill, "The entire system is ... skewed towards denying people asylum."

It isn't just the immigration court that he finds unjust. In Bill's words, "every step of the entire process is colored by the fact that the whole system is just not designed to be fair. It's not supposed to be." For example, the notice for removal proceedings that immigrants receive would be difficult for even a native English speaker to understand. Immigrants who do not speak English must find someone to translate their applications when they get to the U.S., something that becomes more difficult for those with smaller support networks, fewer financial resources, and who speak languages and dialects that are less common in the U.S.

The language barrier continues inside the courtroom. Like Jennifer, Bill noted a lack of qualified interpreters in immigration court. He credited this to the extensive

¹³² Relatedly, a study by the University of Maine School of Law's Refugee and Human Rights Clinic, Immigrant Legal Advocacy Project, American Civil Liberties Union of Maine, and Basileus Zeno, Ph.D. found that in the Boston Asylum Office, adjudicators have "an unwritten 'rule of threes,'" meaning if they find three inconsistencies in a person's testimony, it is sufficient to find their story fraudulent. However, this study found that these "inconsistencies" often are minor differences about nonmaterial or irrelevant facts. See https://www.aclumaine.org/sites/default/files/field_documents/lives-in-limbo-how-the-boston-asylum-office-fails-asylum-seekers-final-1.pdf

training necessary to become a quality interpreter and the fact that they are underpaid. Cases become even more complicated when a client speaks a relatively rare language and must use relay interpreting, “which is ... from one language to another to another.” He cited an instance where a Russian client seeking asylum had a mistranslation in his documents from the court translator, and “the judge said, ‘Oh, well, you’re a liar ... I’m going to deny your asylum claim because ... you submitted a forged document.’”

Bill emphasized credibility determinations as a problem, one that is especially difficult for Black immigrants. He described these determinations as thresholds applicants must meet and said, “If the judge doesn’t believe what you’re saying, you basically can’t get anywhere with the rest of the case.”

These determinations can be based on “speculation and conjecture,” and can be missing cultural understandings. For example, he cited the case of a Nigerian client. The judge claimed his testimony was not credible because, “[he] didn’t say that when [he] got beat up [he] had ... any scars or bruises or anything.” In our interview, Bill pointed out that bruising may look differently on different skin complexions.

Another example he cited comes from representing clients who are Garifuna, an Afro-Honduran ethnic group. Judges have ruled that these clients’ testimonies aren’t sufficient to establish that they will be persecuted again. But, Bill argues, the population has been “mercilessly persecuted with impunity” for over 400 years, and this fact should clearly meet the asylum threshold.

When asked about possible solutions, Bill noted that the U.S. asylum system began after the Holocaust, to prevent the repetition of situations like sending Eastern European refugees back to their countries of origin to face violence and murder. However, today’s system does not fulfill this purpose.

Bill said, “[it] is just not designed to actually figure out who has a meritorious asylum claim and who doesn’t.” Imagining what a functional system would look like, Bill said, “It would probably just be social workers and private investigators who interview people and research documents and try to ... verify whether [they’re] telling the truth or not.” He noted that this is similar to the services provided by refugee resettlement agencies. He also believes employment counselors and ESL teachers would be part of a potential solution.

Professor Bridget M. Haas, at Case Western Reserve University, interviewed asylum officers about their analytical processes and reasons for granting or denying asylum. “Credibility determinations are horrible. They’re just impossible to tell if someone’s telling the truth.... Or know for sure they’re lying,” admitted one asylum officer. “So we

don't want to grant them [asylum] until we believe them. And then we don't believe them, so we don't want to grant them [asylum]."¹³³

A Deliberately Failing Bureaucracy

The One-Year Filing Deadline

Passed in 1996, the Illegal Immigration Reform and Immigrant Responsibility Act began requiring the government to deny asylum to someone who files an application after living in the U.S. for over a year, with exceedingly limited exceptions.¹³⁴

Analyzing a subset of asylum cases, the National Immigrant Justice Center found that one out of five were denied because of this arbitrary deadline.¹³⁵ Another analysis found that USCIS Asylum Officers rejected over 35,000 applications in a period of six years (1999-2005) based on the filing deadline alone.

¹³³ HAAS, BRIDGET M. "Asylum Officers, Suspicion, and the Ambivalent Enactment of Technologies of Truth." *Technologies of Suspicion and the Ethics of Obligation in Political Asylum* 105-128. https://library.oapen.org/viewer/web/viewer.html?file=/bitstream/handle/20.500.12657/51111/external_content.pdf?sequence=1&isAllowed=y.

¹³⁴ Musalo, K., & Rice, M. (2008). *The Implementation of the One-Year Bar to Asylum*. UC Hastings Scholarship Repository; University of California, Hastings College of the Law. https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1567&context=faculty_scholarship

¹³⁵ *Report: The One-Year Asylum Deadline and the BIA: No Protection, No Process*. (2010). National Immigrant Justice Center. <https://immigrantjustice.org/research-items/report-one-year-asylum-deadline-and-bia-no-protection-no-process>

The asylum filing deadline is arbitrary and serves no purpose, other than to reduce the number of cases the government has to consider. It should come as no surprise that the UN Refugee Agency (UNHCR) says imposing a deadline like this is illegal.¹³⁶ A filing deadline is antithetical to the goal of protecting refugees.¹³⁷

Flawed “Notices to Appear”

Following the 2018 Supreme Court decision *Pereira v. Sessions*, DHS was required to include certain information in the notice to appear or NTA. An NTA must include the time and location of the person’s immigration court hearing, otherwise the NTA is considered defective and removal proceedings cannot commence.¹³⁸

Starting in 2019, DHS began issuing NTAs with “dummy dates,” also known as fake dates and times for immigration court hearings.¹³⁹ People were told to attend hearings on dates that did not exist or times that the court would not be open, for example, late at night or on federal holidays. Some advocates speculate that the dummy dates were issued in a misguided attempt to comply with *Pereira*’s requirements while managing the immigration court’s backlogged docket.¹⁴⁰ However, the use of dummy dates overwhelmed immigration courts with lines of respondents reporting to fake court dates so long that people with actual hearings could not get to the courtroom on time and were ordered deported *in absentia* as a result.¹⁴¹ In *Niz-Chavez v. Garland*

¹³⁶ *Draconian Deadline: Asylum Filing Ban Denies Protection, Separates Families*. (2021). Human Rights First.
<https://humanrightsfirst.org/library/draconian-deadline-asylum-filing-ban-denies-protection-separates-families/>

¹³⁷ Musalo and Rice, 2008.

¹³⁸ "Pereira v. Sessions." Oyez, www.oyez.org/cases/2017/17-459. Accessed 19 Feb. 2023.

¹³⁹ Practice Alert: DHS Issuing NTAs with Fake Times and Dates. (n.d.). [Www.aila.org](http://www.aila.org). Retrieved March 3, 2024, from <https://www.aila.org/library/practice-alert-dhs-issuing-ntas-with-fake-times> and Featured Issue: The Pereira Ruling and Resulting Fake NTAs. (n.d.). [Www.aila.org](http://www.aila.org).
<https://www.aila.org/library/the-pereira-ruling>

¹⁴⁰ Ibid.

¹⁴¹ Madan, Monique O. "Fake Court Dates Are Being Issued in Immigration Court. Here's Why." *The Seattle Times*, 2019,
<https://www.seattletimes.com/nation-world/fake-court-dates-are-being-issued-in-immigration-court-heres-why/>. Accessed 19 Feb. 2023.

(2021), the U.S. Supreme Court ruled that those who received defective NTAs could file a motion to dismiss their removal case.¹⁴²

Incorrect Interpreters

Although lawyers are not provided for immigrants at the government's expense, if an individual or witnesses needs a language interpreter, the court will provide one at government cost.¹⁴³ With common languages like Spanish, it is easier to find interpreters to conduct simultaneous interpretation in court. People who speak other languages may have their hearings postponed for months or years, if the court is unable to find interpreters.¹⁴⁴ Alternatively, respondents may be forced to use phone interpreters, or an interpreter speaking an entirely different dialect of their primary language.

Miscommunication is highly likely in these scenarios, and can determine the outcome of a case. For example, regional dialects of Fulani are essentially unique languages, incomparable to regional dialects of U.S. English. Yet, some immigration courts do not distinguish between the versions of Fulani when assigning interpreters to cases. Many Black Mauritians lost their cases due to the court's failure to provide them with the correct interpreter.¹⁴⁵

Additionally, court stenographers only enter what the interpreter says in English into the official hearing transcript. Therefore, if the interpreter does not accurately translate a judge's question or the respondent's answer, judges may find "inconsistencies" between in-court testimony and the immigrant's written asylum application. Sometimes, stenographers are permitted to leave key details, such as the names of people and places, out of transcripts instead of pausing to ask for spellings

¹⁴² Khurgel, Jeff. "Supreme Court's Decision in Niz-Chavez v. Garland May Provide Relief to Some Non-Citizens." *Khurgel Immigration Law Firm*, 2021, <https://www.khurgel.com/supreme-courts-decision-in-niz-chavez-v-garland-to-provide-relief-to-non-citizens/>.

¹⁴³ "4.11 - Interpreters." The United States Department of Justice, 2022, <https://www.justice.gov/eoir/reference-materials/ic/chapter-4/11>.

¹⁴⁴ Medina, Jennifer. "Anyone Speak K'Iche' or Mam? Immigration Courts Overwhelmed by Indigenous Languages." *The New York Times*, 2019, <https://www.nytimes.com/2019/03/19/us/translators-border-wall-immigration.html>. Accessed 5 Feb. 2023.

¹⁴⁵ Tramonte and Setty, 2023.

or clarifications. The result is a court transcript that may be very different from what the immigrant actually communicated.

Behind Closed Doors: Aliou's Experience

The Ohio Immigrant Alliance interviewed Aliou, a Black Mauritanian man who was denied asylum in the U.S. He spoke to us from Senegal, where he currently lives after being deported during the Trump administration. Aliou fled Mauritania in 2002 due to the racism and discrimination he faced there. He sought refuge in the United States but faced a hostile court, a 10-year-long wait, and eventual deportation.

Black Mauritians' survival in their country is threatened by slavery and apartheid—statelessness, land grabbing, slavery, police violence, language erasure, disenfranchisement, and more. These acts are permitted—and often explicitly carried out—by the government. The government often denies Black Mauritians birth certificates and identity papers, making it impossible to prove their citizenship and land ownership. Black Mauritians are targeted by police, who accuse them of being “foreigners” and arrest, beat, incarcerate, and extort them. This happened to many people who were deported during the Trump administration.¹⁴⁶

Even more mundane events like finding a taxi can be humiliating and even dangerous if you are Black in Mauritania. Describing his own experiences hailing a cab, Aliou said, “The white [drivers] ... pass and say you were looking for money.” He continued, “You have your own money. You just want to go where you feel like.”

OHIA asked Aliou what discrimination and racism meant to him. He brought both questions back to his reasons for Mauritania. Discrimination is when “you are in your country, and ... you aren't able to get what you are supposed to get,” he explained.

The lack of identity documentation and the insistence on removing French as an official government language create deliberate barriers for Black people accessing education, employment, and upward mobility. While some asylum adjudicators may see the impacts of these outcomes as evidence of “economic migration,” which is not a ground for asylum, they often fail to see that these conditions were created to reinforce racial oppression.

¹⁴⁶ Tramonte, L. (2022). *Black Mauritians' Ongoing Search For Safety – Ohio Immigrant Alliance*.

Ohioimmigrant.org.

<https://ohioimmigrant.org/2022/03/22/mauritania-today-deportations-arrest-torture-expulsion-oppression-and-black-mauritians-ongoing-search-for-safety/>

This invisibility and denial of personhood can be terrifying. Aliou has experienced that firsthand. He was arrested after a dispute with an Arab Mauritanian, and said that was the day he decided he needed to leave the country. Jails in Mauritania are notoriously abusive toward Black people. Living in Senegal after his deportation from the U.S. in 2022, Aliou still cannot return to Mauritania. “The discrimination is getting worse and worse and worse,” he said.

When Aliou arrived in the U.S. in 2002 and sought asylum at the immigration court in New York, he faced huge barriers to justice, one of them being a failure of communication—a problem the U.S. government is supposed to address. He faced a judge and government lawyer who did not want to believe him. Having recently arrived at the time, he did not yet speak English. The court-provided translator was also from West Africa, but not the same country as Aliou. They spoke the same parent language, but different dialects. Aliou told us he realized this after the hearing, when the judge had already denied his case.

“The judge was so mean to me and they asked me ... question[s] for hours and hours,” he said. The confusion, anxiety, and pressure of this trial were prolonged when it took nine hearings, over five years, for Aliou to receive a negative decision in his case.

Each time Aliou reported to the judge in those five years, she told him to bring more evidence. He remembers, “I collected so much evidence that I brought to her and she still didn’t believe me.” He struggled to understand the judge and her manner of speaking, saying, “It was very, very, hard on me...I was very tired.”

The judge denied Aliou’s asylum case, but his story did not end there. He appealed the decision, and his appeal was denied. Finally, he brought the case to the Circuit Court; that too was denied.

Thus, between 2010 and 2012, Aliou found himself in Columbus, OH, without asylum and without work authorization. Faced with no chances of work, he had little choice but to report himself to ICE, and, after doing so, was able to get a work permit and driver’s license. Reporting himself, however, meant that he had to return to check in with ICE every three months and eventually, on June 12, 2018, they arrested him at one of these meetings.

Aliou spent one week at Butler County Jail in ICE custody and was moved to the Morrow County Jail, not far from Columbus. He said, “That story is long ... so many things happen in it.”

Aliou had evidence to support his case in immigration court. Besides the fact that he is from Mauritania, where the oppression of Black Mauritanians has long been documented, he entered the U.S. legally and sent the judge the evidence she asked

for. He received a letter from a human rights organization explaining the situation to the court. He also had papers from the political party he belonged to in Mauritania. He still doesn't understand why he was denied asylum. "I have been asking myself about that," he said.

When asked whether he feels Black immigrants are treated fairly in U.S. immigration court, Aliou said he wishes the conditions in the countries immigrants are coming from would be believed and documented, "If ... [a] reporter for the American government come[s] here in Mauritania, they don't let them go to the whole city or village to know exactly what happened to the Black people." Thus, he said, when "Black people go to the United States and ask for asylum ... [the U.S. government] just keeps telling them nothing happened in Mauritania."

Immigration Judges' Lack of Independence

A "Quasi-Judicial" Court

Immigration Judges are career civil servants within the Department of Justice, the same agency that represents the U.S. government in removal cases in the federal courts. This is a highly unusual arrangement. Most federal and state courts operate independently from the executive branch, because the separation of powers is crucial to the "checks and balances" that underpin U.S. democracy.

Even the December 2023 USAJobs posting for Immigration Judge positions notes that IJs preside in formal, quasi-judicial hearings.¹⁴⁷

Helped Wanted (No Experience Required)

Immigration court and immigration law are part of the federal legal system. However, Immigration Judges are more like federal employees than traditional federal judges. They do not have "the judicial independence and life tenure that federal judges have."¹⁴⁸ Instead they are "hired and can be fired like other federal employees."¹⁴⁹

¹⁴⁷ *Immigration Judge*. (n.d.). USAJOBS. Retrieved March 3, 2024, from <https://www.usajobs.gov/job/763359500>.

¹⁴⁸ "Fact Sheet: Immigration Courts." *National Immigration Forum*, 2018, <https://immigrationforum.org/article/fact-sheet-immigration-courts/>.

¹⁴⁹ *Ibid*.

Although IJs must be licensed attorneys with seven years of legal experience, they are not required to have any experience in immigration law, specifically.¹⁵⁰ The idea that immigration legal experience should not be a requirement for someone making life or death decisions in an immigration case is absurd.

The nature of treating Immigration Judges as employees of the Executive Branch also allows for ideological preferences in hiring. Most IJs (75%) hired by the Trump administration did have experience in immigration law. But their experiences were primarily working as trial attorneys for DHS, representing the U.S. government in removal proceedings.¹⁵¹

And although the government's lawyer serves as prosecutor in the case, interrogating the individual's credibility, evidence, and facts, IJs can sometimes act like a second critic of the applicant, rather than simply a mediator.

When anti-immigrant ideology or lack of immigration law knowledge is at play, an IJ may defer even more to the prosecuting attorney, leaving the deck highly stacked against an immigrant who may or may not have any legal support.

Behind Closed Doors: M.D.'s Experience

An Immigration Judge questioned M.D.'s credibility because he did not provide "evidence" that he is Black and Fulani, a persecuted group in Mauritania. M.D. addressed the court in Fulani and said, "I am the evidence. I speak Fulani and I am Black." The English transcript of his hearing is also riddled with "(unintelligible)" in place of the names of relatives and locations where important events, such as the murder of his father, took place.

There was an interpreter in the room who could have spelled the words out to make the record more accurate and *credible*. Instead, the record shows big holes in place of material facts, while M.D. was accused of not providing "proof" that he is Black.

¹⁵⁰ *Immigration Judge*. (n.d.). USAJOBS. Retrieved March 3, 2024, from <https://www.usajobs.gov/job/763359500>.

¹⁵¹ "The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool." *Southern Poverty Law Center*, 2019, <https://www.splcenter.org/20190625/attorney-generals-judges-how-us-immigration-courts-became-deportation-tool>.

He was deemed not credible by the Immigration Judge and denied asylum. But the court held the applicant to a ridiculous standard—requiring corroborating evidence that he is, in fact, Fulani and Black—while absolving itself of knowing even basic names that were material to the case.

Situations like these, memorialized in the case record, are carried into the appeals process where rehearings typically do not take place, compounding the injustices of these mistakes.¹⁵²

The Most Powerful Immigration Judge in America

The losing party in immigration court is entitled to appeal the ruling to the Board of Immigration Appeals (“BIA”), another federal agency housed under the Department of Justice.

As another “quasi-judicial” agency controlled by the Executive Branch, BIA decisions can be “overruled by the Attorney General or federal courts.”¹⁵³ The Attorney General (“AG”) is not only the head of the DOJ and the nation’s chief law enforcement officer, but she is also empowered to make precedent-setting decisions in individual immigration cases that come before the BIA.

If the U.S Attorney General, a political appointee, is dissatisfied with a decision rendered by the BIA, she can act as a “super judge,” modifying or overruling the appellate decision. This is called AG “certification,” and it is one of the most blatant examples of how politics can influence the administration of “justice” in federal immigration law.

AG certification power allows the head of the U.S. Justice Department to act as the ultimate authority in immigration court cases, and “correct” what she determines to be errors in BIA decisions, or make a legal or policy change that applies to present and future cases. Certification power was used sparingly in the past; so much so that

¹⁵² Jaafari, Joseph Darius. “Immigration Courts Getting Lost in Translation.” *The Marshall Project*, 2019, <https://www.themarshallproject.org/2019/03/20/immigration-courts-getting-lost-in-translation>.

¹⁵³ “Fact Sheet: Immigration Courts.” *National Immigration Forum*, 2018, <https://immigrationforum.org/article/fact-sheet-immigration-courts/>.

retired Immigration Judge J. Traci Hong called it a “nuclear option.”¹⁵⁴ For example, the Clinton administration used certification authority only three times over two terms, and the Obama administration four times.

While this process is supposed to be used to correct erroneous decisions, President Trump’s AGs used this power frequently, in a way that “erode[d] the neutrality and due process that should exist in immigration court,” according to court observers.¹⁵⁵

High Caseload, Lack of Staff, and the Injustice of Extemporaneous Decisions

The Office of the Chief Immigration Judge in the Executive Office for Immigration Review (“EOIR”), also within the DOJ, oversees operations of the BIA and the immigration courts. The Office of the Chief Immigration Judge evaluates IJ personnel performance based, in part, on the number of immigration cases they complete. Emphasizing quantity over quality undermines IJs’ ability to make thoughtful, individualized decisions.

Complex cases like asylum can take many hours and require multiple hearings on various days, often months apart. Cases can involve hundreds of pages of documentary evidence. As of December 2023, the immigration court case backlog is at an all-time high, with more than 3 million pending cases, and each IJ assigned 4,500.¹⁵⁶

A person with a case in immigration court may also have a visa application pending with USCIS. Immigration Judges have the authority to “administratively close” cases and temporarily remove them from their docket while another application for status is pending before USCIS. The Trump administration curtailed Immigration Judges’ authority to administratively close cases, which led to an increase in the court backlogs.¹⁵⁷ This is an example of how political shifts at the executive level impact

¹⁵⁴ Bellware, Kim. “On Immigration, Attorney General Barr Is His Own Supreme Court. Judges and Lawyers Say That’s the Problem.” *The Washington Post*, 2020, <https://www.washingtonpost.com/immigration/2020/03/05/william-barr-certification-power/>. Accessed 5 Feb. 2023.

¹⁵⁵ Ibid.

¹⁵⁶ *Immigration Court Backlog Tops 3 Million; Each Judge Assigned 4,500 Cases*. (n.d.). Trac.syr.edu. <https://trac.syr.edu/reports/734/>

¹⁵⁷ “Administrative Closure After Matter of Cruz-Valdez Practice Advisory.” *American Immigration Council and ACLU*, 2022, https://www.aclu.org/sites/default/files/field_document/2019.10.22_castro-tum_pa_w_zuniga_romero_update_-_final.pdf

what we might expect to be an “impartial” judiciary, and inflate a court backlog desperately in need of some discernment.

The excessive number of cases in U.S. immigration courts is frequently used by legislators and others for political reasons, and to ascribe an atmosphere of overwhelm to the system itself. Advocates claim the government takes an adversarial position on most cases eligible for immigration court, which eliminates the possibility of shorter, streamlined hearings where the parties agree on the facts.

Behind Closed Doors: Ramata’s Experience

The Ohio Immigrant Alliance interviewed Ramata, a 31-year-old Black, Muslim woman from Mauritania. She spoke with the assistance of an interpreter. Ramata came to the United States in 2010 along with her mother and older brother, who completed the paperwork to begin their long journeys toward winning asylum. It was a lengthy process. Ramata’s case lasted from 2010 to 2022. We asked her about her experiences as a Black, Muslim woman in U.S. immigration court.

Ramata’s story is one of both pain and hope. She spent twelve years building a life in the U.S., not sure if she would be denied asylum and forced to start again. In 2018 her husband was deported, leaving her as a single mother, unsure if she would face the same fate. Ramata told us she thought about moving to Canada with her children and trying to obtain asylum there, but she had already invested significant time and money in her case in the U.S. There was a point where Ramata said she felt hopeless. She no longer trusted the system, including both the government’s actions and the representation provided by her private attorney.

Ramata’s last hearing in immigration court was in January 2022, at the court in Cleveland, Ohio. When the Ohio Immigrant Alliance asked if she thinks her race, nationality, or religion impacted how she was treated in immigration court, Ramata said she believes her race and religion may be one of the reasons her case took so long. She described her wait as “long and painful,” but explained that she “had no choice but to be patient. Maybe if it was someone else the person could not have been patient.” While she believed she was understood by the judge and her attorney, she felt that the government attorney “didn’t want to believe her.” When asked why she thinks her case took so long even though the judge and attorneys understood her, she said, “Maybe they didn’t find me credible.”

Looking back on her case, Ramata is positive. She spoke the truth and felt heard. However, the process was long and torturous. When asked what could be done differently, she emphasized that cases should be processed more quickly. She suggested setting a time limit on how long people have to wait. “I don’t understand

how somebody can be in the immigrant justice system for 12 years and...not be approved,” Ramata said.

When talking about Black women and their unique struggles in U.S. immigration court, Ramata said it isn’t fair to make “an asylum seeker Black woman who is coming to save her life, who is running from atrocities in her country...wait 10, 12, 20 years for a response.” Many people she knows have had their loved ones die while they were waiting for a decision, but they couldn’t travel to attend their funerals due to the status of their immigration cases.

To improve experiences for Black immigrants, Ramata suggested that the U.S. government should approve asylum cases found credible from the outset, rather than making them wait so long. If additional time is needed, she said, the government could make them wait before granting them a green card. This would reduce the stress that she and other immigrants without asylum face as they live and work in the U.S., paying hundreds of dollars every two years for a work permit, contributing to the economy, and paying taxes—all to possibly be denied after a twelve-year wait.

Additionally, Immigration Judges suffer from the lack of administrative support staff, and may even share one law clerk between multiple judges. This reduces their capacity to conduct legal and country conditions research, so vital in asylum claims, and even to stay abreast of evolving case law.

Perhaps in an attempt to respond to the pressure to close cases and manage the enormous backlog, IJs more often than not issue their decisions orally, as soon as testimony is completed. A potential lack of time for more thoughtful deliberation when issuing an oral decision can prevent IJs from analyzing each case in an individualized, unbiased manner, and researching the credibility of claims and the authenticity of evidence.

Immigration Judges may not want to do a rushed job and send someone back to danger, but these structural issues result in the system working as designed—to reduce the number of people permitted to remain in the United States, no matter the true consequences for their safety.

Solutions exist, but they require policymakers and legislators to listen to the people with direct, personal experience. Ramata, cited earlier in this report, suggests quicker approval of cases found credible at the outset. Aliou wants judges to put more stock in migrants’ testimony, understanding that persecuting governments are not credible sources about their own abuse. Jennifer, one of the immigration lawyers we

interviewed, suggested that Black immigrant organizations and the American Immigration Lawyers Association be involved in crafting a new direction, citing their extensive expertise with how the system works—and fails people.

Bill, another immigration lawyer interviewed for this report, suggests taking a page from the refugee resettlement program when it comes to verifying facts about a case. “Social workers and private investigators [could] interview people and research documents and try to ... verify whether [they’re] telling the truth or not,” he said. Bill suggests employment counselors, ESL teachers, and others with specialized expertise could also assist in the processing of cases.

Most importantly, the asylum and immigration system must be reoriented toward prioritizing safety and resettlement, rather than deportation as the default outcome. The forthcoming report, “Behind Closed Doors: Black Migrants and the Hidden Injustices of US Immigration Courts,” will explore these and other solutions.

Additional Reading

This is the third installment in a series by the Ohio Immigrant Alliance entitled, “Behind Closed Doors: Black Migrants and the Hidden Injustices of US Immigration Courts. Find this and prior publications at illusionofjustice.org.

“**Dystopia, Then Deportation**” summarizes insights and recommendations from a strategy session co-hosted by OHIA, the Mauritanian Network for Human Rights in US, and Cameroon Advocacy Network at the Ford Foundation Center for Social Justice in 2023.¹⁵⁸

“**Diaspora Dynamics**” is an annotated bibliography of over eighty studies into the lives of Black migrants in the U.S., published between 1925 and 2023.¹⁵⁹ Both reports were principally authored by Nana Afua Y. Brantuo, Ph.D, Founder and Principal of Diaspora Praxis LLC.

¹⁵⁸ Brantuo, N. (2024). Dystopia, Then Deportation: Post-Event Insights and Items. *Ohio Immigrant Alliance*. <https://illusionofjustice.org/read/project-one-h346n-lw4y6>

¹⁵⁹ Brantuo, N. & Abukar, I. (2024). Diaspora Dynamics: An Annotated Bibliography of Black Migrants’ and Immigrants Experiences in the U.S. Ohio Immigrant Alliance. <https://illusionofjustice.org/read/project-two-whqpe-az3yd>

The image is a black and white optical illusion. It depicts a face with a distorted, pixelated appearance. The features are rendered in a way that creates a sense of depth and movement, though the overall image is static. The background is a grid of black and white squares, which contributes to the distorted effect. The face's features, including the eyes, nose, and mouth, are rendered in a way that makes them appear to be part of a larger, more complex structure. The overall effect is one of a face that is being viewed through a lens or a screen that is causing the image to be distorted.

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