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## Dropping the Veil: How an Investigation into One Asylum Office Reveals Systemic Failures Within the U.S. Affirmative Asylum System

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# **DROPPING THE VEIL: HOW AN INVESTIGATION INTO ONE ASYLUM OFFICE REVEALS SYSTEMIC FAILURES WITHIN THE U.S. AFFIRMATIVE ASYLUM SYSTEM**

*Anna R. Welch and Sara P. Cressey\**

*The eleven asylum offices scattered throughout the United States make life-or-death decisions every year in tens of thousands of asylum cases. Yet, little is known about the internal workings of U.S. asylum offices where the informal, non-adjudicative framework for deciding asylum claims takes place behind closed doors. Our three-year study into the Boston Asylum Office is the first ever comprehensive empirical study into the inner workings of an asylum office in the United States. This Article takes a deeper dive into our study's various findings to highlight systemic failures that are likely pervasive throughout the U.S. affirmative asylum system. We argue that our findings are particularly salient given new federal policies that place even greater authority into the hands of frontline asylum officers. We conclude by making a number of recommendations that would help to address the due process concerns within the affirmative asylum adjudication system identified in our study.*

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\* Professor Anna Welch is the Co-Director of the University of Maine School of Law's clinical programs and the Founding Director of the Refugee and Human Rights Clinic. Sara Cressey is a Visiting Professor teaching in the Refugee and Human Rights Clinic. The authors express their sincere gratitude to the former Refugee and Human Rights Clinic student attorneys who devoted countless hours to preparing and writing the report entitled *Lives in Limbo: How the Boston Asylum Office Fails Asylum Seekers*, upon which this Article is based, including Emily Gorrivan ('22), Grady Hogan ('22), Camrin Rivera ('22), Jamie Nohr ('23), and Aisha Simon ('23). The report was also made possible by volunteers Adam Fisher and Alex Beach, who conducted valuable analysis of data collected from U.S. Citizenship and Immigration Services. The authors also express gratitude to Joseph Tavares ('24) for his research assistance. Finally, the authors are indebted to the Clinic's collaborators who co-authored the report: the Immigrant Legal Advocacy Project (ILAP), American Civil Liberties Union of Maine (ACLU of Maine), and Basileus Zeno, Ph.D. Following the report's release several members of Congress from Massachusetts and Maine called on the Department of Homeland Security Office of Inspector General to investigate the Boston Asylum Office. In March 2022, the Refugee and Human Rights Clinic received the Clinical Legal Education Association's 2022 Award for Excellence in a Public Interest Case or Project. The full report is available at <https://mainelaw.maine.edu/wp-content/uploads/sites/1/Lives-in-Limbo-How-the-Boston-Asylum-Office-Fails-Asylum-Seekers-FINAL-1.pdf>.

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*With this new [asylum] program in place, we will be better equipped to carry out the spirit and intent of the Refugee Act of 1980 by applying the uniform standard of asylum eligibility, regardless of an applicant's place of origin.<sup>1</sup> We can thus implement the law based on a fair and consistent national policy and streamline what has sometimes been a long and redundant process.<sup>2</sup>*

– Gene McNary, Commissioner of the Immigration  
and Naturalization Service

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Amelia<sup>3</sup> fled her home country in central Africa after the country's repressive ruling regime singled her out based on her political affiliations, detained her and subjected her to severe physical and sexual violence, murdered her husband, and disappeared one of her children. After arriving in the United States, she found an attorney who assisted her in preparing and submitting her affirmative asylum application along with extensive supporting documentation, including expert medical reports documenting the ongoing physical and psychological effects of her trauma. A year after submitting her application, Amelia had her asylum interview with a hostile asylum officer who spent several hours interrogating her as she recounted the harrowing persecution she had suffered. Another year of waiting passed before Amelia received a request for additional evidence and a notice that she would need to attend a second interview at the asylum office. Amelia complied with both notices but was nevertheless referred to immigration court, where she spent another five years awaiting a merits hearing. She was finally granted asylum by an immigration judge eight years after her original asylum application was filed.

## INTRODUCTION

The United States' promise of safe haven to those fleeing persecution—an obligation enshrined in both international and domestic law<sup>4</sup>—too often remains unfulfilled, particularly for racial minorities

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1. Gene McNary, *INS Response to Immigration Reform*, 14 DEF. ALIEN 3, 6 (1991).

2. *Id.* Commissioner McNary's remarks were given weeks before the opening of the country's first asylum offices. *Id.*

3. This story is drawn from the stories of multiple clients of the Refugee and Human Rights Clinic, and names and details have been changed to protect the privacy of those clients and preserve confidentiality.

4. Congress enacted the Refugee Act of 1980 to bring the United States into conformity with international standards for the protection of refugees established by the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees. *See* S. REP. NO.

and other marginalized groups. Indeed, the right to seek asylum at the southern border was virtually nonexistent during the era of Title 42<sup>5</sup> and remained severely curtailed under the Biden Administration’s asylum ban,<sup>6</sup> which replaced Title 42 and survived until it was struck down by a federal judge in the Northern District of California.<sup>7</sup> Both Title 42 and Biden’s asylum ban disproportionately impacted migrants of color.<sup>8</sup> The policies also placed asylum seekers in severe, often life-

96-256, at 4 (1979), as reprinted in 1980 U.S.C.C.A.N. 141, 144. The right to seek asylum in the United States is set forth in the Immigration and Nationality Act. See 8 U.S.C. § 1158 (2018).

5. The “Title 42” policy was implemented in March 2020 during the early days of the COVID-19 pandemic and was lifted in May 2023 when the COVID-19 public health emergency (PHE) ended. See Adam Isacson, *10 Things to Know About the End of Title 42*, WASH. OFF. ON LATIN AM. (May 9, 2023), <https://www.wola.org/analysis/end-title-42> [<https://perma.cc/YYA8-85G4>]; see also Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 85 Fed. Reg. 65806, 65810 (2020), <https://www.govinfo.gov/content/pkg/FR-2020-10-16/pdf/2020-22978.pdf> [<https://perma.cc/K3QX-5C7G>]; OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY (2023), <https://www.whitehouse.gov/wp-content/uploads/2023/01/SAP-H.R.-382-H.J.-Res.-7.pdf> [<https://perma.cc/GJN3-KU29>]. Between March 2020 and May 2023, Border Patrol used Title 42 approximately 2.8 million times to quickly expel people who had crossed the southwest border. Isacson, *supra*.

6. See generally *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31314, 31317–18 (May 16, 2023) (codified at 8 C.F.R. pts. 1003, 1208). This regulation created a rebuttable presumption that any person arriving at the southwest border of the United States was not eligible for asylum *unless* they had secured an appointment in advance through a smartphone application called “CBP One.” See *id.* at 31317; see also 8 C.F.R. § 208.33(a)(2)(ii)(B) (2022) (providing that the presumption does not apply to a person who presents at a port of entry “pursuant to a pre-scheduled time and place”). Widespread reports reflect that the CBP One application is plagued with glitches and virtually impossible to use. See, e.g., Ali Rogan & Claire Mufson, *Glitches Plague CBP One App for Asylum-Seekers as Title 42 Comes to an End*, PBS (Apr. 22, 2023, 5:40 PM), <https://www.pbs.org/newshour/show/glitches-plague-cbp-one-app-for-asylum-seekers-as-title-42-comes-to-an-end> [<https://perma.cc/AU2D-9W5D>]; Joel Rose & Marisa Peñaloza, *Migrants Are Frustrated with the Border App, Even After Its Latest Overhaul*, NPR (May 12, 2023, 9:08 PM), <https://www.npr.org/2023/05/12/1175948642/migrants-are-frustrated-with-the-asylum-claim-app-even-after-the-latest-overhaul> [<https://perma.cc/JB82-TZHD>].

7. See *E. Bay Sanctuary Covenant v. Biden*, No. 18-CV-06810-JST, 2023 WL 4729278, at \*19 (N.D. Cal. July 25, 2023).

8. The vast majority of individuals expelled under Title 42 came from Mexico, Guatemala, Honduras, and El Salvador. See John Gramlich, *Key Facts About Title 42, the Pandemic Policy That Has Reshaped Immigration Enforcement at U.S.-Mexico Border*, PEW RSCH. CTR. (Apr. 27, 2022), <https://www.pewresearch.org/fact-tank/2022/04/27/key-facts-about-title-42-the-pandemic-policy-that-has-reshaped-immigration-enforcement-at-u-s-mexico-border/> [<https://perma.cc/N934-CXE> B]; see also *US: Treatment of Haitian Migrants Discriminatory*, HUM. RTS. WATCH (Sept. 21, 2021, 2:49 PM), <https://www.hrw.org/news/2021/09/21/us-treatment-haitian-migrants-discriminatory> [<https://perma.cc/RND5-FZYE>] (“Title 42 . . . singles out asylum seekers crossing into the United States at land borders – particularly from Central America, Africa, and Haiti who are disproportionately Black, Indigenous, and Latino – for expulsion.”). With the new asylum ban now in effect, Human Rights Watch reports that the discriminatory CBP One app “further disadvantages Black and Brown asylum seekers, as it uses facial recognition technology with an inherent bias against darker-skinned people.” *US: Biden ‘Asylum Ban’ Endangers Lives at the Border*, HUM. RTS. WATCH (May 11, 2023, 7:55 PM), <https://www.hrw.org/news/2023/05/11/us-biden-asylum-ban-endangers-lives-border> [<https://perma.cc/AX5F-ABRV>].

threatening danger, whether in Mexico<sup>9</sup> or in their countries of origin to which they were returned.<sup>10</sup>

Those who do manage to make it into the United States to lodge an asylum claim face a Byzantine administrative process plagued by “monumental” backlogs, leading to years-long (or even decades-long) wait times.<sup>11</sup> This Article focuses on one particular aspect of the asylum system, reporting on the first ever comprehensive study into the inner workings of an asylum office in the United States. The findings of the study, set forth in the full report *Lives in Limbo: How the Boston Asylum Office Fails Asylum Seekers*, reveal larger systemic failures within the broader affirmative asylum system.<sup>12</sup>

The investigation into the Boston Asylum Office, spearheaded by lead investigator Anna Welch, involved both qualitative and quantitative research methods.<sup>13</sup> Researchers analyzed documents and data produced by U.S. Citizenship and Immigration Services (USCIS) in response to litigation brought by the authors and their co-counsel to compel compliance with a Freedom of Information Act (FOIA) request, as well as USCIS Quarterly Stakeholder Reports.<sup>14</sup> In addition, researchers conducted more than one hundred interviews with former

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9. See, e.g., Julia Neusner, *A Year After Del Rio, Haitian Asylum Seekers Expelled Under Title 42 Are Still Suffering*, HUM. RTS. FIRST (Sept. 22, 2022), <https://humanrightsfirst.org/library/a-year-after-del-rio-haitian-asylum-seekers-expelled-under-title-42-are-still-suffering/> [https://perma.cc/GP2K-FAQB].

10. See, e.g., Kathryn Hampton et al., *Neither Safety nor Health: How Title 42 Expulsions Harm Health and Violate Rights*, PHYSICIANS FOR HUM. RTS. (July 28, 2021), <https://phr.org/our-work/resources/neither-safety-nor-health/> [https://perma.cc/SV2C-SS6V]. Similarly, the Biden Administration’s asylum ban trapped migrants in dangerous conditions in Mexico. See ANN GARCIA & KATE WHEATCROFT, NAT’L IMMIGR. PROJECT, *FACING AN IMPOSSIBLE CHOICE: EXPERIENCES OF ASYLUM SEEKERS IN MATAMOROS AND REYNOSA TWO MONTHS INTO THE BIDEN ASYLUM BAN 2* (2023), [https://nipnl.org/sites/default/files/2023-07/2023\\_Facing-An-Impossible-Choice.pdf](https://nipnl.org/sites/default/files/2023-07/2023_Facing-An-Impossible-Choice.pdf) [https://perma.cc/4CMX-2TAX]. Despite the violent conditions they faced, migrants were wary of surrendering themselves at the U.S. border to seek protection without an appointment in light of the harsh restrictions in place. Laura Gottesdiener et al., *Biden’s New Asylum Policy Strands Some Migrants at Mexico Border as Conditions Worsen*, REUTERS (July 6, 2023, 10:00 AM), <https://www.reuters.com/investigates/special-report/usa-immigration-asylum-border/> [https://perma.cc/HQ22-NL3G].

11. See *Immigration Court Asylum Backlog*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Sept. 2023), <https://trac.syr.edu/phptools/immigration/asylum/> [https://perma.cc/CNN2-9K2Z] (showing that the asylum backlog in U.S. immigration courts in 2023 has surpassed one million cases).

12. See UNIV. OF ME. SCH. OF LAW ET AL., *LIVES IN LIMBO: HOW THE BOSTON ASYLUM OFFICE FAILS ASYLUM SEEKERS* 29 (2022), <https://mainelaw.maine.edu/wp-content/uploads/sites/1/Lives-in-Limbo-How-the-Boston-Asylum-Office-Fails-Asylum-Seekers-FINAL-1.pdf> [https://perma.cc/A45F-WMC9] [hereinafter LIVES IN LIMBO].

13. *Id.* at 30.

14. *Id.* at 2.

supervisory asylum officers, former asylum officers, immigration attorneys, former asylum seekers, and asylees.<sup>15</sup> The research was completed in January 2022, and the report was released to the public on March 23, 2022.<sup>16</sup>

This Article reproduces the findings of the report and examines their significance in the context of the affirmative asylum system as a whole, particularly in light of recent significant changes to the asylum adjudication process under the Biden Administration that give asylum officers even broader authority. The report's major conclusion is that the Boston Asylum Office maintains an asylum grant rate well below that of the national average.<sup>17</sup> Yet the report's findings reveal concerning practices that are common to asylum offices throughout the country and cast doubt on the capacity of the affirmative asylum system as a whole to render fair and unbiased decisions. Unless and until the inner workings of U.S. asylum offices become more transparent and

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15. *Id.* at 30.

16. *Id.* at 2.

17. *Id.* at 1. The report's authors analyzed data pertaining to asylum applications adjudicated by the Boston and Newark Asylum Offices between 2015 and 2020. Unfortunately, available data for decisions made since the end of 2020 suggests that the trends at the Boston Asylum Office have remained consistent. Between October 2021 and December 2021 (the first quarter of Fiscal Year 2022), the office's approval rate remained at 11 percent. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., I-589 AFFIRMATIVE ASYLUM OVERVIEW: FY2022 Q1 (OCT 1, 2021–DEC 31, 2021), at 10 [hereinafter AFFIRMATIVE ASYLUM OVERVIEW], [https://www.uscis.gov/sites/default/files/document/data/Asylum\\_Division\\_Quarterly\\_Statistics\\_Report\\_FY22\\_Q1\\_V4.pdf](https://www.uscis.gov/sites/default/files/document/data/Asylum_Division_Quarterly_Statistics_Report_FY22_Q1_V4.pdf) [https://perma.cc/7U7L-SDJK]. Between January 2022 and September 2022 (quarters two, three, and four of Fiscal Year 2022), the Boston Asylum Office's grant rate went up to about 25 percent. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., NUMBER OF FORM I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL: JULY 1, 2022–SEPTEMBER 30, 2022 (2022) [hereinafter NUMBER OF FORM I-589: JULY 2022–SEPTEMBER 2022], [https://www.uscis.gov/sites/default/files/document/data/Asylum\\_Division\\_Quarterly\\_StatsFY22Q4\\_I589\\_Stats\\_revised\\_I589\\_Completion\\_Outcome.csv](https://www.uscis.gov/sites/default/files/document/data/Asylum_Division_Quarterly_StatsFY22Q4_I589_Stats_revised_I589_Completion_Outcome.csv) [https://perma.cc/KQL6-RNE5]; U.S. CITIZENSHIP & IMMIGR. SERVS., NUMBER OF FORM I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL: APRIL 1, 2022–JUNE 30, 2022 (2022) ## [hereinafter NUMBER OF FORM I-589: APRIL 2022–JUNE 2022], [https://www.uscis.gov/sites/default/files/document/data/AsylumDivisionQuarterlyStatsFY22Q3\\_I589\\_Completion\\_Outcome.csv](https://www.uscis.gov/sites/default/files/document/data/AsylumDivisionQuarterlyStatsFY22Q3_I589_Completion_Outcome.csv) [https://perma.cc/TW3X-XHBE]; U.S. CITIZENSHIP & IMMIGR. SERVS., ASYLUM QUARTERLY ENGAGEMENT: SCRIPT & TALKING POINTS (2023) [hereinafter ASYLUM QUARTERLY ENGAGEMENT], <https://www.uscis.gov/sites/default/files/document/outreach-engagements/AsylumQuarterlyEngagement-FY23Q3ScriptandTalkingPoints.pdf> [https://perma.cc/7RTG-HACP]. It is important to note that the higher grant rate for the Boston Asylum Office across this nine-month span falls within the variability of the grant rates revealed in our study: the Boston Asylum Office regularly had grant rates of over 20 percent for months at a time between 2015 and 2020, but the rates invariably plummeted again. *See* LIVES IN LIMBO, *supra* note 12, at 1. Another factor that undoubtedly impacted grant rates during the first nine months of 2022 is the adjudication of Operation Allies Welcome (OAW) cases—asylum claims filed by Afghan nationals who were paroled into the United States after the Taliban takeover in Afghanistan—which USCIS reports “have an approval rate greater than 99%.” *See* ASYLUM QUARTERLY ENGAGEMENT 2, *supra*.

other meaningful reforms are implemented, we cannot be confident that asylum seekers are receiving due process in our asylum offices.

This Article proceeds as follows: Part I provides the necessary background on the U.S. asylum process to give context to the arguments that follow, beginning with the historic origins of U.S. asylum and then discussing the asylum applicant's burden of proof as well as the procedural process asylum applicants face depending on whether they are applying for asylum before USCIS or before one of the Department of Justice's immigration courts. Part II discusses our study's major findings and conclusions, including the existence of bias in asylum adjudications, an improper, often *sole* focus on credibility in asylum decision-making, the outsized role that supervisory asylum officers play in influencing asylum decision-making, asylum officer time constraints and immense caseloads, and compassion fatigue and burnout plaguing asylum offices around the country. Finally, Part III provides a number of recommendations for addressing the various due process failures identified in our study.

## I. BACKGROUND

### A. *Origin and Purpose of the Affirmative Asylum System*

U.S. immigration law has its roots in the overt racism that permeated American political and social life in the late nineteenth and early twentieth centuries.<sup>18</sup> Perhaps unsurprisingly then, U.S. immigration laws have consistently been used to favor more “desirable” immigrants, namely those who are considered White, and to exclude others.<sup>19</sup> The country's first comprehensive immigration law, passed in 1921 (“1921 Act”), imposed a quota system based on national origin that barred virtually all immigration from Asia and Africa.<sup>20</sup> The

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18. See, e.g., Anna Welch & Emily Gorrivan, *Ethno-Nationalism and Asylum Law*, 74 ME. L. REV. 187, 193 (2022). (“Early 20th Century U.S. immigration laws were shaped by ideas of biological superiority and overt racism.”); John A. Scanlan, *Immigration Law and the Illusion of Numerical Control*, 36 U. MIA. L. REV. 819, 823 (1982) (describing overt racism of U.S. immigration laws and policies between 1869 and 1965).

19. See Tanya Kateri Hernandez, *The Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws*, 76 OR. L. REV. 731, 737 (1997).

20. See generally Emergency Immigration Act, Pub. L. No. 67-5, ch. 8, 42 Stat. 5 (1921); see also Scanlan, *supra* note 18, at 826 (“In 1921, . . . legislation . . . established for the first time a national-origins quota [which] . . . bar[red] virtually all immigration from Africa and the Orient.”). Though the use of national origin to disqualify certain groups from entry into the United States was a hallmark of the 1921 Act, there was long-standing precedent for the practice at the time. Congress had enacted the first law that excluded certain immigrants based on their nationality nearly forty years earlier with the Chinese Exclusion Act of May 6, 1882. JOYCE C. VIALET, CONG. RSCH.



temporary 1921 Act was replaced with the permanent Immigration Quota Act of 1924,<sup>21</sup> which implemented a revised quota formula that further restricted the entry of immigrants from Eastern and Southern Europe who were “perceived as non-White” at the time.<sup>22</sup> In 1952, the national origins quota system was incorporated into the Immigration and Nationality Act (INA), leading President Truman to decry “the absurdity, the cruelty of carrying over into this year of 1952 the isolationist limitations of our 1924 law.”<sup>23</sup> Other critics similarly argued that the perpetuation of the national origins quota system was “inappropriate to the needs of U.S. foreign policy.”<sup>24</sup>

The broader context for these critiques of the INA was the formation of the United Nations in 1945 and subsequent efforts to develop more permanent international standards for the protection of refugees.<sup>25</sup> As the world reeled from the horrors of World War II, there was “emerging concern for the protection of international human rights.”<sup>26</sup> The Office of the United Nations High Commissioner for Refugees (UNHCR) was established as a subsidiary of the UN General Assembly in 1949 and, two years later, UN member states adopted the 1951 Convention relating to the Status of Refugees.<sup>27</sup> The Convention—the “foundation of international refugee law”<sup>28</sup>—defined who was a refugee and set standards for the treatment of those who met the definition, but was limited in scope to individuals in Europe who became refugees as a result of events that occurred before 1951.<sup>29</sup> As refugee crises continued to arise throughout the 1960s—in particular during the decolonization of Africa—the need for broader protection for refugees became clear.<sup>30</sup> Accordingly, in 1967 the UN adopted a

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SERV., A BRIEF HISTORY OF U.S. IMMIGRATION POLICY 16 (1980), [https://digital.library.unt.edu/ark:/67531/metacrs8492/m2/1/high\\_res\\_d/80-223\\_1980dec22.pdf](https://digital.library.unt.edu/ark:/67531/metacrs8492/m2/1/high_res_d/80-223_1980dec22.pdf) [<https://perma.cc/RRA7-G5N6>].

21. VIALET, *supra* note 20, at 16. *See generally* Immigration Act of 1924, ch. 190, 43 Stat. 153.

22. Hernandez, *supra* note 19, at 742.

23. VIALET, *supra* note 20, at 20–21 (quoting H.R. DOC. NO. 82-520, at 5 (2d sess. 1952)).

24. *Id.* at 20.

25. U.N. HIGH COMM’R FOR REFUGEES, AN INTRODUCTION TO INTERNATIONAL PROTECTION 7 (2005), <https://www.unhcr.org/3ae6bd5a0.pdf> [<https://perma.cc/NG4S-62BK>].

26. Fatma E. Marouf, *The Role of Foreign Authorities in U.S. Asylum Adjudication*, 45 N.Y.U. J. INT’L L. & POL. 391, 396 (2013); *see also* U.N. HIGH COMM’R FOR REFUGEES, *supra* note 25, at 6–9.

27. U.N. HIGH COMM’R FOR REFUGEES, *supra* note 25, at 7–9.

28. *Id.* at 9.

29. *See* Convention Relating to the Status of Refugees pmb., July 28, 1951, 189 U.N.T.S. 137.

30. *See* U.N. HIGH COMM’R FOR REFUGEES, *supra* note 25, at 9.

Protocol Relating to the Status of Refugees, which required signatories to comply with key provisions of the Convention but removed the temporal and geographic limitations on the definition of a “refugee” that had been set forth in the Convention.<sup>31</sup>

The United States, which had not signed onto the Convention, did ratify the Protocol in 1968 “but took over a decade to conform its practices to the Protocol.”<sup>32</sup> For the majority of the twentieth century, the United States had no comprehensive legal framework governing the admission of refugees, instead admitting refugees on an ad hoc basis in response to various crises.<sup>33</sup> Throughout the 1950s, the United States narrowly defined refugees in “geographical and ideological terms” as including those “from communist or communist-dominated countries or countries in the Middle East.”<sup>34</sup> This approach aligned with the nationality-based quota system that had, to that point, been the framework for all U.S. immigration.

The Refugee Act of 1980 formalized the right to seek asylum in the United States, but “the law itself did little to define or prescribe the mechanics of obtaining this status.”<sup>35</sup> During the 1980s, the adjudication of affirmative asylum applications was governed by a set of interim regulations<sup>36</sup> under which immigration officers within Immigration and Naturalization Service (INS) District Offices would decide asylum claims.<sup>37</sup> During that period, criticism of the INS abounded as “unspecialized, under-paid, and over-worked” INS officers<sup>38</sup>

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31. See Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

32. Marouf, *supra* note 26, at 397.

33. See generally Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 11–20 (1981).

34. Gregg A. Beyer, *Affirmative Asylum Adjudication in the United States*, 6 GEO. IMMIGR. L.J. 253, 259 (1992) (quoting VIALET, *supra* note 20, at 23); see also Anker & Posner, *supra* note 33, at 14 (describing the admission of refugees through special enactments in the 1950s as being focused “less on broad humanitarian goals than on giving encouragement and support to anti-communists”).

35. Gregg A. Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, 4 INT’L J. REFUGEE L. 455, 458 (1992).

36. See Aliens and Nationality; Refugee and Asylum Procedures, 45 Fed. Reg. 37392, 37392 (June 2, 1980) (codified at 8 C.F.R. pts. 207–09, 245); Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 52 Fed. Reg. 32552, 32552 (Aug. 28, 1987) (codified at 8 C.F.R. pts. 3, 208, 236, 242, 253); Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 53 Fed. Reg. 11300, 11300 (Apr. 6, 1988) (codified at 8 C.F.R. pts. 3, 208, 236, 242, 253); Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30674, 30675 (July 27, 1990) (codified at 8 C.F.R. pts. 3, 103, 208, 236, 242, 253).

37. Beyer, *supra* note 35, at 459.

38. Beyer, *supra* note 34, at 274.

struggled to apply the complex refugee definition.<sup>39</sup> As UNHCR recognizes, determining refugee status under the framework set forth in the 1951 Convention and the 1967 Protocol is challenging (for both the applicant and the adjudicator) and requires specialized training:

It should be recalled that an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own. His application should therefore be examined within the framework of specially established procedures by qualified personnel having the necessary knowledge and experience, and an understanding of an applicant's particular difficulties and needs.<sup>40</sup>

As the INS worked to develop rules governing the U.S. asylum system, stakeholders made recommendations in line with UNHCR's guidance, including "that the government should invest sufficient resources in the asylum procedure to ensure that claims are fairly and expeditiously determined . . . [and] that asylum adjudicators should be qualified professionals capable of evaluating the merits of cases on humanitarian grounds."<sup>41</sup> On July 27, 1990, the INS issued a final rule establishing procedures to be used in determining asylum claims and mandating the creation of "a corps of professional Asylum Officers" who would receive specialized training in international law and conduct asylum interviews in a nonadversarial setting.<sup>42</sup> The INS then established seven asylum offices with the goal of creating a fairer and

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39. *Id.* at 268–69.

40. U.N. HIGH COMM'R FOR REFUGEES, U.N. REFUGEE AGENCY, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS AND GUIDELINES ON INTERNATIONAL PROTECTION 42 (2019), <https://www.unhcr.org/us/sites/en-us/files/legacy-pdf/5ddfcdc47.pdf> [<https://perma.cc/CS6Q-NNC6>].

41. Beyer, *supra* note 35, at 466–67.

42. Aliens and Nationality: Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30674, 30680 (July 27, 1990) (codified at 8 C.F.R. pts. 3, 103, 208, 236, 242, 253); *see also* WALTER A. EWING & BENJAMIN JOHNSON, IMMIGR. POL'Y CTR., ASYLUM ESSENTIALS: THE U.S. ASYLUM PROGRAM NEEDS MORE RESOURCES, NOT RESTRICTIONS 1 (2005), <https://www.americanimmigrationcouncil.org/sites/default/files/research/Asylum%20Essentials%202-05.pdf> [<https://perma.cc/QL3Y-MEJU>] ("A critical element in the U.S. asylum program is the Asylum Officer Corps, a professional cadre of officers, specially trained in refugee and human rights law, who are responsible for conducting in-depth interview of individuals who apply for the particular form of refugee protection known as 'asylum.'").

more uniform affirmative asylum process.<sup>43</sup> Today, this history is reflected in the mission of the USCIS Asylum Program: “to offer protection to refugees in accordance with the laws of the United States and international obligations.”<sup>44</sup>

Federal regulations still require that asylum officers receive “special training in international human rights law” and that they employ “nonadversarial interview techniques.”<sup>45</sup> USCIS training materials for asylum officers emphasize the importance of the nonadversarial interview:

It is not the role of the interviewer to oppose the principal interviewee’s request or application. Because the process is non-adversarial, it is inappropriate . . . to interrogate or argue with any interviewee. . . .

. . . .

The non-adversarial nature of the interview allows the applicant to present a claim in an unrestricted manner, within the inherent constraints of an interview before a government official.<sup>46</sup>

Unfortunately, as discussed in detail below, the affirmative asylum system remains plagued by many of the issues that the 1990 INS final rule was intended to solve. The process for adjudicating affirmative asylum claims remains long and difficult and too often leads to inconsistent outcomes. Indeed, as our study shows, decisions with respect to who is deserving of asylum often come down to multiple factors, notwithstanding the merits of the claim, including bias, an asylum officer’s “power status” within the asylum office, organizational culture, and individual moral considerations.<sup>47</sup>

43. Beyer, *supra* note 35, at 470.

44. ASYLUM DIV., U.S. CITIZENSHIP & IMMIGR. SERVS., ASYLUM OFFICER BASIC TRAINING COURSE: CORP VALUES AND GOALS 1, 4 (2006), <https://www.aila.org/infonet/aobtc-corps-values-goals> [<https://perma.cc/384P-7EZR>].

45. 8 C.F.R. § 208.1(b) (2022).

46. U.S. CITIZENSHIP & IMMIGR. SERVS., INTERVIEWING—INTRODUCTION TO THE NON-ADVERSARIAL INTERVIEW 15–16 (2019), [https://www.uscis.gov/sites/default/files/document/foia/Interviewing\\_-\\_Intro\\_to\\_the\\_NonAdversarial\\_Interview\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Intro_to_the_NonAdversarial_Interview_LP_RAIO.pdf) [<https://perma.cc/X9QA-ZJJA>].

47. Talia Shiff, *A Sociology of Discordance: Negotiating Schemas of Deservingness and Codified Law in U.S. Asylum Status Determinations*, 127 AM. J. SOCIO. 337, 339, 348 (2021) (explaining how “there is little theorization of the multiple ways categorizations of deservingness interact with codified law as it is applied to real-life cases” and describing how “existing studies overlook how, in the course of applying rules to complex cases, frontline actors negotiate a complex interplay between a claim’s *formal eligibility* for a prescribed right/benefit under codified law and its

### B. *The Asylum Applicant's Burden of Proof*

To qualify for asylum in the United States, an applicant must establish that they are a “refugee” by showing that they have faced past persecution or have a well-founded fear of persecution in their home country on account of one of five protected grounds: race, religion, nationality, political opinion, or membership in a particular social group.<sup>48</sup> The persecution (past or future) must be inflicted by the country’s government or actors that the government cannot or will not control.<sup>49</sup> Asylum seekers have often faced immense trauma and fled for their lives with little opportunity to plan ahead; as a result, corroborating evidence can be hard to come by.<sup>50</sup> Accordingly, an asylum applicant’s credible testimony may be sufficient to sustain their burden.<sup>51</sup> Following the enactment of the REAL ID Act of 2005, however, the asylum officer or immigration judge adjudicating the asylum claim may request that the applicant “provide evidence that corroborates otherwise credible testimony,” which triggers an obligation that the applicant either provide the evidence or demonstrate that they do not have the evidence and cannot reasonably obtain it.<sup>52</sup>

In the vast majority of asylum cases, the applicant’s testimony is the key piece of supporting evidence upon which the success of the

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perceived *deservingness* for that right/benefit as shaped by shared moral schemas”). Indeed, “[h]ow liberally asylum officers applied categorizations of deservingness, and what ethnic/religious/racial and otherwise categorizable groups they placed on either side of the boundary, varied over time as well as across and within asylum offices.” *Id.* at 340.

48. See 8 U.S.C. § 1158(b)(1)(B)(i) (2018); *id.* § 1101(a)(42); 8 C.F.R. § 208.13 (2022).

49. 8 U.S.C. § 1101(a)(42); see also Convention Relating to the Status of Refugees, *supra* note 29, at 444 (defining a “refugee” as someone who is “unable or . . . unwilling to avail himself of the protection” of his country of nationality). This rule flows from the principle that a person who has the protection of their own government does not need the aid of a foreign government. See Penelope Mathew et al., *The Role of State Protection in Refugee Analysis*, 15 INT’L J. REFUGEE L. 444, 444 (2003) (“It is now well accepted that a central question in many refugee status determinations is the role of the state and its ability or willingness to provide protection to the applicant.”).

50. U.N. HIGH COMM’R FOR REFUGEES, *supra* note 40, at 43 (“In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents.”); see also, e.g., *Dawoud v. Gonzales*, 424 F.3d 608, 613 (7th Cir. 2005) (“To expect [asylum seekers] to stop and collect dossiers of paperwork before fleeing is both unrealistic and strikingly insensitive to the harrowing conditions they face.”).

51. 8 U.S.C. § 1158(b)(1)(B)(ii).

52. *Id.*; see also REAL ID Act of 2005, Pub. L. No. 109-13, § 101(a)(3)(B)(ii), 119 Stat. 302, 303 (codified at 8 U.S.C. § 1158). It is important to note that “[d]etained or unrepresented asylum applicants face particularly serious obstacles in obtaining corroborating documentation” to support their asylum claims. DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* § 3:5 (2022); see also Michael Kaufman, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 123 (2008) (noting the difficulty detained immigrants face trying to gather evidence to support their asylum claims).

claim depends. As a result, the trier of fact's assessment of the applicant's credibility can be outcome-determinative.<sup>53</sup> Even in asylum cases with significant corroborating evidence, an adverse credibility determination can lead to denial of the claim. Yet credibility determinations are fraught: the asylum officers and immigration judges who make these determinations are human beings, each of whom brings to the table their own set of biases and cultural norms.<sup>54</sup> Despite the pervasive myth that the average person can accurately judge whether or not another person is lying, "detailed and repeated testing of evaluation of testimony has proven that laypersons and even experts are poor detectors of the truth."<sup>55</sup> In other words, as humans we tend to overestimate our ability to assess credibility.

The breadth of factors that an asylum officer or immigration judge may consider when making a credibility determination only exacerbates these problems. The Immigration and Nationality Act provides:

[A] trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the

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53. See, e.g., Scott Rempell, *Credibility Assessments and the REAL ID Act's Amendments to Immigration Law*, 44 TEX. INT'L L.J. 185, 191 (2008) (discussing the particular importance of credibility determinations in the immigration context); Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 367 (2003) ("Credibility assessment is often the single most important step in determining whether people seeking protection as refugees can be returned to countries where they say they are in danger of serious human rights violations.").

54. Kagan, *supra* note 53, at 367 ("[C]redibility-based decisions in refugee and asylum cases are frequently based on personal judgment that is inconsistent from one adjudicator to the next, unreviewable on appeal, and potentially influenced by cultural misunderstandings."); see also Shiff, *supra* note 47, at 338–39 (observing that multiple factors, ranging from biases and perceptions of others to political cultures, affect how decision-makers assess who is "deserving" of a particular benefit).

55. James P. Eyster, *Searching for the Key in the Wrong Place: Why "Common Sense" Credibility Rules Consistently Harm Refugees*, 30 B.U. INT'L L.J. 1, 38 (2012); see also Paul Ekman et al., *Who Can Catch a Liar?*, 46 AM. PSYCH. 913, 913 (1991); Juliet Cohen, *Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers*, 13 INT'L J. REFUGEE L. 293, 293 (2001).

Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, *or any other relevant factor*.<sup>56</sup>

This standard allows consideration of myriad factors in assessing credibility, inviting the kinds of subjective credibility assessments that undermine the U.S. asylum system's ability to render fair and consistent decisions. Indeed, many of the listed factors are not accurate indicators of truthfulness, particularly in the asylum context where the presence of cultural differences and the effects of trauma make the endeavor of assessing credibility all the more challenging.<sup>57</sup>

### C. Procedural Pathways to Asylum

There are, broadly speaking, two procedural pathways through which a person may seek asylum in the United States.<sup>58</sup> The first is referred to as “affirmative” asylum. A person may apply for asylum affirmatively by filing an application for asylum (the Form I-589) with USCIS.<sup>59</sup> This path is typically only available to individuals who have not already had contact with immigration authorities and been placed in removal proceedings; it is the path often (but not always) followed by people who initially enter the United States on a nonimmigrant visa—for example, a tourist visa or a student visa.<sup>60</sup> The second pathway is referred to as “defensive” asylum, where a noncitizen who has

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56. 8 U.S.C. § 1158(b)(1)(B)(iii) (emphasis added).

57. See Eyster, *supra* note 55, at 38–40.

58. For years, these two pathways were distinct, and an asylum seeker's case generally followed one or the other. That is no longer the case in light of the new Asylum Processing Rule, which took effect on May 31, 2022, and is discussed in more detail below. Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078, 18078 (Mar. 29, 2022) (codified at 8 C.F.R. pts. 208, 212, 235, 1003, 1208, 1235, 1240). For the sake of simplicity, we describe the two traditional procedural pathways first.

59. *I-589, Application for Asylum and for Withholding of Removal*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 13, 2023), <https://www.uscis.gov/i-589> [<https://perma.cc/XPR9-TDT9>]; see 8 U.S.C. § 1158 (2018); 8 C.F.R. § 1208.2 (a)(1)(i) (2022); see also ANKER, *supra* note 52, § A2.2 (discussing eligibility to file an affirmative asylum application).

60. See 8 C.F.R. § 208.2 (2022) (granting jurisdiction to USCIS over all asylum applications filed by a noncitizen “physically present in the United States or seeking admission at a port-of-entry” who has not been issued a Notice to Appear in immigration court). USCIS also has jurisdiction over asylum applications filed by unaccompanied children, even those who have had contact with immigration authorities. See 8 U.S.C. § 1158 (2018).

been placed in removal proceedings requests asylum as a defense to removal.<sup>61</sup>

The adjudication of affirmative asylum claims often takes years. These claims are decided by asylum officers at USCIS's ten asylum offices across the United States, each of which has jurisdiction over a certain geographic region.<sup>62</sup> Asylum officers, as one scholar put it, are "street-level state bureaucrats: lower-level public employees charged with interpreting and enforcing often ambiguous law while interacting with the individuals subject to the said policy."<sup>63</sup> USCIS receives tens of thousands of applications every year, on top of a massive backlog of cases that only continues to grow.<sup>64</sup> USCIS reports that, as of March 31, 2023, the affirmative asylum backlog stood at 797,576 pending applications.<sup>65</sup>

The affirmative asylum process is initiated when an individual files their asylum application with USCIS, often accompanied by a personal declaration and, if they can secure it, documentary evidence such as witness statements, medical reports, and country condition reports.<sup>66</sup> The next step in the process is an interview with an asylum officer.<sup>67</sup> The amount of time applicants will wait for an interview

61. See 8 C.F.R. § 1208.2(b) (2022); see also ANKER, *supra* note 52, § 3:43 (discussing procedures for filing an application for asylum as a defense to removal). An individual who applies for asylum before USCIS but whose application is not approved is typically referred to Immigration Court for removal proceedings, where they can renew their application for asylum. See ASYLUM DIV., U.S. CITIZENSHIP AND IMMIGR. SERVS., AFFIRMATIVE ASYLUM PROCEDURES MANUAL 26 (2016), <https://www.uscis.gov/sites/default/files/document/guides/AAPM-2016.pdf> [<https://perma.cc/9XRA-K5CN>].

62. See U.S. CITIZENSHIP & IMMIGR. SERVS., BACKLOG REDUCTION OF PENDING AFFIRMATIVE ASYLUM CASES 4 (2021), <https://www.dhs.gov/sites/default/files/2021-12/USCIS%20-%20Backlog%20Reduction%20of%20Pending%20Affirmative%20Asylum%20Cases.pdf> [<https://perma.cc/UEH6-XT3K>].

63. Shiff, *supra* note 47, at 349.

64. USCIS received 62,795 applications in 2021 and 93,518 in 2020. RYAN BAUGH, OFF. OF IMMIGR. STAT., DEP'T OF HOMELAND SEC., REFUGEES AND ASYLEES: 2021, at 8–9 (2022), [https://www.dhs.gov/sites/default/files/2022-10/2022\\_0920\\_plyc\\_refugees\\_and\\_asylees\\_fy2021.pdf](https://www.dhs.gov/sites/default/files/2022-10/2022_0920_plyc_refugees_and_asylees_fy2021.pdf) [<https://perma.cc/6M34-SBUA>]. During fiscal year 2022 (which ran from October 1, 2021, through September 30, 2022), the agency received over 202,000 affirmative asylum applications. ASYLUM QUARTERLY ENGAGEMENT, *supra* note 17, at 5.

65. U.S. CITIZENSHIP & IMMIGR. SERVS., NUMBER OF SERVICE-WIDE FORMS BY QUARTER, FORM STATUS, AND PROCESSING TIME: JANUARY 1, 2023–MARCH 31, 2023, [https://www.uscis.gov/sites/default/files/document/data/Quarterly\\_All\\_Forms\\_FY2023\\_Q2.pdf](https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2023_Q2.pdf) [<https://perma.cc/8KGS-JE9P>].

66. See ASYLUM DIV., *supra* note 61, at 4–5; see also David A. Martin, *The 1995 Asylum Reforms: A Historic and Global Perspective*, CTR. FOR IMMIGR. STUD. (May 1, 2000), <https://cis.org/Report/1995-Asylum-Reforms> [<https://perma.cc/B37P-ARQ3>].

67. 8 C.F.R. § 208.9(b) (2022).



depends, in large part, on when and where their application was filed.<sup>68</sup> In early 2018, during the tenure of President Trump, USCIS announced that it would reinstate a policy referred to as “last in, first out” (LIFO) under which the agency prioritizes scheduling interviews for asylum applications that were filed most recently, rather than prioritizing those whose applications have been pending the longest.<sup>69</sup> LIFO was purportedly implemented to reduce the backlog of affirmative asylum cases,<sup>70</sup> but in the years it has been in place it “has failed to reduce the [asylum] backlog, essentially freezing those already waiting for interviews while adding new asylum seekers to the backlog each year.”<sup>71</sup> For asylum seekers stuck in the affirmative asylum backlog, wait times can average four years or more.<sup>72</sup>

As noted above, affirmative asylum interviews are supposed to be “nonadversarial” in nature<sup>73</sup> and more informal than a hearing in immigration court. The interview is conducted behind closed doors with only the asylum officer, the applicant, an interpreter (if necessary), and the applicant’s attorney (if the applicant has been fortunate enough to find one) present.<sup>74</sup> The attorney’s role during the asylum interview is “minimal,”<sup>75</sup> as compared to an adversarial hearing where the attorney may, for example, object to improper questions. The interview is not recorded and no transcript is generated; rather, the notes that the

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68. See TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, A MOUNTING ASYLUM BACKLOG AND GROWING WAIT TIMES (2021), <https://trac.syr.edu/immigration/reports/672/> [perma.cc/EP97-4RNS].

69. See Press Release, U.S. Citizenship & Immigr. Servs., USCIS to Take Action to Address Asylum Backlog (Jan. 31, 2018), <https://www.uscis.gov/news/news-releases/uscis-take-action-address-asylum-backlog> [https://perma.cc/8NJ9-7F73].

70. *Id.* The press release announcing the policy’s implementation framed it as a backlog-reduction tool, but its true purpose was “to identify frivolous, fraudulent or otherwise non-meritorious asylum claims earlier” and “to deter those who might try to use the existing backlog as a means to obtain employment authorization.” *Id.*; see also *Affirmative Asylum Interview Scheduling*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 31, 2022), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/affirmative-asylum-interview-scheduling> [https://perma.cc/FS5Q-VQLF] (“The aim [of LIFO] is to deter individuals from using asylum backlogs solely to obtain employment authorization by filing frivolous, fraudulent or otherwise non-meritorious asylum applications.”).

71. ANIKA ADES & KENJI KIZUKA, HUM. RTS. FIRST, PROTECTION POSTPONED: ASYLUM OFFICE BACKLOGS CAUSE SUFFERING, SEPARATE FAMILIES, AND UNDERMINE INTEGRATION 1 (2021), <https://humanrightsfirst.org/wp-content/uploads/2022/09/ProtectionPostponed.pdf> [https://perma.cc/K55P-96NT]. LIFO remains in effect as of the writing of this Article. See *Affirmative Asylum Interview Scheduling*, *supra* note 70.

72. ADES & KIZUKA, *supra* note 71, at 2.

73. 8 C.F.R. § 208.9(b) (2022).

74. See U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 46, at 13–15.

75. *Id.* at 14.

asylum officer takes while they are conducting the interview are the only record of what was said.<sup>76</sup> Not only do these notes not reflect the complete transcript of what happened during the interview, but they are, by their nature, incomplete and often riddled with errors.<sup>77</sup> As revealed by our study, the informal, non-adjudicative framework for processing asylum claims in the asylum offices leads to a lack of transparency and creates an opportunity for hostility and bias to permeate the decision-making process.

If an asylum officer decides not to grant the application at the affirmative level, the case is referred to immigration court,<sup>78</sup> where the asylum seeker may renew their asylum application; individuals who are apprehended by immigration authorities and placed directly into removal proceedings may also seek asylum before the immigration court in the first instance.<sup>79</sup> After a brief initial hearing, the asylum seeker is entitled to a full evidentiary hearing on their asylum claim before an immigration judge.<sup>80</sup> Immigration court proceedings are more transparent than affirmative asylum proceedings in several ways, as, for example, hearings before immigration judges are generally open to the public (with certain exceptions), and all hearings are recorded.<sup>81</sup> Yet removal proceedings are far from perfect, to put it lightly, and immigration courts face the same monumental backlogs that plague asylum offices—the immigration court backlog stood at over two million total cases, about half of which (just over one million) were asylum cases as of the fall of 2023.<sup>82</sup> This means compounded delays for an asylum seeker referred to immigration court by an

76. *See id.* at 22 (“You will take notes during the interview to remember what was said during the interview.”).

77. *See* LIVES IN LIMBO, *supra* note 12, at 6; *see also* Cuesta-Rojas v. Garland, 991 F.3d 266, 272–73 (1st Cir. 2021) (describing asylum officer notes taken during a credible fear interview as a “sketch” and noting that “[t]hey are not a verbatim transcript”).

78. *See* 8 C.F.R. § 208.14(c)(1) (2022). In a small number of cases where the person seeking asylum already has another form of status by the time their asylum application is decided (e.g., immigrant status, nonimmigrant status, or temporary protected status), the asylum officer will deny the application rather than referring the person to immigration court. *See id.* § 208.14(c)(2)–(3).

79. *Id.* § 1208.4(b)(3)(i).

80. *See generally* EXEC. OFF. FOR IMMIGR. REV., DEP’T OF JUST., IMMIGRATION COURT PRACTICE MANUAL ch. 4.16 (2023), <https://www.justice.gov/eoir/book/file/1528921/download> [<https://perma.cc/NBU8-6C4L>] (providing information on individual calendar hearings and the immigration judge’s responsibilities during such hearings).

81. *Id.* at chs. 4.9(a)(1), 4.10(a).

82. *U.S. Immigration Courts See a Significant and Growing Backlog*, U.S. GOV’T ACCOUNTABILITY OFF. (Oct. 19, 2023), <https://www.gao.gov/blog/u.s.-immigration-courts-see-significant-and-growing-backlog> [<https://perma.cc/9P4Y-EG3L>]; *Immigration Court Asylum Backlog*, *supra* note 11.

asylum officer, who must spend years waiting for a decision from an immigration judge on top of the delays they faced at the affirmative asylum level.

Moreover, despite the complexity of asylum law and the life-or-death consequences of erroneous decisions, there is no right to appointed counsel in immigration proceedings.<sup>83</sup> There is no right to counsel at all in ordinary affirmative asylum proceedings—it is not until a person is placed in removal proceedings that they have a statutory right to counsel *at their own expense*,<sup>84</sup> a luxury that is out of reach for many asylum seekers. On top of the often prohibitive cost, a national shortage of immigration attorneys makes it virtually impossible for everyone who needs a lawyer to find one.<sup>85</sup> Asylum seekers who live in rural areas, who are detained, or who are placed in accelerated removal proceedings—like the Dedicated Docket program<sup>86</sup>—are even less likely to secure counsel.<sup>87</sup> Troublingly in light of these barriers to representation, the odds that an asylum seeker will be

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83. Kaufman, *supra* note 52, at 114–15.

84. See 8 U.S.C. § 1362 (“In any removal proceedings *before an immigration judge* . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel . . . as he shall choose.” (emphasis added)).

85. See, e.g., TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, DESPITE EFFORTS TO PROVIDE PRO BONO REPRESENTATION, GROWTH IS FAILING TO MEET EXPLODING DEMANDS (2023), <https://trac.syr.edu/reports/716/> [<https://perma.cc/B8DG-J3VA>]; Marco Poggio, *83,000 Afghans Made It to the US. Now They Need Lawyers*, LAW360 (Feb. 6 2022, 8:02 PM), <https://www.law360.com/articles/1462197/83-000-afghans-made-it-to-the-us-now-they-need-lawyers> [<https://perma.cc/SW7V-T238>]; Chelsea Versteegen, *An Overwhelmed Immigration System Is Facing a Shortage of Attorneys Amid a Growing Backlog of Cases*, BORDERLESS MAG. (Oct. 13, 2022), <https://borderlessmag.org/2022/10/13/an-overwhelmed-immigration-system-is-facing-a-shortage-of-attorneys-amid-a-growing-backlog-of-cases/> [<https://perma.cc/P6F8-ZFER>].

86. The Dedicated Docket program “was created by the Biden administration to speed the processing of families seeking asylum after arriving along the Southwest Border.” TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, A NATIONAL ASSESSMENT OF THE BIDEN ADMINISTRATION’S DEDICATED DOCKET INITIATIVE (2022), <https://trac.syr.edu/reports/704/> [<https://perma.cc/X5GD-SWZ5>]. The results of this program have been abysmal: “expedited hearing processing substantially reduced the odds that families were able to have their asylum claims considered and asylum itself granted.” *Id.*

87. See HARV. IMMIGR. & REFUGEE CLINICAL PROGRAM, DENIAL OF JUSTICE: THE BIDEN ADMINISTRATION’S DEDICATED DOCKET IN THE BOSTON IMMIGRATION COURT 4 (2023), [http://harvardimmigrationclinic.org/files/2023/06/Dedicated-Docket-Report\\_FINAL.pdf](http://harvardimmigrationclinic.org/files/2023/06/Dedicated-Docket-Report_FINAL.pdf) [<https://perma.cc/K8NK-6BJV>] (“Families assigned to the Boston Dedicated Docket have less access to counsel and are more likely to be deported.”); IMMIGR. RTS. POL’Y CLINIC, CTR. FOR IMMIGR. L. & POL’Y, UCLA SCH. OF L., THE BIDEN ADMINISTRATION’S DEDICATED DOCKET: INSIDE LOS ANGELES’ ACCELERATED COURT HEARINGS FOR FAMILIES SEEKING ASYLUM 8 (2022), [https://law.ucla.edu/sites/default/files/PDFs/Center\\_for\\_Immigration\\_Law\\_and\\_Policy/Dedicated\\_Docket\\_in\\_LA\\_Report\\_FINAL\\_05.22.pdf](https://law.ucla.edu/sites/default/files/PDFs/Center_for_Immigration_Law_and_Policy/Dedicated_Docket_in_LA_Report_FINAL_05.22.pdf) [<https://perma.cc/5EA4-XS4B>] (finding that the majority of individuals in accelerated removal proceedings in Los Angeles Immigration Court are unrepresented).

successful are significantly greater if they are represented by an attorney regardless of the forum in which an asylum claim is adjudicated.<sup>88</sup>

There is one new and notable exception to the longstanding affirmative and defensive asylum processes described above. On May 31, 2022, the Department of Homeland Security (DHS) and Department of Justice (DOJ) began implementing an interim final rule, colloquially referred to as the Asylum Processing Rule (APR), which creates a hybrid process for certain asylum seekers.<sup>89</sup> Ordinarily, individuals who either present themselves at a port of entry without a visa or who are apprehended within one hundred miles of the border within two weeks of entering the country are subject to expedited removal.<sup>90</sup> Those individuals will be removed without a hearing unless they express an intent to apply for asylum or a fear of persecution, which triggers a “credible fear” interview before an asylum officer.<sup>91</sup> If the person successfully demonstrates a credible fear of persecution during the interview, they are placed in formal removal proceedings, where they have an opportunity to seek asylum and other forms of relief from removal at a hearing before an immigration judge.<sup>92</sup>

The APR expands the role and authority of asylum officers by referring certain individuals who are subject to expedited removal to USCIS for an “asylum merits interview” (AMI) before an asylum

88. See TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, ASYLUM DENIAL RATES CONTINUE TO CLIMB (2020), <https://trac.syr.edu/immigration/reports/630/> [https://perma.cc/ED75-SEFY] (reporting that, for asylum cases adjudicated in immigration courts nationwide in 2020, the success rate for unrepresented respondents was 17.7 percent compared to a success rate of 31.1 percent for represented asylum seekers).

89. See generally Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078 (Mar. 29, 2022) (codified at 8 C.F.R. pts. 208, 212, 235, 1003, 1208, 1235, 1240) (providing the date the interim final rule became effective and establishing timelines for the consideration of applications for asylum and related protection by USCIS). As one well-respected immigration non-profit put it in a recent practice advisory, “[t]he Asylum Processing Rule is the most significant change to asylum adjudication procedures since Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA).” VICTORIA NEILSON, NAT’L IMMIGR. PROJECT, NAT’L LAWS. GUILD, BIDEN’S ASYLUM PROCESSING RULE—THREE MONTHS IN, WHAT PRACTITIONERS NEED TO KNOW 2 (2023), [https://nipnlg.org/sites/default/files/2023-02/2022\\_7\\_Sept-FAQs-asylum-processing-rule.pdf](https://nipnlg.org/sites/default/files/2023-02/2022_7_Sept-FAQs-asylum-processing-rule.pdf) [https://perma.cc/4MYM-TN7V].

90. See 8 U.S.C. § 1225(c)(1); 8 C.F.R. § 235.3(b)(1)(ii)(2) (2022); see also HILLEL R. SMITH, CONG. RSCH. SERV., IF12162, FEDERAL AGENCY RULE EXPANDS ASYLUM OFFICERS’ AUTHORITY (2022), <https://crsreports.congress.gov/product/pdf/IF/IF12162/2> [https://perma.cc/R7F3-WMKA] (“[M]any aliens arriving to the United States, or who have recently entered the country without inspection, are subject to an ‘expedited removal’ process under § 235(b)(1) of the Immigration and Nationality Act (INA).”).

91. 8 C.F.R. § 235.3(b)(4) (2022).

92. See 8 U.S.C. § 1225(b)(1)(B)(ii).

officer, rather than placing them in formal removal proceedings.<sup>93</sup> For those subject to the rule, which is being implemented in phases, referral to USCIS kicks off a fast-tracked and more extensive version of the affirmative asylum process.<sup>94</sup> The written record of the positive credible fear finding acts as the individual's asylum application, and an asylum officer must conduct an AMI between twenty-one and forty-five days after the asylum seeker is served with the positive credible fear finding.<sup>95</sup> If the asylum officer denies asylum, they may consider the person's eligibility for withholding of removal and protection under the Convention Against Torture, which asylum officers are not empowered to do in the course of ordinary affirmative asylum proceedings.<sup>96</sup> In the event the asylum officer orders removal, the applicant may request further review, which results in referral to immigration court for "streamlined removal proceedings."<sup>97</sup> The record of proceedings from the AMI, including the asylum officer's written decision, must be admitted into evidence and considered by the immigration judge during the streamlined removal proceedings,<sup>98</sup> creating the risk that busy immigration judges working on a tight timeline will simply rubber stamp the asylum officer's decision.

Given the accelerated timelines for adjudication of these cases, busy immigration practitioners are hesitant to take them on. Accordingly, the vast majority of asylum seekers whose claims have been processed under the APR have been unable to secure representation for their AMIs.<sup>99</sup> Data from DHS shows that "from May 31, 2022 through April 3, 2023, only 8.4 percent of asylum seekers whose cases have been completed by the Asylum Office under the APR were represented at their AMIs."<sup>100</sup> Asylum seekers who were referred to immigration court under the APR and subjected to similarly expedited

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93. See Procedures for Credible Fear Screening and Consideration of Asylum Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. at 18081.

94. See SMITH, *supra* note 90.

95. *Id.*

96. *Id.*

97. Procedures for Credible Fear Screening and Consideration of Asylum Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. at 18078.

98. 8 C.F.R. § 1240.17(c) (2022).

99. REBECCA GENDELMAN ET AL., HUM. RTS. FIRST, ASYLUM PROCESSING RULE AT ONE YEAR: URGENT FIXES NEEDED TO PROVIDE FAIR, EFFICIENT AND HUMANE ADJUDICATIONS 9 (2023) [https://humanrightsfirst.org/wp-content/uploads/2-23/06/Asylum\\_Processing\\_Rule\\_One\\_Year\\_Report\\_June-2023.pdf](https://humanrightsfirst.org/wp-content/uploads/2-23/06/Asylum_Processing_Rule_One_Year_Report_June-2023.pdf) [<https://perma.cc/7EA2-XDFY>].

100. *Id.* at 3.

timelines there also struggled to find lawyers to represent them.<sup>101</sup> This inability to secure counsel makes it all the more difficult for applicants to secure asylum or other relief from removal given that individuals who are represented are at least twice as likely to receive asylum than unrepresented individuals.<sup>102</sup> In light of this significant change to asylum procedures, which places even more power in the hands of asylum officers, the need to better understand the inner workings of asylum offices and to push for meaningful reform has become all the more urgent.

#### D. Prior Studies of The U.S. Affirmative Asylum System

In general, relatively little is known about the inner workings of U.S. asylum offices. Studies of the affirmative asylum system are few and far between, in large part because its lack of transparency makes asylum offices a challenging subject for data gathering. In this section, we provide a brief overview of prior studies into asylum adjudication.

The first empirical study into the process of asylum adjudication in the United States was conducted by Deborah Anker in the early 1990s, about a decade after passage of the Refugee Act.<sup>103</sup> Professor Anker’s study focused on the immigration courts—though she noted that available information at the time suggested that her findings likely applied to the more informal affirmative asylum process as well—and reported on disparities in the adjudication of asylum claims before the immigration courts and the Board of Immigration Appeals.<sup>104</sup> The study found that the adjudicatory system was characterized by “*ad hoc* rules and standards.”<sup>105</sup> Professor Anker explained:

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101. *Id.* Only 41 percent of asylum seekers whose claims were adjudicated in immigration courts under the accelerated timeline of the APR were represented, compared with over 90 percent of all asylum seekers whose cases were decided in the immigration courts during Fiscal Year 2022. *Id.*

102. *Id.*; see also HUM. RTS. FIRST, INADEQUATE ACCESS TO LEGAL REPRESENTATION, RUSHED TIMELINES IMPEDE MEANINGFUL OPPORTUNITY TO SEEK ASYLUM UNDER NEW ASYLUM PROCESSING RULE 1 (2022), <https://humanrightsfirst.org/wp-content/uploads/2022/09/AsylumMeritsInterviewsFactSheet.9.14.22.pdf> [<https://perma.cc/68F7-BQYT>] (“Counsel in asylum adjudication continues to be crucial: asylum seekers with lawyers during AMIs were more than three times more likely to receive asylum than unrepresented individuals.”).

103. Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 436 (1991).

104. *Id.* at 446–47.

105. *Id.* at 446.

Despite Congress' goals in creating statutory asylum procedures, factors rejected by Congress—including ideological preferences and unreasoned and uninvestigated political judgments—continue to influence the decision-making process. As observed in this study, the current process not only falls short of Congress' mandate for fair and uniform treatment of asylum claims, but bureaucratic inefficiencies, often inaccurately attributed to asylum applicants and their attorneys, cause significant delays in reaching final determinations of cases.<sup>106</sup>

Another decade or so later, Jaya Ramji-Nogales, Andrew I. Schoenholtz and Phillip G. Schrag conducted a comprehensive study into disparities in asylum adjudications at all levels— asylum offices, immigration courts, the Board of Immigration Appeals, and the U.S. courts of appeals—by analyzing databases of asylum decisions from each body.<sup>107</sup> The results of the study, which were first published in 2007, found “amazing disparities in grant rates” for asylum cases, “even when different adjudicators in the same office each considered large numbers of applications from nationals of the same country.”<sup>108</sup> With respect to asylum offices specifically, the study found that some asylum officers “appear[ed] to have grant rates that reflect personal outlooks rather than office consensus.”<sup>109</sup>

Scholars have continued to build on the foundations laid by these early studies. Other studies have been conducted into discrete aspects of the affirmative asylum system—for example, in 2022 one scholar published a paper focused exclusively on asylum officers' practices related to provision of interpreters to asylum applicants for their interviews.<sup>110</sup> Another examined the impact of the one-year filing deadline and inconsistencies in asylum officers' applications of the exceptions

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106. *Id.* at 446–47.

107. *See generally* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 296 (2007) (“This study analyzes databases of decisions from all four levels of the asylum adjudication process . . . reveal[ing] amazing disparities in grant rates.”).

108. *Id.*; *see also id.* at 302 (“The statistics that we have collected and analyzed . . . suggest that in the world of asylum adjudication, there is remarkable variation in decision making from one official to the next, from one office to the next, from one region to the next . . . even during periods when there has been no intervening change in the law.”).

109. *Id.* at 372.

110. *See* Hillary Mellinger, *Interpretation at the Asylum Office*, 44 LAW & POL'Y 230 (2022).

to that rule.<sup>111</sup> Of particular note in framing our investigation and findings is an empirical study conducted by a sociologist, Talia Shiff, for which she interviewed thirty asylum officers.<sup>112</sup> Importantly, Shiff’s study shed light on the emotional toll asylum officers face in light of their heavy caseloads and the difficult stories they are confronted with on a daily basis.<sup>113</sup> Many asylum officers reported feeling “cynicism and jadedness” after hearing similar stories over and over again, and also reported that they “often rationalized their emotional detachment as a function of applicants’ lack of credibility.”<sup>114</sup>

Our study builds upon this body of existing research by diving deeply into the practices of a single asylum office. Like many prior studies into asylum adjudication in the United States, the data we collected reveals the presence of bias in asylum decision-making and the inconsistent outcomes that result when asylum officers are under resourced, stretched for time, and overexposed to trauma without adequate institutional support.

### *E. Our Study’s Research Methodologies*

Our study employed both quantitative and qualitative research methods. We analyzed documents and data received in response to a Freedom of Information Act (FOIA) request,<sup>115</sup> and we conducted more than one hundred semi-structured and open-ended interviews

111. See Phillip G. Schrag et al., *Rejecting Refugees: Homeland Security’s Administration of the One-Year Bar to Asylum*, 52 WM. & MARY L. REV. 651 (2010).

112. Shiff, *supra* note 47, at 349. The asylum officers and former asylum officers interviewed for Professor Shiff’s study had worked at seven asylum offices: Arlington, Chicago, Los Angeles, Newark, New York, New Orleans (which is a sub-office of the Houston asylum office), and San Francisco. *Id.* Hers was the first empirical study in which that many U.S. asylum officers were interviewed. *Id.*

113. *Id.* at 356–57.

114. *Id.* at 357.

115. *Boston Asylum Office FOIA Production*, AM. C.L. UNION, <https://www.aclu.org/foia-collection/boston-asylum-office-foia-production> [<https://perma.cc/Y8V2-F76P>] (2023). On July 12, 2019, the ACLU of Maine, the University of Maine School of Law’s Refugee and Human Rights Clinic, and the Immigrant Legal Advocacy Project submitted an FOIA request to USCIS with the goal of understanding why the Boston Asylum Office’s approval rates were substantially lower than most other asylum offices around the country. *Id.* Specifically, the request sought “all records regarding the Boston and Newark Asylum Offices’ policies, procedures, objectives, and decisions rendered in the affirmative asylum decision-making process, regarding affirmative asylum applicants since January 2010 who applied for affirmative asylum at the Newark or Boston Asylum Offices.” *Id.* One year after filing the FOIA request, the above-named organizations filed a complaint in the U.S. District Court for the District of Maine against USCIS for failure to comply with the FOIA request. *Id.* In response to the complaint, USCIS agreed to produce approximately 6,121 responsive pages. *Id.* Among those pages were emails, memoranda, trainings, and asylum officer adjudicator logs. *Id.* However, these documents were heavily redacted. *Id.*



with asylees, asylum seekers, immigration attorneys, former asylum officers, and former supervisory asylum officers, which were obtained through purposeful sampling.<sup>116</sup> We received approval of the Institutional Review Board (IRB) before conducting any of our human research to help ensure that the human participants' rights and information were protected. We also obtained a Certificate of Confidentiality through the National Institute of Health to protect the privacy of the individuals who agreed to be interviewed. This additional certificate provides federal, state, and local protection against civil, criminal, administrative, legislative, and other proceedings for all participants in the study.

Interviews with former asylum officers, former supervisory asylum officers, and immigration attorneys conducted as part of our study touched on trends at various asylum offices around the United States, even though the study focused on the Boston Asylum Office more specifically. As such, many of our observations and findings may be true in the other asylum offices scattered throughout the United States.

## II. SUMMARY OF MAJOR FINDINGS

U.S. asylum offices maintain low asylum grant rates, approving just 28 percent of cases on average. Moreover, the grant rates vary significantly among the various asylum offices. With respect to our study, we found that the Boston Asylum Office maintains an asylum grant rate well below that of the national average. When analyzing the average grant rate of asylum offices across the country between 2015 and late 2020, the Boston Asylum Office granted a little over 15 percent of its cases as compared to the national average grant rate of 28 percent.<sup>117</sup> In evaluating the data on *monthly* grant rates during this

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116. The authors of the report conducted a total of 102 interviews: seventy-eight interviews with asylees and asylum seekers, nineteen interviews with immigration attorneys, and five interviews with former asylum officers and supervisory asylum officers. LIVES IN LIMBO, *supra* note 12, at 31.

117. *Id.* at 4; *Boston Asylum Office FOIA Production*, *supra* note 115. As part of the FOIA litigation, USCIS produced a database of the affirmative asylum applications filed between 2010–2020 in the Boston Asylum Office (25,634 applications) and in the Newark Asylum Office (105,235). *Id.* For each application the database included: (1) the U.S. state from which the asylum seeker applied; (2) the asylum seeker's zip code; (3) the asylum seeker's country of birth, citizenship, gender, ethnicity, language, and age at filing; (4) the date that the asylum seeker filed for asylum; (5) the date of the asylum seeker's interview; (6) the date that the asylum office made the decision; (7) the decision made on the asylum seeker's application and very brief reasoning; (8) the asylum officer and supervisory asylum officer assigned to the asylum seeker's application; and (9) whether the asylum seeker was represented by an attorney. *Id.* In analyzing the data, the report authors removed clearly erroneous data and duplicate entries and analyzed the data using the

period, our study found that the Boston Asylum Office’s grant rates dropped into the single digits on multiple occasions. While the Boston Asylum Office maintains the second lowest grant rate in the country, a number of asylum offices around the country also maintain grant rates below that of the national average.

Table 1: Grant Rates of Asylum Offices Nationwide

Asylum Office	Grant Rate
San Francisco	52.4%
New Orleans	46.4%
Los Angeles	36.0%
Chicago	32.4%
Arlington	27.1%
Houston	25.9%
Newark	24.6%
Miami	20.7%
<b>Boston</b>	<b>15.5%</b>
New York	10.6%

Unfortunately, available data for decisions made since the end of 2020 suggests that the low approval rate remains consistent. In the first quarter of Fiscal Year 2022, the Boston Asylum Office’s approval rate remained at 11 percent.<sup>118</sup> Although between January 2022 and September 2022 (quarters two, three, and four of Fiscal Year 2022), the Boston Asylum Office’s grant rate went up to approximately 25 percent,<sup>119</sup> this higher grant rate across the nine-month span falls within the variability of the grant rates revealed in our study: the Boston Asylum Office regularly had grant rates of over 20 percent for months at a time between 2015 and 2020,<sup>120</sup> but the rates invariably plummeted again.<sup>121</sup>

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computer programming language R. *Id.* This data was supplemented with data from USCIS Quarterly Stakeholder Reports. *Id.*

118. See AFFIRMATIVE ASYLUM OVERVIEW, *supra* note 17, at 10.

119. See U.S. CITIZENSHIP & IMMIGR. SERVS., NUMBER OF FORM I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL: JANUARY 1, 2022–MARCH 31, 2022 (2022), [https://www.uscis.gov/sites/default/files/document/data/AsylumDivisionQuarterlyStats\\_FY22Q2\\_I\\_589\\_Completion\\_Outcome.csv](https://www.uscis.gov/sites/default/files/document/data/AsylumDivisionQuarterlyStats_FY22Q2_I_589_Completion_Outcome.csv) [https://perma.cc/9LDN-AHJQ]; NUMBER OF FORM I-589: APRIL 2022–JUNE 2022, *supra* note 17; NUMBER OF FORM I-589: JULY 2022–SEPTEMBER 2022, *supra* note 17.

120. LIVES IN LIMBO, *supra* note 12, at 1.

121. See NUMBER OF FORM I-589: JULY 2022–SEPTEMBER 2022, *supra* note 17; NUMBER OF FORM I-589: APRIL 2022–JUNE 2022, *supra* note 17. Another factor that undoubtedly impacted grant rates during the first nine months of 2022 is the adjudication of Operation Allies Welcome

To be sure, many of the problems identified in our study are likely not isolated problems but rather are reflective of larger systemic failures pervasive in other asylum offices around the country.<sup>122</sup> As part of this study, we interviewed former asylum officers and supervisory asylum officers with experience working in several asylum offices. Many spoke of biased decision-making, an outsized role of upper management and/or supervisory asylum officers, and a lack of time to complete their job functions—functions that are critical to ensuring U.S. compliance with international and domestic asylum protections.<sup>123</sup>

Our study ultimately finds that the Boston Asylum Office is failing asylum applicants in violation of international obligations and U.S. domestic law. The biased and combative asylum interview process coupled with the asylum backlog and years-long wait to have their asylum applications adjudicated has devastating impacts on asylum applicants and their families. If an asylum officer does not grant the case, in most instances the case is referred to immigration court, which is an intentionally adversarial setting.<sup>124</sup> Once in front of an immigration court, asylum applicants face even lengthier backlogs in getting heard by an immigration judge, leading to further delay in obtaining an asylum decision.<sup>125</sup> Our study found that asylum seekers face years

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(OAW) cases—asylum claims filed by Afghan nationals who were paroled into the United States after the Taliban takeover in Afghanistan—which USCIS reports “have an approval rate greater than 99%.” See ASYLUM QUARTERLY ENGAGEMENT, *supra* note 17, at 2.

122. A recent investigation by another law school clinic, which was modeled after our investigation, revealed that similar systemic issues to those we discovered at the Boston Asylum Office are taking place at the New York Asylum Office. See SAFE HARBOR CLINIC, BROOKLYN L. SCH., A FIEFDOM ON LONG ISLAND: AN INVESTIGATION INTO THE CULTURE AND PRACTICES OF THE NEW YORK ASYLUM OFFICE (2023), [https://www.brooklaw.edu/-/media/Brooklaw/Academics/Clinics-and-Externships/PDFs/A-Fiefdom-On-Long-Island.pdf?utm\\_source=https://perma.cc/RZ8N-HWXC](https://www.brooklaw.edu/-/media/Brooklaw/Academics/Clinics-and-Externships/PDFs/A-Fiefdom-On-Long-Island.pdf?utm_source=https://perma.cc/RZ8N-HWXC). The investigation in New York, like ours, involved review of publicly available information from USCIS, information produced in response to FOIA requests, and interviews with asylum officers, immigration attorneys, and asylum seekers. *Id.* at 10. The report reveals a dysfunctional system within New York Asylum Office—like that in the Boston Asylum Office—characterized by a culture of fear where many asylum officers refer meritorious asylum cases to immigration court to save time, improperly focus on immaterial inconsistencies in asylum seekers’ stories, and are aggressive and combative during interviews. *Id.* at 4–6, 12.

123. These findings are consistent with a 2021 empirical study involving interviews with over thirty former asylum officers. Shiff, *supra* note 47, at 356–57.

124. See 8 U.S.C. § 1229a(b)(1) (“The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses.”).

125. See Elliot Spagat, *Immigrants Waiting 10 Years in US Just to Get a Court Date*, ASSOCIATED PRESS (Apr. 26, 2023, 11:09 AM), <https://apnews.com/article/immigration-courts-wait-54bb5f7c18ca437c6ca7f28231ff0edf> [<https://perma.cc/88MP-DVC7>] (reporting that immigration court backlog reached 2.1 million cases in January 2023). See generally TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, IMMIGRATION COURT BACKLOG NOW GROWING FASTER THAN

of legal limbo leading to significant instability.<sup>126</sup> And, the years-long wait to be granted asylum causes lengthy separation from family members left behind (many of whom remain in life-threatening danger) and the deterioration of an asylum applicant's mental health.<sup>127</sup>

These impacts are preventable where immigration judges ultimately grant asylum in most affirmative asylum applications referred to immigration court.<sup>128</sup> Most asylum offices have approval rates below that of the immigration courts. In fact, the most recent data reported by the Transactional Record Access Clearinghouse revealed that over three quarters of the asylum cases referred to the immigration courts by the asylum offices are granted by immigration courts.<sup>129</sup>

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EVER, BURYING JUDGES IN AN AVALANCHE OF CASES (2022), <https://trac.syr.edu/immigration/reports/675/> [<https://perma.cc/YQ5G-692M>] (discussing the growing backlog of cases in immigration court); *Immigration Court Asylum Backlogs*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (July 2023), <https://trac.syr.edu/phptools/immigration/asylum/> [<https://perma.cc/XZ66-Y9BY>] (visually demonstrating the growing number of pending asylum cases in immigration court).

126. See Interview with Asylum Attorney (July 2021) (on file with authors) (describing how many of her clients have been waiting since 2016 for their asylum interviews).

127. See Interview with Asylum Attorney (Nov. 2021) (on file with authors) (“[My client is] having severe depression. This has derailed his life . . . I’ve never seen an individual on the brink of a nervous breakdown. I don’t know if he’ll survive this or overcome this.”); see also ADES AND KIZUKA, *supra* note 71, at 7 (“Case delays impede asylum seekers’ ability to overcome trauma and may compound it. As Dr. Melba Sullivan, a staff psychologist at the Bellevue Program for Survivors of Torture (PSOT), explained to Human Rights First, “prolonged delays in the adjudication of asylum claims is an ‘ongoing stressor,’ causing asylum seekers to experience prolonged exposure to the trauma trigger of uncertainty of future protection.”); CTR. FOR VICTIMS OF TORTURE, DESIGNING A TRAUMA-INFORMED ASYLUM SYSTEM IN THE UNITED STATES 6 (2021), [https://www.cvt.org/sites/default/files/attachments/u101/downloads/2.4.designing\\_a\\_trauma\\_informed\\_asylum\\_report.feb42021.pdf](https://www.cvt.org/sites/default/files/attachments/u101/downloads/2.4.designing_a_trauma_informed_asylum_report.feb42021.pdf) [<https://perma.cc/G4XB-C58T>] (“In CVT’s experience, the prolonged uncertainty as to when and if asylum seekers will see their families again can cause such acute feelings of hopelessness and depression that it can result in suicidality.”).

128. ADES & KIZUKA, *supra* note 71, at 1–4.

129. See TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, SPEEDING UP THE ASYLUM PROCESS LEADS TO MIXED RESULTS (2022), <https://trac.syr.edu/reports/703/> [<https://perma.cc/955Z-9QLR>] (“Over three-quarters (76%) of cases USCIS asylum officers had rejected were granted asylum on rehearing by Immigration Judges.”). Compare EXEC. OFF. FOR IMMIGR. REV., ADJUDICATION STATISTICS: FY 2023 SECOND QUARTER ASYLUM GRANT RATES BY COURT (2023), <https://www.justice.gov/eoir/page/file/1160866/download> [<https://perma.cc/JS7Y-N4R6>] (showing an asylum grant rate of nearly 30 percent for the Boston Immigration Court in Fiscal Year 2022), with AFFIRMATIVE ASYLUM OVERVIEW, *supra* note 17, at 10 (showing an asylum grant rate of approximately 11 percent for the Boston Asylum Office in the first quarter of Fiscal Year 2022).

## A. Specific Findings

### 1. Bias in Asylum Adjudications

*“Humans are not neutral. We are biased, we are discriminatory. People have a very hard time being a neutral adjudicator . . . . There are very few people who can naturally put their biases aside.”*<sup>130</sup>

The Boston Asylum Office exhibits bias against applicants from certain nationalities, as displayed in Table 2 below.

Table 2: Grant and Referral Rates by Asylum Seeker’s Country of Citizenship

Country of Citizenship	Boston Asylum Office		Newark Asylum Office	
	Total Decisions	Grant Rate	Total Decisions	Grant Rate
Angola	253	2%	75	17%
Democratic Republic of Congo	163	4%	141	33%
El Salvador	1,539	13%	4,386	25%
Rwanda	86	20%	17	35%
Uganda	469	21%	87	38%
Burundi	53	26%	24	83%
Syria	32	34%	221	67%
Egypt	151	44%	1,593	72%
Cameroon	64	48%	217	44%
Afghanistan	17	59%	32	50%
Turkey	167	59%	1,666	86%
Iran	29	69%	71	58%

The Boston Asylum Office’s failure to maintain a nationality-neutral determination process directly violates international and domestic law. Notably, some countries—including Angola, Democratic Republic of Congo (DRC), Rwanda, and Burundi—all have much lower grant rates in the Boston Asylum Office as compared to the Newark Asylum Office.<sup>131</sup> From 2015 to 2020, the Boston Asylum Office granted asylum to just 4 percent of asylum applicants from the DRC despite the extensive documentation of human rights abuses in the DRC. Indeed, the U.S. Department of State acknowledges year

130. Interview with Former Asylum Officer (Oct. 2021) (on file with authors).

131. The Newark Asylum Office is useful for comparison for this data because, prior to the creation of the Boston Asylum Office, the Newark Asylum Office adjudicated affirmative asylum cases for the same geographical region and had a higher average grant rate than the Boston Asylum Office. AFFIRMATIVE ASYLUM OVERVIEW, *supra* note 17, at 10–11.

after year that “[s]ignificant human rights” abuses occur in the DRC, including “unlawful or arbitrary killings, . . . forced disappearances; [and] torture,” all committed by DRC security forces with impunity against its citizens.<sup>132</sup>

This bias against applicants from certain countries is further corroborated by experiences of asylum attorneys appearing before the Boston Asylum Office who were interviewed as part of this study. One asylum attorney noted:

[T]he belief of the Boston Asylum Office is that [clients from certain African countries] are not telling the truth . . . . We have taken a number of cases that have been referred from the Boston Asylum Office and then we have won them in court without a problem and there has been no suspicion about negative credibility.<sup>133</sup>

Indeed, asylum attorneys interviewed as part of this study commented that asylum officers exhibited bias against applicants from certain countries, assuming all applicants from those countries were lying.<sup>134</sup>

Much has been written on bias among judges and other adjudicators. As humans, adjudicators maintain biases that influence their decisions.<sup>135</sup> This is especially true when there are gaps in the law or the laws are unclear. In those instances, decision-makers are forced to fill the gaps—often with their personal judgments and biases.<sup>136</sup> These

132. BUREAU OF DEMOCRACY, HUM. RTS., & LAB., U.S. DEP’T OF STATE, 2021 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: DEMOCRATIC REPUBLIC OF THE CONGO 2 (2022), <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/democratic-republic-of-the-congo/> [https://perma.cc/2LP4-T4PT]; accord BUREAU OF DEMOCRACY, HUM. RTS., & LAB., U.S. DEP’T OF STATE, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: DEMOCRATIC REPUBLIC OF THE CONGO (2021), <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/democratic-republic-of-the-congo/> [https://perma.cc/GDT2-MB CG].

133. Interview with Asylum Attorney (Jan. 2022) (on file with authors).

134. Interview with Asylum Attorney (July 2021) (on file with authors) (explaining negative outcomes in Burundian and Angolan cases and describing a culture of distrust of applicants from those countries within the Boston Asylum Office).

135. See Anjum Gupta, *Dead Silent: Heuristics, Silent Motives, and Asylum*, 48 COLUM. HUM. RTS. L. REV. 1, 27 (2016); Shiff, *supra* note 47, at 360 (“Sociologists have long shown that decision makers do not evaluate pure ‘strangers’ but rather raced, gendered, and otherwise categorizable strangers. These attributed categorizations affect how decision makers interpret peoples’ behaviors and stories and relate to them.” (citations omitted)).

136. See Shiff, *supra* note 47, at 341–42 (discussing how asylum officers’ moral schemas shape their decision-making).

When [asylum] officers encounter standard claims—that is, claims that straightforwardly fit codified legal categories and extralegal categorizations of deservingness—they focus on verifying the applicant’s credibility and are thus more likely to directly

biases might be influenced by personal feelings and stereotypes toward certain ethnic groups, religions, races, gender classifications, and the like.<sup>137</sup> With respect to racial biases, studies have shown that judges are influenced by implicit biases toward certain racial groups. These biases can have a dramatic impact on decision-making. For example, multiple studies in the criminal law context have found disparate treatment along racial lines for individuals convicted of the same crimes.<sup>138</sup> Similarly, in the context of domestic violence asylum cases, the lack of clear, uniform asylum standards related to nexus and motive helps explain why personal bias can so easily come into play in domestic violence cases where motive is harder to corroborate and ascertain.<sup>139</sup> In that context, decision-makers often rely, consciously or unconsciously, on gender-based stereotypes related to, among other things, the societal roles of men and women.<sup>140</sup>

Scholars and judges in federal courts have long criticized the role of bias in immigration judges' decision-making. However, as we highlighted above, little is known about the influence of bias in affirmative asylum decision-making beyond the data revealed through our study. This is because, as we noted earlier, much of the affirmative asylum process takes place behind closed doors with very little transparency.<sup>141</sup> A look at federal courts' findings with respect to bias in immigration court proceedings provides a glimpse into biases that likely pervade agency decision-making not only within U.S. immigration courts but at all levels.

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draw on stereotypes and biases and approach the applicant's information with suspicion. Conversely, when asylum officers encounter claims that do not qualify according to the codified law but do resonate with schematic categorizations of deservingness, they become less skeptical of case-specific information concerning credibility, and indeed, use that information instead to critically reflect on the legitimacy of agency practices and regulations.

*Id.*

137. See Gupta, *supra* note 135, at 30, 38; Shiff, *supra* note 47, at 346 ("More often than not, officers face missing or conflicting information and must use their discretion to assess the veracity of the applicant's claim.").

138. Gupta, *supra* note 135, at 30; see also Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV., 1995, 1196-97 (2009) (citing various studies in the criminal law context wherein researchers uncovered that "black defendants fare worse in court than do their white counterparts").

139. See Gupta, *supra* note 135, at 16 ("[W]hen motives are silent, judges are called upon to fill in the gaps created by such silence, and often their biases work against a finding that nexus has been established.").

140. Gupta, *supra* note 135, at 29.

141. See *supra* Section I.C.

U.S. courts of appeals have vacated agency decisions based on the apparent bias of immigration judges for myriad reasons.<sup>142</sup> For example, in one case the immigration judge repeatedly interrupted the testimony of the asylum applicant and his expert witness with inappropriate and irrelevant questions about the religious beliefs of various witnesses, among other topics, and refused to consider relevant corroborating evidence submitted by the applicant.<sup>143</sup> The court held that the immigration judge’s “wholly inappropriate” comments and questions “suggest[ed] a larger problem of apparent bias on the part of the [Immigration Judge (IJ)] .”<sup>144</sup> In another case, the court vacated the IJ’s decision and remanded with instructions that the case be heard by a different IJ where the original IJ had demonstrated bias towards the Chinese asylum applicant “and perhaps other Chinese asylum applicants.”<sup>145</sup> Courts have also found that IJs demonstrated bias based on sexual orientation<sup>146</sup> and ethnicity<sup>147</sup> and a general predisposition to disbelieve asylum applicants.<sup>148</sup>

The study by Jaya Ramji-Nogales, Andrew I. Schoenholtz and Phillip G. Schrag into inconsistencies in asylum decision-making, discussed above,<sup>149</sup> found “remarkable variation” in asylum adjudications within both the U.S. affirmative and defensive asylum

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142. *See, e.g.*, *Castilho de Oliveira v. Holder*, 564 F.3d 892, 900 (7th Cir. 2009) (vacating and remanding where “cumulatively disturbing” behavior by the immigration judge evidenced bias and showed that applicant “was denied a meaningful opportunity to be heard before a neutral [immigration judge]”); *Islam v. Gonzales*, 469 F.3d 53, 55 (2d Cir. 2006) (vacating agency decision where the immigration judge’s “argumentative, sarcastic, impolite, and overly hostile manner” toward the asylum applicant demonstrated bias and created substantial doubt as to fairness of proceedings); *Korytnyuk v. Ashcroft*, 396 F.3d 272, 292 (3d Cir. 2005) (declining to uphold immigration judge’s adverse credibility determination where the immigration judge ignored parts of the record “in favor of the [immigration judge]’s unsubstantiated, personal view”); *Sanchez-Cruz v. I.N.S.*, 255 F.3d 775, 780 (9th Cir. 2001) (finding that asylum applicant raised colorable due process claim where record showed that IJ exhibited “bias toward single mothers”).

143. *Castilho de Oliveira*, 564 F.3d at 896–900.

144. *Id.* at 899.

145. *Huang v. Gonzales*, 453 F.3d 142, 150–51 (2d Cir. 2006).

146. *See Ali v. Mukasey*, 529 F.3d 478, 491–92 (2d Cir. 2008).

147. *See Smolniakova v. Gonzales*, 422 F.3d 1037, 1049 (9th Cir. 2005) (remarking upon the immigration judge’s “seemingly biased” attitude towards Jewish asylum applicant describing anti-Semitic attack); *Sukwanputra v. Gonzales*, 434 F.3d 627, 637–38 (3d Cir. 2006) (finding bias where the immigration judge made multiple inappropriate remarks, including that the “whole world does not revolve around you and the other Indonesians that just want to live here because they enjoy the United States”).

148. *Cham v. Att’y Gen. of U.S.*, 445 F.3d 683, 690–94 (3d Cir. 2006) (describing in detail the immigration judge’s verbal abuse of the asylum applicant during a two-day hearing and discussing prior cases in which the court had found bias on the part of the same immigration judge).

149. *See supra* Section I.D.



systems.<sup>150</sup> This variation appeared to be “strongly influenced by the identity or attitude” of the individual asylum officer or judge assigned to the case.<sup>151</sup> The study, which analyzed 140,000 decisions by 225 immigration judges over a four-and-a-half-year period, found “amazing disparities in grant rates, even when different adjudicators in the same office each considered large numbers of applications from nationals of the same country.”<sup>152</sup>

Given the stakes in asylum cases, the decision of where to reside remains a life-or-death decision depending on the asylum grant rates of the particular asylum office or immigration court with jurisdiction over the asylum application.<sup>153</sup> For example, in 2022 the overall asylum grant rate at the Atlanta Immigration Court was less than 1 percent, while the overall grant rate at the New York Immigration Court was 65 percent.<sup>154</sup> Similarly, the decision within any given asylum office or immigration court of which officer or judge to assign to the case carries life-or-death consequences where asylum grant rates vary dramatically among adjudicators, even from within the same office or court.<sup>155</sup> For example, one judge in New York granted asylum to just

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150. Ramji-Nogales et al., *supra* note 107, at 302.

151. *Id.* (“The statistics that we have collected and analyzed . . . suggest that in the world of asylum adjudication, there is remarkable variation in decision making from one official to the next, from one office to the next, from one region to the next, from one Court of Appeals to the next, and from one year to the next, even during periods when there has been no intervening change in the law.”); Mica Rosenberg et al., *They Fled Danger at Home to Make a High-Stakes Bet on U.S. Immigration Courts*, REUTERS (Oct. 17, 2017, 1:00 PM), <https://www.reuters.com/investigates/special-report/usa-immigration-asylum/> [perma.cc/N9P2-9C32] (“In Charlotte, immigrants are ordered deported in 84 percent of cases, more than twice the rate in San Francisco, where 36 percent of cases end in deportation.”). The Reuters investigation also found that “an immigration judge’s particular characteristics and situation can affect outcomes. Men are more likely than women to order deportation, as are judges who have worked as ICE prosecutors.” *Id.*

152. Ramji-Nogales et al., *supra* note 107, at 296.

153. See Vyoma Raman et al., *Bias, Consistency, and Partisanship in U.S. Asylum Cases: A Machine Learning Analysis of Extraneous Factors in Immigration Court Decisions*, EAAMO ‘22: EQUITY & ACCESS IN ALGORITHMS, MECHANISMS, & OPTIMIZATION, Oct. 2022, at 1, <https://eaamo2022.eaamo.org/papers/raman-4.pdf> [https://perma.cc/SZ9P-E5QN] (“Using predictive modeling, [the authors] explain 58.54% of the total decision variability using two metrics: partisanship and inter-judge cohort consistency. Thus, whether the [U.S. Executive Office of Immigration Review] grants asylum to an applicant or not depends in majority on the combined effects of the political climate and the individual variability of the presiding judge—not the individual merits of the case.”).

154. TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, ASYLUM SUCCESS VARIES WIDELY AMONG IMMIGRATION JUDGES (Dec. 9, 2021), <https://trac.syr.edu/immigration/reports/670/> [https://perma.cc/3YFC-H7CF].

155. Ramji-Nogales et al., *supra* note 107, at 296 (“In many cases, the most important moment in an asylum case is the instant in which a clerk randomly assigns an application to a particular asylum officer or immigration judge.”); see also Rebecca Hamlin, *Ideology, International Law, and the INS: The Development of American Asylum Policies*, 47 POLITY 320, 334 (2015) (stating

5 percent of asylum seekers while another in the same court granted asylum to 95 percent of asylum seekers.<sup>156</sup>

## 2. Improper Focus on Credibility—Searching for Inconsistencies

The subjective nature of asylum credibility determinations very likely exacerbates the bias found at the Boston Asylum Office—bias that, as noted earlier, is likely pervasive in asylum adjudications across the United States.

Our study found that asylum officers at the Boston Asylum Office place an inordinate amount of focus on credibility and look for small, peripheral details to find “inconsistencies” rather than focus on the salient facts of an asylum applicant’s case.<sup>157</sup> Many asylum officers at the Boston Asylum Office presume asylum seekers are lying and search for *any reason*, regardless of materiality, to find an asylum seeker not credible.<sup>158</sup> Interviews with former supervisory asylum officers, former asylum seekers, and immigration attorneys revealed that asylum officers in Boston supported negative credibility assessments by pointing to small, often immaterial inconsistencies in an applicant’s story.<sup>159</sup>

Former asylum officers and supervisory asylum officers with experience in various asylum offices throughout the United States explained during interviews an informal policy of the “rule of threes,” where a finding of three inconsistencies in an asylum applicant’s story supports an adverse credibility finding, which in turn leads to a denial of asylum or referral to immigration court for removal proceedings.<sup>160</sup> As one former asylum officer noted:

[T]he default—and this is an internal unwritten rule—is that you default to credibility assessments. The rule is a rule of threes. If there are three inconsistencies or not sufficient candidness (things that are highly subjective and easy to write up and very difficult to critique on the supervisory end),

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that outcomes in asylum cases in the United States are “highly reliant on the individual decision maker”).

156. TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, *supra* note 154.

157. Interview with Asylum Attorney (Jan. 2022) (on file with authors) (“Questions seemed to be a direct way to suggest that the client was not credible . . . [I]t was completely unnecessary and not relevant and really insensitive to the fact that [the client] was super traumatized and trying to recount horrific details about violence they experienced.”).

158. See LIVES IN LIMBO, *supra* note 12, at 13.

159. See Interview with Former Asylum Officer (Feb. 2022) (on file with authors).

160. Interview with Former Asylum Officer (Dec. 2021) (on file with authors).

identifying three areas of credibility issues is fatal to an applicant's decision.<sup>161</sup>

Interviews with asylum attorneys confirmed that asylum officers spend a significant amount of time during the asylum interview searching for the inconsistencies, rather than seeking to elicit responses that go to the merits of the overall asylum claim. One asylum attorney described observing asylum interviews where the asylum officers were "looking really purposefully and aggressively toward any indication that there is an inconsistency or any indication that there is a lack of credibility and asking confusing and adversarial questions to try to trip up clients into misstating a minor or irrelevant fact or detail."<sup>162</sup> Another asylum attorney commented that the affirmative asylum process is a "waste of . . . time" where 99 percent of the attorney's cases were referred to immigration court:

The entire strategy that they have is to try to note as many inconsistencies—or to create as many inconsistencies and make note of them—as possible. And that was it, they would spend a lot of time on small issues, confusing the client, distracting them, and never really asking about persecution because they would have enough to find material inconsistency and refer [the asylum applicant to immigration court].<sup>163</sup>

As a result of this inordinate focus on credibility, asylum attorneys spend much of their time preparing clients for intense questioning related to credibility (as opposed to focusing on the merits of the overall case), recognizing that this is the most commonly articulated reason used in affirmative asylum officer decision-making to justify a denial or referral.

To be sure, fraud and security concerns are present in some asylum claims.<sup>164</sup> And asylum officers have the difficult job of determining whether an applicant's claim is materially fraudulent or if serious

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161. *Id.*

162. Interview with Asylum Attorney (Jan. 2022) (on file with authors).

163. Interview with Asylum Attorney (July 2021) (on file with authors).

164. Alisa Chang, *Thousands Could Be Deported as Government Targets Asylum Mills' Clients*, NPR (Sept. 28, 2018, 4:46 PM), <https://www.npr.org/sections/money/2018/09/28/652218318/thousands-could-be-deported-as-government-targets-asylum-mills-clients> [perma.cc/FC2W-GHLT].

security concerns are present.<sup>165</sup> However, as discussed below, the presumption that all asylum claims are fraudulent until proven otherwise loses sight of the refugee and the various challenges asylum seekers face in consistently retelling their stories. Moreover, scholars have found that when asylum officers are forced to engage in reflexive rather than deliberative thought, they view themselves and their job functions primarily as “gatekeepers” charged with “policing fraudulent applicants and safeguarding the integrity of the system,”<sup>166</sup> functions which are in stark contrast to the core humanitarian goals of the affirmative asylum system.

Indeed, while credibility under U.S. asylum law should be just *one factor* in assessing the merits of an asylum claim, credibility is often the “single most salient issue” in practice.<sup>167</sup> Negative credibility determinations are the leading reason asylum officers and judges refer or deny asylum claims.<sup>168</sup> Yet scholars, courts, and commentators have observed for decades that U.S. federal statutory law related to credibility determinations allow individual implicit bias and personal judgment to influence decision-making.<sup>169</sup>

165. EWING & JOHNSON, *supra* note 42 (recognizing that “asylum adjudication may be the most difficult adjudication known to administrative law, owing both to the high stakes and the unique elusiveness of the facts” (quoting Martin, *supra* note 66)).

166. Shiff, *supra* note 47, at 361.

167. BRIDGET M. HAAS, *Asylum Officers, Suspicion, and the Ambivalent Enactment of Technologies of Truth*, in TECHNOLOGIES OF SUSPICION AND THE ETHICS OF OBLIGATION IN POLITICAL ASYLUM 105, 111 (Bridget M. Haas & Amy Shuman eds., 2019).

168. Anker, *supra* note 103, at 515. Anecdotally, former asylum officers interviewed as part of this study commented that adverse credibility determinations accounted for the majority of their referrals or denials. Unfortunately, the Boston Asylum Office failed to produce data regarding the legal reasons behind their asylum denials and referrals, despite requests through this study’s FOIA litigation for them to do so. As a result, our study was forced to rely on anecdotal evidence derived from interviews. This anecdotal evidence is supported by at least one study from the early 1990s that found that “the assessment of credibility is one of the most critical elements in the asylum determination process.” *Id.* Indeed, adverse credibility findings factored into 48 percent of the decisions rendered during the course of the Harvard study. *Id.*; see also Kagan, *supra* note 53, at 368–69 (noting that establishing credibility is perhaps the “single biggest substantive hurdle” in refugee status determinations and explaining that credibility determinations in the asylum and refugee contexts are given very little scrutiny by appellate tribunals, making it difficult, if not impossible, for individuals seeking refugee or asylum protection to overcome a denial or referral).

169. Kagan, *supra* note 53, at 367 (“Despite its importance, credibility-based decisions in refugee and asylum cases are frequently based on personal judgment that is inconsistent from one adjudicator to the next, unreviewable on appeal, and potentially influenced by cultural misunderstandings.”); Ramji-Nogales et al., *supra* note 107, at 306 (explaining that credibility assessments differ from legal assessments of an applicant’s eligibility for asylum in that credibility assessments are “more difficult and subjective,” leading to “greater variability from one adjudicator to another”); Shiff, *supra* note 47, at 363 (finding that “the centering of the [asylum] evaluation process on credibility prompted [asylum] officers to draw directly on group stereotypes and, in many cases, increased their suspicion of applicants”).

This search for “inconsistencies” fails to recognize that many asylum seekers have experienced trauma and may suffer post-traumatic stress-induced memory loss.<sup>170</sup> Many attorneys interviewed as part of our study stated that the majority of their clients suffer from major depression and post-traumatic stress disorder and struggle with the consequent memory loss associated with these diagnoses.<sup>171</sup> In fact, focusing on peripheral details as a means of disentangling truth from falsehood is improper at best. Studies have shown that focusing on specific details such as dates, names, and numbers in an effort to ascertain the truth is questionable even in cases where individuals have not experienced trauma.<sup>172</sup>

Notably, given the massive asylum backlogs faced by asylum offices across the country,<sup>173</sup> years often go by between when the asylum applicant experienced the trauma that necessitated fleeing their country and their asylum interview. Those years of waiting can lead to faded memories, particularly with respect to details about specific dates and times and smaller events.

Language interpretation issues also factor into adverse credibility determinations in asylum adjudications not only at the Boston Asylum Office but in asylum adjudications throughout the United States. The data collected from this study’s FOIA request and subsequent litigation revealed that English speakers are much more likely to be granted asylum at the Boston Asylum Office than non-English speakers, even though speaking English is irrelevant to an individual’s eligibility for asylum. As demonstrated in Figure 1 below, English-speaking asylum seekers are nearly *twice* as likely to be granted asylum as compared to non-English speakers.<sup>174</sup> Conversely, non-English speakers are referred to immigration court 80 percent of the time, while English speakers are referred to immigration court only 58 percent of the time.<sup>175</sup>

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170. Lindsay M. Harris & Hillary Mellinger, *Asylum Attorney Burnout and Secondary Trauma*, 56 WAKE FOREST L. REV. 733, 751 (2021).

171. *See id.* at 747; Urs Hepp et al., *Inconsistency in Reporting Potentially Traumatic Events*, 188 BRIT. J. PSYCHIATRY 278, 280 (2006).

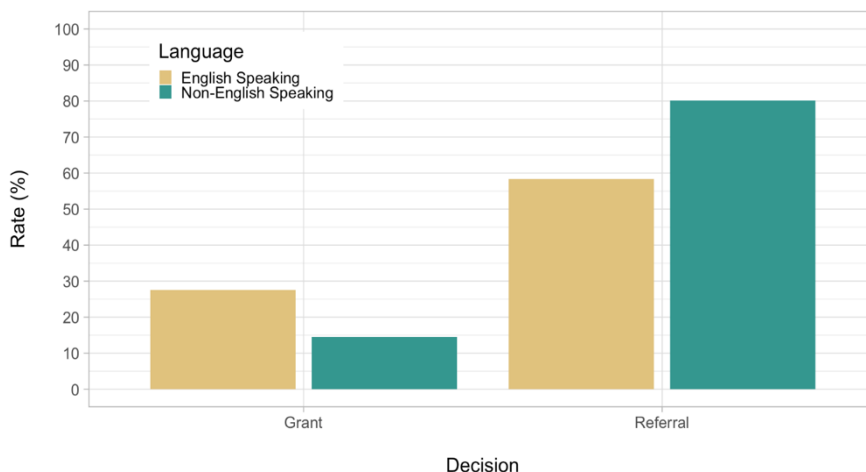
172. *See* CAROL BOHMER & AMY SHUMAN, REJECTING REFUGEES: POLITICAL ASYLUM IN THE 21ST CENTURY 135 (2007).

173. *See Affirmative Asylum Interview Scheduling*, *supra* note 70 (listing number of pending asylum cases in each asylum office as of December 31, 2021).

174. LIVES IN LIMBO, *supra* note 12, at 15.

175. *Id.*

Figure 1: English Speakers Fare Better Than Non-English Speakers



Given the focus on credibility in asylum adjudications, it is unsurprising that non-English speakers fare far worse than their English-speaking counterparts where interpretation (especially poor interpretation) is often riddled with errors, omissions, and misunderstandings.<sup>176</sup> A Harvard study conducted in the early 1990s found that immigration judges cited credibility as a factor in denying asylum in close to half of the decisions that formed the basis of the study.<sup>177</sup> The study found that adverse credibility findings are likely attributable, at least in part, to interpreter mistakes and distortions.<sup>178</sup> These mistakes and distortions in interpreting render the asylum applicants' testimony fragmented, unresponsive, evasive, and even unintelligible.<sup>179</sup> As such, foreign language interpretation issues and the inherent consequences with respect to credibility assessments likely play a significant role in explaining the disparities in asylum grant rates between English and non-English-speaking applicants.

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176. See Anker, *supra* note 103, at 513 (“Interpreter errors, including omissions, dilutions, or other distortions of the applicant’s testimony, affected applicants’ credibility. In some instances, the interpreter’s rendition of the applicant’s testimony communicated a fundamentally different story in English than that which the applicant had told in her native language.”).

177. *Id.* at 515.

178. *Id.* at 509.

179. *Id.* at 515.

### 3. The Oversized Role of Supervisory Asylum Officers

*“If you don’t have a supportive management staff, it’s a lost cause, like trying to swim upstream against unbelievably powerful undercurrents.”*<sup>180</sup>

Our study found that the Boston Asylum Office’s low grant rate is likely driven by the oversized role that supervisory asylum officers play within the office.<sup>181</sup> This outsized management role is not unique to Boston. Although the Affirmative Asylum Procedures Manual requires that asylum officers be given “substantial deference” in deciding whether to grant a case,<sup>182</sup> our study found that supervisory asylum officers exercise a high degree of influence over decisions made by asylum officers.

Every decision rendered by an asylum officer must go through supervisory review.<sup>183</sup> If an asylum officer drafts a decision their supervisor disagrees with, the asylum officer may then be forced to conduct additional factual or related investigation into the asylum seeker’s claim or may even be required to re-interview the asylum seeker to support their original decision.<sup>184</sup> When a supervisory asylum officer returns an application to an asylum officer for further review or reconsideration, this creates additional work for the asylum officer. Former asylum officers interviewed explained they were not provided additional time to further substantiate or rewrite their initial decisions.<sup>185</sup>

One supervisory asylum officer familiar with the Boston Asylum Office stated in an interview that the asylum officers and supervisory asylum officers hired in Boston generally trended against asylum grants and rarely gave asylum seekers the benefit of the doubt.<sup>186</sup>

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180. Interview with Former Supervisory Asylum Attorney (Nov. 2021) (on file with authors).

181. LIVES IN LIMBO, *supra* note 12, at 11.

182. ASYLUM DIV., *supra* note 61, at 27 (“It is not the role of the [supervisory asylum officer] to ensure that the [asylum officer] decided the case as he or she would have decided it. [Asylum officers] must be given substantial deference once it has been established that the analysis is legally sufficient.”).

183. *See id.*; *see also* ASYLUM DIV., *supra* note 44, at 6; ASYLUM DIV., *supra* note 61, at 27 (“Current policy requires 100% supervisory review of Asylum Officer casework.”).

184. LIVES IN LIMBO, *supra* note 12, at 12.

185. Interview with Former Supervisory Asylum Attorney (Nov. 2021) (on file with authors).

186. *Id.* (explaining that the asylum officers and supervisory asylum officers initially hired at the Boston Asylum Office “tended to be people who did not grant [asylum] that much.” and noted that supervisory asylum officers are given “a lot of leeway” in refusing to give the asylum seeker the “benefit of the doubt”). Failure to give asylum seekers the benefit of the doubt contravenes international guidance on adjudicating asylum claims. *See* U.N. HIGH COMM’R FOR REFUGEES,

Former asylum officers with experience in multiple asylum offices around the country stated that they tailored their interviews around what types of questions their supervisory asylum officers may require that they ask before they can refer or grant a case. As explained below, former asylum officers were incentivized to ascertain the predisposition of their supervisory asylum officer before issuing decisions to save time in adjudicating cases and for their job protection.<sup>187</sup> Indeed, one asylum attorney observed an asylum officer tell an applicant that if the decision were up to them, they would grant the case, but the officer denied the case likely due to supervisory influence.<sup>188</sup>

Asylum officers across the United States are subject to the Performance Work Plan (PWP), the “primary tool” used by supervisory asylum officers in assessing asylum officer performance.<sup>189</sup> Supervisory asylum officers write the PWP and “rate Asylum Officers on critical qualitative elements of the job, including . . . decision writing.”<sup>190</sup> This review process provides supervisory asylum officers with a high degree of influence over asylum officer decision-making where a supervisory asylum officer’s “return” of the initial decision leads to additional work.<sup>191</sup> The additional time needed to analyze and decide an asylum case can lead to negative performance reviews, since asylum officers are evaluated, in part, on the number of decisions they issue during a given timeframe.<sup>192</sup>

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*supra* note 40, at 43 (“It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. In such cases, if the applicant’s account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.”).

187. Interview with Asylum Attorney (Aug. 2021) (on file with authors). For example, one asylum officer stated that she had a very difficult supervisory asylum officer, but she liked the asylum attorney’s client and wanted to approve the case. She asked the attorney questions about the case so that he could help her write a favorable assessment. *Id.* The attorney interviewed as part of our study stated: “[i]t was a bit of an eye opener because she was very honest about how she knew in this instance she was going to have to face this really difficult supervisor who would reject the case if she didn’t check all these boxes.” *Id.*

188. Interview with Former Supervisory Asylum Officer Familiar with the Boston Asylum Office (Nov. 2021).

189. ASYLUM DIV., *supra* note 44, at 8.

190. *Id.*

191. LIVES IN LIMBO, *supra* note 12, at 12.

192. Shiff, *supra* note 47, at 362 (confirming our study’s findings with respect to the impact of time constraints on asylum officers and noting that when asylum officers fall behind, they risk



Moreover, supervisory asylum officers can choose to give asylum officers negative performance reviews based on the simple fact that they sent a decision back to the officer for further analysis, fact investigation, and reconsideration.<sup>193</sup> Former asylum officers interviewed as part of the study stated that they were often hesitant or unwilling to disagree with their supervisors out of fear that they would receive a negative performance evaluation.<sup>194</sup> When a supervisory asylum officer returns a case to the officer for reconsideration, the asylum officer's PWP numerical score may be affected.<sup>195</sup>

Negative performance scores carry professional consequences for asylum officers and can result in probation or even job loss. Conversely, asylum officers receive positive performance evaluations when they turn asylum decisions around quickly. One former asylum officer stated that “[y]ou cannot fight for every case or you’ll seem combative and insubordinate so you have to make decisions on which cases you are willing to go against the grain and which ones you fall in line.”<sup>196</sup> In light of these negative impacts, asylum officers are incentivized to write a decision their supervisor agrees with, regardless of whether the officer thinks the asylum applicant merits a grant of asylum. Indeed, in asylum offices such as the Boston Asylum Office where a culture of suspicion and distrust pervades<sup>197</sup> and where supervisory asylum officers maintain a high degree of influence, tying an asylum officer's decision-making to their individual performance evaluations raises serious due process concerns.

#### 4. Asylum Officers' Overwhelming Caseloads

*“If you could just do the interviews in the timeframe that it needs to be done in and push off the other cases, but [you can't because] you're scheduled. You have attorneys waiting in the waiting room, you're thinking about that. There's so much you have to do because you don't just do the interview*

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“reprimand”). One former asylum officer interviewed as part of Shiff's study stated: “[f]alling behind was very stressful . . . and there is no way to catch up.” *Id.*

193. LIVES IN LIMBO, *supra* note 12, at 13.

194. Interview with Former Asylum Officer (Feb. 2022) (on file with authors); Interview with Former Asylum Officer (Dec. 2021) (on file with authors); Interview with Former Asylum Officer (Nov. 2021) (on file with authors); Interview with Former Asylum Officer (Oct. 2021) (on file with authors).

195. LIVES IN LIMBO, *supra* note 12, at 13.

196. Interview with Former Asylum Officer (Feb. 2022) (on file with authors).

197. See LIVES IN LIMBO, *supra* note 12, at 3.

*and the write up, you do fingerprints, background security checks, pulling all of the program, then a whole sheet you have to check.”*<sup>198</sup>

Our study found that asylum officers face incredible time constraints and high caseloads that incentivize them to cut corners. The Boston Asylum Office receives far more applications than it is able to adjudicate in any given year. As such, asylum applicants often face years-long waiting periods for their cases to be adjudicated.<sup>199</sup> On average, the Boston Asylum Office receives over 5,500 asylum applications each year.<sup>200</sup> The data released as part of our FOIA litigation revealed that, on average, the Boston Asylum Office adjudicates 30.5 percent of the asylum applications it receives each year.<sup>201</sup> This means that approximately 70 percent of new cases pending before the Boston Asylum Office each year contribute to the office’s growing backlog.<sup>202</sup> By the end of Fiscal Year 2022, the Boston Asylum Office’s backlog of asylum cases had grown to over 20,000 pending applications.<sup>203</sup> Figure 3 shows the growing backlog of asylum cases yet to receive a final decision.<sup>204</sup>

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198. Interview with Former Asylum Officer (Nov. 2021) (on file with authors).

199. See TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, A SOBER ASSESSMENT OF THE GROWING U.S. ASYLUM BACKLOG (2022), <https://trac.syr.edu/reports/705/> [perma.cc/9TF7-AHNS] (“An estimate of the average backlog wait times from when the case is filed in the Immigration Court to when [the asylum applicant’s] asylum hearing will be scheduled and their claims heard is currently 1,572 days, or 4.3 years.”).

200. See LIVES IN LIMBO, *supra* note 12, at 17.

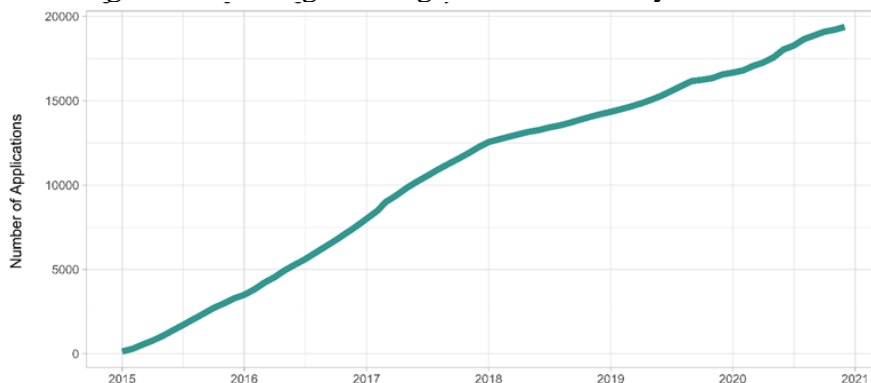
201. *Id.*

202. *Id.*

203. *Id.*; see also AFFIRMATIVE ASYLUM OVERVIEW, *supra* note 17, at 12 (listing the Boston Asylum Office’s affirmative asylum caseload as 20,900 as of December 31, 2021); ADES & KIZUKA, *supra* note 71, at 2 (noting that backlogs in asylum cases are not unique to the Boston Asylum Office, reaching a “historic high” with over 386,000 applications pending nationally by the end of fiscal year 2020).

204. LIVES IN LIMBO, *supra* note 12, at 17 fig. 3. This data was calculated from the databases that USCIS provided through the litigation of the FOIA Request filed by the ACLU of Maine, the University of Maine School of Law’s Refugee and Human Rights Clinic, and the Immigrant Legal Advocacy Project, and contains decisions made between 2015 and 2020.

Figure 2: Growing Backlog at the Boston Asylum Office



These time constraints and backlogs are not unique to the Boston Asylum Office. Nationally, the backlog of asylum cases pending before the U.S. asylum offices is more than 700,000.<sup>205</sup> In its 2022 Annual Report, the Department of Homeland Security stated that it believes that “backlogs and processing delays are perhaps the greatest issues facing USCIS and its stakeholders.”<sup>206</sup> For most applicants with cases pending before the various U.S. asylum offices, the delay in adjudication of their cases worsened when the Trump Administration instituted the LIFO policy, as discussed above.<sup>207</sup>

All of the former asylum officers and former supervisory asylum officers interviewed stated that they simply lacked the time to complete their required jobs.<sup>208</sup> To ensure that asylum seekers fleeing persecution receive adequate due process, asylum officers are responsible for a lengthy list of job duties.<sup>209</sup> These include conducting interviews with asylum applicants and engaging in a thorough review of an asylum applicant’s oral testimony and written documentation.<sup>210</sup> Asylum officers must also remain abreast of both the ever-changing asylum laws and policies as well as the conditions in the countries that applicants have fled.<sup>211</sup> Asylum officers stated that, given time constraints,

205. U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 62.

206. OMBUDSMAN, U.S. CITIZENSHIP & IMMIGR. SERVS., ANNUAL REPORT 2022 v (2022), [https://www.dhs.gov/sites/default/files/2022-06/CIS\\_Ombudsman\\_2022\\_Annual\\_Report\\_0.pdf](https://www.dhs.gov/sites/default/files/2022-06/CIS_Ombudsman_2022_Annual_Report_0.pdf) [<https://perma.cc/8A3D-3T7J>].

207. See Hawthorne Smith, *How the Asylum Backlog Affects Torture Survivors and What the Biden Administration Can Do to Fix It*, CTR. FOR MIGRATION STUD. (Feb. 25, 2021), <https://cmsny.org/publications/asylum-backlog-fifo-smith-022521/> [<https://perma.cc/KDE8-JZXR>].

208. LIVES IN LIMBO, *supra* note 12, at 17.

209. *Id.* at 16.

210. *Id.*

211. *Id.*

they often had to rush through their research and analysis of each case and rush through the asylum interviews and their written decisions.<sup>212</sup> One former asylum officer stated: “The interview might be rushed because the interview shouldn’t take too long. This probably makes decisions more likely to be negative because if [the asylum seekers] don’t have enough time to tell [their] story then you don’t have a story that shows your eligibility for asylum.”<sup>213</sup>

Former asylum officers also stated that they cut various corners (including recycling prior written decisions) in an effort to meet their time obligations.<sup>214</sup> One former asylum officer interviewed explained:

There is a perverse incentive. We have a stack of cases and have to manage our own time. All [cases] must be turned over in a three to five-day period of interviewing . . . . We end up recycling the same decision, plugging in new facts. That is very problematic for so many reasons. [When decisions are recycled,] an applicant, and any evidence submitted along with their application, do not have the same opportunity for review for each individual claim. [It’s] always easier to refer.<sup>215</sup>

The heavy caseloads and time constraints facing asylum officers likely exacerbate the influence of bias in asylum officer decision-making.<sup>216</sup> Studies have shown that when decision-making is rushed, assumptions and stereotypes pervade.<sup>217</sup> A recent empirical study that considered data derived from interviews with over thirty former asylum officers found that time constraints and heavy caseloads facing asylum officers lead to “automatic categorization” of claims that discourage reflective or deliberative thought.<sup>218</sup> With very little time to engage in critical self-reflection, individuals “consider fewer kinds of

212. *Id.* at 17.

213. Interview with Former Asylum Officer (Dec. 2021) (on file with authors).

214. LIVES IN LIMBO, *supra* note 12, at 18.

215. Interview with Former Asylum Officer, (Dec. 2021) (on file with authors); Interview with Former Supervisory Asylum Officer (Nov. 2021) (on file with authors) (“The abuse or temptation to short circuit and not do a full-fledged asylum interview is great for officers who have a tremendous backlog.”).

216. *See* Gupta, *supra* note 135, at 43.

217. Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 432–34 (2011) (“Implicit attitudes surface when individuals are under time pressure and a heavy cognitive load.”).

218. Shiff, *supra* note 47, at 359 (explaining that time pressures and the volume of cases “threatened [asylum officers’] capacity to approach each case on its merits and to remain sensitive to its peculiarities” (citation omitted)).

information, use the information in a more shallow way, give more weight to negative information, and make more variable, less accurate judgments.”<sup>219</sup>

##### 5. Asylum Officers Experience Compassion Fatigue and Burnout

*“Compassion fatigue is a universal problem among [asylum officers] and there is no training on it . . . It definitely made me less likely to approve. You definitely lose compassion, which I think blinds you to someone. Not everyone can express themselves in a way that seems credible and so when your compassion fatigue is there, and [asylum seekers] don’t seem credible you think to yourself, I’m going to deny this person, I’m so sick of this shit.”*<sup>220</sup>

Asylum officers and others working with asylum seekers are exposed to high degrees of trauma.<sup>221</sup> This trauma exposure may in turn manifest in both physical and psychological symptoms, including secondary trauma stress,<sup>222</sup> burnout,<sup>223</sup> and, relatedly, compassion fatigue.<sup>224</sup>

Much has been written about the mental health impacts of working with trauma survivors, but little has been written about the effect of those impacts on the legal profession, particularly immigration

219. Marouf, *supra* note 217, at 431–32 (“[W]hen people are tired, distracted, or rushed, they are more likely to respond based on automatic impulses than when they are energetic, focused, and unhurried.”).

220. Interview with Former Asylum Officer (Oct. 2021) (on file with authors).

221. Harris & Mellinger, *supra* note 170, at 56.

222. Secondary Traumatic Stress is defined as “the natural consequent behaviors and emotions resulting from knowing about a traumatizing event experienced by a significant other—stress resulting from helping or wanting to help a traumatized or suffering person.” CHARLES R. FIGLEY, *COMPASSION FATIGUE: COPING WITH SECONDARY TRAUMATIC STRESS DISORDER IN THOSE WHO TREAT THE TRAUMATIZED* 23 (1995) (citation omitted).

223. Burnout is defined as a “psychological syndrome emerging as a prolonged response to chronic interpersonal stressors on the job.” Christina Maslach & Michael P. Leiter, *Understanding the Burnout Experience: Recent Research and Its Implications for Psychiatry*, 15 *WORLD PSYCHIATRY* 103, 103 (2016). Three key dimensions of burnout include: “overwhelming exhaustion, feelings of cynicism and detachment from the job, and a sense of ineffectiveness and lack of accomplishment.” *Id.*

224. Compassion fatigue is defined as “stress resulting from exposure to a traumatized individual [and] has been described as the convergence of secondary traumatic stress . . . and cumulative burnout.” Fiona Cocker & Nerida Joss, *Compassion Fatigue Among Healthcare, Emergency, and Community Service Workers: A Systemic Review*, *INT’L. J. ENV’T RSCH. & PUB. HEALTH*, June 2016, at 1. The authors explain that secondary traumatic stress and burnout lead to compassion fatigue if secondary traumatic stress and burnout are not mediated. *Id.* at 2.

adjudicators.<sup>225</sup> Although no formal study exists on the impact of trauma exposure on U.S. asylum officers, a 2020 study of over seven hundred asylum attorneys found that they are “particularly susceptible” to burnout and secondary traumatic stress.<sup>226</sup> Moreover, a 2007 survey of stress and burnout levels among immigration judges sheds light on the likely impacts of trauma exposure on asylum officers.<sup>227</sup> That study found that immigration judges suffer significant levels of stress and burnout.<sup>228</sup> One immigration judge, in response to the survey, stated:

As an Immigration Judge, I have to hear the worst of the worst that has ever happened to any human being, particularly in asylum cases. I have to listen to the trauma suffered by individuals. I have to hear it on a daily basis. It’s emotionally draining and painful to listen to such horrors day in and day out.<sup>229</sup>

Other judges responded that they experience skepticism, irritability, anger, and a loss of trust in the immigrants who appear before them.<sup>230</sup> These various symptoms of trauma exposure (among others) likely factor into low asylum grant rates where immigration judges disbelieve asylum seekers, misunderstand asylum seekers, and/or fail to fully consider the facts of a given case.<sup>231</sup>

Interviews with asylum officers as part of our investigation into the Boston Asylum Office revealed strong parallels between the work of immigration judges and asylum officers. Both face incredible case-loads under tight timelines and both hear stories of trauma and human suffering on a daily basis. It is not surprising, then, that former asylum officers and supervisory asylum officers interviewed as part of our study stated that after time, they became desensitized to and jaded by

225. Kate Aschenbrenner, *Ripples Against the Other Shore: The Impact of Trauma Exposure on the Immigration Process Through Adjudicators*, 19 MICH. J. RACE & L. 53, 78 (2013) (“Despite the high likelihood that trauma exposure will occur for any attorney working in the immigration field, few studies have been done on trauma exposure in this context. In fact, the number of studies on trauma exposure in attorneys in general is comparatively limited.” (citing Andrew P Levin & Scott Greisberg, *Vicarious Trauma in Attorneys*, 24 PACE L. REV. 245, 246–48 (2003))).

226. Harris & Mellinger, *supra* note 170, at 819–20.

227. Stuart L. Lustig et al., *Burnout and Stress Among United States Immigration Judges*, 13 BENDER’S IMMIGR. BULL. 22, 25 (2008).

228. *Id.* at 28.

229. *Id.*

230. *Id.* at 29.

231. Aschenbrenner, *supra* note 225, at 105.

the traumatic stories that accompany most asylum applications.<sup>232</sup> Many stated that they suffered burnout and compassion fatigue, which commonly manifest as anger, irritability, and exhaustion, as well as a reduced ability to feel sympathy and empathy.<sup>233</sup> Indeed, one former asylum officer interviewed explained that the asylum applicants' traumatic stories became so "mundane as to lose salience."<sup>234</sup>

The 2021 empirical study conducted by Talia Shiff that involved interviews with over thirty former asylum officers, which we discussed above, confirmed our findings with respect to the mental health toll of affirmative asylum decision-making. Shiff's study found that many asylum officers felt overwhelmed, frustrated, and tearful when the asylum laws were "too narrow" to justify an asylum grant in cases where the asylum officer believed the applicant was still deserving of asylum.<sup>235</sup> Conversely, Shiff's study found that asylum officers experienced "emotional detachment" when considering "repetitive and standard claims."<sup>236</sup> Most asylum officers interviewed as part of Shiff's study discussed experiencing emotional detachment, which led to feelings of guilt and frustration.<sup>237</sup> This guilt and frustration then prompted "cynicism and jadedness."<sup>238</sup> Perhaps unsurprisingly, emotional detachment often leads to adverse credibility determinations.<sup>239</sup>

Asylum applicants and asylum attorneys with experience appearing at the Boston Asylum Office noted that asylum officers often

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232. Interview with Former Asylum Officer (Oct. 2021) (on file with authors).

233. Cocker & Joss, *supra* note 224, at 2; Interview with Former Asylum Officer (Oct. 2021) (on file with authors); Interview with Former Supervisory Asylum Officer (Nov. 2021) (on file with authors).

234. Interview with Former Asylum Officer, (Dec. 2021) (on file with authors) ("This response is absolutely part of the trauma asylum officers hold from doing this work . . . Asylum officers are just exhausted. We are hearing stories of torture and abuse, often involving children, and it's really exhausting and there's no real support or even acknowledgement of the impact on us.").

235. Shiff, *supra* note 47, at 356–57 (summarizing interviews with former asylum officers who described their work as "very hard" and "tragic" when the law did not support an individual's claim and quoting one former asylum officer who stated: "The emotional impact and not being able to help people that needed it; hearing the traumatic experiences of people. When you are referring someone that you know needs help but doesn't fit, it was [emotionally] hard.").

236. *Id.* at 357.

237. *Id.*

238. *Id.* at 356–57 (describing the emotional detachment experienced by asylum officers when hearing repetitive stories). A former asylum officer stated: "A lot of people are fleeing the same thing and the monotony of the process is overwhelming . . . [Y]ou really feel like a robot while the person on the other end of the line is telling you the most graphic story." *Id.* at 357. The asylum officer added that this emotional detachment leads to "getting cynical about the stories . . . hearing horrible stories and as you hear this stuff more and more it becomes more normal and [you get] too cold and cynical about the people involved." *Id.*

239. *Id.* at 357.

lacked empathy for an asylum seeker’s trauma and were even combative with asylum applicants.<sup>240</sup> As discussed above, U.S. regulations require that asylum interviews be non-adversarial, meaning that an asylum officer must not argue with or interrogate an asylum applicant.<sup>241</sup> However, many asylum attorneys interviewed as part of our study commented that the asylum officers took an adversarial and combative approach in their interviews with asylum applicants, in direct violation of U.S. asylum laws.<sup>242</sup> One asylum attorney explained that asylum officers seemed unfazed by the fact that they were working with trauma survivors, noting: “Most of them, it’s like they really don’t care. I’ve had clients break down in the interview because they were describing these horrible experiences, and the officer is dismissive.”<sup>243</sup> Another asylum attorney stated:

The client was a survivor of torture and [the officer] laughed multiple times throughout the client telling his story . . . . She checked her text messages during the interview. The client was horrified, was so embarrassed and so humiliated. He’s pouring out his heart to this person and she’s laughing . . . and yet when she is engaged, she’s cross-examining him up and down . . . . The respect for the situation and the client was not there.<sup>244</sup>

### III. RECOMMENDATIONS

Our study makes a number of recommendations to help address the concerns raised by our findings.

The key recommendation is enhanced transparency and accountability at the asylum offices, particularly the Boston Asylum Office. Our study calls for a U.S. Government Accountability Office investigation into the Boston Asylum Office. Since our study was released in March 2022, several members of Congress from Massachusetts and

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240. LIVES IN LIMBO, *supra* note 12, at 3.

241. 8 C.F.R. § 208.1(b) (2022); *see also* U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 46, at 15–16 (instructing that asylum officers are “neutral decision-maker[s]” and thus must maintain a “neutral and professional demeanor even when confronted with . . . a difficult or challenging [asylum seeker] or representative, or an [asylum seeker] whom [the asylum officer] suspect[s] is being evasive or untruthful”).

242. Interview with Asylum Attorney (Jan. 2022) (on file with authors) (“[The asylum officer] checked her text messages during the interview . . . and yet when she is engaged, she’s cross examining him up and down.”).

243. Interview with Asylum Attorney, (Nov. 2021) (on file with authors).

244. Interview with Asylum Attorney (Jan. 2022) (on file with authors).



Maine called on the Department of Homeland Security Office of Inspector General to investigate the Boston Asylum Office as a critical step in holding the Boston Asylum Office accountable.<sup>245</sup> To date, an investigation has not yet been granted, and the issues brought to light by our study remain pressing.

Indeed, despite requests as part of our FOIA litigation, USCIS failed to produce data with respect to individual asylum officer grant rates within the Boston Asylum Office. Absent the release of such data, an internal audit of the Boston Asylum Office should be conducted to assess bias among individual asylum officers. Bias might be identified by analyzing a number of factors, including feedback from asylum applicants, asylum attorneys, and other stakeholders, as well as an analysis of any trends in asylum decision-making that might indicate a bias against certain individuals or groups. As noted above, the officers hired in the Boston Asylum Office have generally trended against asylum grants.<sup>246</sup> Ultimately, our study recommends replacing asylum officers and supervisory asylum officers who demonstrate bias and/or a lack of cultural literacy.

We also recommend that USCIS implement a system that mitigates the outsized role supervisory asylum officers play in influencing asylum officer decision-making. One important change would be to discontinue tying asylum officers' performance reviews to supervisory asylum officers' requests that the asylum officer reconsider their decision-making. Additionally, our study recommends that asylum officers and supervisory asylum officers be subject to 360-degree evaluations, in which asylum officers are provided the opportunity to evaluate their supervisory asylum officers anonymously. Asylum officers should be evaluated for how well they complete all aspects of their job, which would require considering feedback from asylum applicants, attorneys, and others with whom they interact. This review process might help the asylum offices identify asylum officers who

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245. See, e.g., Press Release, Senator Ed Markey, In Light of Damning Report, Senator Markey Urges Homeland Security Inspector General to Open Investigation into Low Grant Rate, Instances of Bias at Boston Asylum Office (May 27, 2022), <https://www.markey.senate.gov/news/press-releases/in-light-of-damning-report-senator-markey-urges-homeland-security-inspector-general-to-open-investigation-into-low-grant-rate-instances-of-bias-at-boston-asylum-office> [<https://perma.cc/Y7EZ-2JZ2>]; Sarah Betancourt, *Legislators Call for Investigation into Boston Asylum Office over Low Rate of Approvals*, GBH (May 27, 2022, 2:30 PM), <https://www.wgbh.org/news/local-news/2022/05/27/legislators-call-for-investigation-into-boston-asylum-office-over-low-rate-of-approvals> [<https://perma.cc/66PR-Q9BM>].

246. See LIVES IN LIMBO, *supra* note 12, at 1.

exhibit bias, compassion fatigue, and/or burnout (among other concerns) that might influence their decision-making. Moreover, to help ensure supervisors do not wield significant authority over asylum officer decision-making, asylum offices could adopt policies that require a rotation of supervisors per asylum officer or create a panel of supervisors to review asylum officer decisions.<sup>247</sup> Such policies should be considered by the Boston Asylum Office if they have not yet been implemented to date.

Additionally, we recommend various steps to enhance transparency in the affirmative asylum process more generally. For example, our study recommends that all asylum interviews throughout the various asylum offices be recorded and that those recordings be made available to asylum applicants (and their attorneys, for those who are represented). Currently, asylum interviews take place behind closed doors with no recording or written transcript of the proceeding.<sup>248</sup> As noted above, the only written record of what took place during an asylum interview is the asylum officer's notes taken during the interview. Absent an accurate recording or transcript of what occurred behind the closed-door asylum interview, improper practices such as the use of adversarial, insensitive, and biased interview techniques can occur with impunity. This is especially true if the asylum applicant does not have an attorney to bear witness to what occurred during the interview. Importantly, the creation and preservation of accurate records of asylum interviews is critical to ensuring that asylum seekers' due process rights are realized in immigration court. In most cases, the asylum officers' notes and asylum assessments are used to impeach asylum applicants in immigration court, despite the fact that they are not transcripts and do not reflect exactly what was said during an asylum interview.

We also recommend more rigorous hiring of asylum officers and supervisory asylum officers that focuses, at least in part, on language skills and cultural humility. Once hired, our study recommends more support and resources for asylum officers, including improved training on implicit bias and racism, particularly on how implicit biases manifest and how to mitigate their effects. Other recommended training should focus on, e.g., trauma-informed interviewing, cultural

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247. LIVES IN Limbo, *supra* note 12, at 27.

248. See U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 46, at 22.

humility, and how to identify and manage secondary traumatic stress, burnout, and compassion fatigue.

To address asylum officer time constraints, which lead to officers cutting corners to complete their job functions, our study recommends limiting officers to conducting one interview per day, thus allowing asylum officers time to more thoroughly and thoughtfully complete their job functions. Moreover, asylum offices should hire additional asylum officers to spread out the work in light of the incredible case-loads facing asylum officers.

Our study also recommends that asylum officers shift away from presuming asylum seekers are lying and instead apply a “benefit of the doubt” rule to asylum credibility determinations.<sup>249</sup> Asylum seekers face a number of challenges in corroborating their claims, including differing cultural norms, the impact of trauma on memory, language barriers, and limited access to legal assistance.<sup>250</sup> Given these challenges, inconsistencies in an asylum applicant’s case do not necessarily mean that the applicant is lying. Studies have shown that individuals who are forced to share their stories repeatedly are generally incapable of “perfect consistency.”<sup>251</sup> This is especially true for trauma survivors suffering from mental health diagnoses such as post-traumatic stress disorder.<sup>252</sup> Moreover, credibility determinations that focus on an applicant’s demeanor and non-verbal cues are fraught and should not be applied where both demeanor and non-verbal communications vary, sometimes significantly, from culture to culture. As

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249. This approach has also been suggested by other scholars. *See, e.g.,* Joanna Ruppel, *The Need for a Benefit of the Doubt Standard in Credibility Evaluations of Asylum Applicants*, 23 COLUM. HUM. RTS. L. REV. 1, 30 (1991); Kagan, *supra* note 53, at 372.

250. *See* Anker, *supra* note 103, at 451–52 (“[I]mmigration judges generally evaluated asylum claims without consideration of political realities in the applicants’ home countries while also imposing their own cultural and political assumptions in assessing applicants’ credibility, and making implicit political and ideological judgments.”); *see also* Walter Kälin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing*, 20 INT’L MIGRATION REV. 230, 234 (1986) (“The cultural relativity of words, notions and concepts, and, even more importantly, the lack of consciousness of these differences in perception, are major sources of misunderstandings in cross-cultural communication. The problem certainly affects the asylum procedure: Too often officials assume that the way they think is also the way the asylum seeker thinks. . . . This may result in serious misunderstandings and even contribute to the denial of asylum for genuine refugees who, while doing their best to give all the requested information, fail because their counterpart misinterprets their statements.”); ANKER, *supra* note 52, at § 3:11 n.4 (“[N]ote that, even if an applicant provides documentary evidence, such evidence may be discounted by immigration judges, and courts will ‘generally defer to the agency’s evaluation of the weight to be afforded an applicant’s documentary evidence.’” (quoting *Y.C. v. Holder*, 741 F.3d 324, 332 (2d Cir. 2013))).

251. Kagan, *supra* note 53, at 367.

252. Hepp et. al., *supra* note 171, at 280.

such, demeanor and non-verbal cues are unreliable in determining whether an asylum applicant is, in fact, telling the truth.<sup>253</sup>

Our study recommends ending the “last-in, first-out” (LIFO) policy that prioritizes the adjudication of cases most recently filed.<sup>254</sup> The LIFO policy extends wait times for hundreds of thousands of asylum applicants whose cases have already been pending for years.<sup>255</sup>

Finally, our study recommends a paper-based adjudication process when it is clear asylum should be granted based upon the evidence submitted, which would help address the backlog and preserve resources. These paper-based adjudications could mirror USCIS’s approach to other humanitarian-based immigrant categories, including Special Immigrant Juvenile Status, VAWA, and U, among others. Eliminating the in-person interview in cases where, on paper, it is clear asylum should be granted helps preserve resources by saving interviews for situations where the outcomes are perhaps less certain or where significant credibility and security concerns are present. Such an approach would dramatically reduce the asylum office backlogs and would allow for quicker processing of asylum claims. Moreover, this approach would preserve interview resources for cases most in need of additional scrutiny.

## CONCLUSION

An asylum seeker’s likelihood of success should not depend upon where in the United States they have decided to put down roots. Even more fundamentally, a person seeking safe haven in the United States should never face the prospect of being badgered, harassed, or otherwise demeaned by a person whose job it is to safeguard their rights. Although our study focused on one asylum office, it brought to light concerning practices that are common across U.S. asylum offices, and our findings cast significant doubt upon the fairness of the affirmative asylum system as a whole. Given the life-or-death stakes in asylum

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253. Kagan, *supra* note 53, at 379.

254. See Press Release, *supra* note 69 (stating that the LIFO policy was implemented by the Trump administration “to deter those who might try to use the existing [asylum] backlog as a means to obtain employment authorization,” and that it remains in effect today); see also *Affirmative Asylum Interview Scheduling*, *supra* note 70 (stating that the Asylum Division “give[s] priority to the most recently filed affirmative asylum applications when scheduling affirmative asylum interviews” as of January 29, 2018).

255. See, e.g., Rebecca Hamlin, *Unraveling: Trump, the “End” of Asylum, and the Prospects of Restoring Lost Time*, 40 B.U. INT’L L.J. 1, 16 (2022) (observing that the implementation of LIFO “meant that older cases were simply left to stagnate for years”).

cases, additional investigation into the inner workings of asylum offices nationally remains imperative to ensure that due process is realized for asylum seekers. The concerns discussed in this Article are particularly salient as the Biden Administration has turned to asylum officers as the silver bullet that will solve our massive immigration backlogs, placing more power and influence in their hands.<sup>256</sup>

Since the release of our study in March 2022, the Boston Asylum Office has instituted a number of changes that the authors hope will bring the office into better compliance with its legal obligations. These changes include increasing the number of asylum officers and overhauling supervisory staff.<sup>257</sup> The office has also added a “section chief” who is tasked with ensuring that asylum officers make legally correct decisions, rather than decisions that respond to pressures from supervisory asylum officers.<sup>258</sup> While these developments are certainly encouraging, the troubling fact remains that practices at the Boston Asylum Office have diverged significantly from the requirements of U.S. and international asylum protections. To ensure that asylum seekers in New England receive the protection to which they are entitled, continued monitoring of data and the practices at the Boston Asylum Office remains necessary.

The founding purpose of the affirmative asylum system was to create an adjudication process grounded in the humanitarian principles of refugee protection that would allow for the fair and expeditious resolution of asylum seekers’ claims. The system is not living up to that promise and, as a result, the United States is not living up to its obligations under domestic and international law. Meanwhile, all actors within the system are being harmed: the overwhelmed asylum officers who do not have sufficient time to devote to deciding these consequential claims; the asylum seekers who face uncertainty, family separation, and despair during years of waiting; and the immigration practitioners whose ability to assist their clients is hampered by a broken system. The authors sincerely hope that this Article will spark further investigation and reform that will bring us closer to the ideals upon which our system was built.

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256. *See supra* notes 89–102 and accompanying text.

257. Meghann Boyle, Dir., U.S. Dep’t of Homeland Sec., U.S. Citizenship & Immigr. Servs., Comments During USCIS Stakeholder’s Meeting (June 2022) (notes on file with authors).

258. *Id.*