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Immigrants vs. Artificial Intelligence: The Human Cost of AI in Asylum Decisions

Jems Guirguis[†]

Abstract

The rapid deployment of artificial intelligence (AI) technologies in immigration proceedings presents a new frontier in how governments process asylum claims and manage border security. Although AI facilitates the efficient analysis of large-scale data, it also presents significant challenges related to fairness, bias, and discrimination, with particularly acute implications for vulnerable groups, including asylum seekers.¹ These systems, such as facial recognition software and predictive algorithms, often contain intrinsic biases that disproportionately affect people of color and others from marginalized groups.² Relying on AI to predict asylum claim outcomes can discriminate against refugees and expose them to life-threatening risks, including forced return to countries where they face persecution.³ There is evidence that the expansion of AI “leads to an increase in deaths by pushing migrants trying to cross illegally towards more remote and dangerous routes.”⁴ This issue is critical because AI’s use in asylum adjudication directly affects due process rights under the U.S. Constitution and international refugee protections, including the principle of non-refoulement. In particular, U.S. courts must ensure that asylum seekers receive their constitutionally guaranteed right to due process.⁵

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1. See Hannah Tyler, *The Increasing Use of Artificial Intelligence in Border Zones Prompts Privacy Questions*, MIGRATION POL’Y INST.: MIGRATION INFO. SOURCE (Feb. 2, 2022), <https://www.migrationpolicy.org/article/artificial-intelligence-border-zones-privacy> [<https://perma.cc/FY2C-SPGQ>] (explaining the growth of the use of artificial intelligence in the immigration context).

2. See Sandra Wachter, Brent Mittelstadt & Chris Russell, *Bias Preservation in Machine Learning: The Legality of Fairness Metrics Under EU Non-Discrimination Law*, 123 W. VA. L. REV. 735, 767–68 (2021).

3. Madeline Forster, REFUGEE PROTECTION IN THE ARTIFICIAL INTELLIGENCE ERA: TEST CASE FOR RIGHTS, Chatham House 10 (2022), <https://www.chathamhouse.org/sites/default/files/2022-09/2022-09-07-refugee-protection-artificial-intelligence-era-forster.pdf> [<https://perma.cc/R4Z4-M75H>].

4. See Tyler, *supra* note 1.

5. CHERI L. HO, AS UPDATED BY THE OFF. OF STAFF ATT’YS U.S. CT. OF APPEALS FOR THE NINTH

Introduction

Countries like Canada and Germany are beginning to explore automated systems for immigration decisions, highlighting the potential to improve efficiency and shorten processing times.⁶ Automated decision-making encompasses systems ranging from simple decision-support tools to fully autonomous models. These systems analyze data patterns to generate predictions, and in the context of immigration, they can produce decisions that affect individuals' lives.⁷ However, immigration applications are inherently complex and even two human officers reviewing the same evidence can arrive at entirely different conclusions.⁸ These complexities raise concerns about how an automated system would navigate the nuanced aspects of individual applications.⁹ Scholars have expressed concerns about bias in AI systems, where error rates are disproportionately higher for non-Caucasian individuals.¹⁰ For instance, a study by the National Institute of Standards and Technology (NIST) found that facial recognition algorithms are up to 100 times more likely to misidentify Black and Asian faces than Caucasian ones.¹¹ This bias raises alarms when considering the role of AI in asylum proceedings, where incorrect decisions could violate the rights of individuals seeking refuge. Relying on AI to make decisions on asylum claims can lead to discrimination and biased decisions that would likely result in life and

CIR., DUE PROCESS IN IMMIGRATION PROCEEDINGS, E-1 (2024), <https://cdn.ca9.uscourts.gov/datastore/uploads/immigration/immigwest/E.pdf> [<https://perma.cc/ZC2X-J8DS>] (citing *Angov v. Lynch*, 788 F.3d 893, 898 (9th Cir. 2015) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953))) (noting that generally migrants “who have once passed through [the] gates, even illegally,” are afforded the full panoply of procedural due process protections.”).

6. Ana Beduschi, *International Migration Management in the Age of Artificial Intelligence*, 9 MIGRATION STUDS. 576, 576 (2021).

7. See JESSICA BITHER & ASTRID ZIEBARTH, MIGRATION STRATEGY GRP., AUTOMATING DECISION-MAKING IN MIGRATION POLICY: A NAVIGATION GUIDE (2021), <https://policycommons.net/artifacts/8032486/automating-decision-making-in-migration-policy/8942807/> [<https://perma.cc/FSV4-87MN>] (explaining the automated decision-making systems in migration policy, discussing efficiency and the technical accuracies required and the biases that are inputted in the decision-making algorithms).

8. See Sherine El Taraboushi-McCarthy, Lilian Miles, Sebastian Ille & Felicity Kersting, COMPLEXITY OF CHOICE IN ASYLUM SEEKER DECISION-MAKING, UNITED NATION UNIV. (2023), https://collections.unu.edu/eserv/UNU:9159/complexity_asylum_seeker_decision_making.pdf [<https://perma.cc/KY19-AKUP>] (explaining the complexities of asylum law and the difficulties that many migrants face in the asylum process).

9. BITHER & ZIEBARTH, *supra* note 7.

10. Tyler, *supra* note 1.

11. Chad Boutin, *NIST Study Evaluates Effects of Race, Age, Sex on Face Recognition Software*, NIST: NEWS (Dec. 19, 2019), <https://www.nist.gov/news-events/news/2019/12/nist-study-evaluates-effects-race-age-sex-face-recognition-software> [<https://perma.cc/W4DW-PRS3>] (explaining and highlighting how accurately facial recognition software tools identify people of varied sex, age, and racial background, and how there are many errors associated with the software).

death consequences causing the return of refugees to places where they face persecution.¹² The use of AI systems like the CBP One app¹³ increases this risk because it relies on facial recognition technology and has been found to discriminate against darker-skinned users.¹⁴

This issue is essential because the use of AI in immigration contexts impacts due process rights under the Fourteenth Amendment,¹⁵ as well as international refugee protections like the principle of non-refoulement.¹⁶ From a policy perspective, the U.S. government's implementation of the CBP One app, which employs AI-driven facial recognition to screen travelers, including refugees and those seeking asylum, has created significant barriers to the asylum process, making it more difficult for many migrants to access protection and raising concerns about discrimination.¹⁷ AI and algorithms might be in violation of these protections because of the intrinsic bias leading to "a great risk that such systems will misinterpret cultural signifiers."¹⁸

The principle of non-refoulement prohibits returning individuals to countries where they face persecution.¹⁹ Under international human

12. Forster, *supra* note 3, at 10.

13. See *CBP Link Mobile Application*, U.S. CUSTOMS & BORDER PROT. (last modified Jun 10, 2025), <https://www.cbp.gov/about/mobile-apps-directory/cbplink> [https://perma.cc/S9LY-SKEA]; AM. IMMIGR. COUNCIL, CBP ONE: AN OVERVIEW, (2025), https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/04/cbp_one_an_overview_0325.pdf [https://perma.cc/3X2G-SMPH].

14. See *The New Asylum Rule: CBP One*, HILSC: BLOG (May 31, 2023), <https://houstonimmigration.org/the-new-asylum-rule-cbp-one/> [https://perma.cc/3GHR-G82R] (explaining the introduction of the new app that migrants at the border are required to use it to hold their place in line for asylum proceedings).

15. U.S. CONST. amend. XIV, § 1.

16. See ICRC, *Note on Migration and the Principle of Non-refoulement*, 904 INT'L REV. RED CROSS 345 (2018), https://international-review.icrc.org/sites/default/files/irrc_99.pdf [https://perma.cc/J2A8-WQQQ].

17. Bernd Debusmann Jr., *At US Border, Tech Issues Plague New Migrant Applications*, BBC (Mar. 8, 2023), <https://www.bbc.com/news/world-us-canada-64814095> [https://perma.cc/AM9Z-B3KC] (noting that the CBP One app's facial-recognition system often fails to register darker-skinned users, creating a bias that disproportionately blocks Black asylum seekers from accessing appointments).

18. Access Now, USES OF AI IN MIGRATION AND BORDER CONTROL: A FUNDAMENTAL RIGHTS APPROACH TO THE ARTIFICIAL INTELLIGENCE ACT at 5 (2021), https://edri.org/wp-content/uploads/2022/05/Migration_2-pager-02052022-for-online.pdf [https://perma.cc/9E4P-7WQK].

19. *The Principle of Non-refoulement Under International Human Rights Law*, UNITED NATIONS, HUM. RIGHTS: OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf> [https://perma.cc/9KMJ-QP3X]. Persecution is defined as a crime of "severe discrimination [leading to] denial" of basic human rights. Center for Constitutional Rights, *What is Persecution?*, CCR https://ccrjustice.org/sites/default/files/attach/2015/11/Smug_infosheets_3.pdf [https://perma.cc/UDZ3-Y8DQ].

rights laws, the principle of non-refoulement is explicitly enshrined in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).²⁰ Individuals may face threats that rise to the level of persecution when they are targeted for discrimination or harm based on certain protected characteristics. Similarly, the U.S. Constitution holds that, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”²¹ Specifically, asylum seekers are entitled to the same due process protections as migrants “who have once passed through [the] gates, even illegally.”²² If there is a reliance on AI on asylum decisions, there must be assurances that these rights are not violated.

In this Note, I will explore the risks associated with AI in immigration decisions, particularly in the context of asylum applications. This Note examines the biases inherent in algorithmic tools, the limitations of AI in capturing the human nuances essential to asylum adjudications, and the potential for AI to undermine due process protections. I propose that the solutions to these issues include more comprehensive and transparent legislation, as well as humans making the final or near-end decision in asylum cases and implementing AI safely.

I. The Immigration Asylum Process, Due Process, the 14th Amendment, and the Rise of Artificial Intelligence

A. Constitutional Background

The Fourteenth Amendment contains several key provisions, including the Due Process Clause which prohibits states from depriving “any person of life, liberty, or property, without due process of law”²³ This clause has served as the foundation for many landmark Supreme Court decisions concerning civil rights, personal liberties, and government accountability and has been interpreted in two ways: procedural due process and substantive due process.²⁴ Due process is

20. *The Principle of Non-refoulement Under International Human Rights Law*, *supra* note 19.

21. U.S. CONST. amend. VIII.

22. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

23. U.S. CONST. amend. XIV, § 1.

24Legal Info. Instit., *Substantive Due Process*, CORN. L. SCH., https://www.law.cornell.edu/wex/substantive_due_process [https://perma.cc/GT62-YPBK] (“Substantive due process is the principle that the Fifth and Fourteenth Amendments of the U.S. Constitution protect fundamental rights from government interference. Specifically, the Fifth and Fourteenth Amendments prohibit the government from depriving any person of ‘life, liberty, or property without due process of law.’”); David

indispensable in immigration and asylum law, functioning as a real safeguard against arbitrary government action. For undocumented immigrants,²⁵ who occupy the most precarious position in the legal system, it ensures that fundamental principles of fairness and accountability are not reduced to empty promises.²⁶ Undocumented immigrants are “protected by the constitution’s stated right to due process—even a person who illegally entered or stayed in the country.”²⁷

B. The Various Types of Artificial Intelligence Used in Society

The capacity of AI to replicate human decision-making has generated a growing “demand for ‘automated’ or ‘algorithmic’ processes” that can replace the human element.²⁸ AI could be, and has been, used in the marketing sector or the business of decision-making. For example, American Express utilized AI to analyze billions of transactions to identify patterns of activity and to detect whether the activity was fraud or not, with the emphasis of focusing on patterns.²⁹

In the medical field, one way AI is implemented is by utilizing “data from past patients to more accurately diagnose and treat present patients,” also referred to as “black-box medicine.”³⁰ “[B]lack-box medicine” refers to the use of advanced AI systems in healthcare where the reasoning behind their decisions is opaque, making it difficult for humans to understand how conclusions or recommendations are reached.³¹ Although AI offers many advantages in this context, its use is

Hudson, *How Due Process Ensures Fairness and Protects from Governmental Overreach*, THE FIRE (Nov. 1, 2022), <https://www.thefire.org/news/how-due-process-ensures-fairness-and-protects-governmental-overreach> [https://perma.cc/TRX7-EGK8].

25. See Roberto Ramirez, *Migrant vs. Immigrant: How Two Letters Can Change a Society*, GMFUS, <https://www.gmfus.org/news/migrant-vs-immigrant-how-two-letters-can-change-society> [https://perma.cc/DZU5-2G5Y] (“The word ‘migrant’ connotes a person who moves from place to place, but has yet to reach a final destination. In contrast, an ‘immigrant’ is a person who leaves one place of residence for another with the goal to reside there permanently.”).

26. Kirby J. Fullerton, *What is Due Process for Immigrants?*, CARMAN & FULLERTON (Aug. 14, 2025), <https://carmanfullerton.com/what-is-due-process-immigrants/> [https://perma.cc/P5SF-P875].

27. *Id.*

28. Forster, *supra* note 3, at 3 (internal quotations omitted).

29. Ryan Owen, *Artificial Intelligence at American Express – Two Current Use Cases*, EMERJ (Dec. 6, 2021), <https://emerj.com/artificial-intelligence-at-american-express/> [https://perma.cc/8FJP-SP7B].

30. Jennifer W. Elrod, *Trial by Siri: AI Comes to the Courtroom*, 57 Hous. L. REV. 1083, 1087 (2020) (explaining the use of AI in the courtroom and the impact it has on criminal cases in assisting judges in the courtroom).

31. Hanhui Xu & Kyle Michael James Shuttleworth, *Medical Artificial Intelligence and the Black Box Problem: A View Based on the Ethical Principle of “Do No Harm”*, 4 INTELLIGENT MED. 52, 52 (2024) (discussing the challenges of opaque decision-making in medical AI systems, often described as the “black box” problem).

not without flaws. For instance, UnitedHealthcare has been accused of using AI algorithms in its claims determination process that denied elderly patients' claims.³² In that situation, the AI tools did not assist and make individuals' lives better, but rather hurt them due to the problems associated with automated decision-making and the use of AI.³³ The wrongful denial of these claims by health insurers relying on AI tools jeopardizes access to much-needed healthcare, because if it was not for the use of AI, these claims would have been properly evaluated.³⁴ Overall, automated systems are not entirely foolproof and tend to create instability that shakes the lives of many, leading to distress whether in the medical context or other settings.³⁵

Outside of the medical context, AI use has been detrimental in discriminating against individuals due to their age. In 2023, the tutoring company iTutor Group used AI-powered recruiting software that would reject female applicants who were fifty-five years old and older, as well as male applicants who were sixty years old and older.³⁶ The iTutor case highlights the potential for AI systems to perpetuate age discrimination, underscoring the need for rigorous oversight and ethical safeguards to ensure fairness and prevent harm in recruitment and other decision-making processes.³⁷ Without proper oversight, AI systems may unintentionally reinforce biases, making it essential to implement ethical guidelines and transparency measures to promote fairness and equality.

32. Anne Tyler Hall, *Lawsuit Claims UnitedHealthcare Uses AI to Deny Majority of Medicare Advantage Extended-care Facility Claims*, JD SUPRA (Jan. 18, 2024), <https://www.jdsupra.com/legalnews/lawsuit-claims-unitedhealthcare-uses-ai-8036102/> [https://perma.cc/7ZQN-BW8C].

33. See Brendan Pierson, *Lawsuit Claims UnitedHealth AI Wrongfully Denies Elderly Extended Care*, REUTERS (Nov. 14, 2023), <https://www.reuters.com/legal/lawsuit-claims-unitedhealth-ai-wrongfully-denies-elderly-extended-care-2023-11-14/> [https://perma.cc/M235-89VM] ("When these coverage denials are appealed to federal administrative law judges, about 90% are reversed, the complaint said, demonstrating the 'blatant inaccuracy' of the algorithm."); Est. of Lokken v. UnitedHealth Grp., Inc., 766 F. Supp. 3d 835, 840 (D. Minn. 2025).

34. See Pierson, *supra* note 33.

35. Ryan Calo & Danielle Keats Citron, *The Automated Administrative State: A Crisis of Legitimacy*, 70 EMORY L. J. 797, 800 (2021) ("Systems cut, denied, or terminated individuals' benefits without explanation in violation of due process guarantees.").

36. Thor Olavsrud, *11 Famous AI Disasters*, CIO (Oct. 2, 2024), <https://www.cio.com/article/190888/5-famous-analytics-and-ai-disasters.html> [https://perma.cc/24PA-V8CQ].

37. *Id.*

C. Overview of Immigration in the Asylum Process

The Refugee Act of 1980 formalized the right of individuals to seek asylum in the U.S.³⁸ The act defines a refugee as someone outside their country of nationality “who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of [past] persecution or a well-founded fear of persecution.”³⁹ The asylum process consists of three pathways: (1) affirmative asylum, (2) defensive asylum, and (3) asylum processing rule.⁴⁰ Specifically, this Note will focus on those individuals arriving at the U.S.-Mexico border pursuing asylum in general, under one of those three umbrellas, and in instances that require a “credible fear interview” (CFI) to be done before expedited removal in order to not violate international and domestic laws.⁴¹ A CFI results from a screening process that evaluates whether a person placed in expedited removal proceedings might qualify for asylum.⁴² There are two types of fear interviews: “credible fear” and “reasonable fear.”⁴³ An individual has a “credible fear” of persecution that entitles them to asylum if they demonstrate a “significant possibility” of qualifying for asylum or withholding of removal under the Immigration and Nationality Act, or for relief under the Convention Against Torture (CAT).⁴⁴ Such a risk is considered established when the individual shows they are likely to face harm in their home country based on factors like their religion, nationality, or membership in a social group.⁴⁵ Conversely, a “reasonable fear” requires a higher likelihood of being eligible for relief from removal, like persecution or torture, which requires an elevated standard of review when compared to credible fear.⁴⁶ The integrity of the asylum process at the border hinges on the judgment exercised by the officers, prompting federal regulations that require these officers to “receive special training

38. See Gregg A. Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, 4 INT'L J. REFUGEE L. 455, 458 (1992) (explaining the procedures and organizational framework established for U.S. asylum officers).

39. 8 U.S.C. § 1101(a)(42) (requiring that persecution be based on at least one of five protected grounds: (1) race; (2) religion; (3) nationality; (4) political opinion; and/or (5) membership in a particular social group).

40. *Asylum in the United States*, AM. IMMIGR. COUNCIL (May 9, 2025), <https://www.americanimmigrationcouncil.org/research/asylum-united-states> [https://perma.cc/5QKL-QJMR].

41. *Id.*

42. 8 C.F.R. § 208.30(e)(2), (3).

43. HOLLY STRAUT-EPPSTEINER, ANDORRA BRUNO, AUDREY SINGER & HILLEL R. SMITH, CONG. RSCH. SERV., R48078, CREDIBLE FEAR AND DEFENSIVE ASYLUM PROCESSES: FREQUENTLY ASKED QUESTIONS 11–12 (2024), <https://www.congress.gov/crs-product/R48078> [https://perma.cc/5Y3M-BE7C].

44. *Id.* at 1.

45. 8 U.S.C. § 1101(a)(42).

46. See STRAUT-EPPSTEINER ET. AL., *supra* note 43, at 11–12.

in international human rights law [and] non-adversarial interview techniques.”⁴⁷ Currently, due to the informal nature of adjudicating asylum claims, there tends to be a lack of transparency and hostility due to biases in the decision-making process.⁴⁸ In other words, there are fewer record-keeping requirements under the Administrative Procedure Act (APA), resulting in agencies having more discretion on what to record, and courts generally refer to agency discretion in immigration contexts.

i. AI Use at the Border: Primarily in Immigration Proceedings

Relying solely on AI to assess asylum claims poses significant ethical concerns. Automated decisions lack the nuanced understanding, empathy, and moral judgment needed to adjudicate individual circumstances, potentially leading to incorrect decisions that overlook the unique experiences of asylum seekers.⁴⁹ AI is being used and implemented instead of human decision-makers in assessing the validity of asylum claims through strict requirements that require a complex analysis. For example, “[a]ssessments require decision-makers to have regard to the future possible risks to individuals refused entry or returned to their country of origin; such assessments also rely on complex and nuanced tests associated with confirming identity and credibility.”⁵⁰ To uphold fairness in border proceedings, asylum officers are required by federal regulation to receive training in international human rights law and non-adversarial interview techniques.⁵¹ This special training entails the need to filter through asylum applicants and to avoid approving fraudulent asylum cases.⁵² However, as Anna Welch and Sara Cressey

47. 8 C.F.R. § 208.1(b).

48. See Anna R. Welch & Sara P. Cressey, *Due Process Denied: A Case Study on the Failures of U.S. Affirmative Asylum*, HARV. INT'L L.J. (June 1, 2023), <https://journals.law.harvard.edu/ilj/2023/06/due-process-denied-a-case-study-on-the-failures-of-u-s-affirmative-asylum/> [https://perma.cc/WVJ6-3H7Q] (explaining the downfalls of the asylum system and process in the United States, especially the impact it has on those fleeing their home countries due to persecution).

49. See Felicity Kersting, *Why Compassion Matters in Asylum Policy*, UNU CPR (June 28, 2023), <https://unu.edu/cpr/blog-post/why-compassion-matters-asylum-policy> [https://perma.cc/UY2G-X74] (explaining the need for compassionate policies at the center of the asylum process because it's proven to work and promotes well-being which the 1951 Refugee Convention and the 1967 Protocol, as foundational texts, require); see also Petra Molnar, *Using AI in Immigration Decisions Could Jeopardize Human Rights*, CIGI (Oct. 11, 2018), <https://www.cigionline.org/articles/using-ai-immigration-decisions-could-jeopardize-human-rights/> [https://perma.cc/99ZS-LVHP] (explaining that automated decision systems refer to technologies that replace the judgments of human decision-makers which use machine learning and statistics, and that such decision systems can make complex determinations, i.e., “whether people should be given protection on ‘humanitarian and compassionate’ grounds.”).

50. Forster, *supra* note 3, at 6.

51. 8 C.F.R. § 208.1(b).

52. *Fact Sheet: Asylum Fraud and Immigration Court Absentia Rates*, NAT'L. IMMIG. F. (Oct.

point out, “[t]he more informal, non-adjudicative framework for adjudicating asylum claims in the asylum offices lacks transparency and creates an opportunity for hostility and bias to permeate the decision-making process.”⁵³

ii. Use of the CBP One App

This risk of bias is heightened when use of AI intersects with the CBP One app at the border for those individuals seeking asylum.⁵⁴ Requiring applicants to take and upload a real-time selfie exposes a key flaw in the CBP One app: its facial-recognition system routinely performs poorly for people with darker skin tones and other marginalized groups.⁵⁵ The CBP One app was launched in 2020 and is utilized for those who arrive at the U.S.-Mexico border seeking asylum to schedule appointments and maintain eligibility for asylum.⁵⁶ Use of the app is meant to be simple in that it merely requires submitting a selfie to ensure the submission is by a live person.⁵⁷ Once the selfie upload is completed, the migrant is assigned an officer to perform a CFI.⁵⁸ After the asylum seeker is determined to be credible, they can officially file for asylum where the AI systems may be continued to be used to assess whether the migrant is being honest or not.⁵⁹ However, the utilization of AI technology tends to discriminate against African and Haitian migrants because the tool fails to recognize photos of people with darker skin tones.⁶⁰ Bias and discrimination have been formalized and quantified in many different

8, 2021), <https://immigrationforum.org/article/fact-sheet-asylum-fraud-and-immigration-court-absentia-rates/> [https://perma.cc/LD7V-7AQ7].

53. Welch & Cressey, *supra* note 48.

54. See Joel Rose, *Illegal Border Crossings are Down: One Big Reason Why is Now Part of a Court Fight*, NPR (July 19, 2023), <https://www.npr.org/2023/07/19/1188438846/illegal-border-crossings-are-down-one-big-reason-why-is-now-part-of-a-court-fight> [https://perma.cc/4VMD-3ZY6] (demonstrating that there are many risks of incorporating the CBP in immigration asylum proceedings especially migrants at the U.S.-Mexico border are limited in resources, where the CBP app acts as an additional barrier in the asylum proceeding).

55. USA: Mandatory Use of the CBP One Application Violates the Right to Seek Asylum, Research Briefing, AMNESTY INT'L at 9–11, (May 2023), <https://www.amnesty.org/en/wp-content/uploads/2023/05/AMR5167542023ENGLISH.pdf> [https://perma.cc/A4E-DZD3].

56. AM. IMMIGR. COUNCIL, *supra* note 13, at 1.

57. *Id.* at 5.

58. 8 U.S.C. § 1225(b)(1)(A)(ii).

59. Estefania McCarroll, *Weapons of Mass Deportation: Big Data and Automated Decision-making Systems in Immigration Law*, GEO. IMMIGR. L.J. 705, 724 (2020) (examining the decision-making systems used in the immigration context and focusing on the deportation proceedings, impacts, and human rights violations that appear due to these practices).

60. *Id.*

ways through the use of algorithms used at borders, such as those in the European Union, to assess claims and make decisions.⁶¹

iii. Use of RCA and ATA AI Tools

Similarly, there is a Risk Classification Assessment (RCA) tool that uses algorithms which determine whether an immigrant is dangerous to society.⁶² RCA limits many immigrants' rights because it mistakes those who are not a high risk and usually discriminates against them and sends them to be wrongfully detained.⁶³ One example of this type of discrimination is through the Asylum Text Analytics (ATA), an AI tool that evaluates asylum and withholding requests, identifying and tabbing those suspected of being fraudulent, including claims based on deception.⁶⁴ This is problematic because the tool might pick up something mistakenly. For example, an Afghan refugee used an automatic translation tool that "had swapped the 'I' pronouns in the woman's statement to 'we.'"⁶⁵ The U.S. court denied the asylum claim because of this error, as it caused the written application to not match the story that was initially told at the interview—ultimately, "[m]achine-learning translations are not yet in a place to be trusted completely without human review."⁶⁶ On the other hand, the Department of Homeland Security launched a pilot program

61. See Yiran Yang, Frederik Zuiderveen Borgesius, Pascal Beckers & Evelien Brouwer, *Automated Decision-Making and Artificial Intelligence at European Borders and Their Risks for Human Rights* 17–20 (SSRN, Working Paper No. 1, Apr. 10, 2024) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4790619 (discussing how algorithmic risk-assessment and biometric systems at European borders can reproduce and formalize discrimination, including profiling based on nationality, ethnicity, or other protected characteristics).

62. Mica Rosenberg & Reade Levinson, *Trump's Catch-and-Detain Policy Snare Many Who Have Long Called U.S. Home*, REUTERS (June 20, 2018), <https://www.reuters.com/investigates/special-report/usa-immigration-court/> [<https://perma.cc/NS4V-T5M2>].

63. Robert Koulish, *Using Risk to Assess the Legal Violence of Mandatory Detention*, 30 MDPL 5, 7–10. (2016) (analyzing how RCA risk scores are used to determine immigrant detention, as a flawed system for over-classifying risk and resulting in unnecessary immigrant detention).

64. Yael Schacher, *Harvard Law Clinic and Jenner & Block LLP Sue for Information Refugees International Requested on AI's Role in Asylum Decisions*, REFUGEES INT'L. (Dec. 20, 2024), <https://www.refugeesinternational.org/statements-and-news/harvard-law-clinic-and-jenner-block-llp-sue-for-information-refugees-international-requested-on-ais-role-in-asylum-decisions> [<https://perma.cc/D7SS-TX7Y>].

65. Andrew Deck, *AI Translation Is Jeopardizing Afghan Asylum Claims*, REST OF WORLD (Apr. 19, 2023), <https://restofworld.org/2023/ai-translation-errors-afghan-refugees-asylum/> [<https://perma.cc/W494-RAEV>].

66. *Id.* (quoting Sara Haj-Hassan, the chief operations officer of a nonprofit connecting refugee and asylum seekers with translation services) (explaining that "you need human attentiveness. The machine, it can be your friend that you use as a helper, but if you're using that as the ultimate [solution], if that's where it starts and ends, you're going to fail this person.").

that trains immigration officers to conduct interviews with “individuals seeking refugee status,” using generative AI as a tool.⁶⁷ This is problematic because of the biases that have been found in the use of AI.

iv. Training of Asylum Officers

Another issue that arises with AI is the training of asylum officers. The Immigration and Nationality Act’s asylum provision requires asylum seekers to prove a well-founded fear of persecution based on “race, religion, nationality, membership in a particular social group, or political opinion,” which grants U.S. immigration officials legal authority to decide on asylum claims at the U.S. border.⁶⁸ Immigration officials are presently trained using generative AI that demonstrates countless errors and biases.⁶⁹ Relying on generative AI to train immigration officials is problematic because of biases in the training data.⁷⁰

D. Due Process and Technology

Due process is a constitutional right that protects people from being deprived of life, liberty, or property without due process of law.⁷¹ The elements of a fair hearing, as stated by Henry Friendly, typically are: (1) an unbiased tribunal, (2) notice of the proposed action and the grounds asserted for it, (3) an opportunity to present reasons why a proposed action should not be taken, (4) the right to call witnesses, (5) the right to know evidence against oneself, (6) the right to have decisions based only on the evidence presented, (7) the right to counsel, (8) making of a record, (9) statements of reasons, (10) public attendance, and (11) judicial review.⁷² Using “[a]lgorithmic decision-making and the use of machine learning technologies violate[s] most—if not all—of these identified

67. Edward Graham, *DHS Generative AI Pilot Embraces Hiccups of Emerging Tech*, NEXTGOV (July 11, 2024), <https://www.nextgov.com/artificial-intelligence/2024/07/dhs-generative-ai-pilot-embraces-hiccups-emerging-tech/397982/> [https://perma.cc/E8ML-NP7C].

68. 8 U.S.C. § 1158.

69. See Branson Brooks, *DHS Using Generative AI to Train Officers*, EXECUTIVEGOV (July 12, 2024), <https://executivegov.com/2024/07/dhs-using-generative-ai-to-train-officers/> [https://perma.cc/3FKE-RLVU]; see also Graham, *supra* note 67 (explaining that generative AI is being used for trainings on conducting asylum interviews, with leadership embracing AI’s errors because inconsistencies better simulate real interviews).<https://www.nextgov.com/artificial-intelligence/2024/07/dhs-generative-ai-pilot-embraces-hiccups-emerging-tech/397982/?oref=ng-home-top-story> [https://perma.cc/5DJ6-P96D] (describing how the DHS has embraced the hallucinations of generative AI tools, which can “mirror[] the actual conversations [officers] are likely to have with asylum seekers.”).

70. See James Holdsworth, *What is AI Bias?*, IBM, <https://www.ibm.com/think/topics/ai-bias> [https://perma.cc/TAE5-R868].

71. U.S. CONST. amend. XIV, § 1.

72. Henry J. Friendly, *“Some Kind of Hearing”*, 123 U. PA. L. REV. 1267, 1279–95 (1975).

elements of a fair hearing.”⁷³ “A mere assertion that an algorithm *might* result in [an] unfair benefit[] is not sufficient to provide standing for a due process challenge.”⁷⁴ Additionally, the non-refoulement principle prohibits the return of refugees to a country “where they face serious threats to their life or freedom.”⁷⁵ AI might be in violation of these laws because of intrinsic biases by developers creating these tools leading to a great risk that it will misinterpret cultural signifiers. Since AI tools rely on past data, there will likely be some trouble in training and using these tools to assess new data that is focused on personalized assessments, which are prevalent in the asylum context.⁷⁶

Outside of the immigration context, a Wisconsin court held in *State v. Loomis* that relying on AI-enabled analysis raises due process concerns about individualized sentencing, especially when judges are presented with algorithmic risk assessments that may be misused.⁷⁷ The risk assessment could not be effectively contested because the methodology underlying the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) tool,⁷⁸ including how it assigned weights to the different factors, was not transparent.⁷⁹ In that case, the court rejected the due process argument, agreeing that while the

73. Chris C. Goodman, *AI, Can You Hear Me? Promoting Procedural Due Process in Government Use of Artificial Intelligence Technologies*, 28 RICH. J.L. & TECH. 700, 711 (2022).

74. *Id.* at 712.

75. The 1951 Refugee Convention, UNHCR, <https://www.unhcr.org/about-unhcr/overview/1951-refugee-convention> [https://perma.cc/EJW2-7XMK]; *The Principle of Non-Refoulement Under International Human Rights Law*, *supra* note 19. See also Agbolade Omowole, *Research Shows AI is Often Biased. Here's How to Make Algorithms Work for All of Us*, WORLD ECON. F. (July 19, 2021), <https://www.weforum.org/stories/2021/07/ai-machine-learning-bias-discrimination/> [https://perma.cc/V6C6-3BBB] (discussing the prevalence of bias in AI algorithms and implications for equitable decision-making to the use of AI in asylum and immigration determinations.); see also <https://www.unhcr.org/about-unhcr/overview/1951-refugee-convention> [https://perma.cc/2SYA-G6V2] (explaining the key refugee policies established in the United Nation's Convention, including the principle of non-refoulement).

76. See Forster, *supra* note 3, at 14 (“So long as AI-enabled capacities rely on group-based or past historic cases, their exclusive use in government decision-making will often fall short of international legal standards where individualized assessments are expected.”).

77. *State v. Loomis*, 881 N.W.2d 749 (Wis. 2016).

78. Alexandra Taylor, *AI Prediction Tools Claim to Alleviate an Overcrowded American Justice System... but Should They Be Used?*, STANFORD POLS. (Sep. 13, 2020), <https://stanfordpolitics.org/2020/09/13/ai-prediction-tools-claim-to-alleviate-an-overcrowded-american-justice-system-but-should-they-be-used/> [https://perma.cc/5KTT-K26F].

79. *Id.*; see also Ed Yong, *A Popular Algorithm Is No Better at Predicting Crimes Than Random People*, THE ATLANTIC (Jan. 17, 2018), <https://www.theatlantic.com/technology/archive/2018/01/eqvant-compas-algorithm/550646/> [https://perma.cc/Z5MZ-TYN9] (explaining lack of transparency with COMPAS and the risk of courts relying on a system that cannot be fully understood, challenged, or held accountable).

use of such a tool raised due process concerns, cautious and selective use of COMPAS was acceptable.⁸⁰

AI systems learn by projecting past patterns onto the future; when historical data reflect biases, these systems perpetuate those biases.⁸¹ Applying such algorithms without considering societal structures can result in “algorithmic oppression.”⁸² Algorithms undermine due process by restricting access to their source code, which prevents individuals from fully understanding how scores are calculated.⁸³ Thus, defendants cannot effectively challenge or contest the scores assigned to them.⁸⁴ Specifically because due process and the adjudication of these claims require a balancing and there is need for innovation in the process, these AI tools will lack that specific creativity and ability to account for new variables that come with the complexity and variety of asylum cases.⁸⁵

Significantly, the U.S. Court of Appeals for the Federal Circuit issued a decision in a case where a teachers’ union had a viable due process claim because teachers were denied access to an algorithm that the school district used for professional evaluations, finding that withholding the algorithm was a violation of due process rights.⁸⁶ Accordingly, there is some hope that if the Federal Circuit’s ruling is to set precedent then “anyone seeking to challenge agencies’ use of artificial intelligence on due

80. Felicity Bell, Lyria B. Moses, Michael Legg, Jacob Silove & Monika Zalnieriute, *AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators*, 54 (2022), <https://ssrn.com/abstract=4162985> [<https://perma.cc/4ZNV-QGXR>].

81. Zhisheng Chen, *Ethics and Discrimination in Artificial Intelligence-Enabled Recruitment Practices*, 10 HUMANS. & SOC. SCI. COMM’NS 1, 7–11 (2023), <https://www.nature.com/articles/s41599-023-02079-x> [<https://perma.cc/8UDG-UKU5>] (examining how AI recruitment systems replicate bias and proposing ethical safeguards).

82. Apura Vohra, Social Order in the Age of Artificial Intelligence: The Use of Technology in Migration Governance and Decision-Making (Oct. 19, 2023) (LL.M. thesis, The University of British Columbia) (on file with the Allard Research Commons, The University of British Columbia).

83. Katherine Freeman, *Algorithmic Injustice: How the Wisconsin Supreme Court Failed to Protect Due Process Rights in State v. Loomis*, 18 N.C. J.L. & TECH. 75, 87 (2016) (explaining and analyzing the due process violations through the use of algorithmic decision-making in *Loomis* and potential solutions); *see also* *Source Code: Developer’s Guide*, SONAR SOURCE, <https://www.sonarsource.com/resources/library/source-code/> [<https://perma.cc/6QUN-DFQP>] (“Source code is the set of instructions that a programmer writes to create software.”).

84. Freeman, *supra* note 83, at 88.

85. Paul W. Grimm, Cary Coglianese & Maura R. Grossman, *AI in the Courts: How Worried Should We Be?*, 107 JUDICATURE No. 3, 65, 67 (2024), <https://judicature.duke.edu/articles/ai-in-the-courts-how-worried-should-we-be/#> [<https://perma.cc/29MJ-M8LQ>].

86. Cary Coglianese, *AI, Due Process, and Trade Secrets*, REGUL. REV. (Sep. 4, 2023), <https://www.theregreview.org/2023/09/04/coglianese-ai-due-process-and-trade-secrets/> [<https://perma.cc/8JP7-QQYU>]; *see* Hou. Fed’n of Teachers, Local 2415 v. Hou. Indep. Sch. Dist., 251 F. Supp. 3d 1168 (S.D. Tex. 2017).

process grounds" would be able to do so.⁸⁷ If the Supreme Court applies the reasoning from Houston Federation of Teachers, asylum adjudicators who rely on AI may violate due process rights.⁸⁸ This case raises the possibility of establishing a legal rule that prohibits the use of AI in immigration decision-making.

II. The Risks of AI – Problems with AI Adjudicating Asylum Cases

A. Biases and Impacts on Migrants: Marginalized Communities and Ethnicities

AI tools like U.S. Citizenship and Immigration Services' (USCIS) Asylum Text Analytics, CBP's Risk Assessments, and Immigration and Customs Enforcement's (ICE) Facial Recognition are streamlining immigration processes and enhancing security. USCIS's Asylum Text Analytics detects fraud in asylum applications, while CBP's Port of Entry Risk Assessments uses AI to analyze trade and travel data for border security.⁸⁹ ICE's Facial Recognition Service aids in identifying individuals involved in serious crimes, and USCIS's Person-Centric Identity Services Deduplication Model centralizes biographical and biometric data for a comprehensive view of immigration histories.⁹⁰ These tools are intended to streamline immigration processes, reducing delays and enabling more timely, informed decisions.⁹¹ The issue with these tools is that the developers are the ones at fault for bias in the these tools "because they are the ones selecting the data and making the labelling to train the systems."⁹² Part of the problem, according to many, is that a lack of

87. Coglianese, *supra* note 86.

88. Brandon L. Garrett, *Artificial Intelligence and Procedural Due Process*, 27 U. PA. J. CONST. L. 933, 959 (2025).

89. Monique O. Madan, *The Future of Border Patrol: AI is Always Watching*, GovEXEC. (Mar. 22, 2024), <https://www.govexec.com/technology/2024/03/future-border-patrol-ai-always-watching/395167/> [https://perma.cc/7ZTQ-GW42] (discussing the use of AI at the border and the use of the risk assessment through the incorporation of AI, which is riddled with bias and other issues that impact migrants greatly); U.S. Dep't of Homeland Security, *Artificial Intelligence Use Case Inventory Library*, (June 30, 2025), <https://www.dhs.gov/publication/ai-use-case-inventory-library> [https://perma.cc/WL4T-CXSE].

90. U.S. Dep't of Homeland Security, *Artificial Intelligence Use Case Inventory Library*, <https://www.dhs.gov/publication/ai-use-case-inventory-library> [https://perma.cc/WL4T-CXSE].

91. Margaret W. Wong & Assocs., *Department of Homeland Security Artificial Intelligence Use Case Inventory*, IMWONG (Dec. 13, 2023), <https://www.imwong.com/2023/12/13/department-of-homeland-security-artificial-intelligence-use-case-inventory/> [https://perma.cc/58F7-LX4H].

92. See McCarroll, *supra* note 59, at 709 ("Some proponents argue that, regardless of the developers' choices, AI can minimize bias over time to the degree that it is statistically insignificant. This argument falls short because if the system is continuously fed by new data gathered within the framework of institutions and structures infected by bias, there is no

diversity within AI administration can inform the bias in the model itself—particularly regarding race and gender.⁹³

Scholars have expressed concerns about bias in AI systems, particularly in areas like facial recognition, where error rates are disproportionately higher for non-white individuals.⁹⁴ For instance, a study by the NIST found that facial recognition algorithms are significantly more likely to misclassify Black and Asian individuals compared with their white counterparts, with error rates up to 100-fold higher.⁹⁵ This bias raises alarms when considering the role of AI in asylum proceedings, where incorrect decisions could violate the rights of individuals seeking refuge. The use of the CBP One app increases the risk of this bias because it relies on facial recognition technology and has been found to discriminate against darker-skinned users.⁹⁶ One study found that facial analysis software tends to show an error rate of “0.8 percent for light-skinned men, [while the error rate was] 34.7 percent for dark-skinned women.”⁹⁷ Furthermore, AI algorithms tend to be more biased against identifying women than men.⁹⁸ Therefore, the broader use of AI may heighten risks for migrants, leading them to take more hazardous and deadly paths when trying to cross the border illegally, which could result in serious harm or even fatal outcomes.⁹⁹

way ADM Systems can correct for these biases without intervention. Recognizing the biases before creating the system would allow developers to introduce technical fixes to the algorithms.”).

93. Stephanie Weber, *How Artificial Intelligence is Transforming the Criminal Justice System*, THOUGHTWORKS, INC. (Jan. 10, 2018), <https://www.thoughtworks.com/insights/blog/how-artificial-intelligence-transforming-criminal-justice-system> [<https://perma.cc/63QF-9EJ4>]; see, e.g., *Immigration Decision-Making: Artificial Intelligence May Violate Human Rights*, SETZER IMMIGR. L., <https://www.setzerimmigration.com/articles/immigration-decision-making-artificial-intelligence-may-violate-human-rights/> [<https://perma.cc/WVX9-WKW9>] (“AI decision-makers rely on stereotypical factors – such as appearance, religion or travel patterns – and may often ignore more relevant data when making decisions. This imbeds bias into the automated decision-maker.”).

94. See Tyler, *supra* note 1.

95. See Boutin, *supra* note 11.

96. See HILSC, *supra* note 14.

97. Larry Hardesty, *Study Finds Gender and Skin-type Bias in Commercial Artificial-intelligence Systems*, MASS. INST. TECH. (Feb. 11, 2018), <https://news.mit.edu/2018/study-finds-gender-skin-type-bias-artificial-intelligence-systems-0212> [<https://perma.cc/H3PX-YKMU>].

98. Brianna Lifshitz, *Racism is Systemic in Artificial Intelligence Systems, Too*, GEORGETOWN SEC. STUD. REV. (May 6, 2021), <https://georgetownsecuritystudiesreview.org/2021/05/06/racism-is-systemic-in-artificial-intelligence-systems-too/> [<https://perma.cc/UDY5-FYKW>] (“[An AI] service misidentified women for men 19% of the time and darker-skinned women for men 31% of the time, but for lighter-skinned males, there was no error.”).

99. Tyler, *supra* note 1, (“Researchers have found evidence that surveillance systems can have a ‘funnel effect,’ leading migrants to avoid areas where they might be detected and instead are more likely to head to areas where they face increased risk of dehydration,

B. The Risk of Using AI: Why a Human is Needed and Not AI

AI seems equally unable to duly consider concepts that require human intuition, without which justice cannot be administered fairly.¹⁰⁰ Without proper oversight, AI's involvement in immigration decisions can lead to severe consequences, including wrongful deportations and violations of human rights, violating the *refoulement* principle.¹⁰¹ The technology's flaws, coupled with the lack of a comprehensive legal framework that provides guidance and regulation, leads to risks for asylum seekers whose complex, individual circumstances would likely be difficult for algorithms to interpret.¹⁰²

Accordingly, asylum decisions heavily rely on human elements that sometimes cannot be computed, especially when they have life-altering consequences for individuals facing persecution or other dangers in which there is a moral element.¹⁰³ Further, "research finds that the moral dilemmas asylum judges encounter lead to identity conflicts between their professional *role* identity as judges and their *person* identity as compassionate – or less so – individuals."¹⁰⁴ Additionally, decisions are made based on the political dynamics, public references, and other external pressures that could sway immigration officers making the decision.¹⁰⁵ Human decisions are furthermore important because a person's identity plays a central role in shaping the decision-making process, and there tends to be some influence through one's values, beliefs, and social norms that, most of the time, should not be ignored when making decisions.¹⁰⁶

hyperthermia, injury, and exhaustion.").

100. Lifshitz, *supra* note 98.

101. Evie Bellino, *Automated Borders, Human Consequences: The Use of AI in Migration Control and the Legal Limits of International Refugee Law*, AM. U. INT'L REV., <https://auilr.org/2025/09/15/automated-borders-human-consequences-the-use-of-ai-in-migration-control-and-the-legal-limits-of-international-refugee-law/?utm> [https://perma.cc/26NG-EAYQ] (examining the emerging use of AI in border enforcement systems and discussing how the use of this technology may violate non-refoulement obligations and other foundational refugee protections under international law).

102. Madeleine Forster, *Refugee Protection in the Artificial Intelligence Era: A Test Case for Rights*, CHATHAM HOUSE (Sep. 7, 2022), <https://www.chathamhouse.org/2022/09/refugee-protection-artificial-intelligence-era/2-near-future-ai-and-asylum> [https://perma.cc/QY5Q-2RT5] (examining the integration of AI into asylum procedures and highlighting the importance of considering the individual circumstances of asylum seekers, emphasizing that AI systems may struggle to fully account for the nuanced and personal situations of applicants, which are critical to ensuring fair and just outcomes).

103. Katerina Glyniadaki, *Deciding on Asylum Dilemmas: A Conflict Between Role and Person Identities for Asylum Judges*, 50 J. ETHNIC & MIGRATION STUD. 2879, 2880 (2024).

104. *Id.* (emphasis in original).

105. *Id.* at 2886.

106. *Id.* at 2887.

There is a need for empathy, especially in asylum cases. Lest the law become sterile and bureaucratic, we must embrace judicial passion, which Justice Brennan defined as “the range of emotional and intuitive responses to a given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason.”¹⁰⁷ More importantly, immigration cases involve very personal and emotional experiences that require a human element throughout assessment.¹⁰⁸ Every year, people seek refuge in the U.S. due to persecution or fear on account of their “race,” “religion,” or “nationality.”¹⁰⁹ As Justice Brennan suggests, judicial passion—an emotional connection to the facts of the case—becomes crucial in recognizing the humanity of asylum seekers and ensuring their experiences are understood within the broader context of law.¹¹⁰ Here, empathy allows for a more compassionate and just evaluation of everyone’s unique circumstances, ensuring that legal decisions go beyond the black letter law.

Although there are inherent biases, a human element is a huge deal in the asylum decision-making process because humans are uniquely capable of understanding and responding to emotional cues—something that AI, for all its advancements, still struggles with.¹¹¹ Emotional intelligence plays a significant role in assessing cases as a whole with empathy and intuition to protect an immigrant’s humanitarian needs, not just recognizing it from a legal standpoint.¹¹² A human decision-maker can apply discretion and context in evaluating these situations and make

107. Stephen Wizner, *Passion in Legal Argument and Judicial Decisionmaking: A Comment on Goldberg v. Kelly*, 10 CARDozo L. REV. 179, 179 (1988) (quoting William J. Brennan, Jr., *Reason, Passion, and The Progress of the Law*,” 10 CARDozo L. REV. 3, 9 (1988)).

108. Orane Cole, *AI in Immigration Law: Why Embracing Human Expertise Beats the Hype*, CILA (July 2, 2024), <https://cila.co/ai-in-immigration-law-why-embracing-human-expertise-beats-the-hype/> [https://perma.cc/82ZK-F3FH].

109. *Asylum*, USCIS, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum> [https://perma.cc/B3KK-E6P8]; see also *Refugees, Asylum Seekers and Migrants*, AMNESTY INT'L, <https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/> [https://perma.cc/PL8E-5EE5] (“Millions flee from armed conflicts or other crises or violence. Some no longer feel safe and might have been targeted just because of who they are or what they do or believe – for example, for their ethnicity, religion, sexuality or political opinions.”).

110. See Wizner, *supra* note 107, at 179–80; see also Cole, *supra* note 108 (explaining the value of human expertise when assisting with asylum applications).

111. See generally Robert Cook, *Decoding the Divide: 6 Reasons Why AI Isn’t EI*, TRUE COLORS (Jan. 4, 2024), <https://www.truecolorsoftl.com/tciblog/decoding-the-divide-five-reasons-why-ai-isnt-ei> [https://perma.cc/3NQ7-RE52] (discussing the challenges faced with AI due to the fact of the constant struggles that AI faces regarding emotional cues and how AI lacks the emotional intelligence that humans are equipped with).

112. See Savannah Averitt, *Opinion: We Must Consider the Human Element in Voting on Immigration Policy*, PORTLAND PRESS HERALD, (Oct. 26, 2024), <https://www.pressherald.com/2024/10/26/opinion-we-must-consider-the-human-element-in-voting-on-immigration-policy/> [https://perma.cc/SPV8-ZJFZ].

informed decisions even in the absence of complete evidence regarding a migrant claiming persecution or other humanitarian violations.¹¹³ Many asylum seekers face significant language barriers that make it difficult to communicate their case effectively.¹¹⁴ Asylum interviews often require applicants to articulate complex and emotionally charged stories, and the failure to communicate effectively due to language or translation issues can affect the outcome of the decision and even lead to denial of factual asylum claims.¹¹⁵

i. Why Machines Might Be Better

On the other hand, others might argue that machines are the better decision-makers, and empathy in decision-making is not required. For example, when employers are making hiring decisions, certain tools like the situational judgement test can be used to provide insight on how an employee will behave.¹¹⁶ Tools like these utilize algorithms and are used best with assessment tools because humans are “inherently” biased, whether consciously or unconsciously, and machine learning can be trained to focus strictly on objective and relevant data, saving time and costs.¹¹⁷ At the same time, humans might be unpredictable and susceptible to emotional influences, and, depending on an immigration judge or officer, their mood might change from day to day.¹¹⁸ Alternatively, machine learning might provide algorithms that consistently produce the same result—having more consistency that can allow immigration officers to apply the same standard and criteria is vital to immigration policy.¹¹⁹

113. Cole, *supra* note 108. *See generally* Averitt, *supra* note 112 (describing the humanitarian needs causing people to seek refuge and asylum).

114. My Khanh Ngo & Noelle Smith, *The Government Denies People Access to Asylum Because of Language Barriers. We're Fighting Back*, ACLU (Apr. 18, 2024), <https://www.aclu.org/news/immigrants-rights/the-government-denies-people-access-to-asylum-because-of-language-barriers-were-fighting-back> [https://perma.cc/R6L3-7MA7].

115. *Id.* Laura Belfield, *Why Machines are Better Than Humans and Why I Hate Simon Sinek*, SAPIA.AI (Feb. 28, 2020), <https://sapia.ai/resources/blog/why-machines-make-better-decisions-than-humans-oh-and-why-i-hate-simon-sinek/> [https://perma.cc/X2HQ-ST3R].

116. Nathan Thompson, *Situational Judgment Tests: Higher Fidelity in Pre-Employment Testing*, ASC (Nov. 30, 2024), <https://assess.com/situational-judgment-tests> [https://perma.cc/3ZVE-ATE4].

117. *Id.*

118. *See generally id.* (explaining how AI is more consistent than humans).

119. *See generally* Vyoma Raman, Catherine Vera & CJ Manna, *Bias, Consistency, and Partisanship in U.S. Asylum Cases: A Machine Learning Analysis of Extraneous Factors in Immigration Court Decisions*, in *Equity and Access in Algorithms, Mechanisms and Optimization* (EAAMO '22) 1–14 (2022) (explaining the inequalities in the asylum decision-making process and the recommendations made on how to address these issues).

III. Balancing Efficiency and Fairness – A Proposed Approach

A. The Hybrid Approach: Humans Should Make the Final Decision

A hybrid approach that combines both AI and the human element should be implemented in the asylum setting. This would leverage speed, accuracy, and efficiency in processing the initial claims but require a human at the end of the asylum process to make the final decision.¹²⁰ Humans are creative, and, when faced with new variables, they can think of decisions and solutions that AI is incapable of.¹²¹ Although AI can analyze large and small data sets, humans are still more nuanced and creative, and there is a constant need for emotional intelligence in our society that AI cannot provide.¹²² Humans have the ability to connect very disparate and complex ideas that, as of now, AI lacks.¹²³ Scholars have found that, in order to limit bias and discrimination in making decisions in asylum cases, AI tools should be used in a support capacity rather than as the primary “decision-making tool.”¹²⁴

An example of this occurred when two sisters fled Somalia.¹²⁵ Their asylum claim was “based on a fear of sectarian and gender-based violence from militant Islamist groups.”¹²⁶ These sisters, initially recognized as refugees and Kenyan citizens who entered Canada using a study permit under a false identity, truly compromised their credibility, leading to the rejection of their persecution claim.¹²⁷ A photo comparison generated using facial recognition software was the primary evidence against

120. *AI Decision Making: What Is It, Benefits & Examples*, INTELLIAS (May 16, 2025), <https://intellias.com/ai-decision-making/> [https://perma.cc/3SDD-CVPW] (discussing the effects and impacts of utilizing AI to make final decisions, how efficient these tools can be, and whether AI tools will replace human judgment).

121. Michelle Newblom, *AI vs. Human: Creativity, Abilities, and Skills in 2025 (Which is Better?)*, FIVERR (Nov. 24, 2024), <https://www.fiverr.com/resources/guides/business/ai-vs-human> [https://perma.cc/Q8EL-538K] (providing a breakdown on the differences between AI and humans, and how humans are needed for emotional intelligence).

122. *See id.*

123. *See id.*

124. Hilary Evans Cameron, Avi Goldfarb, & Leah Morris, *Artificial Intelligence for a Reduction of False Denials in Refugee Claims*, 35 J. REFUGEE STUD. 493, 504 (2022) (discussing why some asylum cases are denied and the potential of AI as a support tool that to human evaluation that might alleviate uncertainty issues in the decision-making process).

125. Francesca Palmiotto, *When is a Decision Automated? A Taxonomy for a Fundamental Rights Analysis*, 25 GERMAN L.J. 210, 229 (2024), <https://www.cambridge.org/core/journals/german-law-journal/article/when-is-a-decision-automated-a-taxonomy-for-a-fundamental-rights-analysis/362AF985585D28E5E762F4FEEF4719B7> [https://perma.cc/YR8A-5PU6] (“Asha Ali Barre and Alia Musa Hosh are two sisters who fled Somalia and sought asylum in Canada based on a fear of sectarian and gender-based violence from militant Islamist groups.”).

126. *Id.* at 229.

127. *Id.*

them.¹²⁸ In this case, it was noted that the automated system did not make the final decision but instead aided in the decision-making process while a human “review[ed] and [took] into account other factors” to come to a decision.¹²⁹ Overall, including the human element is warranted because it enables nuanced judgment, contextual awareness, and consideration of individual circumstances—factors that algorithms alone frequently fail to capture effectively today.¹³⁰

Having humans make the final decision also removes another layer of potential discrimination and bias when deciding asylum claims, as the data collected in using the AI is riddled with bias and lacks creativity in assessing every claim.¹³¹ Humans are natural problem solvers and are fully capable of making decisions when a new variable is in play.¹³² This is important because each asylum case is complex and has variations which AI will likely have challenges if unaided by human oversight and creativity with it throughout.¹³³

B. Following the European Union’s Approach: A Proposal for More Transparency and Guidance

The U.S. must prepare for AI and ensure the right parameters and laws are set in place. More transparency and regulation will be helpful in utilizing the new and emerging technology. As technology and innovation continue to advance, the government must be urged to implement regulations that embody fairness, equity, and efficiency.¹³⁴ The European Union’s (EU) Artificial Intelligence Act (AI Act) is the first comprehensive regulatory framework designed to ensure the ethical use of AI in decision-making, balancing efficiency through innovation but with strict protections for fundamental rights and due process.¹³⁵ The EU is ensuring

128. *Id.* (citing *Barre v. Canada*, 2022 FC 1078, para. 54 (Can. Ont.) (noting that when Asha and Alia applied for judicial review, the court found the decision to vacate their status unreasonable and in breach of procedural fairness).

129. *Id.* at 229 (citing Data Protection Working Party, *Guidelines on Automated Individual Decision-making and Profiling for the Purposes of Regulation 2016/679*, COM (2017) WP251 final (Feb. 6, 2018) [<https://perma.cc/FGJ6-8DLP>]).

130. See, e.g., Cole, *supra* note 108 (explaining the value of human expertise when assisting with asylum applications); see generally Newblom, *supra* note 121 (explaining the differences between human judgment and AI).

131. See Holdsworth, *supra* note 70.

132. Janine Brooks, *The Art of Problem Solving and its Translation into Practice*, 9 BDJ IN PRAC. 21, 21 (2022), <https://pmc.ncbi.nlm.nih.gov/articles/PMC9442556/> [<https://perma.cc/7G93-8PSR>].

133. See generally *Asylum in the United States*, *supra* note 40 (describing the asylum process and its complexity).

134. *How Should We Balance Efficiency and Equality*, CHI. BOOTH REV. (Aug. 30, 2018), <https://www.chicagobooth.edu/review/how-should-we-balance-efficiency-and-equality> [<https://perma.cc/X9QX-P5B2>].

135. *EU AI Act: first regulation on artificial intelligence*, EUR. PARL.: TOPICS (Aug. 6, 2023),

compliance with due process concerns and protections when using AI to support decision-making.¹³⁶ The EU has proposed some guidance in using AI, also known as the “AI Act,” which is the first comprehensive regulation of AI systems at a supranational level.¹³⁷

Specifically, “the AI Act focuses on the quality of training, validation, and testing data sets of AI systems.”¹³⁸ This focus is crucial, as putting these AI tools to the test and ensuring the tools are used properly provides agencies with clear guidelines on how to use AI.¹³⁹ The Act’s provision of clear obligations for providers of high-risk AI systems is another key component, ensuring that these systems are subject to rigorous oversight and accountability mechanisms.¹⁴⁰

In the context of immigration, the U.S. could greatly benefit from adopting aspects of the EU’s AI Act, particularly as AI technologies are increasingly being used in decision-making processes related to border control, asylum applications, and immigration enforcement. The EU’s AI Act specifically addresses the need for transparency, fairness, and human oversight in AI applications, ensuring that high-risk AI systems—especially those affecting individuals’ rights—are held to strict ethical standards.¹⁴¹ The EU’s AI Act also places a strong emphasis on the quality of data used to train AI systems, which is particularly relevant in immigration contexts.¹⁴² Inaccurate or biased data can lead to unjust outcomes in immigration procedures, such as wrongful denial of asylum or the misidentification of individuals.¹⁴³ Adhering to guidelines on data

<https://www.europarl.europa.eu/topics/en/article/20230601ST093804/eu-ai-act-first-regulation-on-artificial-intelligence> [https://perma.cc/7LTX-LQ5K].

136. Commission Regulation 2016/679, art. 14(2)(g), 15(1)(h), General Data Protection Regulation (GDPR), 2014 J.O. (L 119) 1–3.

137. See generally Lilian Edwards, *Expert Opinion: Regulating AI in Europe*, ADA LOVELACE INST. (2022), <https://www.adalovelaceinstitute.org/report/regulating-ai-in-europe/> [https://perma.cc/5ALK-3BPH] (providing a breakdown and reasoning of the new AI act passed by the European Union, strengthening the argument as to why passing more regulatory frameworks and policy will be beneficial if the ultimate decision is to implement AI in asylum process safely).

138. See Palmiotti, *supra* note 125, at 218 (“Additionally, it places a clear set of horizontal obligations on providers of high-risk AI systems, ranging from document keeping to the duty of information and collaboration in case of risks. Once in compliance with the legal requirements, AI systems must undergo a conformity assessment procedure based (in the large majority of cases) on internal control. Providers themselves assess the compliance of their systems with legal requirements, draw up a declaration of conformity, and affix a CE marking.”).

139. *Id.*

140. *Id.* at 213.

141. *EU AI Act: first regulation on artificial intelligence*, EUR. PARLIAMENT: TOPICS (Aug. 6, 2023), <https://www.europarl.europa.eu/topics/en/article/20230601ST093804/eu-ai-act-first-regulation-on-artificial-intelligence> [https://perma.cc/7LTX-LQ5K].

142. *Id.*

143. See Molnar, *supra* note 49.

quality, the U.S. could ensure that AI systems used in immigration decisions are based on unbiased decisions and data, reducing the risk of discriminatory outcomes.¹⁴⁴ By requiring transparency in how decisions are made and ensuring that there is a clear record of AI system operations, the U.S. Government could help safeguard against arbitrary decisions, which is crucial in ensuring there is a fairness and trustworthiness in the asylum process that is designed to help migrants pursue a better life.¹⁴⁵

Conclusion

Immigration cases are inherently complex and multifaceted. With each case having very specific details, there is a genuine requirement for nuanced, creative, and contextual interpretation.¹⁴⁶ Regarding credibility determinations, there is a reliance on consistency; but if the data inputted causes these immigration decisions to have biases that ultimately are based on nationality, race, or gender, this algorithm will most likely mirror these biases in its determinations.¹⁴⁷ Although humans are biased as well, a well-trained immigration officer or immigration judge should know how to set biases aside and properly consider unique variables while making a final decision.¹⁴⁸ Ultimately, AI is not ready to make decisions that humans need to make because there are certain qualities like “empathy, ethics and morality” that need to be taken into account, and which many algorithms cannot properly analyze.¹⁴⁹ Until and unless AI gets to a level of sufficient humanization in making decisions, it is likely not ready to be utilized fully in the asylum process.¹⁵⁰ Balancing both AI and human elements in the decision-making process of asylum claims should be the answer because humans are creative and empathetic, which are qualities essential in processing individual and unique asylum

144. See Pierson, *supra* note 33.

145. Marlaina Wright, *Asylum Seekers: The Search for Basic Human Right to Healthcare in Industrial Countries*, 35 EMORY INT'L L. REV. 135, 135 (2021) (noting that many asylum seekers pursue migration to achieve safety, education, and a better standard of living).

146. See Cole, *supra* note 108.

147. Elena Abrusci & Richard Mackenzie-Gray Scott, *The Questionable Necessity of a New Human Right Against Being Subject to Automated Decision-making*. 31 INT'L J.L. AND INFO. TECH. 114, 124 (2023).

148. Mary Smith, Michael B. Hyman & Sarah E. Redfield, *Addressing Bias Among Judges*, STATE CT. REP. (Sep. 14, 2023), <https://statecourtreport.org/our-work/analysis-opinion/addressing-bias-among-judges> [https://perma.cc/7UPW-TVQR] (discussing the importance of judges having effective bias training).

149. Joe Kendrick & Andy Thurai, *AI Isn't Ready to Make Unsupervised Decisions*, HARV. BUS. REV. (Sep. 15, 2022) at 1, 3, <https://hbr.org/2022/09/ai-isnt-ready-to-make-unsupervised-decisions> [https://perma.cc/7PEE-7JRF].

150. Chris Gosier, *How Should AI Be Used in Immigration? Cautiously, Experts Say*, FORDHAM NOW, Mar. 13, 2025, <https://now.fordham.edu/university-news/how-should-ai-be-used-in-immigration-cautiously-experts-say> [https://perma.cc/P5PK-23PU].

claims while not violating due process.¹⁵¹ Due to the expansion of AI, there is an “increase in deaths by pushing migrants trying to cross illegally towards more remote and dangerous routes.”¹⁵² Undocumented immigrants are entitled to due protection under due process and are “protected by the [C]onstitution’s stated right to due process—even [if they] . . . illegally entered or stayed in the country.”¹⁵³

To ensure that AI is used ethically and in accordance with due process, it is crucial that any AI-driven decision-making system in immigration proceedings is transparent. AI systems need to undergo rigorous testing to ensure they do not perpetuate discrimination or undermine the protections guaranteed to asylum seekers under U.S. law and international law. Without these safeguards, reliance on AI in asylum decisions risks exacerbating existing injustices and violating the basic and due process rights of those seeking refuge. Ultimately, technology and innovation cannot be slowed, but increasing transparency and implementing regulations can support immigration officers and help streamline asylum proceedings in the future.

151. Joel Anderson & Adam Gerace, *Trait Empathy and the Treatment of Asylum Seekers in Australia*, 60 AUSTL. PSYCH. 207, 210 (2024).

152. Tyler, *supra*, note 1.

153. See Fullerton, *supra* note 26.

