

# Can You Hear Me Now? Attorney Perceptions of Interpretation, Technology, and Power in Immigration Court

Journal on Migration and Human Security

2021, Vol. 9(4) 207-223

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DOI: 10.1177/23315024211034740

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## Executive Summary

The Executive Office for Immigration Review houses America's trial-level immigration courts, which adjudicate hundreds of thousands of cases annually, many resulting in deportations. Most proceedings require interpretation and all rely heavily upon technology. Yet, we know little about communication and technology in these hearings, and even less about the views of attorneys who navigate this system daily. I examine the effects courtroom interpretation and technology have on immigrant voices as described in interviews with immigration attorneys representing clients facing deportation. Attorneys overwhelmingly characterize the court as procedurally unjust, pinpointing how flaws in interpretation, telephonic conferencing, and videoconferencing offer the illusion of due process. Drawing upon criminology, legal sociology, and linguistics, this study finds profound improvements are needed to ensure due process in the nation's immigration courts, including:

1. Elimination of telephonic and videoconferencing in all but extreme circumstances.
2. Modernization of telephonic and videoconferencing technology.
3. Improvement of interpreter standards and working conditions.
4. Education of attorneys, judges, and interpreters regarding challenges inherent to courtroom interpretation and technology.

Although enhancing the quality of interpretation and technology protocols may improve immigrants' access to justice in immigration court, meaningful immigration court reforms should reduce the need for an immigration court altogether.

## Introduction

The Executive Office for Immigration Review (EOIR) employs 438 trial-level judges in 69 immigration courts across the country (EOIR 2020). Immigration judges adjudicate hundreds of thousands of immigration matters annually, with a backlog now surpassing 1 million cases (TRAC 2021). Most are removal hearings, colloquially referred to as deportation hearings,<sup>1</sup> and most use Spanish-language interpreters

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<sup>1</sup>The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) replaced "deportation" and "exclusion" with the term "removal." Here, I use the colloquial term "deportation."

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(EOIR 2019a).<sup>2</sup> Increasingly, hearings use telephonic conferencing, and videoconferencing (Eagly 2013). The multilingual nature of immigration proceedings directly affects credibility assessments and the testimony of immigrants has a dramatic impact on life-or-death immigration decisions rendered in these proceedings (Legomsky 2007). This underscores the importance of language and power in the courtroom. However, scholars have paid limited attention to the impacts of linguistic mediation<sup>3</sup> in immigration courts, whether through interpretation or technology.

*In Exploring Courtroom Discourse:* The language of power and control, Wagner and Cheng (2011) emphasize that communication is linked to power and control in the courtroom (see also, Conley and O’Barr 2005). Whether spoken or written, language is deeply embedded in sociocultural networks, reflecting and creating social reality (Ahearn 2001). Close examination of language reveals how “individuals use strategies and tactics to carve out a semi-independent domain of practice within the constraints placed on them by the powerful” (ibid., 119); conversely, it reveals how language is used to systematically oppress and exclude (Rosa and Flores 2017).

Insights from legal sociology and linguistics demonstrate the impact of language in immigration courts. Asymmetries of power—and legal outcomes—are shaped by language. According to Angermeyer (2015, 13) interpretation practices and language ideologies that support them can “constrain the ability of nonfluent English speakers to participate fully in court” and alter legal outcomes.

In this study, attorneys reveal the profound impacts that interpretation and technology have on deportation hearings with critical implications for due

process and case outcomes. Immigrants’ abilities to communicate clearly and effectively are crucial to obtaining relief from deportation. An immigrant’s voice is often the only evidence they can provide. Once deemed deportable, it is an immigrant’s burden to make a case for relief from deportation—not the state’s. Arguments for relief are generally dependent upon judicial determinations regarding credibility—whether or not immigrants are telling the truth—and are an essential aspect of communication in the courtroom.

I examine the effects courtroom interpretation and technology have on immigrant voices as described by immigration attorneys representing clients facing deportation. Attorneys overwhelmingly characterize the court as procedurally unjust, pinpointing how interpretation, telephonic conferencing, and videoconferencing silence immigrants, literally and figuratively. Findings hold important policy implications, particularly as remote hearings continue proliferating in light of the COVID-19 pandemic. Enhancing interpretation and technology practices is essential to assuring immigrants are provided access to justice in immigration court.

### *An Overview of Interpretation in Immigration Court*

English is the language of record in immigration court. Most individuals in immigration proceedings, however, have limited English proficiency (LEP). The Federal Court Interpreters Act (1978) requires the use of interpreters in federal proceedings, whether civil (e.g., immigration court) or criminal. Executive Order 13,166 and Title VI of the Civil Rights Act requires federal agencies grant LEP individuals “meaningful access” to court (Abel 2011). Lower federal courts, too, have upheld the right to interpretation for LEP individuals in criminal court, but the Supreme Court has not weighed in on the matter (Rathod 2013). When immigrants’ English abilities are “inadequate to fully understand and participate in [deportation] proceedings” they are provided interpreters (EOIR 2020, 64). Mollo stresses that immigration court “interpreters are a focal point in the judicial process. They are arguably more representative of a client than [their] attorney. An

<sup>2</sup>Spanish and Mandarin are the most common languages in immigration court (EOIR 2019a, 2019b). For example, in 2018 approximately 90 percent of all immigration court hearings used interpreters, with 75 percent using Spanish interpretation, followed by 3 percent using Mandarin interpretation (EOIR 2019a, 2019b).

<sup>3</sup>Linguistic mediation is the process of transmitting semantic meaning between languages or parties through an intermediary (Pöchhacker 2008). There exists a rich scholarship exploring translation and interpretation as interlingual and intercultural mediation (Nida 1964; Toury 1980; Hatim and Mason 1990; Wadensjö 1998; Viaggio 2006).

interpreter is a direct spokesperson for the [immigrant]" (Mollo 2005, 702).

EOIR employs about 80 staff interpreters and several hundred contract interpreters (DOJ 2020). Most courts have "in-house" Spanish interpreters. When other languages or dialects are needed, contract interpreters appear in person or via telephonic conferencing. Judges have the responsibility for determining when interpretation is required and if it is being offered in an appropriate language, although they typically rely on immigrants' attorneys, if available, to identify when interpreters are needed and what languages are required. Neither immigration attorneys nor immigrants can select a specific interpreter of their choosing. There is no indigenous-language screening mechanism in immigration court, and immigrants are generally assumed to speak the dominant language of their country of origin (Gentry 2020).

Immigrants' primary languages are routinely misidentified during initial encounters with Customs and Border Protection (Wallace and Hernández 2017). Misidentification may follow them to detention (Beck 2017; Fathi 2020) and immigration court (Gentry 2020). While efforts are made to provide interpretation in primary languages and dialects, sometimes interpretation is only available in a secondary language or alternative dialect. The provision of incorrect interpretation dramatically hinders courtroom communication (NLG 2011) and, particularly with unrepresented immigrants, can go undetected.

Interpreters take an oath "to interpret and translate accurately" and are overseen by the EOIR's Language Services Unit, which conducts "quality assurance programs" (EOIR 2020, 4). Immigration court interpreters need not be certified by the Administrative Office of the US Courts nor take the Consortium for Language Access in the Courts' standard certification examination (Abel 2011). Instead, immigration court conducts internal interpreter screenings and relies upon private language contractors to screen and certify interpreters.

Immigration court uses consecutive and simultaneous interpretation. Consecutive interpretation renders one language to another "spoken in brief sound bites successively, without omissions or embellishments, [allowing parties to] understand each other slowly and deliberately" (NAJIT 2006, 1). Simultaneous

interpretation renders "one spoken language into another when running renditions are needed at the same time as the English language communication" (ibid.). The National Association of Judiciary Interpreters and Translators (NAJIT) advises consecutive interpretation be used when LEP individuals play "an active role" in court, or "when they must speak or respond," and simultaneous interpretation is used when participants play "a passive role" (ibid.). Unlike other court settings, immigration court interpreters need not interpret all statements made during proceedings, typically rendering only statements made by and directed to immigrants.<sup>4</sup>

Although interpretation facilitates hearings and makes legal processes more accessible, it also mediates and modifies communication between parties (Ahmad 2007). Interpretation involves "trans[mission] of a spoken message from one language to another," which, ideally, preserves "the language level, style, tone, and intent of the speaker" (Mollo 2005, 702–703). "Good" interpretation speeds up hearings and reduces the risk of serious misunderstandings and errors (Ahmad 2007; Bowels 2007). "Bad" interpretation is detrimental. As Ahmad explains, "the quality of courtroom interpretation varies greatly, and demand for qualified interpreters vastly outstrips supply" (Ahmad 2007, 1008).

Interpretation issues include minor communication errors, lack of language proficiency, paraphrasing, interjections of personal opinion, and implicit and explicit bias (Abel 2011). For instance, Berk-Seligson (2017) finds interpreters' use of linguistic hedge words—such as "um," "uh," or "well,"—undermines credibility and testimony. In another study, immigration court observers in New York noted multiple instances when interpreters made anti-immigrant statements in open court, like immigrants should "get the f - - - out" (NLG 2011). In short, a lot of "bad" interpretation takes place in courts across America (Giordano 2012), and immigration court is no different (Abel 2011; Gentry 2020).

Interpretation is "inescapably subjective" (Ahmad 2007, 103) and inherently political. "Neutral" interpretation does not exist (Martín Ruano 2014).

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<sup>4</sup>*El Rescate Legal Services v. EOIR* 1991.

Pöchhacker (2008, 14) stresses that the interpreter's role is "fraught with controversy." As Licoppe and Verdier (2013, 248) note, "interpreting is not a purely linguistic and semantic activity, for which a simple criterion of accuracy (of translated meaning) suffices." Effective interpretation requires language proficiency, appropriate register (formality), "culturally specific performance," and emotional simulations bordering on "theatrics" (Ahmad 2007, 103). Slang and colloquial expressions, style, and local or regional differences in language structure, register, vocabulary, meaning, pronunciation, and accent create cultural and linguistic barriers between speakers, interpreters, and listeners (Ahmad 2007; Bowels 2007; Jacquemet 2011).

Abel criticizes immigration court for its routine provision of partial interpretation, leaving "LEP individuals [unable] to comprehend the testimony of English-speaking witnesses and exchanges between the Immigration Judge and Trial Attorney and defense counsel" (Abel 2011, 5). If pro se, immigrants cannot count on lawyers to summarize uninterpreted dialog and "may leave the proceeding with no idea what has just occurred ... unable to respond to testimony provided by other witnesses" (ibid.).

Ultimately, interpreters are not "passive and invisible participants" in the courtroom (Aliverti and Seoighe 2017, 152). *What* interpreters say (and do not say), *how* they say it, and even *who* they are has a profound impact on proceedings (Hale 2008; Inghilleri 2012; Angermeyer 2015). Court interpreters function as gatekeepers, helping to enforce, redefine, or contest the legal system's control over litigants and the societal subordination of minority-language speakers (Angermeyer 2009; see also, Davidson 2000).

### *An Overview of Technology in the Courtroom*

Computers, telephonic and videoconferencing, and other technological advances represent routine aspects of courtroom procedure, yet can dramatically alter proceeding outcomes. Adoption of courtroom technology results from several factors, including cost-effectiveness, the prevalence of computers in everyday life, weakening of psychological barriers to technology implementation by court actors, and general expectations of technology use (Lederer 1994).

Videoconferencing, in particular, has had a profound impact on criminal and civil proceedings. The first video trial occurred in 1971 (Hartmus 1996). The first remote appearances and arraignments began a decade later (Lederer 1994). During remote arraignments, defendants appear via live two-way television (ibid.). Remote appearances via video and phone have been found to save time and money, and mitigate safety risks associated with transporting incarcerated defendants to trial or having witnesses testify in person (Morgan 2008; Eagly and Shafer 2015).

Videoconferencing appeared in immigration court in 1995 (Flanders and Williams 2014) and passage of the Illegal Immigration Reform and Immigrant Responsibility Act (1996) formalized its use (Haas 2006). By the mid-2000s, most immigration courts were outfitted with videoconference technology (Walsh and Walsh 2008). By 2010, 12 percent of all immigration court hearings were conducted via videoconference (ibid.). Today, videoconferencing is used in place of physically transporting detainees to court for hearings in about 1/3 of all detained cases (Eagly and Shafer 2015). It is also used to facilitate judge substitutions.

Widespread outfitting of videoconferencing technology, coupled with an increase in matters received by EOIR (Ryo 2016) and detention (Gilman and Romero 2018; DeStefano 2019), has led some to predict that videoconferencing may become the dominant method of deportation adjudication (Eagly and Shafer 2015). Immigrants do not have a right to in-person hearings in courts with videoconferencing equipment. The Fourth Circuit has recognized that videoconference testimony fails to convey emotion with the same power as in-person testimony, and the Fourth and Seventh Circuits have acknowledged that appearing via videoconference is not the same as appearing physically and may be detrimental to an individual's case.<sup>5</sup> However, the circuit courts have yet to find videoconferencing deprives immigrants of a full or fair opportunity to present their cases in immigration court.<sup>6</sup>

<sup>5</sup>. *Thornton v. Snyder* 2005; *Rusu v. INS* 2002.

<sup>6</sup>. *Rusu v. INS* 2002.

Videoconferencing has been criticized for its potential to “greatly change the dynamic of a [court] proceeding,” (Kuchler and O’Toole 2008, 210). It depersonalizes interactions (Hartmus 1996) and impedes defense attorneys’ ability to zealously represent clients (Poulin 2003). Although Licoppe and Verdier (2013) find videoconferencing affords increased opportunities for participation, Poulin (2003) finds videoconferencing impair defendants’ audio and visual perceptions and deprives them of spontaneous interjections, opportunities to address the court, and the ability to seek clarification. Poulin (2003) also argues videoconferencing may negatively influence courts’ perspectives, defendants’ experiences, and process fairness. Videoconferencing also disproportionately impacts those who cannot afford—or are ineligible for—bond (Lederer 1994; Diamond et al. 2010). Because detained immigrants are less likely to have attorneys than nondetained immigrants,<sup>7</sup> these technological deficiencies may be magnified.

Technological problems are exacerbated in the immigration context, where credibility assessments and interpretation play a central role in adjudication (Legal Assistance Foundation of Metropolitan Chicago and Chicago Appleseed Fund for Justice 2005). Nonlinguistic and paralinguistic cues, including intonation and physical gestures, are fundamental aspects of communication (Ahmad 2007). Telephone and video equipment lack technical capabilities court interpretation requires, compromising quality (Abel 2011). Telephonic interpretation eliminates visual cues, creates delays, and impedes sound cues interpreters use “to determine the meaning, style and tone of the speech to be translated” (Abel 2011, 8; see also, Lee 2007). As telephonic interpretation is provided via speakerphone, it is accompanied by the “additional drawback of poor sound quality” (Abel 2011, 8).

Videoconferencing inhibits accurate transmissions of communication and immigrants’ comprehension of hearing dialog, altering voice tones and changing meaning, making some words inaudible, and

impairing immigrants’ abilities to accurately understand nonverbal cues from interpreters and others (Mollo 2005). Videoconferencing exacerbates cultural differences in communication and reduces mutual trust and understanding, which has serious implications given multicultural interactions inherent to immigration court (Federman 2006). This is also problematic because arguments for relief from deportation, such as asylum claims, are often predicated upon immigrants’ ability to recount past trauma and victimization “in a clear and consistent manner that is compelling to U.S. adjudicators” (Ardalan 2015, 1002).

Furthermore, videoconferencing inadequately captures body language and eye contact, dehumanizing individuals. As Walsh and Walsh (2008, 265) explain, “fundamentally alter[ing] the way a judge perceives an asylum applicant’s testimony ... mak[ing] an applicant seem less trustworthy” and negatively impacting fact-finder decisions (see also, Leung 2014). For these reasons, Abel (2011) calls for the curtailment of telephonic and videoconferencing when interpretation is used in immigration court.

Videoconferencing is also associated with litigant disengagement and may “interfere with meaningful participation in the adversarial process” (Eagly and Shafer 2015, 941; see also, Thorley and Mitts 2019). For example, Eagly and Shafer (2015) find that immigrants with televideo trials are significantly less likely to obtain lawyers or apply for relief from deportation or voluntary departure than immigrants with in-person trials. Eagly and Shafer (2015) argue that videoconferencing confuses and discourages immigrants, impedes confidential attorney-client communication, reduces immigrants’ ability to understand and assert their rights, and hinders judges’ ability to advise immigrants of their rights.

Examined together, existing literature on courtroom interpretation and technology practices, relevant laws, and court decisions are indicative of power dynamics and structural constraints that impede immigrants’ access to justice in immigration court (Baran and Holmquist 2018).

## Methods

Between 2014 and 2016 I conducted 18 in-depth, semistructured interviews with immigration attorneys

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<sup>7</sup>For example, between 2007 and 2012, 37 percent of all immigrants in deportation proceedings, and just 14 percent of all detained immigrants were represented by an attorney (Eagly and Shafer 2015).

working primarily in two East Coast immigration courts. Interviews afford insider perspectives on justice and the law drawn from lived experience (Ansems, van den Bos and Mak 2020). Attorney interviews offer unique insights into the interplay of language, technology, and power in immigration court.

Admittedly, attorney interviews provide just one perspective—albeit informed—on deportation hearings. They have intimate knowledge of how immigration law “on the books” is operationalized “in practice” (Pound 1910), yet perspectives of immigration attorneys are notably absent from the literature (Levin 2009). Those representing clients in deportation are particularly well-positioned to assess matters of fair process in the immigration system. Moreover, unlike immigration judges and interpreters,<sup>8</sup> immigration attorneys employed in law schools, nonprofits, and private practice are not prohibited by their employers from speaking to journalists or researchers.

The two courts under study were quite similar. They were “average” with respect to composition, number, and types of matters handled annually. For example, both courts consisted of five to 10 judges; the national average at the time was four. In 2014, courts A and B received just over 6,000 and 4,000 immigration matters respectively (EOIR 2015); nationwide, the median and mean numbers of matters received per court in 2014 were 4,632 and 5,187 (EOIR 2015). Despite similarities, the courts still differed. Court A had a higher asylum grant rate and a lower removal rate than Court B (TRAC Reports, Inc. 2015). For instance, in 2014 while court B’s asylum rate mirrored the national average, court A’s asylum grant rate was more than 1.5 times the national average (EOIR 2015).

Recruitment consisted of convenience and snowball sampling (Babbie 2007; Small 2009) using pre-existing networks, cold-calling and emailing, direct referrals, and recruitment in immigration court. The interview instrument consisted of a series of open and closed-response questions influenced by

grounded theory methods (Glaser 1965; Corbin and Strauss 1990). Interviews were constructed to capture legal encounter contexts, quality of decision making, quality of treatment, and voice.

Half the attorneys interviewed identified as female and half as male. All but one was born in the United States. All attorneys identified as White. Three participants identified as Hispanic/Latino and discussed being children of immigrants. Over half of attorneys interviewed were in their 30’s; the rest ranged from early 40’s to mid-60’s. Nearly three-quarters of participants had at least some second language fluency, and nearly half of these were native speakers of a language other than English.

Most practiced immigration law exclusively. One attorney had experience as a prosecutor, and another was a former criminal defense attorney. Two attorneys had clerked in immigration courts. Approximately half were in private practice, while half worked in nonprofits. One lawyer was employed by Immigration and Customs.<sup>9</sup> Most attorneys in private practice took some pro bono cases. All but one attorney primarily practiced in the geographic region under study, however, several had previous experience in other states.

Interviews were analyzed using content and critical discourse analysis (Downe-Wamboldt 1992; Fairclough 2011). I adopted a “flexible” approach (Deterding and Waters 2018), coding for predetermined themes and variables while still allowing themes to emerge naturally. This provided for a conceptualization of hearings as spaces where power and control manifest through communication and map onto the social world (Richmond 2005).

## **Mediating Language**

Despite wielding little formal power, interpreters may be the most influential actors in immigration court. Consistent with overall immigration court rates, interpreters were used in most hearings in the courts under study. As attorneys repeatedly explained, relying on

<sup>8</sup>Off-the-record conversations with government employees, including attorneys, interpreters, and judges, are excluded from analysis.

<sup>9</sup>One DHS attorney, immigration’s prosecutorial equivalent, agreed to be interviewed despite prohibitions against speaking to researchers; their views did not diverge from other participants.

interpretation during deportation hearings puts LEP immigrants at a clear disadvantage.

In the words of one attorney, interpretation is “more art than science,” involving not only transmission of words, but of cultural and emotional meaning. Most stressed that, even under the best circumstances, some words and phrases are lost in translation. No matter how good interpreters are, another insisted, “it’s always better for your client if they can speak English—the impact of what they’re saying is more direct and the best translator in the world can’t convey all the nuances.” Beyond being fluent, attorneys emphasized interpreters must account for emotion, intonation, and pauses, which is more difficult to gauge in some languages than others. “You translate a word to English and it’s just—it doesn’t have the same, almost a feeling,” another attorney reflected, “Like it’s [the] history and feeling of this word. That can be really difficult [to convey].”

Attorneys generally agreed that the quality of interpretation in the courts under study was good. Still, many noted court interpreters sometimes provide shortened summary interpretations of courtroom dialog. Beyond impacting content accuracy, as one attorney remarked, shortened interpretations can be downright “nerve-racking” for immigrants and attorneys alike:

If you don’t know the other language, then you’re sort of on pins and needles like, ‘What in the heck is [the interpreter] saying?’ It’s huge ... You’re speaking your native language and the interpreter comes back in English—and you were going on for a long time—and the interpreter says, ‘She said yes.’ It can play a huge role ... [with regard to] the psychological impact. It’d be great if we could do it all in a language we all understood.

In addition to making immigrants appear inarticulate, short answers can make them seem nervous, hesitant, or disingenuous. Moreover, it is difficult to know if what may have been omitted will become crucial to an assessment of credibility later. Given the possibility of shortened interpretations, some attorneys prepped clients to provide testimony in “bite-sized speech” with deliberate pauses allowing—and prompting—interpreters to produce word-for-word interpretations. Still, they stressed this was an inadequate means of addressing a larger problem.

Attorneys also highlighted communication issues posed by country and dialect variations, and the provision of interpretation in immigrants’ secondary languages. For example, one attorney recalled a case being “ground to a halt” because an interpreter did not speak the same dialect as her client. Another explained that many of his indigenous clients were not provided interpretation in their primary language, but in a secondary (colonizing) language. However, such examples were infrequent.

Attorneys stressed inappropriate interpretation not only occurred when clients spoke uncommon dialects or languages, but even when they spoke popular languages. Spanish interpretation was most common in the courts under study, reflecting the large Spanish-speaking communities in the area. Spanish varies greatly across countries; speakers from each country have distinct accents and vocabularies. As one attorney reflected, Spanish-speaking communities in the region are predominantly Central American, but most Spanish-speaking interpreters in the courts under study are Colombian, Cuban, or Puerto Rican. Attorneys said this linguistic disconnect caused miscommunications with potentially grave consequences. As many pointed out, while some interpreters attempted to account for such differences, this was not uniform.

Beyond questions of adequate or appropriate interpretation, attorneys highlighted the occasional interpreter error. Attorneys expressed frustration over what they perceived as bias in favor of official interpretations. One attorney shared, “There’s this sort of unwritten belief in court ... that what the interpreter says is somehow sacrosanct and you can’t challenge it.” Attorneys generally agreed that, when challenged, interpreters stand by what they have said and judges side with them. Thus, some were less inclined to challenge interpreter mistakes than others.

Approximately half the attorneys interviewed said they challenge interpreter errors only when “egregious” enough to be detrimental to a case. For example, one attorney recounted objecting to an interpretation of the Spanish slang term “*maricón*” as “fairy,” explaining that, in the context, it was uttered, connotation of the word was more appropriately translated as the more derogatory term “faggot.” Because he felt the case outcome hinged, in part, on the correct interpretation of this single

word, it necessitated objection. Limiting objections to serious errors can be difficult for attorneys as they must balance the severity of the error against the impact of an objection, which may interrupt the flow of their examination, dilute the impact of testimony, or raise the ire of the judge. Recalling another interpreter error an attorney elaborated, “when something’s off and you’re representing someone, you do kind of take it a little bit personally. So [in a recent case] I was kind of biting my tongue and punching my fist, but I didn’t say anything.”

Challenging interpreter mistakes requires awareness of errors. While most attorneys I interviewed had some second language competency—typically Spanish—many acknowledged that they were not always in an ideal position to judge interpreter accuracy. When attorneys do not speak the client’s language or understand the cultural and linguistic nuances involved in interpretation, it is difficult—if not impossible—to catch and address mistakes.

Interpretation in immigration court is exponentially complicated by the use of technology. The courts under study used telephonic and videoconference technology frequently. Interpreters were physically present to provide Spanish interpretation; telephonic conferencing was generally used to call a privately contracted interpretation service for other language needs. Videoconferencing was most commonly used in place of bringing detained immigrants to court. Interpreters and immigrants were provided headsets to allow for simultaneous interpretation when physically in the courtroom, but the consecutive interpretation was used when either interpreter or immigrant was elsewhere.

Attorneys consistently preferred their clients be in the courtroom for hearings with access to in-person interpretation. Attorneys associated the use of technology during hearings with many technical difficulties, from poor connections and inaudible audio to dropped calls and frozen images. They found videoconferencing inherently problematic. As one attorney lamented, videoconferencing is “choppy” and often accompanied by a time-lag. Another remarked videoconferencing can be “annoying because [there’s] a lot of trouble with the TVs and sound going out and the screens freezing.” Still another referred to videoconference technology used by the court as “somewhat antiquated,” noting the picture quality can be

“degraded so much that you can only see a form [instead of a human being].” Attorneys also told stories of judges losing their temper over videoconferencing malfunctions. One attorney summarized, “it’s obviously a problem when [immigrants] start talking and you can’t hear them.” Such technological inadequacies may not appear until audio from the hearing is transcribed upon appeal.

Given these issues, it is unsurprising attorneys flagged any combination of interpretation and telephonic or videoconferencing as potentially detrimental to their cases. For example, many highlighted the negative cumulative effects of the transmission of sound across multiple devices, locations, and people. One attorney elaborated:

[Videoconferencing] is problematic. It creates technological issues with the interpreters because oftentimes the interpreter is actually on the telephone with the [immigrant] at the detention center, but that means that they have the sound feed over the telephone and the sound feed over the [videoconferencing] equipment and you hear people complain a lot about ... just the quality of sound. They can’t hear the interpreters.

Another summarized, “If efficiency is an issue with live interpreters, individuals in the same room, it’s more of an issue [with videoconferencing].”

Audiovisual difficulties were also said to exacerbate problems of interpreter accuracy. As one attorney emphasized, interpreters are “not just supposed to be saying the words, but conveying emotion as well,” which is harder to do if they cannot see or hear the person speaking. Moreover, interpreters are unable to provide simultaneous interpretation when hearings are conducted via telephonic or videoconferencing due to insufficient technology, staffing, or both.

Indeed, videoconferencing was generally associated with limited interpretation. Attorneys recalled stretches of courtroom dialog during videoconference hearings that were not interpreted for clients; only communication directed to or spoken by clients was interpreted. Although they acknowledged interpretation of all hearing dialog would likely double the length of hearings, for a handful of attorneys, this was a matter of due process. One recounted:

[Videoconferencing is] really awful. I had a [complicated case] the government was really, really fighting. We started out with his ex-partner testifying in Spanish, which my client could understand. But then an expert testified for three hours. We didn’t have

simultaneous translation. We had no translation. My client couldn't understand anything that was being said. The court thought that was fine. I actually suggested having the translator step out, we get [the respondent] a phone in the room, and [the translator] just uses my cell phone and translates in the back of the courtroom. No. That wasn't allowed. In the end we had about nine hours in just English testimony. I went to [the detention facility] with my laptop and I translated it for him ... [The court] didn't care. They didn't care at all. I tried to argue due process and everything and 'we don't have the capability' was their response.

The inability of parties and interpreters to see one another is further exacerbated by the limited number of cameras and monitors provided in these videoconferencing settings.

Given these issues, most attorneys believed courtroom technology negatively impacts judge evaluations and decisions. As one attorney pointed out, discretionary relief from deportation often rests upon credibility, which is determined as much by *how* one is perceived as *what* one says. "When you have live people in court," one attorney reasoned, "it's much easier for...the judge to evaluate demeanor." Another elaborated, "I think it's very impactful to see someone there [in the courtroom] and crying," as opposed to watching someone give testimony on TV. One attorney even insisted judges rarely looked at respondents appearing via videoconferencing. As another summarized:

It's a very difficult thing, [videoconferencing]. Your client cannot see you unless the judge moves the camera. Your client, if he [doesn't speak English], can only hear the translator ... [and is] looking down at this screen and not at the judge ... The problem is, there's no real sense of being here.

Ultimately, attorneys overwhelmingly agreed that interpretation and telephonic and videoconferencing technology, on their own, pose numerous due process problems and hinder immigrants' ability to participate in deportation hearings. These problems only intensify when interpretation and technology combine.

## Mediation as an Obstacle to Due Process in Immigration Court

Mediation in deportation hearings raises serious due process concerns. On the surface, interpretation and technology appear to facilitate immigrant inclusion in the hearing process. Yet, as described by attorneys,

they embody structural barriers to hearing participation masking the superficiality of due process in immigration court and casting doubt on the legitimacy of America's deportation process.<sup>10</sup>

Despite a right to meaningful access to US courts as established by precedent, executive order, federal legislation, and agency directives, LEP individuals in immigration court face systematic barriers to participation in their deportation hearings. Language is embedded in and constructs social relations (Fairclough 2011) and influences distributions of power in the courtroom (Haviland 2003). Institutional language policies and rights—such as those enforced by courts—are not neutral or natural, but influenced by ideology (*ibid.*). As described by attorneys, reliance on interpreters under existing court structures greatly disempowers immigrants while benefiting the state.

In the immigration context language difference is a "substantive dimension of systems of inequality and marginalization" (Ahmad 2007, 1030). Oftentimes, it serves to maintain the control of "dominant legal and political institutions" involved in the immigration process at the expense of justice (Inghilleri 2005, 82). Failure to provide LEP immigrants with adequate interpretation is tantamount to a trial in absentia (Gonzalez, Vasquez and Mikkelson 1992; Ahmad 2007). Attorney interviews herein support previous claims that interpretation in immigration court is inadequate.

Admittedly, there may be some "bad apple" interpreters in immigration court. Yet, most problematic aspects of EOIR interpretation are shaped by structural conditions beyond interpreters' control, including exploitative working conditions for staff and contract interpreters. However, employment conditions for contract interpreters are especially problematic. At the outset of this study, EOIR had an exclusive contract with Lionbridge, a private company offering artificial intelligence, content creation and marketing, and interpretation and translation services worldwide. In 2015, the court signed a

<sup>10</sup>The superficiality of due process currently afforded to those facing deportation is even more dramatic in the context of expedited or summary removal, particularly when occurring following en masse guilty pleas in criminal court for illegal entry (Kanstroom 2018; Kerwin and McCabe 2010).

six-year contract with SOS International (SOSi), “the largest private, family-owned and operated technology and services integrator in the aerospace, defense, and government services industry,” for all interpretation needs (SOSi 2020).<sup>11</sup>

When SOSi took over interpretation responsibilities for the court, it cut interpreter pay by nearly half, reducing rates from \$65/hour to \$35/hour. Interpreters are made to travel to various courts around the country on short notice. They work long, often unpredictable shifts. The 2015 SOSi contract also required interpreters to remain at assigned hearings until released, with no guaranteed breaks.<sup>12</sup> This is particularly troublesome as the National Association of Judiciary Interpreters and Translators (NAJIT) stresses that even the most “experienced or talented” interpreter can become mentally fatigued after just 30 minutes of sustained simultaneous interpretation or prolonged periods of consecutive interpreting, “resulting in a significant loss of accuracy” (NAJIT 2020, 6). Exploitative treatment of these interpreters is well-known among immigration and interpretation circles, and has caused several labor disputes over wages, employee classification, and union-busting (Agrawal 2018). Such labor struggles are not conducive to quality interpretation.

Poor working conditions for interpreters exist alongside poor court protocols. Lower interpreter certification and training standards in immigration courts than in other federal courts may result in an underqualified pool of interpreters who, as a group, are more likely to commit errors than their counterparts. Even when interpreters have the experience and qualification needed to provide the nuanced, culturally competent interpretation required within the immigration context, EOIR may incorrectly assign them to cases based on misinformation or misunderstandings about language needs. In these cases, immigrants may struggle to understand and communicate through interpreters who do not speak their primary dialect or language, such as when Spanish interpretation is provided for a native Mam speaker from Guatemala.

Gentry (2020, 58) asserts that inappropriate interpretation in immigration court is not “merely a product of inconsistent and remotely mismanaged ad hoc policies,” but is “the uncontested settler colonial linguistic legacy ... [that] serves as the jurisprudential foreground for indigenous discrimination in the immigration process.” He argues that jurisprudence is “literally meaningless” for indigenous peoples in immigration court because interpretation practices subject them to systematic exclusion from due process (Gentry 2020, 51). While immigrants with LEP *and* limited proficiency in a colonizing language face double marginalization within the courtroom, attorney interviews suggest current interpretation practices subject *all* LEP immigrants to systematic exclusion from due process in immigration court.

The very need to use interpreters may drastically limit immigrants’ abilities to communicate in court. Minimal English abilities offer immigrants some advantages. English knowledge makes it possible to try to follow judges, lawyers, and witnesses conversing in English. In turn, immigrants may ask questions or request clarification, either from their attorneys—if represented—or from interpreters, judges, and other courtroom actors. Still, limited abilities cannot guarantee meaningful access to justice in immigration court. Lacking fluency, LEP immigrants appear left out of their hearings.

As evidenced by attorney interviews, interpretation deficits are exacerbated by technology. Telephonic and videoconferencing systems are notorious among attorneys for poor audio and video quality, including dropped calls and lost visuals. This technology restricts transmission of nonverbal communication, impeding accurate interpretation. Like previous studies (Lederer 1994; Poulin 2003; Mollo 2005), this study highlights the dehumanizing effects of such technology, distorting voices and faces and damaging interpretation and credibility assessments. For these reasons, Mollo (2005, 695) argues that videoconferencing “threatens our commitment to equal justice under the law,” concluding, “while it is possible to transmit the words, it is impossible for [a] television to transmit the people, the history, and the story of the immigrant” (*ibid.*, 707). Attorneys interviewed for this project shared Mollo’s critique.

<sup>11</sup>SOSi was subsequently awarded a new five-year contract in 2020 (DOJ 2020).

<sup>12</sup>SOS International, LLC, 21-CA-178096 (N.L.R.B.-ALJ Mar. 12, 2018).

Perhaps most striking, even under ideal conditions involving a knowledgeable interpreter and functioning technology, entire portions of hearing dialog are sometimes shortened or omitted. As Ahmad (2007, 1027) explains, this reduces immigrants to “mute, dark figure[s], uncomprehending of all that transpires” during their hearings. Despite rulings to the contrary, this hinders due process and quite possibly denies immigrants’ the ability to fully participate in deportation hearings.

Being able to listen to—and understand—what transpires during deportation hearings is integral to meaningful access to the court. Failure to interpret hearing dialogue excludes immigrants from important conversations and testimony, robbing them of the ability to form opinions about what is happening. How can immigrants participate in their own deportation hearings if they are not included in courtroom conversations? Indeed, Mellinger stresses that “in-person interpretation is necessary but insufficient for purposes of ensuring meaningful access to judicial proceedings,” and that “safeguard[ing] LEP immigrants’ due process rights” requires high-quality interpreters who provide accurate and complete interpretation in the appropriate language (Mellinger 2020, 6).

Returning to the words of one attorney, “it’s obviously a problem when [immigrants] start talking and you can’t hear them.” Something is wrong when technical difficulties prevent the court from hearing immigrants speak. Something is wrong when immigrants are systematically excluded from communicating during their own hearings. EOIR’s use of interpretation and technology silences immigrants, literally and figuratively. Interpretation in an inappropriate language or, worse, the absence of interpretation altogether, denies immigrants even the illusion of due process. Inaccurate and ineffective interpretation mean that even when immigrants can speak and be heard, their voices are not their own. They are misinterpreted, misquoted, and even reduced to one syllable existence, a simple “yes” or “no.” Telephonic and videoconferencing further disrupt immigrant voice, muffling speech, masking emotion, and dehumanizing interactions between immigrants and attorneys, interpreters, and judges.

Lamentably, the impacts that language proficiency and technology have on deportation hearings have been largely ignored. Interpretation and

technology practices within immigration courts vastly limit immigrants’ abilities to participate in deportation hearings in a meaningful way. This structural disadvantage disproportionately impacts unrepresented immigrants based on national origin as those from primarily non-English speaking countries can only access their hearings through interpreter mediation. Detained immigrants are also disproportionately affected by these constraints as they do not have a right to in-person hearings, exacerbating the technological barriers they encounter. Put simply, current immigration court practices, as described by immigration attorneys, are indicative of grave injustice.

## Implications for Policy and Future Research

In light of these findings, immigrants must be guaranteed the right to in-person deportation hearings. Telephonic and videoconferencing should be eliminated in all but the most extreme circumstances (e.g., personal needs, public health, rare languages). Mandatory detention should be eliminated, and community supervision<sup>13</sup> should be the norm (Kerwin 2015)<sup>14</sup>

In lieu of in-person hearings, courtroom technology must be modernized, with audio and visual quality greatly enhanced. Courtrooms should be outfitted with multiple cameras so that detained immigrants can more closely watch speakers. Technology should be reviewed to ensure that it accurately captures speakers’ faces.<sup>15</sup> Reasonable accommodations

<sup>13</sup>Community supervision effectively ensures immigrants appear in immigration court (OIG 2015). It also helps immigrants avoid physical, psychological, and sexual harms often associated with detention (Ackerman and Furman 2013).

<sup>14</sup>Detention numbers fell during the COVID-19 pandemic (Tosh et al. 2021). Prior to this, however, the use of detention was trending upward. As the world transitions to a “new normal,” it seems that previous detention trends will resume. For example, in June 2021 the Supreme Court effectively eliminated detained immigrants’ right to request bond if they have previously been deported (*Johnson v. Guzman Chavez* 2021).

<sup>15</sup>Racial biases in the technology used to capture and reproduce images in facial recognition software, film, and video affect how we view “the other” (Buolamwini and Gebru 2018; Lewis 2019).

must be provided to immigrants with disabilities that impair their use of technology.

In addition to ensuring in-person interpretation, EOIR should transition to reliance on staff interpreters—not precarious, exploited contractors. Interpretation standards must match or exceed professional norms. As court interpreters are “duty-bound to fully communicate all courtroom exchanges” (NAJIT 2020, 1), the entire hearing—not just portions directly addressing immigrants—should be interpreted. Use of consecutive and simultaneous interpretation should be based upon professional norms—not dictated by insufficient staffing or technology. At a minimum, interpretation should be held to the same standards—and working conditions—as in criminal courts. Team interpreting, in which two or more interpreters share interpretation responsibilities, can help accomplish these goals. NAJIT argues that team interpreting is perhaps “the most effective tool for protecting the integrity of interpretation, the liberty and rights of defendants/litigants, and...is critical to the administration of justice and the safeguarding of due process” (2020, 1). Attorneys, judges, and interpreters need to be provided with basic training on the potential biases and challenges of interpretation and technology in immigration courts. Finally, EOIR should collect and publicly share data on the use of interpretation and technology in all court proceedings.

Unsurprisingly, similar recommendations were made in a federally commissioned review of EOIR carried out by Booz Allen Hamilton, including creating standard operating procedures governing consecutive and simultaneous interpretation, limiting videoconference technology, finding “a technological or logistical solution to simultaneous interpretation over [videoconferencing],” and providing adequate training for judges regarding appropriate interpretation practices in courtroom settings (2017, 25). These recommendations have largely been ignored.

This study should not be generalized beyond its limitations. Findings are rooted in attorneys’ perceptions based on their legal knowledge, lived experience, and professional expectations. These perceptions may not correspond to those of other stakeholders, nor are they necessarily an “objective” representation of fair or unfair procedures in immigration court. The sample size does not allow for

comparisons among and between attorneys, such as by attorney identity (e.g., age, race/ethnicity, class, gender), employment context (e.g., private vs. non-profit, solo practitioner vs. firm), or specialization (e.g., asylum, criminal convictions, juveniles, gender-based violence, etc.). Yet even with these caveats, this study raises significant concerns.

Future research should explore similar questions across an expanded network of courts and a larger, more representative sample of attorneys. This research should include additional stakeholders, like court interpreters, Department of Homeland Security attorneys, immigration judges, and immigrants. Literature on-court communities (Eisenstein, Flemming and Nardulli 1998) and analyses of regional and court-based variation in immigration adjudication (Ramji-Nogales, Schoenholtz and Schrag 2009) suggest the possibility of variation in interpretation and technology practices across courts. However, significant variation is unlikely as immigration courts are federal, interpretation and technology policy decisions are created and implemented in a top-down fashion from a centralized administrative manager, and the same company is used for interpretation needs.

Findings are also limited to the time period in which data were collected. Given the dynamic nature of the US immigration policies and priorities, this is significant. Since data collection for this project began in 2014, the number of immigration judges across the country nearly doubled; despite this increase, EOIR’s backlog has ballooned (Schmidt 2019). In addition, changes to immigration resource allocation — such as ending the federal Legal Orientation and Help Desk Program (LOP) for detained immigrants (National Immigrant Justice Center 2018), interpreter labor conflicts, and the establishment of case completion quotas and other court accelerators and performance measures (Office of the Attorney General 2017; EOIR 2018, 2019a, 2019b)—are indicative of enhanced structural constraints that may further limit immigrants’ access to due process in immigration court. Future research should examine how such changes have affected the mediation of language in immigration court and related policy implications.

Given the increasing presence of technology in our everyday lives, future researchers should explore the evolving relationship between due process, migration

policy, and technology. This is especially salient in the context of the Covid-19 pandemic. Covid-19 has tested our capacity—and desire—to operate in digital spaces. The realms of justice and immigration are not exempt from this new (digital) world. While criminal and civil courts, including immigration court, temporarily closed when the pandemic hit, many quickly transitioned to semi-remote or fully remote hearings (Tosh, Berg and León 2021). Postpandemic predictions forecast a new era of digital engagement, hyflex education, and work-from-home models (Castrillon 2020; Locke 2021). This reality, coupled with preexisting trends, suggests technologically augmented, partially automated,<sup>16</sup> and fully remote deportation hearings—along with the due process threats they pose—may soon be the norm.

As with all academic inquiry, this study is limited by the concepts it employs. The merits of due process should not be accepted at face value. Although due process rights help level the playing field when individuals confront the power of the state, they do little to address substantive injustices inherent in our justice systems. The criminal justice and immigration systems are replete with examples of due process failures. Constitutionally enshrined protections have not safeguarded communities of color and other marginalized groups from disenfranchisement, mass incarceration, over-policing, and wrongful convictions (Barak 2021).

In immigration court one need look no further than the Fifth Amendment to reveal the empty promise of such protections, which guarantees immigrants the constitutional right to a “fundamentally fair” deportation hearing. Yet, deportation hearings are fundamentally unfair.<sup>17</sup> Issues of language and technology in immigration court explored here are not merely the result of insufficient due process, but are symptomatic of substantive structural inadequacies within the immigration system. Due process protections govern the “rules of the game,” ensuring everyone plays “fairly.” Yet, what good are rules if the game is

rigged? Attention to matters of due process in immigration court (e.g., meaningful access to the court in one’s primary language, the right to an in-person hearing) may overlook substantive injustices inherent to the immigration system (e.g., mandatory detention practices, racist, classist, and otherwise exclusionary immigration policies) (Barak 2021). These issues are beyond the scope of this study but merit further attention.

Still, as Poulin asserts, “when the quality of actual and perceived justice is at stake ... We should be concerned not only about the outcome of any single step in the process, but also ... [with] subjective experience[s]” of justice (2003, 1092). During summer 2020, Christopher Santoro resigned as acting chief immigration judge, citing the importance that immigration court not only *be* fair, but be *perceived* as fair. Santoro elaborated upon his concerns over Trump administration policies and priorities in a memo to court employees:

There will always be those who disagree with a judge’s (or jury’s) decision and our [immigration] court system is no different. But for the public to *trust* a court system, for the public to believe that a court is providing fair and equitable treatment under the law, that court system must not only dispense justice impartially but also appear to be impartial. Maintaining the appearance of impartiality and fairness can often be more difficult than being impartial and is a goal each of us—regardless of our role—must strive for every day.

Ultimately, perceptions of justice within immigration court merit examination not despite the fact that due process can be used to manipulate images of fairness, but because of it.

This study highlights just some of the many problems running deep within the US immigration system. Current interpretation and technology practices reveal the promise of justice in immigration court is little more than a façade—at least from immigration attorneys’ perspectives. Further exploration of due process within immigration court is needed to determine whether or not addressing existing interpretation and technology problems through the reforms proposed here would improve immigrants’ access to justice in a meaningful way. Drawing inspiration from movements to abolish the death penalty, prison, and the police, meaningful immigration court reform efforts should also reduce the need for an immigration court altogether.

<sup>16</sup>In 2019, EOIR adopted prerecorded videos in place of interpreters to advise immigrants of their rights and address frequently asked questions (AILA 2020).

<sup>17</sup>See Huynh (2021) on barriers to due process for unaccompanied minors in immigration court.

## Acknowledgments

The author would like to thank K. Sebastian León, Hillary Mellinger, and Zeena Whayeb for their invaluable feedback.

## Declaration of Conflicting Interests

The author declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

## Funding

The author disclosed receipt of the following financial support for the research, authorship, and/or publication of this article: This research was supported by American University's Doctoral Dissertation Student Research Award (2014-2015) and the Tinker Foundation's Tinker Field Research Grant (2014). It was conducted with approval from American University's Institutional Review Board.

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