



PRACTICE ADVISORY¹

Representing Immigrant Clients Affected by the Racial Bias of the Criminal Legal System: Mitigating the Effect of Past Racial Bias When Seeking Discretionary Relief and Bond

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I. INTRODUCTION

Immigrants of color who have past convictions and arrests should ask immigration judges to consider the racial bias of the criminal legal system.

Social science evidence overwhelmingly demonstrates that our criminal legal system is biased against people of color. Because of this pervasive bias, people of color, especially Black people, suffer disproportionate targeting and arrests, leading to worse outcomes at every stage of the criminal legal process.

The systemic bias in the criminal legal system also impacts immigration proceedings. For clients in immigration proceedings, their criminal history is often the biggest hurdle to obtaining discretionary relief from removal or release from immigration detention.

Immigration judges (IJs) regularly rely on evidence generated during the criminal process when making discretionary decisions related to asylum, cancellation of removal, and other forms of relief, and also when deciding whether to release a noncitizen on bond.

- ❑ According to the FBI, Black and Latinx people were “overrepresented among persons arrested for nonfatal violent crimes” relative to their representation in the general population while white people were underrepresented.
- ❑ Federal prosecutors are 1.75 times more likely to charge Black defendants with offenses carrying higher mandatory minimum sentences than white defendants with the same criminal records.
- ❑ According to a U.S. Department of Justice report, Black and Latinx jail inmates are overrepresented among the “unconvicted” jail population, which includes those unable to afford bail.
- ❑ In plea bargaining, prosecutors are less likely to give Black individuals a reduced charge and the benefits of reduced sentences than similarly situated white individuals.
- ❑ Black and Latinx male defendants receive sentences that are on average 19% longer than white defendants who are arrested for the same crimes.
- ❑ Black probationers are revoked, charged with parole violations, and returned to prison for a parole violation at higher rates than white and Latinx probationers.

Source: *Bias in the Criminal Legal System*.

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IJs routinely exercise discretion in a range of contexts, including when deciding: adjustment of status (INA § 245(a)); asylum (INA § 208(a)); cancellation of removal for permanent residents (INA § 240b(a)); cancellation of removal for nonpermanent residents (INA § 240b(b)); voluntary departure (INA § 240B); as well as various waivers of deportability and inadmissibility, including: INA § 237(a)(1)(H); INA § 237(a)(1)(E); INA § 209(c); INA § 212(h); INA § 212(i); INA § 212(k). In addition, when adjudicating bond redetermination requests, IJs must exercise judgment to decide whether a noncitizen is a flight risk or a danger to society. See 8 C.F.R. § 236.1(d). In making all of these determinations, IJs must decide how much weight to give any piece of evidence and then must engage in a balancing test of “positive” and “negative” equities.

Unfortunately, IJs do not typically consider the bias inherent in the criminal legal system when exercising discretion. For example, an IJ may deny a discretionary waiver to a Latinx noncitizen who was arrested on multiple occasions without considering the fact that the arrests may have been a result of racial profiling. Similarly, an IJ may deny bond to a Black noncitizen who was convicted of a non-violent offense who nonetheless received a mid-high range prison sentence, without considering the fact that the length of the Black noncitizen’s sentence may be attributable to biases in sentencing determinations, not the nature or dangerousness of the alleged crime.

This practice advisory, along with the accompanying report, *Bias in the Criminal Legal System: A Report Aggregating Social Science Research and Reporting on Racial Bias in the Criminal Legal System*, and [template brief](#), provides a framework for you to make legal arguments and introduce evidence during your client’s immigration court proceedings if they are seeking discretionary relief or requesting bond. You can use this advisory and the accompanying report to argue that the immigration judge should take into account the systemic racial bias of the criminal legal system when considering your client’s criminal history.

II. HOW TO USE THIS ADVISORY

You can use this advisory and the accompanying report to request that IJs consider systemic racial bias during discretionary decisions relating to relief from removal (like asylum, cancellation, or adjustment of status), waivers (like 212(h), 212(k), 212(i), 209(c), etc.), and bond.

To provide a tangible example, this practice advisory will follow the case of Mr. M, an undocumented citizen and national of Honduras. Mr. M is 42 years old and has lived in the United States since he was 11. He has three U.S. citizen children, ages three to nine years old, and a long-term U.S. citizen partner with whom he has lived for over a decade. Mr. M’s immediate relatives, including his parents and his siblings, are also all U.S. citizens. He has a lengthy work history, including as a taxi driver. Mr. M has had multiple interactions with the criminal legal system over the past 20 years. Nearly 20 years ago, he was arrested and convicted of statutory rape. He was 22 years old at the time. In the past 16 years, he has had over a dozen driving related misdemeanors and/or infractions. Only three of them have been in the last nine years. Mr. M is in removal proceedings and applying for adjustment of status based on a now current visa petition his father filed for him. He is statutorily eligible for adjustment of status, but both the Department of Homeland Security (DHS) and the IJ have indicated they have concerns about whether he warrants a grant of relief in the exercise of discretion given his criminal history. Mr. M is prepared to testify regarding his remorse and rehabilitation as a careful driver. He is prepared to explain that since the birth of his first child, he became more conscientious about driving carefully and safely. He will testify that while he has a total of 15 traffic violations, 12 of them were over a decade ago and he has only been stopped three times in the last nine years. In addition to speaking with Mr. M about his remorse and rehabilitation, you have also come to learn that Mr. M’s arrests and convictions are all from a county that is known for its over policing of communities of color. In light of this information, in addition to documenting Mr. M’s positive equities, you may also consider raising a legal argument and presenting evidence regarding the racial bias in the criminal legal system.

If you are representing a client, like Mr. M, who is likely impacted by the overwhelming racial bias of the criminal legal system, there are **two** steps that you should take to raise the issue in your client’s case.

1. STEP 1: Creating the Factual Record & Introducing Evidence into the Record

Identify and gather evidence to support a factual finding that systemic racial bias exists in the criminal legal system as experienced by your client. This step includes: reviewing the accompanying **report**, gathering articles, reports, and data that are relevant to the locality where your client was arrested or convicted, and interviewing your client in order to learn of their first-hand experiences of bias in the criminal legal system. Where helpful and appropriate, you should include pertinent and useful details in your client’s declaration.

2. STEP 2: Making the Legal Arguments

Ask the IJ to evaluate and consider the compelling evidence of racial bias in the criminal legal system when considering your client’s criminal history as a matter of discretion. In making this request, you should set forth two related, but distinct legal arguments. The first argument is that the IJ should give less evidentiary weight to the contents of a criminal record—as evidence of failure to rehabilitate or other negative equities—because of the pervasive bias in the criminal legal system. The second argument is that the IJ should consider evidence of pervasive racial bias when evaluating the totality of circumstances in discretionary determinations.

III. GATHERING EVIDENCE, WRITING A LEGAL BRIEF AND PRESENTING THE EVIDENCE AND LEGAL ARGUMENTS TO THE COURT

STEP 1: Creating the Factual Record & Introducing Evidence into the Record

If you are representing a noncitizen of color in seeking discretionary relief or bond, and the client has past encounters with the legal system, you should start by locating evidence of bias in the criminal legal system, as experienced by your client. There are many sources that you can rely on to establish this point. Below are three categories of evidence that will be useful to creating a record of bias in your client’s encounters with the criminal legal system.

CATEGORY 1: You should file the accompanying **report** in immigration court as an exhibit in support of your client’s application for discretionary relief. The report has been written specifically for an audience of immigration judges. The report aggregates research conducted by social scientists, government agencies, and nonpartisan organizations on racial bias in the criminal legal system. It explains that due to racial bias that is embedded in the criminal legal system, a person’s race plays an outsized role in the likelihood that they will develop a criminal record. The report advises that an immigration judge can enhance accuracy in their discretionary decision making where they consider the biased context under which people of color experience the criminal legal system.

CATEGORY 2: In addition to the report, which describes national and aggregated data, it is important to identify and gather evidence of bias in the criminal legal system in the zip codes/cities or counties of the client’s arrests and convictions. This is because, where available, this localized evidence will provide additional relevant factual support to the argument that bias likely impacted your client’s experience(s) in the criminal legal system.

Examples include:

- The Police Scorecard (<https://policesscorecard.org/>) “is the first nationwide public evaluation of policing in the United States. The Scorecard calculates levels of police violence, accountability, racial bias and other policing outcomes for over 16,000 municipal and county law enforcement agencies, covering nearly 100% of the US population.”
- Local Prosecution Empirical Studies: *Racial Disparities in Prosecutorial Outcomes*, Denver University (2021)

https://www.denverda.org/wp-content/uploads/news-release/2021/Racial-Disparities-in-Prosecutorial-Outcomes_March2021_final-002.pdf. This is an example of such a report for the Denver area. There may be other such localized reports for your areas. We recommend that you look for similar sources.

- Local News Sources or Investigative Reports: You should consult other sources, such as local news media reports, local investigative reports, or court orders directed at local law enforcement agencies.

When available, you might also consider asking other witnesses or letter/declaration writers to describe first-hand observations of bias in the criminal legal system in your client’s community.

CATEGORY 3: You should include first-hand experiences relating to bias in the client’s declaration, if in your judgment this evidence would be persuasive to the IJ. You should weigh how to present your client’s story in a way that allows your client to describe racial bias within the criminal legal system while still accepting responsibility for their actions and expressing remorse. You are in the best position to assess, based on your client’s individual facts and the IJ presiding over the case, whether presenting evidence of first-hand experiences with racial bias would be strategic.

If you decide to proceed, in preparing the client’s declaration, you should ask clients certain questions about their subjective experiences with the criminal system, including:

Question	Sample Declaration Language for Mr. M.
How often did you see police in your neighborhood?	The police regularly patrolled certain areas where I lived. They were the areas that were most heavily populated by Latinx families. There was one exit near my house where I often saw a patrol car sitting on the side of the off ramp. I remember noticing that when I traveled to different parts of the county, parts that were more affluent or had the fancier shopping, sightings of police were much less frequent. It was also common knowledge that the police would only set up DUI roadblocks in certain areas. Those areas were the more low-income areas of the city and where the population was more predominantly black and brown.
How often did police stop you for alleged traffic violations?	It seems like the police stopped me regularly. Most of the time, they would ask to see my license and registration and then they would let me leave. There were, of course, times that I did not make a complete stop or that I ran the red light or didn’t properly slow down in a cross walk. I know that this was dangerous and that I could have harmed others on the road. But there were also many times where I had no idea why they were stopping me. They usually assumed that I did not speak English. One time I just asked. The response was something along the lines of: well, you have tinted windows and a 49er football vanity license plate.
How did police treat you when you interacted with them?	Sometimes the interactions were pleasant, but often I felt like the police were looking down on me and assuming that I was a bad person. They always spent a long time running my plates. They would ask me questions about where I was coming from and where I was going. Sometimes they would ask me about my immigration status, which I know they are not supposed to do. Often they would also ask me if I had any weapons or drugs in the car. They even did this when my only offense was not making a complete stop at a stop sign.

Question	Sample Declaration Language for Mr. M.
Did you notice any racial disparities in how often police would stop people in your neighborhood, and in how they would treat people once they were stopped?	Police more regularly stopped people of color than white people. My fiancé is a white woman. Unfortunately, she's not a great driver and is probably the worst driver in the family. But she hardly ever gets stopped and when she does, normally she is let go with a warning. When I pass by someone who's been pulled over by the police, more often than not they are Latinx.
How did police treat your family and friends?	The way that police treated my family and friends differed. For example, when I was with my white fiancé, they were kind to her and directed gentle questions to her. It was almost as if they wanted to make sure that she was okay and that she wanted to be in the car with me. When I am with other Latinx friends, the police stops tend to be more aggressive and intimidating. The officers speak in louder and harsher tones and ask more questions.

Sample Exhibit List

K. DOCUMENTS EVIDENCING MR. M'S COMMITMENT TO DRIVING SAFELY.....x
[REMOVED]

L. DOCUMENTS EVIDENCNG [RACIAL/ETHNIC] BIAS IN THE CRIMINAL LEGAL SYSTEM.....x
 See Exhibit B, Declaration of Mr. M

1. [Name of Stanford Report].....x
[insert excerpts]

2. Police Scorecard Report for San Francisco Police Department, available at: <https://policesscorecard.org/ca/police-department/san-francisco>x
San Francisco Police Department: Receiving Score of 31% (out of 100)
"Scores range from 0-100% comparing cities with over 250k population. Cities with higher scores spend less on policing, use less force, are more likely to hold officers accountable and make fewer arrests for low-level offenses."
"Police Presence/ Over-Policing (Officers per Population): 24% [worse]"
"Police Accountability: 15%"
"Arrest Rate for Low Level Offenses: 76%"
"Based on population, a Black person was 9.7x as likely and a Latinx person was 4.3x as likely to be killed by police as a White person in San Francisco from 2013-21."
Black Population in San Francisco = X%, Black Individuals Arrested = 34%
Latinx Population in San Francisco = 15%, Latinx Individuals Arrested = 28%

3. [insert local news sources /investigative reports].....x

M. MISCELLANEOUS RECORDS EVIDENCING THAT MR. M MERITS A POSITIVE EXERCISE OF DISCRETION.x
[REMOVED]



STEP 2: Making the Legal Arguments

Now that you have identified and collected evidence of bias in your client’s exhibits and exhibit list, the next step is to prepare language that you can use in your pre-hearing brief. This language provides the immigration judge with viable legal arguments about why she (1) should give certain criminal records less evidentiary weight, and (2) should consider the existence of bias in the criminal legal system when engaging in a discretionary analysis. By briefing the issue before the IJ, you will preserve the issue for appeal, should that be necessary.

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First, your brief should argue that as an evidentiary matter, the IJ should assign limited weight to the records related to your client’s criminal history because those records were generated by a racially biased criminal legal system. Although most evidence is admissible in removal proceedings, the IJ must nonetheless determine how much weight to give each piece of admitted evidence, based on its reliability and probative value. Given the disproportionately harsh outcomes for people of color in the criminal legal system, the criminal records are not reliable indicators of a noncitizen of color’s failure to rehabilitate and should be afforded limited weight.

Second, your brief should argue that the IJ must consider evidence of racial bias in the criminal legal system as part of the totality of your client’s circumstances when deciding whether to grant discretionary relief. Board of Immigration Appeals precedent requires IJs to consider not only the existence of a criminal history, but also the unique facts and circumstances underlying it. Just like the nature of a noncitizen’s role in an offense and a noncitizen’s mental health—circumstances the Board has considered in examining a noncitizen’s criminal history—systemic racial bias is relevant context that must be taken into account in the discretionary analysis.

For a detailed template of the argument based on Mr. M’s case, please click [here](#). As a reminder, we encourage advocates to adapt and adjust the arguments because cases will arise in different circuits and will involve different forms of discretionary relief, different criminal records out of different jurisdictions, and different levels of indicia of bias.

NOTE: THE BOND CONTEXT IS DIFFERENT

Bond is distinct in that the inquiry is focused on whether your client is a flight risk and/or a danger, rather than whether favorable discretion is warranted based on the totality of the circumstances. The first argument described above, that the IJ should give certain criminal records less weight, is an evidentiary argument that transfers easily to the bond context. The second argument, that the IJ should consider systemic bias in the discretionary determination, may be reframed for the bond context as an argument that the IJ should consider systemic bias in assessing whether your client is a danger. For further guidance on bond, consult *A Guide to Obtaining Release from Immigration Detention*, National Immigration Project., <https://nipnlg.org/work/resources/guide-obtaining-release-immigration-detention>.

IV. CONCLUSION

It is our hope that this practice advisory, along with the accompanying report, provides a framework for you to make legal arguments and introduce evidence during your client's immigration court proceedings if they are seeking discretionary relief or requesting bond. If you choose to make these arguments and are interested in sharing updates and reflections, please consider sending those to: Khaled Alrabe, khaled@nipnlg.org and Ann Garcia, ann@nipnlg.org.