

2012

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Recommended Citation

Molly Bowen, *Avoiding an "Unavoidably Imperfect Situation": Searching for Strategies to Divert Mentally Ill People Out of Immigration Removal Proceedings*, 90 WASH. U. L. REV. 473 (2012).

Available at: http://openscholarship.wustl.edu/law_lawreview/vol90/iss2/5

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AVOIDING AN “UNAVOIDABLY IMPERFECT SITUATION”: SEARCHING FOR STRATEGIES TO DIVERT MENTALLY ILL PEOPLE OUT OF IMMIGRATION REMOVAL PROCEEDINGS[†]

I don't know why they want to torture me. I'm a rich man. I'm god. They want to have me remove the plants from heaven to earth . . .

—Michael A., a man with severe mental illness, explaining to an asylum officer why he fears persecution if removed to Nigeria.¹

Michael A. came into the immigration system, was detained, and asserted that he feared persecution if returned to Nigeria, the country that U.S. Immigration and Customs Enforcement (ICE) asserted was his home country.² He was interviewed by an asylum officer who recommended that he receive a hearing in immigration court on his asylum application.³

Thousands of individuals have similar experiences every year. What is important about Michael A.'s case is that, at some point during this process, he claimed that he was a United States citizen.⁴ Attorneys with knowledge of this case state that the government's proof of his status as a non-citizen was uncertain.⁵

The asylum officer who interviewed Michael A. noted that he suffers from psychosis and until recently was on anti-psychotic medication.⁶ The asylum officer also stated that his testimony was delusional and therefore implausible; because it was implausible, it was not credible.⁷ More specifically, the officer noted his psychosis which “calls into question the entire credibility of his claim.”⁸ Michael A. received a hearing but his application was denied, and, ultimately, he was ordered deported.⁹ This

[†] “[O]ur goal is to ensure that proceedings are as fair as possible in an *unavoidably imperfect* situation. To that end, this decision will provide a framework for analyzing cases in which issues of mental competency are raised.” Matter of M-A-M-, 25 I. & N. Dec. 474, 476 (B.I.A. 2011) (emphasis added).

1. HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, DEPORTATION BY DEFAULT: MENTAL DISABILITY, UNFAIR HEARINGS, AND INDEFINITE DETENTION IN THE US IMMIGRATION SYSTEM 29 (2010), http://www.aclu.org/files/assets/usdeportation0710_0.pdf [hereinafter DEPORTATION BY DEFAULT].

2. *Id.*

3. *Id.* at 29–30.

4. *Id.* at 27.

5. *Id.* at 27.

6. *Id.* at 29–30.

7. *Id.*

8. *Id.*

9. *Id.* at 30.

case, and the illegal deportation of multiple mentally ill United States citizens,¹⁰ has raised questions about the treatment of mentally ill individuals in the immigration removal system.¹¹ If mental illness automatically tarnishes the credibility of one's claim, how seriously did the immigration officer and court explore his claim of citizenship? Did he receive appropriate monitoring, medication, and mental health treatment while detained by the Department of Homeland Security (DHS)? Most importantly, even if Michael A. did not qualify for asylum, are the goals of the immigration system advanced by removing an individual with a severe mental illness, especially when that illness may have presented barriers to the proper presentation of his case?

Recent efforts to better protect mentally ill individuals in removal proceedings have focused on increasing procedural safeguards. Scholars and advocates have called for reforms such as providing free attorneys to indigent mentally ill individuals,¹² requiring DHS to release all mental health records in their possession so an individual can document his mental illness,¹³ appointing guardians ad litem for mentally ill respondents¹⁴ and providing training to immigration judges on mental health symptoms.¹⁵ The goal of these reforms is to ensure that all individuals receive a full and fair hearing.¹⁶

10. See *infra* notes 44–50 and accompanying text.

11. For purposes of this Note, “serious mental illness” refers to a mental condition that significantly “disrupt[s] a person’s thinking, feeling, mood, ability to relate to others and daily functioning.” *What is Mental Illness: Mental Illness Facts*, NAT’L ALLIANCE ON MENTAL ILLNESS, http://www.nami.org/template.cfm?section=about_mental_illness (last visited Nov. 4, 2012). The National Alliance on Mental Illness (NAMI) includes “major depression, schizophrenia, bipolar disorder, obsessive-compulsive disorder (OCD), panic disorder, post traumatic stress disorder (PTSD) and borderline personality disorder” as common serious mental illnesses. *Id.*

12. Legal representation is thought to improve outcomes in immigration cases. Asylum seekers with legal representation “were granted asylum at a rate of 45.6%,” compared to 16.3% approval for individuals without legal representation. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007). This statistic is explained in part by the selection effect—that legal representatives often do not represent individuals with weak claims—but the dramatic difference in grant approval rate suggests that the “power of representation” goes beyond the selection effect. *Id.*; see also Helen Eisner, Comment, *Disabled, Defenseless, and Still Deportable: Why Deportation Without Representation Undermines Due Process Rights of Mentally Disabled Immigrants*, 14 U. PA. J. CONST. L. 511 (2011) (arguing for right to counsel for mentally ill individuals).

13. See *infra* Part II.B.

14. Alice Clapman, *Hearing Difficult Voices: The Due-Process Rights of Mentally Disabled Individuals in Removal Proceedings*, 45 NEW ENG. L. REV. 373, 378 (2011).

15. See *infra* text accompanying note 105 for a discussion of training.

16. See *infra* Part I.C for a discussion of the due process rights of individuals in removal proceedings.

An important procedural reform came in May 2011 when the Board of Immigration Appeals (BIA) decided *Matter of M-A-M*.¹⁷ For the first time, *Matter of M-A-M* established a requirement for immigration judges to assess mental competency and provided suggestions for safeguarding the procedural rights of mentally ill individuals in removal proceedings.¹⁸ These procedural reforms, however, are insufficient to stop wrongful removals of mentally ill people. To prevent the wrongful removal of people with severe mental illness, this Note argues that the focus must shift from simply increasing procedural rights to developing options to divert these individuals out of immigration removal proceedings altogether. Terminating proceedings for mentally ill individuals or exercising discretion not to place those persons in proceedings in the first place will increase accuracy of outcomes, guarantee that those respondents who are ultimately removed had a meaningful opportunity to present their case, and make the immigration system more humane.

This Note presents the unique challenges facing mentally ill individuals in immigration removal proceedings and the lack of tailored protections in the current system. It explores how *Matter of M-A-M* presents a limited improvement to the current system. Finally, it presents two pathways out of immigration removal proceedings, termination and prosecutorial discretion, and offers recommendations for strengthening these options.

I. SEEING THE PROBLEM: MENTALLY ILL PEOPLE IN REMOVAL PROCEEDINGS

A. *The Process of Proceedings*

Many different paths may bring an individual with severe mental illness into the immigration removal system. Immigration enforcement begins with the apprehension of an individual by a DHS officer¹⁹ or by a

17. 25 I. & N. Dec. 474 (B.I.A. 2011).

18. *Id.* at 478.

19. DHS is the government agency responsible for immigration service, enforcement, and adjudication. STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 10, 3 (5th ed. 2009). The Homeland Security Act of 2002 dismantled the Immigration and Naturalization Service (INS) and shifted immigration enforcement to the newly-created DHS. Homeland Security Act of 2002, 6 U.S.C. § 291 (2006). Within DHS, both ICE and U.S. Customs and Border Protection enforce immigration law. Customs and Border Protection focuses on enforcement at the border of the United States; “border” includes both land borders and ports of entry such as airports and seaports. LEGOMSKY & RODRÍGUEZ, *supra*, at 3. ICE enforces immigration law primarily in the interior of the country. *Id.* The development of DHS was not just a structural change but also signaled a change in the magnitude of immigration enforcement. The INS had less than two thousand agents enforcing immigration law within the United States before September 11, 2001. Jennifer M. Chacón, A

state or local law enforcement officer.²⁰ If the officer has prima facie evidence that the individual “was entering, attempting to enter, or is present in the United States in violation of the immigration laws,”²¹ the immigration officer may serve a charging document commonly called a “notice to appear” on the individual.²² This commences removal proceedings.²³ The individual may be detained from apprehension through the conclusion of the proceeding.²⁴ In contested removal proceedings, an attorney represents ICE.²⁵ The noncitizen has a right to representation, but only at his or her expense.²⁶ At the removal hearing, ICE must establish by

Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights, 59 DUKE L.J. 1563, 1572 (2010). The estimated employment for ICE in 2010 was 20,000 employees. *Id.*

20. LEGOMSKY & RODRÍGUEZ, *supra* note 19, at 649. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) established the first information-sharing partnerships between state and local law enforcement officers and ICE. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, ICE, <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited Nov. 4, 2012). The Secure Communities program announced in March 2008 strengthened these partnerships and increased the focus on apprehension of criminal aliens. *Secure Communities*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited Nov. 4, 2012). For diverse perspectives on the strengths and concerns of these partnerships, see Shadi Masri, *Current Development in the Executive Branch: ICE's Initiation of Secure Communities Program Draws More Criticism than Praise*, 25 GEO. IMMIGR. L.J. 533 (2011); Nicholas D. Michaud, Note, *From 287(g) to SB 1070: The Decline of the Federal Immigration Partnership and the Rise of State-Level Immigration Enforcement*, 52 ARIZ. L. REV. 1083 (2010); Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639 (2011).

21. 8 C.F.R. § 287.3(b) (2012).

22. 8 C.F.R. § 1003.14 (2012). The “notice to appear” includes the time and location of the removal hearing, the charged grounds of deportability, and the factual allegations supporting the charges. LEGOMSKY & RODRÍGUEZ, *supra* note 19, at 650–51.

23. IIRIRA consolidated what was formerly described as “exclusion” and “deportation” proceedings into “removal” proceedings. 8 U.S.C. § 1229a (2006). A removal hearing is an administrative proceeding by DHS. LEGOMSKY & RODRÍGUEZ, *supra* note 19, at 10.

24. See Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules and Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531 (1999). Some noncitizens are subject to mandatory detention. Alice E. Loughran, *Congress, Categories, and the Constitution—Whether Mandatory Detention of Criminal Aliens Violates Due Process*, 18 GEO. IMMIGR. L.J. 681, 683–84 (2004). Five categories of noncitizens are subject to mandatory detention: “(1) certain arriving noncitizens, (2) noncitizens subject to ‘expedited removal,’ (3) noncitizens who have certain criminal convictions, (4) suspected terrorists, and (5) noncitizens who have final orders of removal.” Faiza W. Sayed, Note, *Challenging Detention: Why Immigrant Detainees Receive Less Process Than “Enemy Combatants” and Why They Deserve More*, 111 COLUM. L. REV. 1833, 1838–39 (2011). The mandatory detention provisions were recommended by the U.S. Commission on Immigration Reform to ensure that noncitizens did not abscond after apprehension. *Id.* Noncitizens not subject to mandatory detention may still be detained at the discretion of DHS. LEGOMSKY & RODRÍGUEZ, *supra* note 19, at 651. See also Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.—C.L. L. REV. 601 (2010).

25. LEGOMSKY & RODRÍGUEZ, *supra* note 19, at 654.

26. *Id.* “Because deportation is a civil proceeding, potential deportees have no sixth amendment

clear and convincing evidence that the charged individual is in fact a noncitizen.²⁷ If that individual is found to be a noncitizen and is deportable,²⁸ he or she will be removed unless he or she is eligible for a form of affirmative relief from removal such as cancellation of removal, asylum, or adjustment of status.²⁹ Both the noncitizen and ICE may appeal a decision to the BIA.³⁰ Judicial review is available for some, but not all, administrative decisions.³¹

B. Mental Illness in the System

A significant number of individuals in immigration removal proceedings have a mental illness. The majority of information on individuals in removal proceedings with mental illness focuses on the detained population. The Department of Immigrant Health Services estimated that between two and five percent of individuals detained in 2008 had a “serious mental illness” and between ten and sixteen percent of detainees had “some form of encounter with a mental health professional or the mental health system.”³² Additionally, for some people the

right to counsel.” U.S. v. Campos-Asencio, 822 F.2d 506, 509 (5th Cir. 1987).

27. LEGOMSKY & RODRÍGUEZ, *supra* note 19, at 655. The removal of United States citizens is prohibited by law. The laws governing removal refer only to “deportable aliens.” Immigration and Nationality Act § 237(a), 8 U.S.C. § 1227(a) (2008). “Alien” is defined in immigration law as “any person not a citizen or national of the United States.” 8 U.S.C. § 1101(a)(3) (2008); *see also Problems with ICE Interrogation, Detention, and Removal Procedures: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 15 (2008) [hereinafter *Problems with ICE Interrogation*] (statement of Gary Mead, Deputy Dir. of the Office of Detention and Removal Operations).

28. Individuals apprehended in the United States who entered without inspection at a border are treated as subjects of admission at the time of the removal hearing and therefore must satisfy the grounds of inadmissibility. Immigration and Nationality Act § 237(a), 8 U.S.C. § 1227 (2008). A noncitizen who has been admitted may still be “deportable” if he or she does not satisfy another set of grounds related to criminal convictions, false claims of citizenship, marriage fraud, and other behavior. *Id.*

29. LEGOMSKY & RODRÍGUEZ, *supra* note 19, at 656.

30. *Id.* at 657.

31. *See* Immigration and Nationality Act § 242(b)(2), 8 U.S.C. § 1252 (2005). Availability of judicial review of agency decisions is a highly complex area of immigration law. *See* Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 582 (2011); Aaron G. Leiderman, Note, *Preserving the Constitution’s Most Important Human Right: Judicial Review of Mixed Questions Under the REAL ID Act*, 106 COLUM. L. REV. 1367 (2006); Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459 (2006); Rebecca Sharpless, *Fitting the Formula for Judicial Review: The Law-Fact Distinction in Immigration Law*, 5 INTERCULTURAL HUM. RTS. L. REV. 57 (2010).

32. DEPORTATION BY DEFAULT, *supra* note 1, at 16 (quoting *Selected responses from ICE to questions posed by The Washington Post regarding the provision of mental health care to immigration detainees*, May 2008, <http://media.washingtonpost.com/wp.srv/nation/specials/immigration/documents/>

experience of detention and removal proceedings leads to increased symptoms of anxiety and depression.³³

The 2008 ICE Standards provide guidance for assessing and responding to mental illness in detained individuals. Specifically, these standards provide that newly admitted detainees will have a mental health screening within twelve hours and will receive a comprehensive appraisal within fourteen days; all detainees will have access to twenty-four-hour emergency medical, dental, and mental health services; and that “detainees with . . . known mental health concerns will be referred . . . for evaluation, diagnosis, treatment, and stabilization.”³⁴ Unfortunately, these standards are not always met.³⁵ Many detention facilities do not meet the guideline of conducting a mental health assessment within twelve hours of a new detainee arriving.³⁶ The practice of conducting mental health screenings in English is a problem for the many detainees who are not proficient English-speakers.³⁷ Lack of staff raises concerns about supervision and care.³⁸ Dennis Slate, a top mental health official in ICE, reported that the

day3_ice_mentalhealth.gif (accessed May 11, 2010)). The Department of Immigrant Health Services “provides health services in some immigration detention facilities . . .” *Id.* No definition of serious mental illness or “encounter” with the mental health system was provided. *See id.*

33. The symptoms may be triggered by feeling of lack of control, uncertainty, and isolation. CARA M. CHEYETTE, PHYSICIANS FOR HUMAN RIGHTS, PUNISHMENT BEFORE JUSTICE: INDEFINITE DETENTION IN THE US 11–13 (Scott Alan ed., 2011), available at https://s3.amazonaws.com/PHR_Reports/indefinite-detention-june2011.pdf.

34. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, 2008 OPERATIONS MANUAL ICE PERFORMANCE-BASED NATIONAL DETENTION STANDARDS: MEDICAL CARE 1–2, 11 (Dec. 2, 2008), available at http://www.ice.gov/doclib/dro/detention-standards/pdf/medical_care.pdf. The standards also provide that health authorities must be notified within twenty-four hours if detainees need or request mental health services. *Id.* at 12. Every facility is expected to have a mental health program that offers intake screenings, referral, crisis intervention, transfers to a mental health facility if the detention facility cannot care for the detainees mental health needs, and a suicide prevention program. *Id.* at 13. Additional guidance is provided on isolation of mentally ill individuals, the use of restraints, and forcible psychotropic medication. *Id.* at 14–15. Additional standards focus specifically on suicide prevention and intervention. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, 2008 OPERATIONS MANUAL ICE PERFORMANCE-BASED NATIONAL DETENTION STANDARDS: SUICIDE PREVENTION AND INTERVENTION (Dec. 2, 2008), available at http://www.ice.gov/doclib/dro/detention-standards/pdf/suicide_prevention_and_intervention.pdf.

35. For an analysis of the ICE detention health care system from former Director of the ICE Office of Detention Policy and Planning, see Dora Schriro, *Improving Conditions of Confinement for Criminal Inmates and Immigrant Detainees*, 47 AM. CRIM. L. REV. 1441 (2010).

36. TEXAS APPLESEED, JUSTICE FOR IMMIGRATION’S HIDDEN POPULATION: PROTECTING THE RIGHTS OF PERSONS WITH MENTAL DISABILITIES IN THE IMMIGRATION COURT AND DETENTION SYSTEM 25 (2010), available at http://www.texasappleseed.net/index.php?option=com_docman&task=doc_download&gid=313.

37. *See id.*

38. The Washington Post’s study of the Willacy County detention center found: “Suicidal detainees can go undetected or unmonitored. Psychological problems are mistaken for physical maladies or a lack of coping skills. In some cases, detainees’ conditions severely deteriorate behind

ratio of detention staff to mentally ill inmates was 1:1,142,³⁹ far below the ratio of 1:400 in Federal Bureau of Prisons facilities.⁴⁰

Mentally ill individuals experience unique obstacles in immigration court, and immigration judges have identified working with incompetent respondents as “one of the many challenges” that they face.⁴¹ For individuals with severe mental illness the courtroom experience may become “an experience of pervading perplexity, bewilderment, and distress.”⁴² Many forms of mental illness exaggerate or diminish one’s presentation of emotion, making judges less likely to believe that an individual has good moral character and merits the judge’s favorable exercise of discretion.⁴³ Mental illness is dynamic; a person who is competent to perform some tasks may nonetheless be unable to present evidence and understand the proceeding.⁴⁴

It is impossible to quantify the number of individuals whose mental illness has prevented that individual from presenting his or her case for relief from removal. However, there are multiple cases in the last ten years

bars. Some get help only when cellmates force guards and medical staff to pay attention.” Dana Priest & Amy Goldstein, *Careless Detention: Suicides Point to Gaps in Treatment, Errors in Psychiatric Diagnoses and Drugs Plague Strained Immigration System*, WASH. POST, May 13, 2008, at A1. The Willacy County detention center in Texas did not have a clinical doctor or pharmacist. Bill Ong Hing, *Systemic Failure: Mental Illness, Detention, and Deportation*, 16 U.C. DAVIS. J. INT’L L. & POL’Y 341, 365 (citing Dana Priest & Amy Goldstein, *Careless Detention: System of Neglect*, WASH. POST, May 11, 2008, <http://www.washingtonpost.com/wp-srv/nation/specials/immigration/index.html>). Only one part-time psychiatrist worked for the facility, which housed 2,018 detainees. *Id.*

39. FLA. IMMIGRANT ADVOCACY CTR., DYING FOR DECENT CARE: BAD MEDICINE IN IMMIGRATION CUSTODY 32 (2009), available at <http://www.tallahassee.com/assets/pdf/CD131100321.pdf>.

40. *Id.*

41. Mimi E. Tsankov, *Incompetent Respondents in Removal Proceedings*, 3 IMMIGR. L. ADVISOR 1, 1 (2009), available at <http://www.justice.gov/eoir/vll/ILA-Newsletter/ILA%202009/vol3no4.pdf>.

42. Ian Freckelton, *Therapeutic Appellate Decision-Making in the Context of Disabled Litigants*, 24 SEATTLE U. L. REV. 313, 316 (2000).

43. As one psychologist noted, people with post-traumatic stress disorder face a complicated “balancing act” in presenting testimony. DEPORTATION BY DEFAULT, *supra* note 1, at 35. “[I]f the person is totally shut down, the judge may assume the person is apathetic. If the respondent is sobbing on the stand, the judge accuses them of making a scene.” *Id.* (quoting Human Rights Watch Interview with Dr. Denise Berte, in Phila., Pa. (Feb. 15, 2010)).

44. Discussing mental illness in the criminal context, Justice Breyer wrote:

Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual’s functioning at different times in different ways In certain instances an individual may well be able to . . . work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel.

Indiana v. Edwards, 554 U.S. 164, 175–76 (2008). For further discussion on the dynamic nature of mental illness, see Kevin M. Cremin et al., *Ensuring a Fair Hearing for Litigants with Mental Illnesses: The Law and Psychology of Capacity, Admissibility, and Credibility Assessments in Civil Proceedings*, 17 J.L. & POL’Y 455, 473–74 (2009).

where mentally ill United States citizens have been illegally removed.⁴⁵ Because ICE does not have jurisdiction over United States citizens, these removals are unlawful.⁴⁶ One such example is Peter Guzman, a cognitively-impaired twenty-nine-year-old United States citizen who came to ICE's attention after his arrest for trespassing.⁴⁷ He was deported to Mexico and was missing for approximately three months before his family found him and brought him home.⁴⁸ Another case is Mark Lyttle, a United States citizen with "a record of bipolar depression and a learning disability," who was removed to Mexico on two occasions even though FBI fingerprint records indicated that he was a United States citizen.⁴⁹ In another case, a severely mentally ill United States citizen told immigration officials that she was a Russian immigrant.⁵⁰ She was almost removed to Russia as a result.⁵¹

The unlawful removal of mentally ill United States citizens is a symptom of the error rate in the immigration adjudication system. Some error is likely,⁵² but the immigration system's inability to determine that a respondent is a United States citizen raises great concerns about less-obvious injustices and mistakes in the removal system.⁵³ The errors matter because of the harsh consequences of removal, especially for an individual with serious mental illness. Peter Guzman was found "bathing in the

45. See generally Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606 (2011) (presenting quantitative analysis of the rate of detention and deportation of United States citizens).

46. *Problems with ICE Interrogation*, *supra* note 27, at 15 (statement of Gary Mead, Deputy Dir. of the Office of Detention and Removal Operations).

47. *Id.* at 30 (statement of James Brosnahan, Senior Partner at Morrison & Foerster, LLP and attorney for Peter Guzman).

48. *Id.* at 30–31.

49. Eugenia Pyntikova, *Mental Illness in Immigration Detention Facilities: Searching for the Rights to Receive & Refuse Treatment*, 25 GEO. IMMIGR. L.J. 151, 167–68 (2010).

50. Emily Ramshaw, *Mentally Ill Immigrants Have Little Hope for Care When Detained*, DALL. MORNING NEWS, July 13, 2009, <http://www.justice.gov/eoir/vll/benchbook/tools/MHI/library/Emily%20Ramshaw,%20The%20Dallas%20Morning%20News,%20July%2013,%202009.pdf>.

51. *Id.*

52. Some would argue that error is inevitable. In a 2008 Congressional hearing on the interrogation and detention of United States citizens, Representative Steve King (R-Iowa) stated, "There is a huge human haystack of humanity that crosses our border every night that has piled up here in the United States To deal with all of that without a single mistake would be asking too much of a mortal." *Problems with ICE Interrogation*, *supra* note 27, at 3.

53. Concern about the accuracy of the immigration adjudication system is widespread. Addressing this issue, Judge Richard Posner once stated "the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice." *Benslimane v. Gonzalez*, 430 F.3d 828, 830 (7th Cir. 2005) (citing *Niam v. Ashcroft*, 354 F.3d 652, 654 (7th Cir. 2003)). One immigration judge likened immigration removal proceedings to "holding death penalty cases in traffic court." Julia Preston, *Lawyers Back Creating New Immigration Courts*, N.Y. TIMES, Feb. 9, 2010, at A14.

Tijuana River and eating garbage,”⁵⁴ and Mark Lyttle was discovered “drifting among Latin American shelters and obtaining nourishment and liquid from roadside soda cans in El Salvador.”⁵⁵ Greater caution in cases involving mentally ill respondents will prevent illegal removal of United States citizens;⁵⁶ ensure the protection of noncitizens with claims to relief from removal proceedings; and uphold the humanitarian goals of the immigration adjudication system.

C. Existing Protections of People With Mental Illness and Advocacy for Improvement

Before *Matter of M-A-M-*, immigration statutes and regulations provided limited protections for individuals with serious mental illness in immigration removal proceedings. “If it is impracticable by reason of an alien’s mental incompetency for the alien to be present at the proceeding,” additional safeguards must be provided to protect an alien’s rights and privileges.⁵⁷ “Present” is interpreted to include both physical and mental presence.⁵⁸ A respondent who is not “present” may have an “attorney, legal representative, legal guardian, near relative, or friend . . . appear on [his or her] behalf.”⁵⁹ If none of these people appear on behalf of the incompetent individual, the respondent’s custodian may appear.⁶⁰ An immigration judge may not accept an admission of removability from an incompetent respondent who is neither represented nor accompanied.⁶¹

In addition to the specific requirements of immigration law and regulations, individuals in immigration removal proceedings are entitled to

54. Stevens, *supra* note 45, at 612 (citing Jacqueline Stevens, *Thin ICE*, NATION, June 23, 2008, available at <http://www.thenation.com/article/thin-ice>).

55. *Id.* (citing Interview with Mark Lyttle, deported U.S. citizen, in Kennesaw, Ga. (June 22, 2009)). Prior to deportation, these men were either “housed and self-sufficient or cared for by their families. . . .” *Id.*

56. Hiroshi Motomura describes this as a “citizen proxy” argument. Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1728 (2010). Through citizen proxy appeals, unauthorized migrants show that a United States citizen’s or lawful permanent resident’s rights will be protected by upholding a migrant’s rights. *Id.* The citizen or permanent resident is an “interest surrogate” for the migrant. *Id.* at 1754.

57. Immigration and Nationality Act § 240(b)(3), 8 U.S.C. § 1229a(b)(3) (2006).

58. *Mohamed v. Gonzales*, 477 F.3d 522, 526 (8th Cir. 2007). “A mentally incompetent person, although physically present, is absent from the hearing for all practical purposes.” *Id.*

59. 8 C.F.R. § 1240.4 (2012).

60. *Id.* The custodian is a representative of DHS—the very same agency arguing for the respondent’s removal and possibly also detaining the respondent. Clapman, *supra* note 14, at 381. Clapman describes this unusual arrangement: “as clear a conflict of interest as can be imagined but one expressly authorized by the current regulations.” *Id.*

61. 8 C.F.R. § 1240.10(c) (2012).

due process of law under the Fifth Amendment.⁶² This “includes the right to a full and fair hearing,”⁶³ and the right “to be heard upon the questions involving [the] right to be and remain in the United States.”⁶⁴ Although noncitizens do not receive the same complement of rights as guaranteed to citizens,⁶⁵ the constitutional protection of due process extends to even those “whose presence in this country is unlawful, involuntary, or transitory.”⁶⁶ These due process rights are grounded in the Supreme Court’s acknowledgment that deportation or removal has a serious impact on individual liberty. In *Ng Fung Ho v. White*, the Court said deportation “may result . . . in loss of both property and life, or of all that makes life worth living.”⁶⁷

Due process for noncitizens in removal proceedings simply requires that the proceeding meets a test of fundamental fairness.⁶⁸ Compliance with the safeguards provided in statute and regulation is often considered sufficient to satisfy constitutional due process requirements.⁶⁹ This includes the right to representation at no cost to the government⁷⁰ and that the respondent has a “reasonable opportunity” to present and examine evidence and cross-examine witnesses.⁷¹ While “[m]eticulous care must be exercised lest the procedure by which [an individual] is deprived of that

62. *Reno v. Flores*, 507 U.S. 292, 306 (1993).

63. *In re M-D-*, 23 I. & N. Dec. 540, 542 (B.I.A. 2002) (citing *Landon v. Plasencia*, 459 U.S. 21, 32–33 (1982)).

64. *The Japanese Immigrant Case*, 189 U.S. 86, 101 (1903); *accord Demore v. Kim*, 538 U.S. 510, 523 (2003).

65. “Congress may make rules as to aliens that would be unacceptable if applied to citizens.” *Demore*, 538 U.S. at 522.

66. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

67. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

68. The fundamental fairness test was established in *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 (6th Cir. 1975). In *Landon v. Plasencia*, the Court recommended a different test to determine if a lawful permanent resident who left the United States and was placed in exclusion proceedings upon her return was afforded due process. 459 U.S. at 35. Instead of examining whether the proceedings met fundamental fairness, the Supreme Court stated that the lower court to which the case was remanded should use the three-prong balancing test from *Mathews v. Eldridge*. *Id.* at 34 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976)). The *Mathews* test balances, “[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews*, 424 U.S. at 335.

69. In *Nee Hao Wong v. INS*, the respondent was accompanied by his state-appointed conservator as well as by counsel. *Nee Hao Wong v. INS*, 550 F.2d 521, 522 (9th Cir. 1977). This complied with the regulation stating that respondents for whom it is impracticable to be present due to mental incompetency can have a guardian appear on his or her behalf and so satisfied due process. *Id.* at 523.

70. Immigration and Nationality Act § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (2006).

71. Immigration and Nationality Act § 240(b)(4)(B), 8 U.S.C. § 1229a(b)(4)(B) (2006).

liberty not meet the essential standards of fairness,”⁷² the immigration judge has a great deal of discretion to construct a hearing that is fundamentally fair.⁷³ The judge’s decisions are awarded great deference on review.⁷⁴

Prior to the BIA opinion in *Matter of M-A-M-*, an evaluation of respondent’s mental health was not included in the package of procedural rights. In *Mohamed v. Gonzales*, the BIA acknowledged that respondent Abdi Gelle Mohamed was mentally ill.⁷⁵ However, the immigration judge did not hold a competency hearing.⁷⁶ The court noted that Mohamed responded to the charges against him, coordinated witness appearances, was aware of the nature of proceedings, and resisted removal.⁷⁷ On appeal, the court held that the absence of a competency hearing did not violate Mohamed’s due process rights.⁷⁸

Even if a respondent is determined to be mentally ill, the proceedings continue against that individual. In *Nee Hao Wong v. INS*, one of the first cases to address the due process rights of mentally ill respondents, the Ninth Circuit held that due process did not require delaying proceedings until a respondent’s competency was restored.⁷⁹ Rather, the Court held that “[t]he Immigration and [Nationality] Act contemplates that deportation proceedings may be had against mental incompetents.”⁸⁰

This differs notably from the mental competence standard applied to criminal defendants.⁸¹ The criminal competence standard requires that a

72. *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

73. An immigration judge can operate in “wide margins” without “offend[ing the] principles of fundamental fairness.” *Laurent v. Ashcroft*, 359 F.3d 59, 62 (1st Cir. 2004) (citing *Logue v. Dore*, 103 F.3d 1040, 1045 (1st Cir. 1997)).

74. This deference is a product of the plenary power doctrine, considered “the most famous jurisprudential piece of American constitutional immigration law.” Adam B. Cox, *Immigration Law’s Organizing Principles*, 157 U. PA. L. REV. 341, 346 (2008). Plenary power in immigration is:

a collection of several separate but related principles: first, that the immigration authority is reposed in the federal government and not the states; second, that the authority is allocated in some fashion between the executive and legislative departments of the federal government; and, third, that the judicial branch has an extremely limited role in reviewing the executive’s immigration decisions if, indeed, the judiciary may review those decisions at all.

Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 939 (1995).

75. *Mohamed v. Gonzales*, 477 F.3d 522, 525 (8th Cir. 2007).

76. *See id.*

77. *Id.* at 527.

78. *Id.*

79. *Nee Hao Wong v. INS*, 550 F.2d 521, 523 (9th Cir. 1977).

80. *Id.*

81. *See generally* *Dusky v. United States*, 362 U.S. 402 (1960); *Drope v. Missouri*, 420 U.S. 162 (1975). “[C]ontrary to the substantive due process protection from trial and conviction to which a mentally incompetent criminal defendant is entitled, removal proceedings may go forward against

defendant have a “rational as well as factual understanding of the proceedings against him” and “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.”⁸² Requiring that a defendant can comprehend and participate in the hearing “has long been accepted.”⁸³ A criminal must be able to access the rights that are essential to a fair trial such as effective assistance of counsel, confrontation and cross-examination, and testifying on one’s own behalf.⁸⁴ Although some may consider removal to be as grave a consequence as incarceration, respondents in immigration proceedings receive far fewer constitutional protections than criminal defendants.⁸⁵ This difference is based largely on a formalistic distinction between criminal law and civil law, with immigration removal proceedings falling in the latter category and thus meriting fewer procedural safeguards.⁸⁶

Another source of protections for mentally ill individuals comes in the form of guidance in the Immigration Judge Benchbook. The Benchbook encourages immigration judges who suspect that a respondent has a mental illness to use simple sentences, build an extensive record, grant the respondent continuances to try and obtain representation, and potentially help the respondent secure legal representation.⁸⁷

This patchwork of laws, regulations, and guidance leaves gaps in the protection of many mentally ill individuals. The BIA decision in *Matter of M-A-M* took the first steps towards achieving many of these goals.⁸⁸

incompetent aliens.” *Brue v. Gonzales*, 464 F.3d 1227, 1233 (10th Cir. 2006) (internal citations omitted) (citing *Nee Hao Wong*, 550 F.2d at 523).

82. *Dusky*, 362 U.S. at 402.

83. *See Drope*, 420 U.S. at 171.

84. *Riggins v. Nevada*, 504 U.S. 127, 139–40 (1992) (Kennedy, J., concurring) (citing *Drope*, 420 U.S. at 171-72).

85. *See Nee Hao Wong*, 550 F.2d at 523. “[T]he full trappings of procedural protections that are accorded criminal defendants are not necessarily constitutionally required for deportation proceedings.” *Id.* Extensive scholarship explores the interplay of criminal procedure rights and immigration law. *See* Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461 (2011); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289 (2008); Anne R. Traum, *Constitutionalizing Immigration Law on Its Own Path*, 33 CARDOZO L. REV. 491 (2011).

86. *See generally* Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299 (2011).

87. U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, *Immigration Judge Benchbook: Mental Health Issues: Part II.B*, <http://www.justice.gov/eoir/vll/benchbook/tools/MHI/> (last visited Nov. 4, 2012) [hereinafter *Benchbook*].

88. *Matter of M-A-M*, 25 I. & N. Dec. 474 (B.I.A. 2011).

II. THE BOARD OF IMMIGRATION APPEALS RESPONDS: CREATING A FRAMEWORK FOR COMPETENCY ASSESSMENT IN *MATTER OF M-A-M-*

A. *Establishment of New Procedural Safeguards*

In *Matter of M-A-M-*, the BIA established a framework for immigration judges to assess mental competency and described some safeguards that judges can provide to mentally incompetent respondents.⁸⁹ In this case, the respondent represented himself pro se throughout the proceeding.⁹⁰ He told the judge he had schizophrenia and was not receiving proper medication at the time of the hearing.⁹¹ The immigration judge found him removable and denied his applications for relief from removal.⁹² The respondent appealed the decision to the BIA and alleged “that the Immigration Judge failed to properly assess his mental competency.”⁹³

The BIA held that competency is presumed,⁹⁴ and that no obligation to assess an alien’s competency arises until there are “indicia of mental incompetency.”⁹⁵ If indicia are present, the immigration judge must determine if the respondent can participate in the hearing.⁹⁶ The immigration judge must determine “whether an alien . . . has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses.”⁹⁷ To assist the immigration judge in determining competency, DHS must provide any evidence in its possession related to a

89. *Id.* at 479–84.

90. *Id.* at 475.

91. *Id.* He submitted reports and a psychiatric evaluation from the New York State Office of Mental Health documenting his mental health problems. *Id.*

92. *Id.* at 475–76.

93. *Id.* at 476.

94. *Id.* at 477 (citing *Muñoz-Monsalve v. Mukasey*, 551 F.3d 1, 6 (1st Cir. 2008)).

95. *Id.* The judge may observe indicia from respondent’s behavior or evidence of illness or incompetency in the record, although “a diagnosis of mental illness does not automatically equate to a lack of competency.” *Id.* at 479–80. Additionally, because mental illness is not stagnant the judge is required to re-assess competency throughout the hearing to identify if competency has decreased or been restored. *Id.* at 480.

96. *Id.* at 480. Potential methods the judge may use to test competency include asking respondent simple questions about his or her whereabouts and mental state, asking if respondent has or is taking medication for a mental illness, continuing proceedings so respondent can obtain evidence about competency, using a mental competency evaluation, relying on a friend or family member to share information for the respondent, or delaying the case so respondent can obtain mental health treatment or a representative. *Id.* at 480–81.

97. *Id.* at 479.

respondent's incompetency.⁹⁸ If a respondent lacks sufficient competency to proceed, the immigration judge must prescribe safeguards pursuant to section 240(b)(3) of the Immigration and Nationality Act.⁹⁹ The BIA vaguely suggested that the immigration judge may look into alternatives to removal proceedings if, after best efforts are taken, respondent is still unable to participate in the hearing.¹⁰⁰

Here, the BIA found "good cause to believe that the respondent lacked sufficient competency."¹⁰¹ They remanded the case so the immigration judge could apply the new framework for assessing competency to make a finding as to respondent's competency, and apply the appropriate and necessary safeguards.¹⁰²

B. Strengths, Gaps, and Limitations in the Decision

The BIA decision in *Matter of M-A-M-* provided, at minimum, a framework that judges, practitioners, and respondents in immigration proceedings could look to for guidance. The decision equipped immigration judges with new tools to assess mental competency. Requiring DHS to provide any evidence in its possession related to a respondent's incompetency will provide the only medical evidence of mental illness in many cases. As the custodian of a detained respondent, DHS often has medical or mental health records that explain what the respondent cannot.¹⁰³ Demanding release of these documents could greatly aid immigration judges in understanding the factual background of a respondent's mental illness in future cases. The decision also correctly acknowledges the dynamic nature of mental health. Requiring immigration judges to reassess competency throughout the proceeding will ensure that procedural safeguards are tailored to an individual's current needs and abilities.¹⁰⁴

However, the decision in *Matter of M-A-M-* leaves many gaps in the protections for mentally ill people in immigration proceedings. One concern is that immigration judges lack expertise and training to assess

98. *Id.* at 480.

99. *Id.* at 481.

100. *Id.* at 483.

101. *Id.* at 484.

102. *Id.* The court did not give any examples or specifics as to what safeguards might be appropriate in this particular situation.

103. *See, e.g.,* FLA. IMMIGRANT ADVOCACY CTR., *supra* note 39, at 6.

104. *See Matter of M-A-M-*, 25 I. & N. Dec. at 480. This understanding of mental health is consistent with clinical research. *See* Cremin et al., *supra* note 44, at 476.

competency.¹⁰⁵ Immigration judges are not medical or mental health experts. Without extensive training and the involvement of mental health professionals in the immigration system, it is unlikely that immigration judges can either accurately assess whether someone has indicia of mental illness or understand how that illness may affect the respondent’s participation in the proceeding.

The concern about judge’s ability to assess competence is heightened by the use of videoconference technology for detained respondents. Through videoconferencing technology, the respondent remains in the detention center and appears on a video screen in the immigration courtroom.¹⁰⁶ Although the government states that the use of this technology in lieu of live hearings in the same courtroom “does not change the adjudicative quality or decisional outcomes,”¹⁰⁷ many disagree.¹⁰⁸ Some scholars argue that fact-finding and credibility assessments are more accurate when conducted in person.¹⁰⁹ If an immigration judge’s perception is altered by the use of videoconferencing technology, the judge may fail to notice that a respondent is mentally incompetent and therefore fail to provide essential safeguards. Another issue is that although immigration judges can ask for a competency evaluation,¹¹⁰ it is not clear who must arrange and pay for the evaluation.¹¹¹

105. See *Due Process for People with Mental Disabilities in Immigration Removal Proceedings*, 33 MENTAL & PHYSICAL DISABILITY L. REP. 882, 895–96 (2009). Competency assessments are required under the *Matter of M-A-M-* framework. See *Matter of M-A-M-*, 25 I. & N. Dec. at 479.

106. See U.S. DEP’T OF JUSTICE, EXEC. OFFICE OF IMMIGRATION REVIEW, FACT SHEET: EOIR’S VIDEO CONFERENCING INITIATIVE (2004), available at <http://www.justice.gov/eoir/press/VCFactSheetSep04.pdf>. Video conferencing reduces costs because respondents do not need to be transported from distant detention facilities to immigration court. *Id.* Additionally, videoconferencing increases efficiency by evenly spreading cases across large groups of immigration judges, rather than having heavy caseloads in one area and light caseloads in another area. *Id.*

107. U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FACT SHEET: EOIR HEADQUARTERS IMMIGRATION COURT (2004), available at <http://www.usdoj.gov/eoir/press/04/HQICFactSheet.pdf>.

108. See, e.g., *Rusu v. INS*, 296 F.3d 316 (4th Cir. 2002); Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259 (2008); *Developments in the Law—Access to Courts: Access to Courts and Videoconferencing in Immigration Court Proceedings*, 122 HARV. L. REV. 1181 (2009).

109. Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1108–11 (2004). Studies of videoconferencing in criminal courts raise concerns about the limitations of video technology and its inability to capture nonverbal cues like facial expression, gaze, gestures, and body language—that are not visible within the screen—and eye contact. *Id.*

110. *Matter of M-A-M-*, 25 I. & N. Dec. at 481.

111. If DHS arranges and pays for the mental competency evaluation, their involvement as a party in the proceedings does raise a conflict of interest. LEGAL ACTION CTR., REPRESENTING CLIENTS WITH

Additionally, the focus of *Matter of M-A-M-* on individuals in removal proceedings provides little help to individuals who stipulate to their removal and thus never appear in front of an immigration judge.¹¹² The stipulated removal program allows an individual to stipulate to his or her removal and thereby waive a hearing in front of an immigration judge.¹¹³ The immigration judge may enter a removal order based on this stipulation by both the respondent and the government.¹¹⁴ The stipulated removal program speeds up immigration adjudication by eliminating the requirement of holding a hearing and potentially an appeal.¹¹⁵ The program also benefits some respondents. A respondent who is ineligible for relief or wants to avoid a prolonged hearing process and long-term detention may prefer to stipulate to his or her removal and quickly be removed from the country.¹¹⁶

A narrow reading of *Matter of M-A-M-* might limit its application to individuals actually in removal proceedings. However, if the approval of

MENTAL COMPETENCY ISSUES UNDER *MATTER OF M-A-M-* 8–9 (2011), available at <http://www.legalactioncenter.org/sites/default/files/mental-competency-issues-3-8-2012minorupdate.pdf>.

112. 29,012 cases went through the stipulated removal program in 2009. DEP'T OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FISCAL YEAR 2011 OVERVIEW: CONGRESSIONAL JUSTIFICATION 18, available at http://www.ice.gov/doclib/foia/secure_communities/fy2011overviewcongressionaljustification.pdf. “The Attorney General shall provide by regulation for the entry by an immigration judge of an order of removal stipulated to by the alien (or the alien’s representative) and the Service. A stipulated order shall constitute a conclusive determination of the alien’s removability from the United States.” 8 U.S.C. § 1229a(d) (2006).

113. Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 616 (2009).

114. *Id.*

The stipulation shall include:

- (1) An admission that all factual allegations contained in the charging document are true and correct as written;
- (2) A concession of deportability or inadmissibility as charged;
- (3) A statement that the alien makes no application for relief under the Act;
- (4) A designation of a country for deportation or removal under section 241(b)(2)(A)(i) of the Act;
- (5) A concession to the introduction of the written stipulation of the alien as an exhibit to the Record of Proceeding;
- (6) A statement that the alien understands the consequences of the stipulated request and that the alien enters the request voluntarily, knowingly, and intelligently;
- (7) A statement that the alien will accept a written order for his or her deportation, exclusion or removal as a final disposition of the proceedings; and
- (8) A waiver of appeal of the written order of deportation or removal.

8 C.F.R. § 1003.25(b) (2012).

115. Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 616–17 (2009).

116. *Id.* at 645. Unfortunately, “government coercion, misinformation or incomplete information” may also influence respondent’s choice to stipulate to his or her removal. *Id.* at 642.

stipulated removal orders also implicates *Matter of M-A-M-*, it is unclear how an immigration judge would be able to screen for indicia of incompetency simply by reviewing the stipulated removal paperwork. This concern is particularly relevant in jurisdictions where judges approve stipulated orders of removal from individuals detained in mental institutions.¹¹⁷ Some judges require an individual to be brought in for a hearing before the judge will approve a stipulated order of removal.¹¹⁸ This can help ensure that a respondent’s waiver of rights was “voluntary, knowing, and intelligent.”¹¹⁹ Such a requirement, though, diminishes the efficiency goals of the stipulated removal program.¹²⁰ Read broadly, *Matter of M-A-M-* may require compromises in the stipulated removal program.

Finally, the framework provides no guidance for cases where the respondent’s mental illness is so severe that he or she cannot share information, understand the testimony of others, or effectively present his or her case.¹²¹ As Part III will discuss, this insistence on moving mentally ill individuals through proceedings despite breakdowns in the procedural protections creates a danger of wrongful removal and other error. Preventing these problems requires developing options to divert mentally ill individuals out of proceedings.

III. TWO PATHS OUT OF PROCEEDINGS—TERMINATION AND PROSECUTORIAL DISCRETION

Given the ongoing challenges in evaluating the competency of individuals in removal proceedings and guaranteeing their full participation, I turn now to options for diverting respondents out of proceedings altogether when their mental illnesses present insurmountable

117. Baltimore Chief Counsel for ICE noted that “[w]e *do* use Stipulated Removal in cases of aliens who have been found not criminally responsible and who are detained at a state mental institution.” JENNIFER LEE KOH ET AL., DEPORTATION WITHOUT DUE PROCESS 26 n.40 (2011), available at http://www.stanford.edu/group/irc/Deportation_Without_Due_Process_2011.pdf [hereinafter DEPORTATION WITHOUT DUE PROCESS] (emphasis added) (quoting Chief Counsel Offices Responses: Stipulated Removal Process (Feb. 10, 2006)).

118. *Id.* at 28 n.53 (citing correspondence within ICE noting that the “chief immigration judge and court administration in New York City ‘stated clearly that they will not sign off on Stipulated Removal Orders without having the detainee brought to court’” and that “immigration judges in San Juan and Buffalo require court appearances for unrepresented aliens”).

119. 8 C.F.R. § 1003.25(b).

120. An internal ICE document described an immigration judge’s demand to hold a hearing before approving the orders as “making the use of a stipulated order pointless.” DEPORTATION WITHOUT DUE PROCESS, *supra* note 117, at 28 n.53.

121. *See supra* note 100.

barriers. I analyze two potential paths out of proceedings—termination of proceedings by the immigration judge and prosecutorial discretion by ICE agents and counsel. Finally, I propose reforms to strengthen these options.

A. *Termination of Removal Proceedings*

Termination of removal proceedings is a process whereby the immigration judge cancels the removal proceedings against an individual, leaving him or her just as he or she was prior to commencement of the proceedings.¹²² The respondent does not gain immigration status or a pathway to permanent relief.¹²³ The only benefit to the respondent is relief from the immediate removal proceeding.¹²⁴ The following section will explore the regulatory and due process basis for an immigration judge's power to terminate removal proceedings against a mentally ill individual.

1. *Regulatory Basis for Immigration Judges' Power to Terminate Proceedings for Individuals with Severe Mental Illness*

Immigration regulations explicitly provides for termination of proceedings when an alien has a pending naturalization application, has demonstrated prima facie eligibility for naturalization, and presents special humanitarian considerations.¹²⁵ Notably, the BIA has interpreted immigration law and regulations to prohibit an immigration judge from terminating removal proceedings for purely humanitarian reasons (such as mental illness) if the respondent is removable.¹²⁶

The federal courts give great deference to BIA interpretations of immigration law, which carry the force of law. This deference towards agency legal interpretations was developed in *Chevron v. Natural Resources Defense Council*.¹²⁷ Where Congress's intent is clear in the statute, the agency must give effect to such "unambiguously expressed

122. Stella Burch Elias, "Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza, 2008 WIS. L. REV. 1109, 1112 n.20 (2008).

123. *Id.*

124. This means that proceedings can always be brought against the respondent again in the future. See *Rajah v. Mukasey*, 544 F.3d 427, 446–47 (2d Cir. 2008).

125. 8 C.F.R. § 1239.2(f) (2012).

126. *Matter of Wong*, 13 I. & N. Dec. 701, 703 (B.I.A. 1971); see also *Panova-Bohannon v. Ashcroft*, 74 F. App'x. 424, 425 (5th Cir. 2003); *Rodriguez-Gonzalez v. INS*, 640 F.2d 1139, 1142 (9th Cir. 1981); *Lopez-Telles v. INS*, 564 F.2d 1302, 1304 (9th Cir. 1977).

127. 467 U.S. 837 (1984) (establishing the standard for deference to administrative interpretations of law).

intent.”¹²⁸ If the statute is unclear or silent on the issue, the reviewing court will defer to an agency’s interpretation unless it is “arbitrary, capricious, or manifestly contrary to the statute.”¹²⁹ Statutory interpretations developed through case-by-case adjudications which carry precedential value receive *Chevron* deference.¹³⁰

Applying this deferential review standard, the federal courts have limited immigration judges’ discretion to terminate proceedings based on the effect of mental illness on an individual’s participation in and understanding of the proceedings. In *Panova-Bohannan v. Ashcroft*, the Fifth Circuit looked to statutory language stating that “[a]t the conclusion of the [removal] proceeding the immigration judge shall decide whether an alien is removable from the United States.”¹³¹ The court also agreed with the BIA that immigration officials, not judges, possess the discretion to terminate removal proceedings.¹³² Finding that the BIA position was not “arbitrary, capricious, or manifestly contrary to the statute,” the court deferred to the BIA.¹³³ Similar positions have been upheld in the Ninth and Eleventh Circuits.¹³⁴

The federal courts that have considered this issue have deferred to the BIA’s limited interpretation of immigration judges’ power to terminate proceedings. However, this interpretation appears contrary to the plain language and structure of the regulations. Specifically, 8 C.F.R. § 1240.12(c) provides:

The order of the immigration judge shall direct the respondent’s removal from the United States, *or the termination of the proceedings*, or other such disposition of the case as may be appropriate. The immigration judge is authorized to issue orders in the alternative or in combination as he or she may deem necessary.¹³⁵

128. *Id.* at 843.

129. *Id.* at 844.

130. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 921–22 (9th Cir. 2006).

131. *Panova-Bohannan v. Ashcroft*, 74 F. App’x. 424, 425 (5th Cir. 2003) (quoting 8 U.S.C. § 1229a(c)(1)(A) (2006)).

132. *Id.*; *see also Lopez-Telles v. INS*, 564 F.2d 1302, 1304 (9th Cir. 1977) (“The immigration judge is not empowered to review the wisdom of the INS in instituting the proceedings This division between the functions of the immigration judge and those of INS enforcement officials is quite plausible and has been undeviatingly adhered to by the INS.”).

133. *Panova-Bohannan*, 74 F. App’x at 426 (citing *Lopez-Telles*, 564 F.2d at 1304).

134. *See, e.g., Barahona-Gomez v. Reno*, 236 F.3d 1115, 1120 (9th Cir. 2001); *Jean v. Nelson*, 727 F.2d 957, 981 (11th Cir. 1984).

135. 8 C.F.R. 1240.12(c) (2012) (emphasis added).

Arguably, this regulation can be read to include termination as a potential outcome of a proceeding. Although the immigration regulations only describe one situation where the immigration judge clearly has power to terminate proceedings, no regulation or statute explicitly limits termination to this instance.

Additionally, the Immigration Judge Benchbook developed by the Executive Office of Immigration Review provides possible support for termination in other situations. The Benchbook states that the immigration judge should take steps to ensure fundamental fairness that “may include but are not limited to administratively closing or terminating proceedings.”¹³⁶ Because the Benchbook is a guidance document that is not intended to carry the force of law,¹³⁷ it would not receive the highly deferential *Chevron* standard, but it may receive some degree of respect based on its limited power to persuade.¹³⁸

The lack of clarity in the language of the statute suggests that room remains for disagreement by a different circuit, particularly given the Benchbook’s timid endorsement of termination of proceedings on account of mental illness that interferes with participation in the hearing.¹³⁹ For termination to present a viable pathway out of proceedings for mentally ill individuals, regulatory reform is necessary to ensure immigration judges’ ability to terminate proceedings in this situation.

2. *Constitutional Due Process Basis for Immigration Judges’ Power to Terminate Proceedings for Individuals with Severe Mental Illness*

Another basis for terminating proceedings is that continuing proceedings against a mentally ill individual would violate his or her due process rights. Individuals in removal proceedings are entitled to procedural due process under the Fifth Amendment.¹⁴⁰ To constitute a due process violation, the denial of termination must have likely affected the results of the hearing.¹⁴¹ Thus far, the BIA and federal courts have never found that an individual’s due process rights were violated because his or her mental illness prevented a full and fair hearing.

136. *Benchbook*, *supra* note 87.

137. The Benchbook describes itself as “only . . . a guide for immigration judges.” *Id.*

138. *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (citing *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000)).

139. *See supra* note 136.

140. *Reno v. Flores*, 507 U.S. 292, 306 (1993) (citing *The Japanese Immigrant Case*, 189 U.S. 86, 100–01 (1903)).

141. *Muñoz-Monsalve v. Mukasey*, 551 F.3d 1, 7 (1st Cir. 2008).

In one line of due process cases brought by mentally ill individuals in proceedings, the BIA and courts have found the respondent to be sufficiently competent and therefore continuing proceedings does not violate due process. Merely having headaches and memory problems during proceedings did not constitute incompetency in *Nelson v. INS*.¹⁴² In a more extreme example, the respondent in *In re: Kirk Troy Patrick Smikle* spent two years in a residential treatment program for schizophrenia.¹⁴³ He told the immigration judge that he was “okay” to proceed although he earlier said he was confused when he entered a plea.¹⁴⁴ Because the respondent stated that he could proceed and the court did not find his claim of incompetence to be substantiated, there was no due process violation.¹⁴⁵

Additionally, courts find that the due process rights of a respondent who cannot understand or participate in the hearing are sufficiently protected if the respondent has legal representation. In *Matter of H-*, the Board of Immigration Appeals found that the hearing was fair because an alien of “unsound mind” was represented by counsel who introduced evidence and examined witnesses.¹⁴⁶ In *Matter of E-*, the respondent was considered sufficiently represented despite having a diagnosed mental disability, history of hospitalization, and stating that he was “unable to understand the nature and consequences of the . . . removal proceedings.”¹⁴⁷ His claim of due process violation was denied.¹⁴⁸ In *Soobrian v. Attorney General*, the court held that petitioner’s due process rights were not violated because he was present at the hearing, had counsel, and witnesses testified on his behalf.¹⁴⁹ The courts do not seem concerned that an attorney’s representation of his or her client may be hampered by that client’s mental illness.¹⁵⁰

Notably, in all of these cases, the respondent was represented by counsel, and the court found that the respondent’s interests were

142. 232 F.3d 258, 261–62 (1st Cir. 2000).

143. *In re Kirk Troy Patrick Smikle*, No. A41 361 229, 2007 WL 2463933, at *1 (B.I.A. Aug. 6, 2007).

144. *Id.*

145. *Id.* at *2.

146. *Matter of H-*, 6 I. & N. Dec. 358, 360 (B.I.A. 1954).

147. *Matter of E-*, No. A14 340 742, 2003 WL 23269901, at *1 (B.I.A. Dec. 4, 2003).

148. *Id.*

149. 388 F. App’x 182, 193-94 (3d Cir. 2010); *see also* *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 620–21 (9th Cir. 2006).

150. *See, e.g., Sanchez-Salvador v. INS*, No. 92-70828, 1994 WL441755, at *1–2 (9th Cir. Aug. 15, 1994) (holding no due process violation for a respondent who was under the care of a doctor during the removal hearing for his mental illness because his “incompetence did not prevent him from presenting, through counsel, a strong case”).

satisfactorily represented.¹⁵¹ Because there is no automatic right to appointed counsel in immigration proceedings,¹⁵² respondents in this situation may still have an argument that an immigration judge's refusal to terminate proceedings violates that respondent's due process rights.

The difficulty is that unrepresented individuals with severe mental illness may not have the competence to appeal a decision, so the BIA and federal courts simply may not see these cases and have the opportunity to provide greater guidance on the due process rights of mentally ill individuals who are not represented. Given *Matter of M-A-M*'s new requirement for assessing competence, there may be more cases asserting a due process basis for termination of proceedings. Continued monitoring of these cases is necessary to determine whether the courts are properly analyzing competence and if termination of proceedings for unrepresented mentally ill individuals constitutes a due process violation.

B. Using Prosecutorial Discretion to Divert Individuals Out of Proceedings

The exercise of prosecutorial discretion presents an opportunity to protect mentally ill individuals from, not merely within, proceedings. The decision to exercise immigration enforcement power against an individual is inherently discretionary.¹⁵³ ICE does not have the resources to remove every noncitizen in the United States;¹⁵⁴ in March 2011, ICE stated that it "only has [the] resources to remove approximately 400,000 aliens per year."¹⁵⁵ Developing priorities and utilizing prosecutorial discretion to effectuate these priorities channels limited resources to achieve agency goals.¹⁵⁶ For a large, decentralized agency such as ICE, clarity on the use

151. See Tsankov, *supra* note 41, at 2.

152. See *supra* note 25.

153. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-92 (1999); see also *Matter of Yauri*, 25 I. & N. Dec. 103, 110 (B.I.A. 2009) (finding that DHS has prosecutorial discretion over granting deferred action); *In re Bahta*, 22 I. & N. Dec. 1381, 1391 (B.I.A. 2000) (holding that the INS has prosecutorial discretion to decide if the agency will commence removal proceedings).

154. Memorandum from John Morton, Dir., U.S. Immigration and Customs Enforcement, to ICE Employees 1 (Mar. 2, 2011), available at <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>.

155. *Id.*

156. See Memorandum from John Morton, Dir., U.S. Immigration and Customs Enforcement, to ICE Field Office Dirs., Special Agents in Charge, and Chief Counsel, re: Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 2 (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [hereinafter Memorandum from Morton re: Prosecutorial Discretion and Enforcement Priorities] ("ICE must prioritize the use of its

of discretion should help agents represent the agency’s goals and concerns.¹⁵⁷ Additionally, prosecutorial discretion ensures a role for humanitarian concerns in immigration control and enforcement.¹⁵⁸

ICE agents and officers exercise prosecutorial discretion at every stage of the enforcement process.¹⁵⁹ Favorable discretion can be exercised by not issuing a Notice to Appear against an individual, so he or she will simply not be put in removal proceedings.¹⁶⁰ In other situations, prosecutorial discretion may result in a grant of deferred action, which does not establish lawful status but does grant a temporary reprieve from deportation and may allow the alien to apply for an Employment Authorization Document.¹⁶¹ A grant of deferred action does not prevent ICE from bringing an enforcement action against that individual in the future.¹⁶² Deferred action could also include a grant of a stay of removal for a person whose removal has been ordered.¹⁶³

Prosecutorial discretion is constrained by law.¹⁶⁴ If a determination or act is mandatory under immigration law, the agent or officer generally must comply with that legal mandate.¹⁶⁵ “Congress may limit an agency’s

enforcement personnel, detention space, and removal assets to ensure that the aliens it removes represent, as much as reasonably possible, the agency’s enforcement priorities.”).

157. See Mary Giovagnoli, *What ICE’s Latest Memo on Prosecutorial Discretion Means for Future Immigration Cases*, HUFFINGTON POST, June 21, 2011, http://www.huffingtonpost.com/mary-giovagnoli/what-ices-latest-memo-on-_b_881517.html (“If ICE officials follow the guidance in [the Director’s June 17] memo they can take some comfort in knowing that individual discretion has been sanctioned from the top.”).

158. Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244–45 (2010).

159. *Id.* at 244 (“Prosecutorial discretion extends to decisions about which offenses or populations to target; whom to stop, interrogate, and arrest; whether to detain or to release a noncitizen; whether to initiate removal proceedings; whether to execute a removal order; and various other decisions.”).

160. See MARY KENNEY, LEGAL ACTION CTR., PROSECUTORIAL DISCRETION: HOW TO ADVOCATE FOR YOUR CLIENT 8, 14 (2011), available at <http://www.legalactioncenter.org/sites/default/files/ProsecutorialDiscretion-11-30-10.pdf>.

161. *Id.*

162. *Id.* at 14.

163. *Id.* at 4.

164. See Memorandum from Bo Cooper, Gen. Counsel of INS, to Comm’r of INS 4-6, available at <http://www.legalactioncenter.org/sites/default/files/docs/lac/Bo-Cooper-memo.pdf> (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996)). For example, prosecutorial discretion is limited by the Constitution; decisions may not be unjustifiably based on race, sex, religion, or other classification in violation of equal protection. *Id.* at 6.

165. *Id.* at 4–5. However, in some instances prosecutorial discretion can be implemented to avoid triggering a legal mandate. *Id.* at 5–6. For example, section 236(c) of the Immigration and Nationality Act requires that when a notice to appear is issued against an alien with certain types of criminal offenses, that alien must be taken into custody in an immigration detention facility and is not eligible for bond or release during the pendency of his or her case. Immigration and Nationality Act § 236(c), 8 U.S.C. § 1226(c) (1996). Kenney points out that while an ICE officer cannot exercise discretion to allow that alien to have a bond, the officer could exercise discretion and not issue a notice to appear

exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue."¹⁶⁶ As the term suggests, prosecutorial discretion is a matter left to the discretion of the agency. Judicial review of an agency's decision not to exercise enforcement power against an individual is extremely limited.¹⁶⁷

ICE has a long history of providing guidance on the use of prosecutorial discretion for individuals in immigration removal proceedings.¹⁶⁸ In the last year, DHS provided extensive guidance on the use of prosecutorial discretion for low and high priority removal cases. On June 17, 2011, ICE Director John Morton issued two memoranda on the prosecutorial discretion in immigration enforcement.¹⁶⁹ The first memorandum emphasized aligning use of ICE resources with "the agency's enforcement priorities, namely the promotion of national security, border security, public safety, and the integrity of the immigration system."¹⁷⁰ Effectuating these priorities means sometimes the

against the person or, arguably, cancel a notice to appear before it is filed with the immigration court. KENNEY, *supra* note 160, at 5–6.

166. Heckler v. Chaney, 470 U.S. 821, 833 (1985).

167. *Id.* at 831.

The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities In addition to these administrative concerns, we note that when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch.

Id. at 831–32.

168. See generally Wadhia, *supra* note 158, at 246–65.

169. Memorandum from Morton re: Prosecutorial Discretion and Enforcement Priorities, *supra* note 156; Memorandum from John Morton, Dir., U.S. Immigration and Customs Enforcement, re: Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs 1 (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf> [hereinafter Memorandum from Morton re: Victims, Witnesses, and Plaintiffs].

170. Memorandum from Morton re: Prosecutorial Discretion and Enforcement Priorities, *supra* note 156, at 2. This memorandum drew upon other memoranda on the topic of prosecutorial discretion. *Id.* at 1 (referencing memoranda issued by INS General Counsel Sam Bernsen in 1976, INS General Counsel Bo Cooper in 2000 and 2001, INS Commissioner Doris Meissner in 2000, Principal Legal Advisor William J. Howard in 2005, and Assistant Secretary Julie L. Meyers in 2007). This memorandum rescinded two prosecutorial discretion memoranda by Executive Assistant Commissioner for Field Operations Johnny N. Williams, the first on Supplemental Guidance Regarding Discretionary Referrals for Special Registration from 2002 and the second on Supplemental NSEERS Guidance for Call-In Registrants from 2003. *Id.* at 2.

ICE agent or attorney should not use the “full scope of the enforcement authority available to the agency in a given case.”¹⁷¹ The memorandum included a lengthy list of factors to consider in determining whether to exercise favorable prosecutorial discretion.¹⁷² Serious mental or physical disabilities and serious health conditions were factors promoting a favorable grant of discretion.¹⁷³ Negative factors included serious or lengthy criminal record, risk to national security or public safety, and “egregious” immigration law offenses.¹⁷⁴ The memorandum emphasized that there was no right to favorable prosecutorial discretion and that guidance on prosecutorial discretion did not limit ICE’s authority to enforce immigration law.¹⁷⁵

Then in August 2011, the government announced that a joint DHS-Department of Justice working group would conduct case-by-case review of all immigration cases pending in immigration courts, at the BIA, and in federal appeals courts.¹⁷⁶ In November 2011, DHS announced guidelines for implementing the priority criteria.¹⁷⁷ Although the November 2011 memorandum states that the June 2011 memorandum should still be considered, it altered some criteria and expanded the list of high-priority factors.¹⁷⁸ Notably, a greater number of individuals with minor criminal

Relevant ICE resources include use of enforcement agents and attorneys, space in detention facilities, and resources to physically remove individuals from the United States. *Id.*

171. *Id.*

172. *See id.* at 4.

173. *Id.* at 5. Other positive factors include: “veterans and members of the U.S. armed forces; long-time lawful permanent residents; minors and elderly individuals; individuals present in the United States since childhood; pregnant or nursing women; [and] victims of domestic violence, trafficking, or other serious crimes.” *Id.*

174. *Id.*

175. *Id.* at 6. A second memorandum encouraged officers to exercise prosecutorial discretion to ameliorate the deterrent effect that immigration enforcement has on crime victims, witnesses, and civil plaintiffs’ willingness to report crimes to the police and pursue legal justice. Memorandum from Morton re: Victims, Witnesses, and Plaintiffs, *supra* note 169, at 1. The memorandum specifically focused on victims of domestic violence and individuals engaged in non-frivolous civil rights cases, such as unfair labor practice claims, disputes with landlords regarding housing conditions, or employment discrimination complaints. *Id.* at 1–2.

176. *See* Letter from Janet Napolitano, Sec’y of Homeland Security, to Senator Dick Durbin 2 (Aug. 18, 2011), available at <http://www.aila.org/content/default.aspx?docid=36684>.

177. ALEKSA ALONZO, LEGAL ACTION CTR., DHS REVIEW OF LOW PRIORITY CASES FOR PROSECUTORIAL DISCRETION 1 (2011), available at http://www.ilcm.org/advocacy/prosecutorial_discretion/LAC%20practice%20advisory%20on%20Pros%20Disc'n%2012-2011.pdf. The memorandum containing the guidelines was released on November 17, 2011, along with two other documents on implementation of prosecutorial discretion. *Id.*; *Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review*, available at <http://www.ice.gov/doclib/foia/prosecutorial-discretion/guidance-to-ice-attorneys-reviewing-cbp-uscis-ice-cases-before-eoir.pdf> [hereinafter *Guidance to ICE*].

178. *Guidance to ICE*, *supra* note 177, at 3.

convictions or recent immigration violations would be considered high-priority under the November 2011 memorandum.¹⁷⁹ This memorandum reinforced serious mental illness as a factor favoring the exercise of discretion, noting that individuals who have a serious mental health or physical condition requiring significant medical or detention resources should not be considered an enforcement priority.¹⁸⁰

The agency's clarification of priorities provides greater transparency in immigration enforcement but many questions remain as to the practical utility of this system for immigrants in general and especially for mentally ill immigrants. The next section will identify some of the chief concerns regarding the implementation of prosecutorial discretion and the limitations to prosecutorial discretion working to divert individuals out of immigration removal proceedings.

1. Challenges to Effective Implementation of Prosecutorial Discretion Guidelines

The prosecutorial discretion guidelines present a significant change to how immigration agents and counsel consider the individuals before them. Thorough training is required to effectuate the guidelines. DHS launched a training program to train enforcement staff and counsel on the

179. The June 2011 memorandum included "serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind" in the high priority category. Memorandum from Morton re: Prosecutorial Discretion and Enforcement Priorities, *supra* note 156, at 5. The November 2011 guidance memorandum significantly increases the types of criminal convictions that make an individual an enforcement priority, including individuals convicted of:

- a felony or multiple misdemeanors,
- illegal entry, re-entry or immigration fraud, or
- a misdemeanor violation involving—
 - violence, threats, or assault,
 - sexual abuse or exploitation,
 - driving under the influence of alcohol or drugs,
 - flight from the scene of an accident,
 - drug distribution or trafficking, or
 - other significant threat to public safety

Guidance to ICE, *supra* note 177, at 1. Whereas the June 2011 memorandum stated that "particular care and consideration" should be taken in the case of "egregious" immigration violators, the November 2011 memorandum considers individuals who violated the terms of their admission or entered the United States without permission in the last three years to be a high priority case, even if such violation or admission only occurred once. Compare Memorandum from Morton re: Prosecutorial Discretion and Enforcement Priorities, *supra* note 156, at 5, with *Guidance to ICE*, *supra* note 177, at 1.

180. *Guidance to ICE*, *supra* note 177, at 2.

prosecutorial discretion guidelines.¹⁸¹ DHS announced that commanding officers and prosecutors participated in the training.¹⁸² However, the National ICE Council, an organization representing approximately 7,000 deportation officers, raised concern about prosecutorial discretion.¹⁸³ National ICE Council leadership expressed concern that the discretion guidelines “amounts to orders from ICE officials for agents not to enforce the law.”¹⁸⁴ The leadership stated that it has “so far not allowed its members to participate in the training.”¹⁸⁵ Without training, it is not clear if prosecutorial discretion will be implemented at all.

Another concern with the implementation of prosecutorial discretion focuses on the power imbalance between individuals and immigration officers. “Discretion can also reinforce powerlessness. It recasts an applicant as a supplicant.”¹⁸⁶ After some incidents of corruption and bribery amongst enforcement agents and counsel,¹⁸⁷ close attention is needed to ensure that the exercise of prosecutorial discretion does not mask abuses of power by officials. Community education and monitoring of prosecutorial discretion is necessary to ensure that the use of discretion makes the system more—not less—just, particularly with vulnerable populations such as individuals with serious mental illness.

2. Criminal Convictions Trump Humanitarian Concerns

ICE’s priorities reflect a serious concern about individuals who violate immigration law or have criminal convictions.¹⁸⁸ The classification of even minor criminal convictions as a negative factor means that many individuals will not be able to benefit from prosecutorial discretion

181. Julia Preston, *Agents’ Union Stalls Training on Deportation Rules*, N.Y. TIMES, Jan. 7, 2012, at A15.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 621 (2006).

187. In March 2011, the former assistant chief council of ICE was convicted of thirty-six felony counts, including a scheme in which he impersonated a high-ranking immigration official or judge and told undocumented immigrants he could help them obtain immigration benefits in exchange for a bribe. Sam Allen, *Former U.S. Immigration Attorney Sentenced for Taking More Than \$400,000 in Bribes to Help Illegal Immigrants*, L.A. TIMES, Mar. 21, 2011, available at <http://latimesblogs.latimes.com/lanow/2011/03/former-us-immigration-attorney-accepts-more-than-400000-in-bribes-for-helping-illegal-immigrants.html>. In 2004, a former INS officer was convicted on federal corruption and civil rights violations stemming from incidents where he demanded sex and money from two women seeking asylum. *Former INS Officer Gets 4-Year Prison Term*, L.A. TIMES, Nov. 23, 2004, available at <http://articles.latimes.com/2004/nov/23/local/me-briefs23.1>

188. See *supra* notes 170 and 179 and accompanying text.

guidelines.¹⁸⁹ For individuals with severe mental illness, the criminal-immigration nexus is particularly damaging. Statistics demonstrate that “prisons appear to have become a repository for a great number of . . . mentally ill citizens.”¹⁹⁰ The Council of State Governments Justice Center found in a study of five local jails that 14.5% of men and 31% of women entering the jails had a serious mental illness.¹⁹¹ That rate is three to six times greater than the rate of mental illness in the non-jailed population.¹⁹² Extrapolating this study to the total number of jail admissions in 2007 suggests more than two million individuals entering jail in that year had a serious mental illness.¹⁹³

The reasons the mentally ill population is over-represented in prison are complex and varied, but include deinstitutionalization of the mentally ill without access to community-based treatment;¹⁹⁴ high rates of substance dependence or abuse by mentally ill individuals;¹⁹⁵ and high arrest rates for “lifestyle” crimes.¹⁹⁶ The increasing connections between immigration enforcement and the criminal justice system mean that a large proportion of individuals in the immigration adjudication system will have criminal convictions and also mental illness.

189. The decision to arrest an individual and charge him or her with a crime usually occurs before an individual interacts with an ICE agent or counsel. For that reason, the prosecutorial discretion in the criminal justice system may truly be “the discretion that matters” in determining the outcome of an individual’s immigration case. See Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil—Criminal Line*, 58 UCLA L. REV. 1819, 1837 (2011).

190. Ruiz v. Johnson, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999).

191. Press Release, Justice Center: The Council of State Governments, Council of State Governments Justice Center Releases Estimates on the Prevalence of Adults with Serious Mental Illnesses in Jail (June 1, 2009), available at http://consensusproject.org/jc_publications/council-of-state-governments-justice-center-releases-estimates-on-the-prevalence-of-adults-with-serious-mental-illnesses-in-jails/MH_Prevalence_Study_brief_final.pdf. Serious mental illness as defined for this study included “bipolar disorder, schizophrenia spectrum disorders, and major depression.” *Id.* It did not include “anxiety disorders . . . , adjustment disorders, or acute reactive psychiatric conditions, such as suicidal thinking.” *Id.*

192. *Id.*

193. *Id.*

194. Shane Levesque, *Closing the Door: Mental Illness, the Criminal Justice System, and the Need for a Uniform Mental Health Policy*, 34 NOVA L. REV. 711, 718–19 (2010).

195. A study by the Bureau of Justice Statistics found much higher rates of alcohol or drug abuse or dependence amongst inmates who had a mental health problem than inmates who did not have a mental health problem. See DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 5 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf>. In local jails, the difference was 76.4% compared to 53.2%; in State prisons 74.1% compared to 55.1%, and in Federal prisons, 63.6% compared to 49.5%. *Id.*

196. See Levesque, *supra* note 194, at 719. “Lifestyle crimes are typically nonviolent offenses that do not cause direct harm to others, but do create feelings of unease among community members.” *Id.*

The tensions between the positive discretionary factor of mental health and the negative discretionary factors of criminal convictions and immigration law offenses are clearly demonstrated by the recent case of twenty-two-year-old Mexican citizen Yanelli Hernandez Serrano.¹⁹⁷ Ms. Hernandez entered the United States unlawfully at age thirteen and during her time in the United States was convicted of forgery and driving under the influence.¹⁹⁸ Her attorney stated that she attempted suicide twice and was diagnosed with mood disorder and borderline personality disorder.¹⁹⁹ Ms. Hernandez was ordered removed by an immigration judge on January 25, 2012.²⁰⁰ She requested a stay of this order of removal in the exercise of discretion because removal would cause her great hardship due to her mental illness.²⁰¹

ICE denied Ms. Hernandez’s request.²⁰² ICE official Rebecca J. Adduci stated that Ms. Hernandez did not provide sufficient documentation of her claim.²⁰³ Additionally, the enforcement priorities played a role in this denial.²⁰⁴ Ms. Adduci stated that “[t]he removal of individuals with final orders of removal, as well as criminal aliens, is an ICE civil immigration enforcement priority.”²⁰⁵ Ms. Hernandez was removed to Mexico on

197. In addition to the mental health factor, Ms. Hernandez also has positive discretionary factors of long-term residence in the United States and entry at a young age. Mark Curnutte, *Woman Faces Deportation, Fate Undecided*, CMTY. PRESS CINCINNATI (Jan. 31, 2012), <http://communitypress.cincinnati.com/article/AB/20120131/NEWS/301310067/Woman-faces-deportation-fate-undecided?Odyssey=nav%7Chead>; see also *ICE Departs Former Reading Woman*, CINCINNATI ENQUIRER (Jan. 31, 2012), <http://news.cincinnati.com/article/20120131/NEWS01/120131032/ICE-departs-former-Reading-woman-?odyssey=tabtopnewsstext|FRONTPAGE>.

198. *Id.*

199. *Id.* Most recently, Ms. Hernandez attempted suicide while incarcerated. Curnutte, *supra* note 197. She previously attempted suicide in 2008. *Id.* The Cincinnati Enquirer verified this earlier suicide attempt with documents obtained from University Hospital. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* The letter to Ms. Hernandez’s attorney stated, “Your request is denied. The basis of this request is that your client cannot depart from the United States due to hardships she will face stemming from long-term mental illness. You have provided no documentation to support this claim.” *Id.*

204. *Id.*

205. *Id.* ICE spokesman Khaalid Walls stated:

ICE has adopted common sense policies that ensure our immigration laws are enforced in a way that best enhances public safety, border security and the integrity of the immigration system . . . ICE has adopted clear priorities that call for the agency’s enforcement resources to be focused on the identification and removal of those that have broken criminal laws, recently crossed our border, repeatedly violated immigration law or are fugitives from immigration court.

Id.

January 31, 2012.²⁰⁶ This is a single example with circumstances unique to this individual. However, the decision to remove Yanelli Hernandez rather than exercise positive discretion demonstrates that the balancing of mental illness and criminal convictions may do little to aid individuals with criminal convictions. If criminal conviction is seen as trumping all other factors, we risk losing the nuanced approach and humanitarian goals of prosecutorial discretion.

3. *Obtaining Prosecutorial Discretion Requires Resources*

Arguing for favorable prosecutorial discretion requires significant resources.²⁰⁷ Favorable factors, including serious mental disability, are often not obvious to the ICE agent or counsel. An individual with severe mental illness may need the help of counsel or friends and family to document and present these favorable factors.²⁰⁸ This Note is concerned with the importance of diverting severely mentally ill people out of the system due to the insurmountable barriers they face in arguing their case against removal.²⁰⁹ These same barriers will make it more difficult to argue persuasively for prosecutorial discretion.

IV. RECOMMENDATIONS AND CONCLUSION

Currently, termination of proceedings and prosecutorial discretion are options for diverting mentally ill individuals out of proceedings in theory, not practice. However, the Benchbook discussion of immigration judges' ability to terminate proceedings for individuals with serious mental illness may signal a change in agency policy.²¹⁰ Regulatory reform is needed to ensure that judges have greater discretion to terminate proceedings and thereby ensure individuals are not removed when they could not understand and participate in their hearing.²¹¹ Additionally, the exercise of prosecutorial discretion must incorporate a more holistic analysis of an

206. *Id.*

207. *See infra* note 212.

208. Best practices recommended by the Legal Action Center of the American Immigration Council suggests providing a memorandum explaining why prosecutorial discretion is appropriate, providing additional evidence to support claim of positive factors, using agency memoranda to support the argument, and possibly seeking a continuance if the case is already in proceedings. In challenging situations, reaching out to elected officials, working with advocacy organizations, and developing media campaigns are other recommended strategies. KENNEY, *supra* note 160, at 11–14.

209. *See supra* notes 41–43 and accompanying text.

210. *See supra* note 136 and accompanying text.

211. *See supra* notes 135–39 and accompanying text.

individual’s situation. Refusing to grant favorable discretion for all individuals with even minor criminal convictions will make prosecutorial discretion unavailable to many individuals with mental illness.²¹² Together, these more nuanced approaches will ensure that mentally ill individuals are not processed through a removal system and removed from the United States when they could not present a case.

Many important questions remain as to what to do with an individual after he or she is diverted out of the removal system. This, too, requires a case-by-case analysis. Some individuals whose mental health has deteriorated while in (and perhaps as a result of) detention or removal proceedings may be perfectly capable of functioning in a normal community setting. Others may require the support of family, social service agencies, or mental health professionals. An ideal response would be to engage social workers to provide transitional services, much like the services provided to individuals with mental health issues leaving hospitals or other state institutions.

This Note does not answer all of the questions but rather hopes to promote consideration of alternatives to detention and removal, instead of simply bolstering the current removal system with more procedural protections. By expanding options to divert this population out of proceedings, we can ensure that immigration law is enforced fairly and that wrongful deportations become anecdotes of the past, not a norm of the future.

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212. *See supra* notes 188–206 and accompanying text.

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