

ADDRESSING ALL HEADS OF THE HYDRA: REFRAMING SAFEGUARDS FOR MENTALLY IMPAIRED DETAINEES IN IMMIGRATION REMOVAL PROCEEDINGS

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ABSTRACT

This article concerns the constitutional rights of detained, mentally impaired non-citizens in defending against deportation. Due process requires that such detainees receive a full and fair hearing. However, until recently, they were not provided an attorney to assist them in navigating our extremely complicated immigration system. Mentally impaired detainees were expected to proceed alone in proving the elements of their claims against skilled government attorneys—a daunting task even for those unencumbered by a mental disorder. On December 31, 2013, the Department of Justice (“DOJ”) released guidelines detailing new procedures for how immigration courts should handle these cases, including the provision of counsel upon a finding of mental incompetence. The guidelines were issued as a direct response to Franco-Gonzales v. Holder, a class action lawsuit brought by the American Civil Liberties Union in federal district court in California seeking appointed counsel for detained, unrepresented, mentally impaired non-citizens. The guidelines created a three-stage process for assessing competency. Only at the end of this process—and after an individual is declared incompetent—is counsel appointed.

This article argues that the DOJ guidelines fall far short of Franco’s promise of due process for this particularly vulnerable population. It proposes

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an alternative model wherein counsel is appointed the moment the court is presented with “indicia” of incompetence, rather than after an adjudication of incompetence. “Indicia” should create a presumption of incompetency that can be rebutted only after a forensic evaluation is conducted and the court holds a robust hearing into the matter. This article reveals, through empirical evidence, the critical role that counsel plays in the investigation of a respondent’s ability to participate in the proceedings, and how an attorney is often the only party positioned to marshal all the evidence relevant to the question of competency. Additionally, where a lack of competence is found, the court should appoint a guardian ad litem (“GAL”) to assist the attorney in the individual’s defense. Counsel and the GAL should work in tandem to achieve the outcome most favorable to the individual, which could be termination, the pursuit of relief, or even deportation in some instances. The expanded use of existing “Deferred Action” categories offers an additional remedy when none of the above proposed options are adequate.

The article concludes that the DOJ guidance must be amended in accordance with these recommendations. This proposal best ensures vigorous and informed examination of an individual’s competency, while safeguarding the individual against the inherent limits of immigration courts, conflicts of interest, and undue harm.

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INTRODUCTION

In the spring of 2013, an immigration judge (“IJ”) in Newark, New Jersey, informally reached out to an attorney at a local non-profit organization and asked the attorney to intervene in the case of a man named Jean.¹ Jean was a detained, possibly mentally ill man from Haiti facing deportation. The IJ was unsure how to proceed and explained that she was not sure whether Jean was mentally impaired or simply uncooperative. He oscillated from displaying extreme hostility to both the IJ and the government attorney to being so despondent as to not communicate at all. Jean had no attorney and seemingly no family, and little was known of his personal details.

The attorney visited Jean in a county jail where she learned he was being held in solitary confinement. Jean’s deportation officer stated that Jean was on suicide-watch—but in all likelihood was “faking it” to get special treatment. Upon meeting Jean, the attorney learned that he had come to the United States as a small child. He had family somewhere in the state from whom he was estranged. A bit distrustful of the attorney, Jean was only willing to provide her with his mother’s first name, which was an unusual, distinctly Haitian name. Jean also shared that prior to his detention he had been homeless and living on the streets. When asked why he was in solitary confinement, he explained that he had been engaging in self-mutilation.

1. The individual’s true name and personal details have been obscured in the interest of preserving confidentiality.

The attorney accepted the case pro bono and informed the IJ that Jean did appear to have family—a mother, at a minimum, who was local to the area. Counsel began trying to use the mother’s distinct first name to locate her² and expressed concern to the IJ about Jean’s ability to understand the nature and object of the proceedings. The attorney’s subsequent examination of the county jail’s health records revealed that Jean had been prescribed anti-psychotic medication and had been diagnosed with a vague “impulse control disorder.” Counsel requested that a competency hearing be conducted to determine Jean’s ability to meaningfully participate in his removal proceeding.

Before the parties had an opportunity to conduct such a hearing, Immigration and Customs Enforcement (“ICE”) made a unilateral decision to transfer Jean to a detention facility in Florida that had a special unit for the mentally ill. Counsel only discovered the impending transfer during a visit to Jean, who expressed fear and agitation over the move. The attorney filed an emergency motion for an injunction against the transfer and for a competency hearing prior to the transfer—both of which were denied.³ When the parties reconvened before the IJ in Newark—this time with Jean appearing via video teleconferencing (“VTC”) from the facility in Florida—the government attorney moved to transfer venue to the immigration court in Florida. Counsel opposed, arguing that such a transfer of venue would sever Jean from both family in New Jersey who might assist in the case and his pro bono attorney. The IJ denied the government’s motion, expressing concern that to do otherwise would effectively dismantle safeguards that were being put in place for a potentially mentally incompetent man.

As the debate over Jean’s future continued in court, the attorney was able to locate Jean’s family in New Jersey, including his mother and several other relatives, who had been searching for Jean for more than a year. To assist in his case, Jean’s family produced years of psychiatric records, evidence of hospitalizations, and other useful documentation, including a specific diagnosis of schizophrenia and disorganized psychosis. At the next hearing, the attorney presented voluminous information detailing Jean’s life and mental condition, as well as members of his family—some of whom wept upon seeing his face on the VTC screen.

Jean is only one of the many detained mentally impaired immigrants who regularly appear pro se in our immigration courts each day. The acute problem of

2. The attorney conducted an Internet search of Jean’s mother’s unusual first name and the two cities in which Jean had claimed to have been homeless. The attorney discovered a home address of a woman in one of the towns with a matching first name and mailed the woman a letter asking her to respond if she knew Jean.

3. The IJ denied the first motion for lack of jurisdiction over the physical location of a detainee—which is solely within the province of ICE—and the second for unarticulated reasons, although she presumably felt that because she could not prevent or delay the transfer, she could not schedule a competency hearing in the short timeframe before it took place.

mentally impaired immigrants appearing unassisted in immigration removal proceedings has been both well documented and heavily criticized.⁴ In April 2013, advocates of appointed counsel for such respondents⁵ scored an important victory. As a result of the settlement in *Franco-Gonzales v. Holder*⁶—a class action lawsuit brought against the federal government by the American Civil Liberties Union (“ACLU”) on behalf of detained, unrepresented, mentally ill immigrants in removal proceedings—the government agreed to provide qualified representatives for detained immigrants with mental disorders.⁷

At the time of publication, the new appointed counsel program created by the *Franco* settlement is not yet fully in place nationwide. On December 31, 2013, the Executive Office for Immigration Review (“EOIR”) released a guidance for appointing counsel, including provisions governing forensic evaluations of potentially incompetent respondents (hereinafter the “Guidance”).⁸ The Guidance sets forth several steps in the competency assessment process, including the discretionary procurement of an independent mental health evaluation and, upon a finding of incompetency, the appointment of a “qualified representative.”⁹ At the time of this writing, these new procedures are in place in a handful of locations nationwide under a program called the “National Qualified Representative Program,” or “NQRP.”¹⁰

4. See *Franco-Gonzalez v. Holder*, No. 2:10-CV-02211, 2013 WL 3674492, at *16 (C.D. Cal. Apr. 23, 2013) (noting the “harms that can ensue” in the absence of “meaningful procedures to safeguard mentally incompetent detainees”); see also Alice Clapman, *Hearing Difficult Voices: The Due-Process Rights of Mentally Disabled Individuals in Removal Proceedings*, 45 NEW ENG. L. REV. 373 (2011) (detailing “the acute problem of mentally ill respondents appearing pro se in immigration removal proceedings”); Aliza B. Kaplan, *Disabled and Disserved: The Right to Counsel for Mentally Disabled Aliens in Removal Proceedings*, 26 GEO. IMMIGR. L.J. 523, 524 (2012) (“A mentally disabled pro se applicant with no understanding of the complexities of this hybrid legal-administrative system will be at a significant disadvantage and no match for the ICE attorney.”); Amelia Wilson & Natalie H. Prokop, *Applying Method to the Madness: The Right to Court Appointed Guardians Ad Litem and Counsel for the Mentally Ill in Immigration Proceedings*, 16 U. PA. J.L. & SOC. CHANGE 1 (2013).

5. “Respondent” is a term given to non-citizens in removal (or colloquially “deportation”) proceedings. See 8 C.F.R. § 1001.1(r) (2014) (“The term *respondent* means a person named in a Notice to Appear issued in accordance with section 239(a) of the [Immigration and Nationality] Act, or in an Order to Show Cause issued in accordance with § 242.1 of 8 CFR chapter I as it existed prior to April 1, 1997.”).

6. 2013 WL 3674492.

7. See *infra* Part II. It is worth noting that non-detained mentally impaired immigrants are also in need of qualified representatives, as well as the other safeguards and procedures advocated herein.

8. U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, PHASE I OF PLAN TO PROVIDE ENHANCED PROCEDURAL PROTECTIONS TO UNREPRESENTED DETAINED RESPONDENTS WITH MENTAL DISORDERS (2013) [hereinafter EOIR GUIDANCE], available at <https://immigrationreports.files.wordpress.com/2014/01/eoir-phase-i-guidance.pdf>.

9. *Id.* at 15.

10. Contracts (including one viewed by one of the authors of this article) for the provision of qualified representatives are often (though not exclusively) between EOIR (through its subcontractor the Vera Institute of Justice) and area Legal Orientation Providers (“LOP”) such as

This article exposes the substantial shortcomings in the federal government's Guidance and its failure to adequately protect the rights of this particularly vulnerable population. We provide a model for how these cases should be conducted, including appointment of counsel at the appropriate time in the competency-assessing process, mandatory competency hearings, and upon a finding of incompetence, the appointment of a guardian ad litem ("GAL") to assist the attorney in determining how to protect the best interests of the respondent. Working in tandem, counsel and a GAL can then determine how to proceed, whether by seeking termination of a case, applying for some form of affirmative relief such as asylum, or ultimately consenting to deportation with provisions for safe repatriation. We also argue for expanding the use of the existing discretionary authority to grant Deferred Action to certain mentally incompetent respondents.¹¹

Part I of this article elucidates the problem of pro se mentally impaired detainees. Part II explains the most recent governmental attempts to address the problem. Part III recounts the facts of more cases like that of Jean, including the different approaches that judges and attorneys have taken in these cases. Part IV analyzes the Guidance on appointment of counsel for this population in light of Part III's case examples and proposes the appropriate order of events where competency is at issue. Finally, Part V goes beyond the Guidance to explain how these cases should be handled *after* a respondent has been found incompetent, including through the appointment of GALs and the use of Deferred Action in appropriate cases. We conclude that in order to address all heads of the multifaceted hydra that is the problem of mentally impaired immigrants appearing in removal proceedings, the Guidance must be amended to incorporate these proposed changes.¹² Only then will mentally impaired immigrants receive a fair hearing and the integrity of our immigration system be restored.

the Florence Project and the American Bar Association. Qualified representatives are paid hourly. In immigration courts in certain states that were ordered to provide counsel in *Franco*, see *infra* Part II.B, representation is triggered by the alien's inclusion in the *Franco* order. However, in other courts that were subject to the government settlement rather than the *Franco* order, a representative will be appointed only once an IJ makes a determination of incompetence. Significantly, appointed representatives are authorized to bill for work with U.S. Citizenship and Immigration Services ("USCIS") and post conviction relief—but are *not* authorized to bill for competency hearings or administrative appeals. The contracts provide for the continued funding of a representative for thirty days past the final order granting relief or ninety days past the release of an individual who has not been granted relief.

11. See *infra* Part V.B.iv.

12. See EOIR GUIDANCE, *supra* note 8, at 1 n.2 (noting that "EOIR . . . intends to issue a Notice of Proposed Rulemaking . . . and, upon receipt and review of public comment, a Final Rule" concerning enhanced protections for mentally ill respondents).

I.

THE PROBLEM: A LACK OF DUE PROCESS FOR MENTALLY IMPAIRED
IMMIGRANT DETAINEES

Under the Due Process Clause, all respondents in deportation proceedings have a right to “a full and fair hearing.”¹³ The Board of Immigration Appeals (“BIA” or the “Board”) has similarly held that the constitutional requirement of due process mandates that immigration proceedings be fundamentally fair.¹⁴ Courts have increasingly recognized the unfairness of expecting respondents with mental disorders¹⁵ to either represent themselves in immigration court or obtain counsel on their own.¹⁶ If only recently, courts have also increasingly acknowledged the critical need for attorney involvement in these cases in order to ensure due process.¹⁷

Although the exact number of detained respondents with mental disorders is unknown, it is significant. Human Rights Watch estimates that about fifteen percent of all immigrants heard by the Immigration Court have a mental disorder.¹⁸ An annual fact sheet published by ICE concerning the health services

13. *See, e.g.*, *Reno v. Flores*, 507 U.S. 292, 306 (1993) (noting that it is “well-established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings”); *see also* *Leslie v. Att’y Gen. of U.S.*, 611 F.3d 171, 181 (3d Cir. 2010) (citing *Xu Yong Lu v. Ashcroft*, 259 F.3d 127, 131 (3d Cir. 2001) (holding that due process guarantees immigration respondents a fundamentally fair hearing)); *Cabrera-Perez v. Gonzales*, 456 F.3d 109, 115 (3d Cir. 2006) (per curiam) (“[D]ue process requires that aliens threatened with removal are provided the right to a full and fair hearing that allows them a reasonable opportunity to present evidence on their behalf.”); *Brue v. Gonzales*, 464 F.3d 1227, 1233 (10th Cir. 2006) (citing *Schroeck v. Gonzales*, 429 F.3d 947, 952 (10th Cir. 2005) (finding that those in removal proceedings are entitled to due process and, therefore, “the opportunity to be heard at a meaningful time and in a meaningful manner”)); *Jaadan v. Gonzales*, 211 F. App’x 422, 430 (6th Cir. 2006) (citing *Ahmed v. Gonzales*, 398 F.3d 722, 725 (6th Cir. 2005)) (holding that noncitizens in removal proceedings are “entitled to due process in the form of a ‘full and fair hearing’”); *Garcia-Jaramillo v. Immigration & Naturalization Serv.*, 604 F.2d 1236, 1239 (9th Cir. 1979) (holding that, in a deportation hearing, an alien is entitled to due process, which is satisfied only by a full and fair hearing); *Wilson & Prokop*, *supra* note 4, at 22 (“Under the federal Due Process Clause, all noncitizens in deportation proceedings, including those with disabilities, have a due process right to a full and fair hearing.”).

14. *See* *Matter of Exilus*, 18 I. & N. Dec. 276, 278 (B.I.A. 1982) (“The constitutional requirements of due process are satisfied in an administrative hearing if the proceeding is found to be fair.”).

15. For the purposes of this article, the authors use the terms “mental disorder” and “mental impairment” to encompass both mental illness (e.g., schizophrenia, bi-polar disorder, and severe depression) and cognitive disabilities (e.g., low intelligence, dementia, and traumatic brain injury).

16. *See, e.g.*, *Franco-Gonzalez v. Holder*, No. 2:10-CV-02211, 2013 WL 3674492, at *20 (C.D. Cal. Apr. 23, 2013) (“The record in this case demonstrates that delaying relief for class members results in an inability to fairly participate in removal proceedings.”), discussed *infra* Part II.B.

17. *See id.*; *see also infra* Part II.C.

18. HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, DEPORTATION BY DEFAULT: MENTAL DISABILITY, UNFAIR HEARINGS, AND INDEFINITE DETENTION IN THE US IMMIGRATION SYSTEM 17 (2010) [hereinafter DEPORTATION BY DEFAULT], available at http://www.aclu.org/files/assets/usdeportation0710_0.pdf; *see also* Kaplan, *supra* note 4, at 536 n.107 (“ICE and Executive

received by detained immigrants indicates that about one in four detainees received mental health interventions in fiscal year 2012.¹⁹ In 2008, the Division of Immigrant Health Services estimated that between two and five percent of immigrant detainees had a “serious mental illness” and put those who had “some form of encounter with a mental health professional or the mental health system” at between ten and sixteen percent.²⁰

Often, the detention of mentally impaired respondents stems from their homelessness²¹ and associated criminal offenses.²² Detained respondents with mental disorders are also often a product of a system in the United States that incarcerates the mentally impaired instead of placing them in treatment centers or hospitals.²³

Office of Immigration Review (EOIR) do not track the number of non-citizens with mental disabilities that go through the detention system.”)

19. *Detainee Health Care—FY2012*, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION & CUSTOMS ENFORCEMENT (Sept. 1, 2012), <http://www.ice.gov/factsheets/dhc-fy12> (last visited Mar. 8, 2015) (reporting that, of 220,574 intake screenings in FY2012, there were 54,969 mental health interventions).

20. Dana Priest & Amy Goldstein, *Caseless Detention: Suicides Point to Gaps in Treatment*, WASH. POST, May 13, 2008, at A8 (“No one in the Division of Immigration Health Services (DIHS), the agency responsible for detainee medical care, has a firm grip on the number of mentally ill among the 33,000 detainees held on any given day, records show. But in confidential memos, officials estimate that about 15 percent—about 4,500—are mentally ill, a number that is much higher than the public ICE estimate. The numbers are rising fast, memos reveal, as state mental institutions and prisons transfer more people into immigration detention.”)

21. See G. Sullivan, A. Burnam & P. Koegel, *Pathways to Homelessness Among the Mentally Ill*, 35 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 444 (2000) (stating that in the United States twenty to twenty-five percent of the homeless population is mentally ill and also finding that the homeless population with mental illnesses had twice the prevalence of alcohol abuse problems and six times the prevalence of drug abuse problems as compared to the mentally ill people in the study who were not homeless).

22. See, e.g., Kathryn A. Worthington, *Kendra’s Law and the Rights of the Mentally Ill: An Empirical Peek Behind the Courts’ Legal Analysis and a Suggested Template for the New York State Legislature’s Reconsideration for Renewal in 2010*, 19 CORNELL J.L. & PUB. POL’Y 213, 220 (2009) (“When one considers that nearly three-quarters of inmates with mental illness have a co-occurring substance abuse problem, it is not difficult to imagine how the mentally ill wound up incarcerated by committing vagrancy, property, and drug offenses.”); Michael Matza, *Sad Tale of Mental Illness and U.S. Detention*, PHILA. INQUIRER (Nov. 15, 2013), http://articles.philly.com/2013-11-15/news/44078208_1_immigration-detainees-detainee-deaths-u-s-immigration (detailing the case of a schizophrenic woman who committed suicide in immigration detention after being detained due to convictions for trespassing, shoplifting, and assault).

23. See Nicholas Kristof, *Inside a Mental Hospital Called Jail*, N.Y. TIMES, Feb. 9, 2014, at SR1 (noting that more than half the prisoners in the United States have a mental health problem; nationwide more than three times as many mentally ill people are incarcerated as are hospitalized; and more than forty percent of those with serious mental illness have been arrested at some point in their lives); Mike Kessler, *Prison: The New Mental Hospital*, TAKEPART (Jan. 22, 2014), <http://www.takepart.com/feature/2014/01/22/prison-new-mental-hospital?cmpid=tpnews-eml-2014-01-25-women> (detailing multiple examples of how “[t]he prison system has become the mental health system” and the mentally ill “aren’t getting very good treatment either in prison or after they’ve done their time”); Timothy Williams, *A Psychologist as Warden? Jail and Mental Illness Intersect in Chicago*, N.Y. TIMES (July 30, 2015), <http://nyti.ms/1I3KTv9> (noting that “[t]here are

Once detained in immigration custody, mentally impaired respondents face major barriers to justice. Studies show that the mentally impaired are more likely to be indigent²⁴ and thus unable to pay a bond. Like other respondents in removal proceedings, they traditionally have not had a right to a lawyer at government expense.²⁵ Because they often cannot afford a lawyer,²⁶ much less locate one in detention,²⁷ they largely appear pro se.²⁸ Appearing pro se dramatically decreases a mentally impaired respondent's chances of success in

now 10 times as many mentally ill people in the nation's 5,000 jails and prisons as there are in state mental institutions"); HUMAN RIGHTS WATCH, *ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 5* (2003), available at <http://www.hrw.org/sites/default/files/reports/usa1003.pdf> (attributing the increase of incarceration of the mentally ill within state and federal institutions to de-funding of health care institutions and "the punitive anti-crime effort, including a national 'war on drugs' that dramatically expanded the number of persons brought into the criminal justice system, the number of prison sentences given even for nonviolent crimes (particularly drug and property offenses), and the length of those sentences").

24. See Sullivan, Burnam & Koegel, *supra* note 21, at 445 (noting that while homelessness and indigence are not necessarily synonymous, the two are inextricably linked).

25. See 8 U.S.C. § 1362 (2012) ("In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (*at no expense to the Government*) by such counsel, authorized to practice in such proceedings, as he shall choose." (emphasis added)).

26. See U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, *FY 2012 STATISTICAL YEAR BOOK*, at G1 (2013), available at <http://www.justice.gov/eoir/statpub/fy12syb.pdf> ("Many individuals in removal proceedings are indigent and cannot afford a private attorney. Some seek free or pro bono representation, while others proceed without counsel on their own, or pro se."); Andrew I. Schoenholtz & Hamutal Bernstein, *Improving Immigration Adjudications Through Competent Counsel*, 21 *GEO. J. LEGAL ETHICS* 55, 56 (2008) ("Many times individuals slated for removal hearings have difficulty procuring representation because they do not know how to go about finding counsel, do not have the resources to pay a private-sector lawyer, and/or are detained and thus even more limited in their information about and access to counsel."); Donald Kerwin, *Revisiting the Need for Appointed Counsel*, *MIGRATION POLICY INSTITUTE: INSIGHT NO. 4* (2005), available at http://www.migrationpolicy.org/sites/default/files/publications/Insight_Kerwin.pdf.

27. See Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 *FORDHAM L. REV.* 541 (2009); see also NAT'L IMMIGRANT JUSTICE CTR., *ISOLATED IN DETENTION: LIMITED ACCESS TO LEGAL COUNSEL IN IMMIGRATION DETENTION FACILITIES JEOPARDIZES A FAIR DAY IN COURT 3* (2010) [hereinafter *ISOLATED IN DETENTION*], available at <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Detention%20Isolation%20Report%20FULL%20REPORT%202010%2009%2023.pdf> ("Most of the immigrants detained in the surveyed facilities have insufficient access to legal counsel because the facilities are isolated and legal aid organizations do not have the resources to serve them. More than a quarter of the surveyed facilities had no access to legal aid outreach from non-governmental organizations (NGOs), including direct representation and legal orientation programs.").

28. See Clapman, *supra* note 4; Wilson & Prokop, *supra* note 4; *DEPORTATION BY DEFAULT*, *supra* note 18, at 46, 53–56 (detailing the elevated challenges that mentally ill noncitizens face in accessing and securing counsel); Laura Murray-Tjan, *Immigration Puzzle of the Week: Do We Deport People for Being Mentally Ill?*, *HUFFINGTON POST* (Mar. 12, 2014), http://www.huffingtonpost.com/laura-murraytjan/immigration-mentally-ill-deportation_b_4577314.html.

everything from obtaining a bond²⁹ to defending against deportation.³⁰ Even those with cognizable removal defenses can fail to prove their cases, as the type of evidence required is often impossible to obtain while detained and without outside help.³¹ Those with meritorious cases can also lose when they fail to present legal arguments before the judge or incorrectly complete forms without assistance.³²

Stakes are high in removal cases with the consequence being deportation.³³ The Supreme Court has called deportation, “the equivalent of banishment or exile.”³⁴ Because of a lack of due process for this population, many mentally impaired respondents may be unfairly deported.³⁵ At least one mentally impaired U.S. citizen was wrongly removed.³⁶

29. See NAT’L LAW. GUILD, *BROKEN JUSTICE: A REPORT ON THE FAILURES OF THE COURT SYSTEM FOR IMMIGRATION DETAINEES IN NEW YORK CITY* 10 (2007), available at http://www.nlgnyc.org/pdf/publications/broken_justice.pdf (“[D]etainees appearing pro se are uninformed about what relief is available, whether permanent or temporary. One detainee had waived his right to appeal his \$30,000 bond because of a lack of legal counsel to advise him.”).

30. See *ISOLATED IN DETENTION*, *supra* note 27, at 4 (citing a 2005 Migration Policy Institute study which found that detained individuals, when represented, won permanent residence before an immigration court in forty-one percent of the cases compared to twenty-one percent for those without representation; and eighteen percent of detainees with legal representation prevailed in requests for asylum, compared to only three percent for unrepresented detainees); Wilson & Prokop, *supra* note 4; Joan Friedland, *Immigrants Without Legal Representation Not Benefiting from Prosecutorial Discretion*, IMMIGRATION IMPACT (May 14, 2012), <http://immigrationimpact.com/2012/05/14/immigrants-without-legal-representation-not-benefitting-from-prosecutorial-discretion>.

31. The Capital Area Immigrants’ Rights Coalition suggests that pro bono attorneys, for example, obtain the following evidence on behalf of their clients with mental disorders: outpatient mental health treatment and case management reports, medical records from prior hospitalizations, medical records from the detention center, incarceration and jail mental health records, criminal court records, competency hearings and evaluations, school records, disability benefit applications and accompanying evaluations, and any Enforcement and Removal Operations records. See STEPHEN DEKOVICH & LIZ MCGRAIL, *CAPITAL AREA IMMIGRANTS’ RIGHTS COALITION, PRACTICE MANUAL FOR PRO BONO ATTORNEYS: REPRESENTING DETAINEES WITH MENTAL DISABILITIES IN THE IMMIGRATION DETENTION AND REMOVAL SYSTEM* (2d ed. 2013), available at <http://www.caircoalition.org/wp-content/files/CAIR-Coalition-Practice-Manual-2013.pdf>.

32. See Paloma Esquivel, *Detained Immigrants with Mental Illnesses Face Barriers in Court*, L.A. TIMES (Feb. 7, 2012) available at <http://articles.latimes.com/2012/feb/07/local/la-me-mental-disabilities-20120207>.

33. See Julia Preston, *Lawyers Back Creating New Immigration Courts*, N.Y. TIMES, Feb. 9, 2010, at A14 (quoting IJ Dana Marks, who likened asylum hearings to “holding death penalty cases in traffic court”).

34. See *Delgado v. Carmichael*, 332 U.S. 388, 391 (1947).

35. See Esha Bhandari, *Yes, the U.S. Wrongfully Deports its Own Citizens*, AM. CIVIL LIBERTIES UNION (April 25, 2013), <https://www.aclu.org/blog/speakeasy/yes-us-wrongfully-deports-its-own-citizens> (detailing the case of a mentally ill American citizen man from North Carolina who was wrongfully deported to Mexico and noting that his story “is unfortunately far from unique. Although no exact numbers exist, ICE regularly detains and deports U.S. citizens without ever providing them with a lawyer.”).

36. See *id.*

Perhaps even worse, many mentally impaired respondents languish in prolonged detention while judges attempt to muddle through these challenging cases.³⁷ While incarcerated, they receive sub-par mental health treatment, if any at all, and are often placed in isolation, where their conditions worsen.³⁸ Some detainees resort to suicide. For example, the ICE website reported that, between 2003 and 2010, seven detainees hanged themselves.³⁹ Further, at least one mentally impaired detained respondent hanged herself as recently as October 2013.⁴⁰

This cascade of deleterious effects has rightly been recognized as a major due process and humanitarian problem for our entire immigration system. Consequently, under the *Franco* settlement, the federal government has recently enacted a new program, albeit with significant gaps, in which qualified representatives and medical evaluators may participate in the cases of mentally impaired individuals.

II.

RECENT ATTEMPTS TO ADDRESS THE PROBLEM

Judges have been grappling with the cases of mentally impaired respondents for years⁴¹ and have long acknowledged the need for increased protections for this population in order to ensure a fair hearing.⁴² However, until the BIA's 2011

37. See Wilson & Prokop, *supra* note 4, at 6; Nina Bernstein, *Mentally Ill and in Immigration Limbo*, N.Y. TIMES, May 4, 2009, at A17 (telling the story of a mentally ill Chinese woman who spent more than a year in jail—at times in solitary confinement—emaciated and suicidal, without treatment); Matza, *supra* note 22 (detailing the case of a schizophrenic woman who was detained by ICE for more than two and a half years and whose request for release to a psychiatric facility was denied before she committed suicide in detention in October 2013).

38. See Wilson & Prokop, *supra* note 4, at 6.

39. See Matza, *supra* note 22. These deaths were later reclassified as “asphyxiations,” presumably to obscure the fact that suicides are taking place.

40. *Id.*

41. See, e.g., Matter of S-, 2007 WL 2463933 (B.I.A. Aug. 6, 2007) (holding that, despite evidence to the contrary, Respondent was competent to represent himself and that his procedural due process rights had not been violated since safeguards were not put in place); Matter of O-, 2007 WL 4707468 (B.I.A. Nov. 16, 2007) (upholding the IJ's finding that a Respondent, who argued that she was unable to represent herself, was capable of pro se representation despite the lack of a competency hearing); Matter of V-, 2006 WL 2008263 (B.I.A. May 24, 2006) (finding that since Respondent answered all questions asked of him and because he was represented a competency hearing was unnecessary); Matter of E-, 2003 WL 23269901 (B.I.A. Dec. 4, 2003) (finding that safeguards were in place because a BIA accredited representative had represented Respondent in court and holding that Respondent's due process rights had not been violated); Matter of Stoytcheff, 11 I. & N. Dec. 329 (B.I.A. 1965) (holding that a special inquiry officer in an exclusion proceeding did not violate Respondent's due process rights when he used the regulations for mental incompetents in deportation proceedings); see also Mimi E. Tsankov, *Incompetent Respondents in Removal Proceedings*, IMMIGR. L. ADVISOR, Apr. 2009, at 1, 18, available at <http://www.justice.gov/eoir/vll/ILA-Newsletter/ILA%202009/vol3no4.pdf>.

42. See Letter from the National Association of Immigration Judges to Members of Congress (Jan. 11, 2012), available at <http://naij-usa.org/wp-content/uploads/2014/06/NAIJ-letter-in-support>

decision in *Matter of M-A-M-*, there was little guidance for IJs presiding over these cases.

In the absence of such guidance, many judges began reaching out to free legal services providers to request assistance for respondents who appeared to lack the mental capacity to mount a defense pro se.⁴³ These requests by judges, which amounted to de facto appointments of attorneys that they knew and who appeared before them regularly, were improper in that the attorneys received no compensation and the process by which they were appointed lacked both uniformity and regulation. Judges, however, were emboldened to continue and even expand this practice after *Matter of M-A-M-*, which directed them to take extra measures to protect the rights of potentially incompetent respondents.⁴⁴

A. *Matter of M-A-M-: Its Value and Shortcomings*

IJs only began conducting competency hearings following the BIA's seminal case on the issue of mental competence, *Matter of M-A-M-*.⁴⁵ In that case, a pro se mentally ill Jamaican man was in removal proceedings as a result of criminal convictions for controlled substance violations.⁴⁶ At the outset of the proceedings, the respondent informed the judge that he had been diagnosed with schizophrenia and needed medication.⁴⁷ Eventually, psychiatric evaluations and reports about the respondent were included in the record.⁴⁸ Although the respondent expressed misgivings about his ability to continue without representation, the IJ proceeded with the case.⁴⁹ The IJ summarized the respondent's mental health history but failed to make a legal determination as to

-of-mental-competence-legislation_Jan-20121.pdf ("Those who appear in Immigration Court unrepresented are often uneducated in our language, culture and law, but are nevertheless required to present their claims unaided, while the DHS is represented by skilled government attorneys. This challenge becomes much more difficult when a respondent has a mental health disability, exponentially so when he or she is detained."); Mimi E. Tsankov, *supra* note 41, at 1 ("Immigration Judges are challenged to provide fundamental fairness to individuals who may not be able to represent themselves effectively and cannot obtain representation. Immigration Judges do so within a limited regulatory framework and with sparse precedent case law.").

43. See, e.g., Murray-Tjan, *supra* note 28 (noting that a particular IJ would call her office and ask that she visit with a mentally ill detainee); see also Wilson & Prokop, *supra* note 4.

44. *Matter of M-A-M-*, 25 I. & N. Dec. 474, 481 (B.I.A. 2011).

45. *Id.* at 479; LEGAL ACTION CTR., REPRESENTING CLIENTS WITH MENTAL COMPETENCY ISSUES UNDER MATTER OF M-A-M- (Nov. 30, 2011), available at <http://www.legalactioncenter.org/sites/default/files/docs/lac/Mental-Competency-Issues.pdf> (noting that prior to *Matter of M-A-M-* no formal procedure existed for determining competency).

46. *Matter of M-A-M-*, 25 I. & N. Dec. at 474–75.

47. *Id.* at 475.

48. *Id.*

49. See *id.* ("Initially, the respondent indicated that he could not represent himself but, upon further questioning by the Immigration Judge, said he 'believed' that he could answer the questions put to him by the Immigration Judge and the DHS attorney.").

competence or hold a competency hearing.⁵⁰ The IJ denied the respondent's applications for relief and ordered him removed.⁵¹

On appeal, the Board articulated "a framework for analyzing cases in which issues of mental competency are raised."⁵² The Board acknowledged that its decision was incomplete and addressed only "a limited set of questions regarding aliens with competency issues in immigration proceedings."⁵³ It stated that the decision was intended "to ensure that proceedings are as fair as possible in an unavoidably imperfect situation."⁵⁴

The Board noted that there is a general presumption of competence and that, absent indicia of mental incompetency, an IJ has no obligation to analyze an alien's competency.⁵⁵ Moreover, the BIA cited several criminal cases in which competency was only presumed "absent some contrary indication" arising from irrational behavior, the defendant's demeanor, or prior relevant medical opinions.⁵⁶ Under either reading, where there are "indicia," the presumption of competence should be rebutted.

The Board further acknowledged that the Immigration and Nationality Act ("INA") and the Code of Federal Regulations ("CFR") contemplate instances where "competency concerns trigger the application of appropriate safeguards."⁵⁷ The court cited INA section 240(b)(3), which reads: "If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe *safeguards* to protect the rights and privileges of the alien."⁵⁸

In the opinion, the Board listed what it called "examples of appropriate safeguards," which it said "include, but are not limited to:" refusal to take pleadings from a pro se mentally incompetent respondent; identification of a family member or close friend who can assist the court; providing additional time for a respondent to locate legal representation; involvement of a guardian; waiving the respondent's appearance at court; "actively aiding in the development of the record, including the examination and cross-examination of witnesses"; and reserving appeal rights on behalf of the respondent.⁵⁹ The Board stated that, in each particular case, the IJ can "decide which of these or other

50. *Id.* at 476.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 477.

56. *Id.* (internal citation omitted).

57. *Id.* at 477–78.

58. *Id.* at 477 (emphasis added) (citing Section 240(b)(3) of the Act, 8 U.S.C. § 1229a(b)(3) (2006)).

59. *Id.* at 483.

relevant safeguards to utilize.”⁶⁰ Finally, the Board explained that, in some cases, the court will be unable to ensure appropriate safeguards and that, in those cases, the IJ “may pursue alternatives with the parties, such as administrative closure.”⁶¹

Matter of M-A-M- was a watershed decision. For the first time, the court identified the acute need for competency determinations and explicit findings of fact in immigration proceedings where indicia of incompetence manifest.⁶² The Board provided a properly expansive definition of “indicia” that should trigger a competency determination.⁶³ The Board also correctly articulated the test of competency to stand trial in criminal proceedings.⁶⁴ The Board then held that the test for competency in immigration proceedings is “whether [the respondent] 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.”⁶⁵

However, while *Matter of M-A-M-* was an important first step in protecting the rights of mentally impaired respondents, it failed to provide the standardized mandatory procedures necessary to effectively protect the rights of this population. The decision is more advisory than binding in nature and, in fact, does not require competency hearings at all. It states that, “[w]hen there are indicia of incompetency, an Immigration Judge must take measures to determine whether a respondent is competent to participate in proceedings,” but continues that such an approach may vary from case to case.⁶⁶ It refers to mental competency evaluations as merely “[a]nother measure available to Immigration Judges” when faced with a respondent displaying indicia of incompetency.⁶⁷ Similarly, the Board wrongly cites a case in which the Department of Homeland Security (“DHS”) arranged for a psychiatric evaluation of a detained alien as an example of how competency evaluations can proceed.⁶⁸ To avoid a conflict of interest, such an evaluation must be performed by an independent medical professional secured by the court.

60. *Id.*

61. *Id.*

62. *See id.* at 481–82 (citing INA § 240(b)(3)).

63. *See id.* at 479–80. Examples include a respondent’s inability to understand and respond to questions, the inability to stay on topic, and mental health records or school records showing potential illness or deficiency. *Id.*

64. *See id.* at 479 (citing *Drope v. Missouri*, 420 U.S. 162, 171 (1975)).

65. *Id.* at 484.

66. *Id.* at 480.

67. *Id.* at 481 (describing other measures, including “permit[ting] a family member or close friend to assist the respondent in providing information . . . [and] facilitat[ing] the respondent’s ability to obtain medical treatment and/or legal representation”).

68. *Id.* (citing *Matter of J-F-F-*, 23 I. & N. Dec. 912, 915 (A.G. 2006)).

Finally, *Matter of M-A-M-* left several questions unanswered. First, because there was no appointed counsel system for mentally impaired detainees at the time, the BIA did not discuss appointed counsel at all, let alone when counsel should be appointed. Nor did *Matter of M-A-M-* mandate that a mental health evaluator appear at the competency hearing to face cross-examination.⁶⁹ In reality, an IJ's only assistance in making complicated determinations of mental competency is often a cursory, one- to two-page "Mental Health Review" conducted by individuals hired by ICE.⁷⁰ The individuals conducting the Mental Health Reviews are not always licensed physicians, and DHS does not require them to be.⁷¹ Furthermore, DHS attorneys do not produce these evaluators in immigration court for cross-examination by the IJ or the respondent—thus leaving the issue of the probative value of such reports unexplored.⁷²

In light of *Matter of M-A-M-*'s failure to adequately spell out the procedures for conducting mental competency assessments in immigration court, practical attempts to apply the decision have resulted in a haphazard, ineffectual patchwork of safeguards. As the cases in Part III, *infra*, illustrate, efforts on the part of IJs have yielded disparate and unreliable outcomes in both competency hearings specifically and removal proceedings generally.

B. Franco-Gonzales v. Holder Settlement and Announcement of a New Program of Enhanced Protections by the Government

In an effort to achieve due process in removal proceedings for detainees with mental disorders, the ACLU brought a class action lawsuit in the U.S. District Court for the Central District of California on behalf of hundreds of detained respondents suffering from mental disorders.⁷³ On March 22, 2013, Judge Dolly M. Gee announced her intention to grant a permanent injunction against EOIR and ICE "ordering extensive relief related to their treatment of

69. *See id.* at 480–81.

70. As per the Detainee Handbook, detainees "will undergo a thorough medical examination conducted by approved medical examiners within 14 days after [their] arrival. Medical staff or trained officers will also conduct a pre-screening interview to assess [detainees'] physical and mental health as part of the intake process." DORA SCHIRO, U.S. DEP'T OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT, NATIONAL DETAINEE HANDBOOK 4 (2009), available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>.

71. *See* U.S. DEP'T OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, MANAGEMENT OF MENTAL HEALTH CASES IN IMMIGRATION DETENTION (2011), available at http://www.oig.dhs.gov/assets/Mgmt/OIG_11-62_Mar11.pdf (suggesting that these individuals may not always be licensed psychiatrists).

72. *See infra* Part III.D (discussing a case example in which DHS would not produce the author of the Mental Health Review for cross-examination in immigration court).

73. *See* Franco-Gonzalez v. Holder, No. 2:10-CV-02211, 2013 WL 3674492, at *1 (C.D. Cal. Apr. 23, 2013).

detained immigrants.”⁷⁴ The following month, Judge Gee issued a judgment in the plaintiff’s favor requiring immigration courts in Arizona, California, and Washington to provide legal representation for detained respondents with mental disorders “in all aspects of their removal and detention proceedings”⁷⁵ and bond hearings for detained immigrants with mental disorders or disabilities in custody for six months or more.⁷⁶

On the eve of the threatened nationwide injunction against EOIR and ICE, the government settled the case. The Department of Justice (“DOJ”)/EOIR and DHS/ICE each issued separate memoranda announcing the implementation of several measures meant to provide greater procedural protections for mentally incompetent individuals.⁷⁷ Specifically, the DOJ/EOIR memorandum announced the following three enhancements: (1) an IJ must conduct a competency hearing if medical records or other evidence reveal that a respondent may suffer from a serious mental condition or disorder that could compromise his or her ability to proceed without representation; (2) IJs have the option of ordering an independent mental competency examination and the production of a psychiatric or psychological report if unable to decide whether an individual is competent to represent him- or herself following a competency hearing; and (3) “[i]f, at the conclusion of a competency hearing(s), [an IJ] finds that the unrepresented detained alien is not mentally competent to represent him- or herself, and the alien does not at that point otherwise have legal representation, EOIR will make available a qualified legal representative to represent the alien in all future detained removal and/or bond proceedings.”⁷⁸ Significantly, the memorandum only calls for the provision of counsel *after* the completion of the competency hearing.

The DHS/ICE memorandum announced new procedures to ensure that all ICE detainees with potential mental incompetence in removal proceedings “be identified, that relevant information about them is provided to the immigration court so that an immigration judge can rule on their competency, and, where appropriate, that such aliens are provided with access to new procedures for

74. See Press Release, Public Counsel, Class Action Lawsuit Forces Policy Change to Protect Detained Immigrants with Serious Mental Disabilities (Apr. 22, 2013), *available at* http://www.publiccounsel.org/press_releases?id=0068.

75. *Franco-Gonzalez*, 2013 WL 3674492, at *20.

76. *Id.*

77. Memorandum from Brian M. O’Leary, Chief Immigration Judge, U.S. Dep’t of Justice, Exec. Office for Immigration Review, to All Immigration Judges (Apr. 22, 2013), *available at* <http://nwirp.org/Documents/ImpactLitigation/EOIRDirective04-22-2013.pdf>; U.S. DEP’T OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT, CIVIL IMMIGRATION DETENTION: GUIDANCE FOR NEW IDENTIFICATION AND INFORMATION-SHARING PROCEDURES RELATED TO UNREPRESENTED DETAINEES WITH SERIOUS MENTAL DISORDERS OR CONDITIONS (Apr. 22, 2013) [hereinafter *GUIDANCE FOR NEW IDENTIFICATION*], *available at* http://www.ice.gov/doclib/detention-reform/pdf/11063.1_current_id_and_infosharing_detainees_mental_disorders.pdf.

78. Memorandum from Brian M. O’Leary, *supra* note 77, at 2.

unrepresented mentally incompetent detainees being implemented by EOIR.”⁷⁹ To identify these individuals, ICE announced two methods. First, all immigration detention facilities staffed by ICE Health Service Corps (“IHSC”) were to begin screening immigration detainees upon entering the detention center and performing “a more thorough medical and mental health assessment within 14 days of their admission.”⁸⁰ Second, for privately run detention centers, Enforcement and Removal Operations (“ERO”) and IHSC personnel were to “immediately begin working with the detention facilities’ medical staff to develop procedures to identify detainees with serious mental disorders or conditions that may impact their ability to participate in their removal proceedings.”⁸¹

The memoranda stated that the new procedures were expected to be fully operational by the end of 2013.⁸² The government missed that deadline, but at the time of publication of this article, the procedures are operational in a handful of locations nationwide.⁸³

C. Recent Executive Office for Immigration Review Guidance

On December 31, 2013, EOIR published a lengthier document entitled “Phase I of Plan to Provide Enhanced Procedural Protections to Unrepresented Detained Respondents with Mental Disorders” (the “Guidance”).⁸⁴ The Guidance begins to flesh out the program that the DOJ/EOIR and DHS/ICE memoranda announced.⁸⁵ It first restates EOIR’s commitment after *Franco* to identify detained pro se respondents who are not competent to represent themselves.⁸⁶ It affirms that EOIR will not proceed in the case of any such

79. GUIDANCE FOR NEW IDENTIFICATION, *supra* note 77.

80. *Id.* at 2.

81. *Id.*

82. *See id.*

83. *See supra* note 10 for an explanation of the current NQRP programs.

84. EOIR GUIDANCE, *supra* note 8. The document refers to itself as a “guidance” document: “This guidance sets forth principles by which Immigration Judges should assess competency within the context of EOIR’s nationwide plan to provide enhanced procedural protections to unrepresented, detained respondents with mental disorders.” Thus we have chosen to adopt the shorthand “the guidance” to refer to the document herein. Notably, the inclusion of “Phase I” in the title of the document implies that there will be further guidance documents to come. Because the Phase I document focuses heavily on procedures for mental health examinations and contains little about qualified representatives, presumably (and advisably) Phase II will focus on procedures for appointing qualified representatives.

85. *See* Memorandum from Brian M. O’Leary, *supra* note 77; GUIDANCE FOR NEW IDENTIFICATION, *supra* note 77.

86. Notably, the Guidance only speaks of “competency to represent oneself” rather than “competency to stand trial.” *See, e.g.*, EOIR GUIDANCE, *supra* note 8, at 1. That is because in immigration law, unlike in criminal law, a case can proceed against a respondent even if she is incompetent. Thus there is no concept of “competency to stand trial.” While some may see the premise that an immigration case can proceed against an incompetent respondent as unjust and

respondent until “appropriate procedural protections and safeguards are in place.”⁸⁷

The Guidance instructs IJs on how to assess competency. It reiterates the standard as stated in *Matter of M-A-M-*: to be competent the respondent must be able to comprehend the nature and object of the proceedings, consult with counsel, and understand her rights to present evidence, cross-examine witnesses, and appeal. The respondent must also have the ability to make decisions about her rights, respond to the charges, and present information and respond to questions about eligibility for relief.⁸⁸ A respondent is incompetent if the IJ finds by a preponderance of the evidence that she is unable to perform any of those functions because of a mental disorder.⁸⁹ The Guidance creates three stages to assess competence: the indicia stage, the judicial inquiry, and the competency hearing. In the indicia stage, the IJ is attentive to any behaviors or other indicators of a competency issue. Examples of indicia, also discussed in *Matter of M-A-M-*, include medical records showing mental health treatment, psychiatric hospitalization, limited academic achievement, serious depression or anxiety, and poor intellectual functioning.⁹⁰ Such indicia can come from “any reliable source including, but not limited to: family members, friends, legal service providers, health care providers, social service providers, caseworkers, clergy, detention personnel, or other collateral information or third parties knowledgeable about the respondent.”⁹¹

Where there is a bona fide doubt about the respondent’s competence, the IJ moves to stage two and conducts a judicial inquiry. In the inquiry, the IJ asks the respondent questions to determine whether there is reasonable cause to believe that she may be incompetent. A list of suggested questions for the IJ to ask appears in an Appendix to the Guidelines and includes: “What is today’s date (including year)?”; “What state and country are we in today?”; “Are you seeing a doctor or taking any medications?”; “Are you currently being treated for a mental health (psychological/psychiatric) or emotional problem?”; “Can you explain to me the immigration charges against you?”; and “What is a legal representative?”⁹²

The IJ can make a determination of competency on the basis of the judicial inquiry alone. If the IJ finds the respondent competent, then the individual receives no qualified representative or particular safeguards. If the IJ finds the respondent incompetent, then the respondent is entitled to a qualified

argue that a case must be categorically terminated under such circumstances, we decline to adopt that view here, for reasons explained in Part V.B, *infra*.

87. EOIR GUIDANCE, *supra* note 8, at 1.

88. *Id.* at 2.

89. *Id.*

90. *Id.* at 4.

91. *Id.*

92. *Id.* at app. A.

representative and other appropriate safeguards as determined by the IJ. Alternatively, if at this point the IJ still does not feel she has sufficient evidence to rule on competency, then she moves to stage three—the competency hearing.⁹³

Prior to the competency hearing, the IJ must consider referring the respondent to a medical professional for a mental health examination.⁹⁴ It is worth noting that although the IJ may not be required to make such a referral, the Guidance states that a mental health exam referral is appropriate where the IJ does not have sufficient evidence to determine competency, the same standard for holding a competency hearing.⁹⁵ Additionally, the Guidance states that, upon receipt of a mental health examiner's report, the IJ must schedule a competency hearing to address it.⁹⁶ Therefore, it logically follows that if an IJ determines it appropriate to hold a competency hearing, a mental health evaluation will also be appropriate, and vice versa.

Notably, the Guidance creates a forensic referral program and recognizes that DHS Mental Health Reviews are not adequate for the purpose of determining competency.⁹⁷ These reviews, the Guidance explains, are performed by the government for administrative reasons, such as determining whether the respondent is a danger to herself or others and needs treatment in detention, not for purposes of determining competency to represent oneself.⁹⁸ The Guidance also recognizes that independent medical evaluations are needed to avoid the conflict of interest when DHS attorneys present Mental Health Reviews in court.⁹⁹ This recognition is a welcome departure from *Matter of M-A-M-*, which cited the use of such a review with approval.¹⁰⁰

The Guidance contains extensive detail about the qualifications of the examining professionals that EOIR states it will procure.¹⁰¹ The minimum qualifications include a license in psychology or medicine, completion of an EOIR-approved training, and experience in conducting forensic examinations.¹⁰² The mental health professionals are directed to use structured and standardized assessment tools and methods whenever possible.¹⁰³ Additionally, either party

93. *Id.* at 6.

94. *Id.* at 7.

95. *Id.*

96. *Id.* at 14.

97. *Id.* at 5.

98. *Id.*

99. *Id.*

100. *Matter of M-A-M-*, 25 I. & N. Dec. 474, 481 (B.I.A. 2011); *see also supra* notes 66–71, and accompanying text.

101. *See* EOIR GUIDANCE, *supra* note 8, at 8–9.

102. *Id.* at 8.

103. *Id.* at 9.

may cross-examine the professional.¹⁰⁴ Permitting cross-examination is a departure from the current practice in which DHS typically submits its Mental Health Review to the court and asks the IJ to rely on it, but refuses to produce the mental health examiner for questioning by the IJ or respondent.¹⁰⁵

The Guidance defines the role of the mental health professional and the IJ.¹⁰⁶ The mental health professional identifies and describes for the court any cognitive, emotional, or behavioral impairments that the respondent has and their effects on the respondent's ability to perform the functions required for competency.¹⁰⁷ The IJ's role is to evaluate the totality of the evidence, including the mental health professional's report and testimony, to determine competence.¹⁰⁸

The Guidance also details the format and scope of the mental health exam.¹⁰⁹ Essentially, the medical professional evaluates the relevant aspects of the respondent's cognitive, emotional, and behavioral functioning, as well as whether she meets the criteria for competence.¹¹⁰ Notably, the professional must assess, among other things, the respondent's ability to make a rational decision about being represented by counsel and her ability to assist the counsel.¹¹¹

The Guidance makes provisions for payment of the medical professional for the mental health exam and report,¹¹² which are notably absent for the qualified representative that EOIR says it will provide. In fact, details about the prescribed qualified representatives—their qualifications, training, how they will be selected, what they are expected to do, how they will be paid—are comparably sparse. The Guidance states that EOIR will provide a qualified representative where the IJ has found the respondent incompetent.¹¹³ However, perhaps acknowledging the irony in only appointing counsel once the respondent has been held incapable of assisting such counsel,¹¹⁴ the Guidelines cryptically state that “[t]he court should consider the examining mental health professional's assessment of the respondent's ability to consult with and assist counsel when deciding whether provision of a qualified representative is an effective safeguard and protection in a case.”¹¹⁵

104. *Id.* at 10.

105. For case examples demonstrating this current practice, see *infra* Part III.

106. EOIR GUIDANCE, *supra* note 8, at 10.

107. *Id.*

108. *Id.*

109. *Id.* at 11.

110. *Id.* at 12–13.

111. *Id.* at 13.

112. *Id.*

113. *Id.* at 15.

114. For further discussion regarding the appropriate timing of appointing counsel, see *infra* Part IV.

115. EOIR GUIDANCE, *supra* note 8, at 15.

The Guidelines explain that once counsel has been provided, the respondent does not have the right to waive it.¹¹⁶ However, if a situation arises where the respondent can assist counsel but refuses to do so, the Guidelines offer scant remedy: “[t]he refusal of a respondent who has been determined by the mental health professional to be able to consult with and assist counsel, to cooperate with the qualified representative provided by the court, does not negate the efforts of the government to provide an appropriate safeguard or protection.”¹¹⁷ This quote offers no guidance on how to handle such a situation and instead questionably insists that the government should not be held accountable if its program fails in this way.

Another provision similarly seems to recognize the fact that a qualified representative, provided in this fashion by the government, may not be an effective safeguard. The provision states that when the IJ finds a respondent incompetent, the IJ’s decision must discuss the safeguards and protections considered, as well as their appropriateness and adequacy.¹¹⁸ This seems to anticipate at least some instances when the safeguards and protections, that is, the government’s qualified representative program, will be inadequate.¹¹⁹

In fact, the Guidance addresses some, but not all, of the major problems with immigration removal proceedings for mentally impaired detainees. The case examples in the following Part demonstrate some of those problems. The chief flaw in the Guidance, as described in the following Part and more fully explained in Part IV, *infra*, is one of timing. Fortunately, the following case examples also point to solutions.

III.

HOW IMMIGRATION COURTS HAVE EVALUATED COMPETENCE

Before turning to the question of how a respondent’s competency should optimally be assessed, it is first important to understand how IJs currently assess competency under *Matter of M-A-M-*. Mentally impaired respondents have been identified in a variety of ways: by non-profit agencies conducting “Know Your Rights” or Legal Orientation Program presentations at detention facilities;¹²⁰ by respondents’ family members requesting legal assistance;¹²¹ by DHS trial

116. *Id.*

117. *Id.*

118. *Id.* at 16.

119. *See infra* Part IV.G.

120. One of the authors of this article has discovered dozens of mentally impaired detained immigrants through participation in a “Know Your Rights” program.

121. *Immigration Judge Benchbook—Mental Health Issues*, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/eoir/vll/benchbook/tools/MHI> (last visited June 4, 2015) (“[T]he respondent, or the attorney, legal representative, legal guardian, near relative, or friend who was served with a copy of the Notice to Appear may assert or present evidence of a mental health issue.”).

counsel contacting free legal service providers to ask that an attorney intervene in a particular case,¹²² and often by IJs reaching out directly to legal service providers to request that an attorney take a particular case.¹²³ The authors of this article have represented numerous respondents exhibiting or diagnosed with mental illness or disability, including in many competency hearings, and have communicated with many other non-profit service providers regarding their experiences.

A. Haddock

One example of such a case is that of Haddock,¹²⁴ which took place in the summer of 2013. Haddock's case bears many similarities to that of Jean. Haddock was a detained schizophrenic man from Jamaica. Prior to detention, he was both homeless and a long-term drug addict. His drug addiction led to physical deterioration, including the loss of all of his teeth, which in turn complicated his ability to communicate with the court. Haddock was pro se for roughly two months before the IJ presiding over the case asked a local non-profit organization to assess Haddock's eligibility for free services. The IJ attributed the communication difficulty to Haddock's lack of teeth and resultant speech impediment, rather than to any mental disability or illness.

The attorney from the non-profit organization agreed to interview Haddock. During the initial interview, the attorney suspected that Haddock was perhaps mentally as well as physically impaired. This suspicion was based on the quality of Haddock's answers to the various questions posed and the fact that he was housed separately in his detention center's "forensic unit"—which in other facilities is typically referred to as the "Special Housing Unit," or "SHU."¹²⁵ Those in administrative isolation are often placed there for health reasons.¹²⁶

122. *Id.* ("Ideally, in a detained setting, DHS counsel will alert the Immigration Judge to any mental health issues discovered upon intake or based on information contained in the Department's file.").

123. *See, e.g.,* Murray-Tjan, *supra* note 28.

124. The Respondent's true name and personal details have been obscured in the interest of preserving client confidentiality. All application materials and court decisions (which were not published) are on file with the authors.

125. *See* 28 C.F.R. § 541.22 (2014) ("Special Housing Units (SHUs) are housing units in Bureau institutions where inmates are securely separated from the general inmate population, and may be housed either alone or with other inmates."); Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells Often for Weeks*, N.Y. TIMES, Mar. 24, 2013, at A1 (describing the use of solitary confinement in detention centers).

126. *See* 28 C.F.R. § 541.22(a) (2014) ("Administrative detention status is an administrative status which removes you from the general population when necessary to ensure the safety, security and orderly operation of correctional facilities, or protect the public. Administrative detention status is non-punitive, and can occur for a variety of reasons."). The authors of this article note general concern over the use of solitary confinement, whether for health or other reasons.

The attorney requested Haddock's medical records from the jail, which in turn revealed that Haddock had been prescribed anti-psychotic drugs since his detention. The records further indicated that Haddock had been previously treated for schizophrenia at a local hospital. The attorney—who had not yet formally entered an appearance in the case—signaled to the IJ and the DHS attorney that perhaps Haddock lacked competency, and suggested that a *Matter of M-A-M* hearing be held. At that point, DHS ordered a “Mental Health Review,” which was performed by an Advanced Practice Nurse (“APN”). The APN detailed her findings in a brief handwritten report, which the IJ found to be sufficient to trigger a competency hearing. The interviewing attorney then formally entered the case.

Prior to and during the competency hearing, Haddock's attorney was crucial to exposing both his extensive medical history and his limited understanding of the proceedings. The attorney submitted detailed medical records dating back ten years evidencing Haddock's schizophrenia of a “disorganized nature.” These records starkly contrasted with the ICE attorney's speculation that Haddock was “malingering” or, at a minimum, exaggerating his symptoms for an unidentified benefit. Among other questions designed to demonstrate Haddock's disorientation to the court, his attorney asked him what court he believed he was in: Family Court, Criminal Court, Drug Court, Immigration Court, or Traffic Court. Haddock stated that he believed he was in either Traffic Court or Drug Court. When his attorney asked the question: “Who am I? Do you know who I am?” Haddock responded, “You are the judge who's trying to free me, man.” Seeking clarification, the attorney asked, “I'm the judge?” Haddock unequivocally stated “Yes, ma'am.”¹²⁷ Similarly, when questioned as to the role of the DHS prosecutor, Haddock stated, “Make sure I stay in court and never use drugs in my life no more. Go to your groups and be yourself.”

Despite Haddock's tenuous grasp on the nature and meaning of the proceedings—including its basic components and actors—DHS argued that the presence of an attorney restored the respondent to competence. Haddock's attorney, conversely, argued that Haddock's impairment was so elevated and his participation in the proceedings so feeble that she was essentially without a client with whom she could consult regarding case strategy. In the absence of a GAL to assist the attorney in the case's production, the attorney argued, her presence in court was merely ceremonial. The IJ agreed but, instead of appointing a GAL, found that no “safeguard” existed for such a respondent other than prolonged treatment in a hospital. She terminated the proceeding “without prejudice.”

127. All Digital Audio Recordings (DAR), application materials, and court decisions (which were not published) are on file with the author.

B. Lenny

Haddock's case turned out well for him because he was already a permanent resident and could return to receiving benefits and outpatient care once released from detention. However, for Lenny, another Jamaican man,¹²⁸ termination was less helpful. Lenny was placed in removal proceedings in the fall of 2013. He was exhibiting signs of mental incompetence during initial hearings and lacked friends, family, or an attorney to assist in his case. The IJ did not know the nature of Lenny's disability or illness—only that he was extremely unresponsive and spent most of each VTC hearing staring into the camera, occasionally smiling and nodding in response to the judge's questions. Though no system of appointed counsel yet existed, as in Jean and Haddock's cases, the IJ asked a local non-profit legal services organization to intervene in the case.

Upon meeting Lenny it was clear to the attorney that he was having trouble following the conversation. His confinement in the solitary unit seemed distressing to Lenny; he described his detention as "very lonely." The attorney filed requests for Lenny's medical records and discovered that Lenny was diagnosed with schizophrenia in 2005 and was believed to be cognitively impaired. One evaluation performed by a jail psychologist described him as possessing a "4th grade intellect" and a "slow, blunted affect," while another reported that he lay in bed for hours, unmoving, staring at the ceiling.¹²⁹ The attorney requested a competency hearing on Lenny's behalf.

The competency hearing for Lenny was distinct from that of Haddock in two ways. First, Lenny was aware of his surroundings, knew that he was facing deportation to Jamaica, knew why he was facing deportation ("I assaulted someone"), and could correctly identify the roles played by those in the courtroom. To the naked eye, Lenny may have appeared competent. However, the second distinction from Haddock's case was that Lenny's attorney was able to secure an independent psychologist who was also a forensic specialist to conduct an evaluation. The psychologist produced a lengthy, detailed report and appeared in immigration court to describe his findings and answer questions about the report.

The psychologist used several tests to gauge Lenny's ability to participate meaningfully in his own defense, specifically, the "Woodcock-Johnson III Tests of Achievements" and the "Evaluation of Competency to Stand Trial—Revised 10/23/2013" test, or "ECST-R." In his report, the psychologist stated:

128. The Respondent's true name and personal details have been obscured in the interest of preserving client confidentiality. All application materials and court decisions (which were not published) are on file with the authors.

129. All application materials and court decisions (which were not published) are on file with the authors.

On the *Rational* scale, denoting overall ability to ratiocinate (i.e., to think or put forward an argument about something in a logical way), [Lenny] was found to have Moderate to Severe impairment. On the CWC scale (rational ability to *Consult With Counsel*), he was found to have Moderate impairment. On the *FAC* scale (*Factual Understanding* of Court proceedings), he was found to be Moderate to Severe impairment. And on the *RAC* scale (*RA*tional understanding of Court proceedings), he was found to have Severe to Extreme impairment.¹³⁰

During testimony, the psychologist was asked to elaborate on the substantive difference between “rational” versus “factual” understanding of the proceeding. He responded, “if you asked [Lenny] what he would prefer, he could answer. However when you offered up options, he could not repeat back to you what those options were and what it meant he had to do.”¹³¹

The psychologist further found that, despite Lenny’s correct identification of the court’s components (prosecutor, judge, attorney), he could not comprehend or clarify their specific roles:

[H]e showed some ability to respond appropriately to the gist (e.g., his lawyer is to help him and “the prosecutor” was on the “other side” and the use of the word “judge.”). However, his limitations were seen in an inability to rationally elaborate: “The judge . . . the judge is, listens to what you get to say and then judge on [sic] me.” When asked what he meant he replied, “It is their statement and stuff like that and decides their statement. You tell a judge your story.” For the “prosecutor” he said, “the person that prosecutes you, like, decides how much time you have to do and things like that.”

The expert’s evaluation and testimony were critical in exposing Lenny’s limited ability to understand and productively engage in his legal situation. The IJ found Lenny incompetent and, believing there was no other option, terminated the proceedings as the judge in Haddock’s case had done.

C. Gojira

It is important to realize that the notion of “incompetence” is not limited to those suffering from serious mental illness, but can also encompass those with other mental challenges, such as mental retardation or even brain damage.

130. All application materials and court decisions (which were not published) are on file with the authors.

131. DAR on file with the authors.

Gojira¹³² was originally from Haiti but had been a permanent resident of the United States since the age of five. He started hearing voices as a teenager. The voices drove him to attempt suicide by jumping from a three-story building. He survived the fall, but as a result endured severe and permanent brain damage. Gojira was of such limited functioning that his participation in the proceedings was virtually nonexistent. Furthermore, the IJ did not see any way to address the most basic elements of the case (the charges brought against Gojira by the government in the spring of 2012), without first assessing his competence. The IJ held a competency hearing and found Gojira to be incompetent. Only after making this finding, however, did the IJ reach out to local pro bono providers to represent Gojira. An attorney entered the case and made a motion for appointment of a GAL, nominating a vetted, non-interested social worker to represent Gojira's best interests. That motion was denied because, despite the BIA's explicit mention of the participation of a guardian as a safeguard in *Matter of M-A-M*,¹³³ the IJ believed that he "lacked authority" to appoint one. The attorney then argued that, without a GAL (and essentially without a respondent), the proceeding was farcical and should be terminated. The IJ agreed and Gojira was released from detention and admitted directly into a psychiatric hospital.

Notably, while some IJs—such as the one in Gojira's case—do not believe they have the authority to appoint a GAL, others believe *Matter of M-A-M* does confer appointment power and have elected to do so.¹³⁴ In Part V, *infra*, we discuss the necessity and appropriate timing of GAL involvement, which should be required in all cases where the IJ has made a finding of incompetence.

D. Cerletti

As Cerletti's case illustrates, and as is further explored below, the fact that a person is mentally ill does not necessarily mean that she is "incompetent." Nor does prior mental illness necessarily indict a respondent's current competence. Cerletti¹³⁵ was an exceedingly intelligent young man from Pakistan who found himself in deportation proceedings in 2012 following a scuffle with a police officer. He had been diagnosed with schizophrenia in 2009 and suffered from persecutory delusions and paranoia. Upon his detention, ICE performed a "Mental Health Review" and submitted the results to the IJ. Like most Mental

132. The Respondent's true name and personal details have been obscured in the interest of preserving client confidentiality. All application materials and court decisions (which were not published) are on file with the authors.

133. *Matter of M-A-M*, 25 I. & N. Dec. 474, 483 (B.I.A. 2011).

134. See Wilson & Prokop, *supra* note 4, at 10–11 (detailing the cases of two mentally ill respondents in different courts who had GALs appointed by their respective IJs to assist with proceedings).

135. The Respondent's true name and personal details have been obscured in the interest of preserving client confidentiality. All application materials and court decisions (which were not published) are on file with the authors.

Health Reviews, it was two pages long, handwritten, and contained a one-sentence diagnosis with no further elaboration. The IJ found the review sufficient to trigger a competency hearing. During the hearing, the IJ confirmed that the government would not provide a witness, including the person who prepared the Mental Health Review.¹³⁶ The name of the evaluator at the bottom of the evaluation was illegible. When asked by the IJ if the trial attorney knew who had performed the exam and what methodology she had used, the trial attorney responded in the negative on both points. Exasperated, the IJ challenged the trial attorney to explain how—if the reviewer was unavailable, her name was illegible, and her title and methodology were unknown—the review was of any value. The DHS attorney had no response.

With a woefully inadequate mental health review in hand, an unrepresented respondent, and an uncooperative trial attorney, the judge was facing what would likely be a challenging competency hearing. She appealed to area non-profit legal service providers and was able to bring Cerletti's case to the attention of a pro bono attorney who agreed to intervene prior to the competency hearing.

The attorney was surprised to learn that this particular IJ had a policy of not examining the question of a respondent's removability until competency had been determined. In other words, the IJ had neither required the respondent to plead to the basic factual allegations contained within the "Notice to Appear" nor turned to the question of what relief was available to him, and would not do so until she had addressed whether he was competent to plead. Prior to this case, the attorney had only ever experienced IJs first disposing of the question of removability and then turning to competency.¹³⁷

The attorney learned that Cerletti had been diagnosed with schizophrenia and had been receiving disability benefits due to this condition for years. The attorney submitted this information, along with years of medical records, to the court. The revelation of these facts did not render Cerletti "incompetent" per se. Rather, the IJ's competency determination ultimately turned on whether Cerletti was properly oriented, cooperative with his attorney, and understood why he was in proceedings, who was involved therein, and what the potential consequences might be (deportation). The IJ found Cerletti competent and then proceeded to the pleadings stage and, ultimately, defenses.

Cerletti's case is fairly exemplary in terms of the proper order of proceedings where competence is at issue.¹³⁸ First, the judge identified indicia of incompetence, then counsel was secured, then the competency hearing was held,

136. During the proceeding, the IJ asked DHS trial counsel: "I believe I was previously informed that the government is not going to provide a witness, including the person who prepared the [Mental Health Review]. Is that true?" to which DHS responded, "No witnesses." DAR on file with the authors.

137. The attorney was one of the authors of this article. The case examples in this Part are a representative sample of her cases.

138. See Part IV.A., *infra*, in which we lay out the ideal order of events.

then the judge turned to pleadings, and, finally, the question of relief. What Cerletti's case lacked, however, was an independent forensic evaluation to inform the IJ on Cerletti's present mental condition and the opportunity to cross-examine the performer of the DHS Mental Health Review, who amounted to a government witness.

While Cerletti's Mental Health Review was performed by a physician, that is not always the case.¹³⁹ Moreover, regardless of who performs the evaluation, DHS attorneys do not produce the evaluator for cross-examination. This is particularly problematic in cases where the evaluator accuses a respondent of malingering. In one case, for example, a young Mexican national with schizophrenia and very low verbal functioning was diagnosed by an unidentified evaluator as "Axis I—unspecified psychosis, malingering." The field for Axis II, meanwhile, contained only the word "Deferred," Axis III stated "None," Axis IV stated "legal issues, incarceration, pending deportation," while Axis V mysteriously contained only the number "40."¹⁴⁰ Fortunately for this particular respondent, the IJ held that the evaluation's probative weight was minimal due to DHS's failure to produce or even name the evaluator.¹⁴¹

IV.

HOW IMMIGRATION COURTS SHOULD EVALUATE COMPETENCE

While augmented procedural protections for mentally impaired respondents are absolutely necessary, one of the major deficits of the government's April 22, 2013, memoranda and December 31, 2013, Guidance is one of timing. Specifically, qualified representatives must be appointed at the indicia stage rather than after a determination of incompetence, for both legal and practical reasons. Other modifications to the Guidance must also be made in order to ensure fair hearings for mentally impaired respondents. This Part both elucidates the flaws in the Guidance and recommends the necessary solutions.

A. The Proper Timeline

In the cases of potentially mentally impaired respondents, recall that the Guidance, explained in Part II.C, *supra*, creates the following timeline: First, the IJ identifies indicia of incompetence,¹⁴² in line with *Matter of M-A-M-*. Then, instead of appointing counsel to assist in the competency-determining process,

139. See U.S. DEP'T OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, *supra* note 71.

140. The Axes referred to in this Mental Health Review (and others) are defined in AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

141. The Respondent in this case bonded out of detention and his case is still pending before the court. All application materials and court decisions (which were not published) are on file with the authors.

142. EOIR GUIDANCE, *supra* note 8, at 3.

she conducts what amounts to an ineffectual and unnecessary judicial inquiry.¹⁴³ Despite the indicia of incompetence, the judge (with no advice from a medical professional) can nonetheless find the respondent competent on the basis of the judicial inquiry alone, in which case the respondent must continue pro se.¹⁴⁴ If the IJ finds the respondent incompetent on the basis of the judicial inquiry, she then appoints a qualified representative and enacts safeguards.¹⁴⁵ If, however, the IJ is uncertain, she schedules a competency hearing with the option of procuring an independent mental health evaluation.¹⁴⁶ At the competency hearing, if an independent mental health evaluation occurred, the evaluator may rightly be called by either party.¹⁴⁷ Any other relevant testimony is also taken. Again, if the IJ finds the respondent competent, the respondent continues pro se. If she finds the respondent incompetent, she appoints a qualified representative (although the value is greatly reduced at that late stage) and attempts to enact other safeguards.

As evidenced in the case examples in Part III, *supra*, this timeline substantially differs from the current practice of immigration courts, which has its own problems. Prior to the Guidance, IJs had typically proceeded according to the following timeline: First, the judge would rightly identify “indicia” of incompetence. Then, she immediately and properly would request assistance from pro bono counsel. Notably, no meaningless judicial inquiry phase would occur. Instead, the pro bono counsel would exercise her primary value by researching the respondent’s current and prior mental health situation, often by obtaining medical records from detention centers and outside medical facilities, and locating the respondent’s family.¹⁴⁸ Optimally, the counsel would secure a pro bono independent medical evaluation and participate in the evaluation so that the evaluator could literally gauge the respondent’s ability to assist her counsel. Then a competency hearing would take place. Pro bono counsel would again prove her value by representing the respondent at the competency hearing. If an independent medical evaluation occurred, the evaluator would rightly testify. DHS would often present its own “Mental Health Review,” the author of which, wrongly, would not testify. At the hearing, other relevant testimony would also be taken, such as that of respondent’s family. Importantly, whether the IJ found the respondent competent or incompetent on the basis of the competency hearing, pro bono representation would continue. If the IJ found the respondent incompetent, she would enact other safeguards. These safeguards, however,

143. *See id.*

144. *See id.*

145. *See id.*

146. *See id.*

147. *See id.*

148. *See supra* Part III.

could be undermined by DHS, as in Jean's case discussed in the introduction to this article.

Both the pre-Guidance sequence of events and the sequence described in the Guidance have certain merits and drawbacks, which are explored in this Part. However, neither of them delivers on *Franco's* promise of due process for mentally impaired respondents. Rather, to deliver on that promise, best practices dictate that the following timeline be followed: First, the IJ identifies indicia of incompetence. At that point, the presumption of competency is rebutted and the safeguard of a qualified representative is appointed (with remuneration). The qualified representative researches the respondent's current and prior mental health situation, often by obtaining medical records from detention centers and outside medical facilities, and locating the respondent's family. Then, a mandatory competency hearing is scheduled and the IJ has the option of procuring an independent mental health evaluation. If the IJ orders such an evaluation, the qualified representative participates in the evaluation so that the evaluator can literally gauge the respondent's ability to assist her counsel. The qualified representative represents the respondent at the competency hearing. If an independent medical evaluation occurred, the evaluator testifies. A DHS Mental Health Review is given minimal probative weight unless its author testifies. Any other relevant testimony is also taken, such as that of respondent's family. Ultimately, whether the IJ finds the respondent competent or incompetent, the qualified representation continues through the appeal process. If the IJ finds the respondent incompetent, she enacts other safeguards,¹⁴⁹ but they may not be undermined by DHS. Only after a ruling on competency does the IJ take pleadings or turn to relief.

This timeline takes the merits of both the pre- and post-Guidance sequence of events and creates a procedure that best guarantees due process to this population. This timeline represents the better approach, as it recognizes that the best, and often *only* way, that a qualified representative can make a difference is by being appointed at the indicia stage rather than after a determination of incompetence.

B. Ill-Timed Appointment of Qualified Representatives Fails to Make Good on Franco's Promise

The settlement in *Franco-Gonzales v. Holder* requires appointment of qualified representatives at the indicia stage, rather than after a determination of incompetence. In order to avoid an injunction like that issued against immigration courts in Arizona, California, and Washington, the government agreed to issue a nationwide plan to provide qualified representatives for the

149. For a discussion of how IJs should proceed *after* a respondent is declared incompetent, see *infra* Part V.

mentally impaired.¹⁵⁰ In the injunction against those three states, the federal district judge in *Franco* required the immigration courts to provide legal representation for respondents with mental disorders “in all aspects” of their immigration proceedings.¹⁵¹ Removal proceedings begin when DHS files a Notice to Appear with the immigration court after it is served on the respondent.¹⁵² Thus, to comport with *Franco*, an IJ must appoint a qualified representative as early in the proceedings as she can, namely as soon as she becomes aware that there is an issue of competence, or at the indicia stage.

Early appointment is necessary to comport with both the letter and spirit of *Franco*, which sought to ensure due process for this population. This interpretation is also consistent with *Matter of M-A-M-*, which held that competency is only presumed “absent some contrary indication” arising from “indicia.”¹⁵³ Thus, when there are indicia of incompetence, there is effectively a presumption of incompetence, and safeguards, including a qualified representative, are triggered.¹⁵⁴

In the Guidance, the government may have adopted the extremely narrow view of its obligation to provide appointed counsel either to save money or because of an unduly limited reading of *Matter of M-A-M-*. Specifically, the government may have focused on *Matter of M-A-M-*’s directive that, “[i]f an Immigration Judge determines that a respondent lacks sufficient competency to proceed with the hearing . . . [then she] . . . shall prescribe safeguards to protect the rights and privileges of the alien.”¹⁵⁵ Arguably, this statement could support requiring the safeguard of a qualified representative only *after* a finding of incompetence. However, that is an overly narrow reading of a decision that admitted it was incomplete and addressed only “a limited set of questions regarding aliens with competency issues in immigration proceedings.”¹⁵⁶

Importantly, *Matter of M-A-M-* did not contemplate the mandatory appointment of qualified representatives. Therefore, it did not weigh in on exactly when the safeguard of an attorney must occur. However, like *Franco*, the spirit of the decision was “to ensure that proceedings are as fair as possible in an unavoidably imperfect situation.”¹⁵⁷

150. See *supra* Part II.B.

151. *Franco-Gonzalez v. Holder*, No. 2:10-CV-02211, 2013 WL 3674492, at *20 (C.D. Cal. Apr. 23, 2013) (emphasis added).

152. See 8 C.F.R. § 1003.13–14 (2014). A Notice to Appear (or “NTA”) is Form I-862. See U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT PRACTICE MANUAL 57–58 (2009), available at http://www.justice.gov/eoir/vll/OCIJPracManual/Practice_Manual_review.pdf.

153. *Matter of M-A-M-*, 25 I. & N. Dec. 474, 477 (B.I.A. 2011) (internal citation omitted).

154. *Id.*

155. *Id.* at 481 (internal citation omitted).

156. *Id.* at 476.

157. *Id.*

The spirit of fairness is evident in *Matter of M-A-M-* when it states:

Even if an alien has been deemed to be medically competent, there may be cases in which an Immigration Judge has good cause for concern about the ability to proceed, such as where the respondent has a long history of mental illness, has an acute illness, or was restored to competency, but there is reason to believe that the condition has changed. In such cases, Immigration Judges should apply appropriate safeguards.¹⁵⁸

Thus, where the IJ has “cause for concern,” which is, after all, what indicia should arouse, she should apply safeguards. Therefore, it is also consistent with *Matter of M-A-M-* to appoint the safeguard of the qualified representative at the indicia stage. In light of the spirit of the decision “to ensure that proceedings are as fair as possible,”¹⁵⁹ this is the better way to read *Matter of M-A-M-* and *Franco* together.

Moreover, providing counsel at the “indicia” stage makes more logical sense given the definition of competence. Specifically, both *Matter of M-A-M-* and the Guidance list the ability to consult with and assist counsel as a dispositive element of competence.¹⁶⁰ Such a definition, taken from the landmark criminal case *Drope v. Missouri*,¹⁶¹ presumes that counsel will be present. After all, in criminal cases, counsel for indigent defendants is provided.¹⁶² Thus, in mental health evaluations in criminal cases, the evaluator can gauge the individual’s ability to assist her counsel, for example, by observing the counsel and the individual together and interviewing the attorney. If no counsel has been appointed, this portion of the evaluation can only be performed by pure conjecture. Another logical flaw in appointing counsel only *after* the finding of incompetence is that a determination of incompetence often entails a holding that a respondent is unable to assist counsel, thereby rendering an attorney’s appointment moot.

Perhaps even more compelling than the legal reasons for early lawyer involvement in these cases are the logistical reasons. The Guidance itself points to the logistical need for the lawyer at the indicia stage. For example, the document lists multiple sources of indicia, including family members, friends, health care providers, social service providers, caseworkers, clergy, and detention personnel.¹⁶³ It envisions IJs reviewing medical records, evidence of psychiatric hospitalizations, and school records showing limited academic

158. *Id.* at 480.

159. *Id.* at 476.

160. *See supra* Parts II.A–B.

161. 420 U.S. 162, 171 (1975).

162. *See Gideon v. Wainwright*, 372 U.S. 335 (1963).

163. EOIR GUIDANCE, *supra* note 8.

achievements.¹⁶⁴ However, in reality, often these individuals have no family or friends or are not in touch with them. As explained in Part I, *supra*, they are often homeless. This was true, for example, of Jean, Haddock, and Lenny. Thus there is often no one to obtain this information in the absence of a lawyer. Typically in cases where such evidence is produced, it is presented by an attorney.

Each of the cases described in this article underscores the value of engaging an attorney earlier in the proceedings rather than later. In Jean's case alone, the entire course of his life was altered as a result of his attorney's ability to swiftly unearth his psychiatric history and extensive support system in the U.S. In fact, in each of the profiled cases, the attorneys were able to do valuable legwork before the competency hearing, including investigating and evaluating the significance of the physical location of the detainee in the detention facility; obtaining critical medical records both from detention centers housing the respondents and from outside medical facilities when available; arranging and coordinating independent medical evaluations by licensed forensic psychologists (prior to the new forensic referral program); participating in part of the evaluations so that the evaluator can actually gauge the respondent's ability to assist counsel; and contacting family members and health care providers who could shed light on the respondent's mental health. In the absence of an attorney at the indicia stage and at the competency hearing itself, none of this legwork would have been done, and the court would not have had the necessary information to make an accurate determination of competency.

In light of the substantial value that early lawyer involvement in these cases provides, IJs who have already been requesting the early intervention and assistance of non-profit organizations and pro bono attorneys to do this work without compensation prior to the competency hearing¹⁶⁵ may believe they can simply continue to do so under the new Guidance. However, this is not likely to work, as the new system actually disincentivizes early lawyer involvement. It does so because, under the new system, a lawyer has no incentive to agree to represent a respondent for free before and during the competency hearing when she could get paid by simply waiting until after the competency hearing instead. Thus, ironically, the new Guidance is likely to *decrease* representation of mentally impaired respondents—the complete opposite of the intention of *Franco*.

Moreover, even if IJs could lean hard enough on non-profit organizations for them to continue this work for no remuneration, the judicial practice remains improper.¹⁶⁶ It is a complete violation of the spirit of *Franco*, which intended

164. See *supra* Part II.C.

165. See *supra* Part II.

166. See *supra* Part II; see also Wilson & Prokop, *supra* note 4, at 19–22, 33.

that government-funded qualified representatives be appointed when they are actually needed to ensure fairness in the proceeding.

Instead, the qualified representatives must be appointed and fully compensated for their work at the appropriate time to actually have any beneficial effect on the due process rights of the mentally impaired. As is evident in the case examples above, particularly those of Haddock and Gojira, the attorney is often moot when appointed without a GAL after a respondent has already been declared incompetent. The attorney's safeguarding effect is uniquely and best achieved before and at the competency hearing itself.

C. Necessities of a Legal Referral Program

As noted in Part II.C, *supra*, the Guidance lacks many details about the prescribed qualified representatives—their required qualifications, training, how they will be selected, what they are expected to do, and how and when they will be paid. Some of the specifics have begun to emerge in NQRP programs recently enacted in several cities.¹⁶⁷ However, several developments are troubling. For example, the programs seem to rely almost exclusively on Legal Orientation Program (“LOP”) providers to serve as qualified representatives. The LOP is an EOIR-run initiative that contracts with local nonprofit organizations to provide detained individuals with general information about immigration laws and procedures.¹⁶⁸ Restricting contracts for qualified representatives to LOP providers is unwise, however, because they only operate in 32 detention facilities nationwide, and not at all in some regions.¹⁶⁹

Instead, EOIR headquarters should consult with local immigration courts to identify organizations that operate in their respective regions, particularly those that specialize or have experience in representing mentally impaired respondents. Appointments should be made from such organizations, which may include LOP providers, on a rotating basis. A court administrator, or other designated individual within the court system other than the IJ, should be charged with selecting the next representative off the list. This unbiased system will avoid the appearance of favoritism by an IJ, while ensuring that the cases are evenly distributed among approved representatives or organizations.

Participation in a qualified representative program should be predominantly accessible to non-profit organizations and other legal service providers such as law school clinical programs. The court should generally not seek to draw upon

167. See note 10, *supra*, for known details about the NQRP programs.

168. See *Office of Legal Access Programs*, U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, <http://www.justice.gov/eoir/probono/probono.htm#LOP> (last visited Mar. 7, 2015).

169. See *Projects: Legal Orientation Program*, VERA INSTITUTE FOR JUSTICE, http://www.vera.org/project/legal-orientation-program?qt-projects_legal_orientation_progr=5#qt-projects_legal_orientation_progr (last visited Mar. 7, 2015).

the private bar. Non-profit providers generally offer higher quality immigration representation than attorneys in the private bar.¹⁷⁰ Moreover, non-profit organizations and academic institutions are able to draw upon a wider pool of statutorily created “qualified representatives”—namely, law students¹⁷¹ and BIA accredited representatives.¹⁷² Finally, these organizations often provide additional, ancillary aid to their clients, such as assistance with housing and referrals to case-workers, social workers, and health care providers, as well as translation services.¹⁷³ The private bar typically does not assist their clients in this way.¹⁷⁴

Finally, as argued in Part IV.B, *supra*, qualified representatives must be compensated for the substantial work that they do beginning at the indicia stage. This compensation must then continue through the appeal process should the attorney elect to continue representation. Under the current NQRP programs, appointed representatives are not authorized to bill for competency hearings or

170. See Steering Committee of the New York Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 393 (2011) (“When assessing the general quality of representation among the different types of counsel on a scale of one to ten, immigration judges rated private counsel significantly lower than pro bono counsel, non-profits, and law school clinics. Given that private counsel provides the vast majority of representation in removal-defense proceedings in New York Immigration Courts, this significantly lower rating is consistent with the responses indicating that nearly half of all representation falls below basic standards of adequacy. While there is no doubt that there are a number of private attorneys providing high-quality legal services in New York Immigration Courts, this disparity in ratings brings a significant problem into focus.”); see also Kirk Semple, *In a Study, Judges Express a Bleak View of Lawyers Representing Immigrants*, N.Y. TIMES, Dec. 18, 2011, at A24 (“[Immigration Judges] gave private lawyers the lowest grades, while generally awarding higher marks to pro bono counsel and those from nonprofit organizations and law school clinics.”).

171. See 8 C.F.R. § 1292.1(a)(2)(ii) (2014) (“In the case of a law student, he or she has filed a statement that he or she is participating, under the direct supervision of a faculty member, licensed attorney, or accredited representative, in a legal aid program or clinic conducted by a law school or non-profit organization, and that he or she is appearing without direct or indirect remuneration from the alien he or she represents.” (emphasis added)).

172. See 8 C.F.R. § 1292.2 (2014) (“A non-profit religious, charitable, social service, or similar organization established in the United States and recognized as such by the Board may designate a representative or representatives to practice before the Service alone or the Service and the Board (including practice before the Immigration Court).”).

173. See, e.g., *National Immigration Legal Services Directory*, IMMIGRATION ADVOCATES NETWORK, <http://www.immigrationadvocates.org/nonprofit/legaldirectory> (last visited Mar. 7, 2015) (providing a national map of all nonprofit immigration legal service providers by state, county, and detention facility); see also *Low Cost Immigration Service Providers*, NEW YORK IMMIGRATION COALITION, http://www.thenyc.org/sites/default/files/Low_Cost_Immigration_Service_Providers_Final_Draft_111914.pdf (listing New York metropolitan no/low cost providers and additional services offered at each organization).

174. This is not to say that a private attorney could never be appointed; rather, upon a showing of relevant training and expertise, any attorney specializing in immigration could serve as a qualified representative.

federal appeals.¹⁷⁵ This policy presents a major due process problem as it results in a mentally incompetent respondent being expected to conduct a legal appeal pro se.

D. Problems with the Judicial Inquiry

As the contrasted timelines in Part IV.A, *supra*, make clear, the formal judicial inquiry required by the Guidance was not a procedure typically employed by immigration courts to assess competency prior to the Guidance.¹⁷⁶ Instead, courts tended to proceed from the indicia stage to requesting the assistance of counsel, and then to the competency hearing. The types of questions recommended to judges and listed in Appendix A of the Guidance, including “What is today’s date (including year)?”; “What state and country are we in today?”; “Are you seeing a doctor or taking any medications?”; and “Can you explain to me the immigration charges against you?”¹⁷⁷ may have been asked of the respondent by a mental health examiner in the course of an evaluation or by the respondent’s attorney at the competency hearing. But, prior to the Guidance, the judge was not required to ask them.

One problem with the questions in Appendix A of the Guidance is that they are not appropriately tied to the safeguards that the government is offering. For instance, the questions include “What is a legal representative?” The result of this question is ironic because, under the Guidance, if a respondent can correctly identify what a legal representative is and can assist such a representative, then she will likely be deemed competent to represent herself and will not be given one. Rather, under the Guidance, she will only be appointed a representative if she is unable to articulate what a legal representative’s role is and/or is deemed unable to assist one. Nor do the responses to these questions provide adequate information for a judge to declare a respondent competent to represent herself when there are indicia of incompetence. Recall that *Matter of M-A-M-* cited criminal case law that competency is no longer presumed when there are indicia of incompetence.¹⁷⁸ Thus, it is consistent with *Matter of M-A-M-* that, upon display of such indicia, the respondent should be presumed *incompetent*, and a judge should not be able to rebut this presumption on the basis of inquiry alone. The IJ is not a medical professional and is not qualified to make conclusions about a respondent’s mental state on the basis of mere questioning. Perhaps the

175. One of the authors of this article has viewed a contract between EOIR (through its subcontractor the Vera Institute of Justice) and legal service providers.

176. It does not appear that the formal “judicial inquiry” stage was anticipated by DOJ/EOIR in its memorandum announcing the new appointed counsel program either. *See supra* Part II.B (noting that the DOJ/EOIR memorandum announced that IJs were to proceed straight to competency hearings where there were medical records or other evidence, i.e. “indicia,” suggesting that the respondent had a serious mental impairment).

177. EOIR GUIDANCE, *supra* note 8, at app. A.

178. *Matter of M-A-M-*, 25 I. & N. Dec. 474, 477 (B.I.A. 2011).

responses to these questions coupled with whatever indicia appeared in the case could be adequate to declare a respondent *incompetent*. However, an independent mental health evaluation of the respondent must be required before an IJ can find the respondent *competent* (which, under the EOIR Guidance, would disqualify the respondent from being appointed counsel).¹⁷⁹

Thus the assumption that the IJ has the ability to declare a respondent competent after the judicial inquiry and without an independent medical evaluation¹⁸⁰ is flawed. The timeline we propose in Part IV.A, *supra*, dispenses with the judicial inquiry stage completely and continues the current practice of proceeding from the indicia stage, to engagement of a representative (a paid one in our proposal), to the competency hearing. Relevant questions designed to demonstrate the respondent's orientation to time and space can be asked at the competency hearing. However, if EOIR insists on maintaining the independent judicial inquiry stage, then its provisions must be amended to require an independent medical evaluation before a finding of competence can be made. Finally, even if the respondent is found competent, under our proposed timeline, the representation that began at the indicia stage continues through the end of the proceeding. Continuity of representation is necessary because, as *Matter of M-A-M-* noted, “[m]ental competency is not a static condition.”¹⁸¹ Rather, “competency varies in degree, can vary over time, and interferes with an individual’s functioning at different times in different ways.”¹⁸² Therefore, IJs need to consider indicia of incompetence throughout the proceedings, and apply appropriate safeguards when indicia re-emerge later in a case, “[e]ven if an alien has been deemed to be medically competent.”¹⁸³ The IJ must remain attentive to possible re-emergence of such indicia at any time, and the lawyer must remain engaged to assist with that process throughout the proceeding.

E. Considerations for the Mental Health Evaluation

Overall, the new forensic referral program created by the Guidelines is laudable. It represents a vast improvement over the current system, in which independent mental health evaluations are rarely performed. Many respondents could benefit from such evaluations. Jean, discussed at the beginning of this

179. Although Cerletti, whose case is profiled in Part III, *supra*, was found competent without an independent mental health exam, given his long history of schizophrenia, the IJ should have had more information on his present mental condition before making such a determination. The stakes of a finding of competence were lower in Cerletti’s case because he already had pro bono counsel, but under the Guidance procedure, the result of such a determination would have been dire in that he would not have received counsel, and his chances of losing his case would have gone up dramatically. See *supra* Part I (highlighting the dramatic decrease in success in all aspects of a proceeding when a respondent appears pro se).

180. See the Guidance timeline in Part IV.A, *supra*.

181. *Matter of M-A-M-*, 25 I. & N. Dec. at 480.

182. *Id.*

183. *Id.*

article, is one example of such a respondent. While the indicia in his case (i.e., the wildly pendulous behavior) did trigger the judge's request for attorney assistance, the judge did not yet have the authority to order an independent mental health exam, and the pro bono attorney was unable to obtain one. Therefore, a forensic evaluator was never engaged. Such an evaluator could have shed light on Jean's mental condition and inquired as to whether Jean had ever been hospitalized. Instead, it was only due to a fortuitous combination of diligence and luck on the part of the attorney that any psychiatric records were introduced. The forensic referral program addresses several problems with the system as it now exists. Concerning the "mental health reviews" that DHS typically submits into evidence, the Guidance correctly recognizes both that these reviews are inadequate to determine competence¹⁸⁴ and that DHS has a conflict of interest in presenting them to the court.¹⁸⁵ The new independent mental health exams address the principal concerns with the mental health reviews—that the reviews are not always conducted by a doctor¹⁸⁶ and that DHS is not required to produce the evaluator for cross-examination in court.¹⁸⁷ The Guidance states that the mental health professionals assigned by the court must be doctors with forensic experience who have completed an EOIR training¹⁸⁸ and that the professional may be examined by either party.¹⁸⁹ The qualification requirements are a marked improvement over the status quo, particularly the required forensic experience. However, the Guidance does not state what weight the DHS mental health reviews will be given upon implementation of the new forensic referral program. Our proposal in Part IV.A, *supra*, provides that the DHS mental health reviews should be given only minimal weight unless the doctor who performs the review testifies and can be cross-examined in court. Despite the improvement from the current system, the Guidance does not address some important considerations concerning the new independent mental

184. See EOIR GUIDANCE, *supra* note 8, at 5; see also *supra* Part II.C (explaining that the DHS mental health reviews are not performed to determine whether the detained individual is competent to represent herself, but to determine whether she is a danger to herself or others and to address appropriate treatment during detention); Part III, *supra* (giving several case examples demonstrating the inadequacy of such reviews, including that of a young Mexican national whose review was so brief and cryptic as to be indecipherable to any of the parties in court).

185. See EOIR GUIDANCE, *supra* note 8, at 5; see also *supra* Part II.C. For example, a detention facility may have a vested interest in re-affirming as appropriate its continuing treatment of a detainee. Conversely, ICE may have a vested interest in influencing an IJ's conclusion of competence; a finding of incompetence, after all, may result in safeguards that delay proceedings or even result in their termination.

186. See, for example, Haddock's case, discussed in Part III, *supra*. The DHS mental health review in his case was a brief document, handwritten by an advanced practice nurse.

187. See, for example, Cerletti's case, discussed in Part III, *supra*. DHS argued that it was not its policy to bring the performer of the mental health review to court. In fact, DHS did not even know the evaluator's name, title, or qualifications, and was unwilling to make any effort to discover them.

188. EOIR GUIDANCE, *supra* note 8, at 8–9.

189. See *id.* at 10.

health exams. Most importantly, mental health evaluators and IJs both should recognize that although the standard for competence in immigration court borrows heavily from that in criminal court, respondents in immigration court must be *more* competent to represent themselves than criminal defendants. Unlike criminal defendants, the burden of proof in seeking relief and challenging inadmissibility resides with respondents, and as a result, they must be capable of more active participation in order to affirmatively prove their case.¹⁹⁰ Thus there is a heightened need to look closely and carefully at the respondent's cognitive abilities, taking into account what she will actually be required to do in immigration court. In a case like Haddock's, described in Part III, *supra*, in which the respondent could not correctly identify any of the players in the courtroom or even the type of court in which he appeared, it is relatively simple to identify his lack of understanding of the nature and object of the proceedings. However, in a case like Lenny's, also profiled in Part III, it may be more difficult. While Lenny could identify the nature and object of the proceeding and correctly identify all the roles of those in the courtroom, a thorough independent medical evaluation revealed that he was still unable to perform the actions required of him in immigration court without assistance.

In addition, assessing competence is a complicated endeavor. The mere presence of current or past mental illness or treatment does not necessarily equate to incompetence.¹⁹¹ Recall the case of Cerletti, profiled in Part III, *supra*, in which, despite a history of schizophrenia, Cerletti understood the nature and object of the proceedings, could correctly identify the roles of those in the courtroom, and could assist his attorney. Further, judges often forget that mental incompetence can sometimes result not from mental illness but from cognitive impairment. Gojira's case in Part III, *supra*, in which Gojira had suffered severe brain damage, is an example.

Finally, as argued in Part IV.B, *supra*, a lawyer must be engaged both to assist with and participate in the forensic evaluation process. As explained above, when the evaluator assesses the respondent's ability to "assist a qualified representative,"¹⁹² the lawyer should participate in that portion of the evaluation. The lawyer can also assist with the evaluation in other ways. For example, the Guidance includes a forensic referral form for the IJ in Appendix B. The form asks the name of a contact the mental health professional can speak with, who may be knowledgeable about the respondent's past or current cognitive,

190. *See, e.g.*, INA § 291 (stating that once alienage is established, the burden is on the respondent to show the time, place, and manner of entry); *Matter of S-Y-G-*, 24 I. & N. Dec. 247 (B.I.A. 2007); *Matter of Jean*, 23 I. & N. Dec. 373 (B.I.A. 2002) (holding that in applications for relief from deportation, the burden of proof is on the respondent to show eligibility for the relief sought); *see also* 8 C.F.R. § 1240.8 (2014).

191. PATRICIA ZAPF & RONALD ROESCH, EVALUATION OF COMPETENCE TO STAND TRIAL (BEST PRACTICES IN FORENSIC MENTAL HEALTH ASSESSMENT) 28 (2009).

192. EOIR GUIDANCE, *supra* note 8, at 11.

emotional, and behavioral functioning.¹⁹³ The Guidance also states that other documents, records, or information relevant to determining the competence of the respondent should accompany the referral.¹⁹⁴ A lawyer is the logical actor to both procure such information and documents and to provide them to the court and evaluator to assist with the assessment. In the absence of a lawyer, often no one exists who can assume this role.

F. The Competency Hearing

Several points regarding the competency hearing itself bear mentioning. First, under our proposal, the competency hearing becomes mandatory when a respondent shows indicia of incompetence. This requirement differs from the Guidance, in which a competency hearing is only held when the judge cannot make a determination on the basis of the judicial inquiry alone.¹⁹⁵ Our model dispenses with the judicial inquiry stage. Therefore, a competency hearing is always necessary when there are indicia of incompetence. As stated above, in our model, the respondent would be represented at the competency hearing. Second, our model concurs with the Guidance in stating that an independent medical exam is not always necessary, at least to declare a respondent *incompetent*.¹⁹⁶ However, whenever an independent medical evaluation is performed, a competency hearing must be held in which the evaluator testifies and can be cross-examined by either party. This requirement is consistent with the Guidance, which states that, upon receipt of a mental health examiner's report, the IJ must schedule a competency hearing to address it.¹⁹⁷

Finally, only at the conclusion of the competency hearing should pleadings be taken, as occurred in Cerletti's case, profiled in Part III, *supra*. Otherwise there is a significant risk that an incompetent respondent will provide incorrect facts or admit to grounds of deportation that are not supported by the facts.¹⁹⁸

G. The Failure of Safeguards as They Have Traditionally Been Conceived

Matter of M-A-M- contains a long, non-exhaustive list of proposed safeguards for a mentally incompetent respondent. The list includes actions such as giving extra time for case preparation, locating a family member or guardian to assist in the case, waiving the respondent's appearance in court, and reserving

193. *See id.* at app. B.

194. *See id.* at 8.

195. *See supra* Part II.C.

196. We believe that when there are "indicia" of incompetence, an independent medical exam must be obtained before the IJ can declare a respondent *competent*. *See supra* Part IV.D.

197. EOIR GUIDANCE, *supra* note 8, at 14.

198. *See* 8 C.F.R. 1240.10(c) (2014) ("The immigration judge shall not accept an admission of removability from an unrepresented respondent who is incompetent."). An IJ would not know whether she had an incompetent respondent until after a competency hearing.

an unrepresented respondent's appeal rights.¹⁹⁹ However, as Jean's case demonstrates, such safeguards have not always been effective. In Jean's case, for example, the IJ was powerless to prohibit DHS from transferring Jean to a detention facility more than 1000 miles away from both his pro bono attorney and his family. In our proposed timeline, safeguards could not be undermined by DHS. Rather, the IJ would have both the authority and the obligation to see that they are not.

As mentioned in Part II.C, *supra*, the Guidance itself seems to recognize in several places the failure of its qualified representative program as an effective safeguard. It directs IJs to discuss the adequacy of the safeguards applied²⁰⁰ and to consider the mental health evaluator's assessment of the respondent's ability to assist counsel when deciding whether providing a qualified representative is an effective safeguard.²⁰¹ Implicit in these provisions is recognition of the idea that providing qualified representation after a finding of incompetency is not an adequate safeguard.

When discussing a situation where the respondent is able to assist counsel, but refuses to do so, the Guidance goes even further. "The refusal of a respondent who has been determined by the mental health professional to be able to consult with and assist counsel, to cooperate with the qualified representative provided by the court, does not negate the efforts of the government to provide an appropriate safeguard or protection."²⁰² "Well, we tried," it seems to say. However, there is a solution to this dilemma, and to find it, the government need only re-think and re-frame its conception of safeguards.

V.

HOW IMMIGRATION COURTS SHOULD HANDLE A CASE AFTER A FINDING OF INCOMPETENCE

The Guidance is more concerned with procedures for identifying incompetent respondents than explaining how to proceed once they are so identified. In fact, other than providing the respondents with the often-hollow safeguard of legal representation after a competency hearing, the Guidance offers little in terms of how to proceed. Upon a legal determination by the IJ that a respondent is incompetent, the first step should be appointment of a GAL. This Part explains the authority to appoint GALs and their role in the proceedings. It also discusses alternative remedies that qualified representatives and guardians should then pursue jointly to achieve the best outcome for mentally impaired respondents.

199. See *Matter of M-A-M-*, 25 I. & N. Dec. 474, 483 (B.I.A. 2011).

200. EOIR GUIDANCE, *supra* note 8, at 16.

201. *Id.* at 15.

202. *Id.*

A. Guardians ad litem: The Authority to Appoint Them upon a Determination of Incompetence

Appointment of a GAL is meant to ensure that a mentally incapacitated party's best interests are considered during litigation—even if the attorney or the incapacitated party disagrees with the GAL's assessment.²⁰³ A GAL is distinct from a "legal guardian" in that the term and scope of the GAL's involvement is limited to the litigation itself.²⁰⁴ A legal guardian has authority beyond any specific litigation to assist with personal and property interests of an individual who is incapable of doing so due to infancy, incapacity, or disability.²⁰⁵ A GAL is appointed by court order and serves only for the duration of the legal action.²⁰⁶

In certain circumstances, judges routinely appoint GALs. In civil and criminal cases, if an individual is adjudicated "incompetent," the judge suspends the case until the individual is restored to competence and, if no such restoration occurs or proves possible, subsequently terminates the case.²⁰⁷ If an individual is found to possess a mental delay or deficiency (is classified as "mentally retarded"²⁰⁸) and said condition does not rise to the level of incompetence, the judge makes other accommodations to protect the individual's right to a fair hearing, including the appointment of a GAL.²⁰⁹

Immigration proceedings have departed from the practice of most other civil and criminal courts. If an individual is ruled "incompetent," the case is not automatically suspended or terminated. Under *Matter of M-A-M-*, the proceeding instead advances to the question of how and what safeguards to provide—for example, allowing extra time for case preparation, locating a family member to

203. See *In re Lee*, 754 A.2d 426, 439 (Md. Ct. Spec. App. 2000) ("Indeed, in many cases, the guardian ad litem may serve as the principal witness against the alleged disabled person.").

204. *Guardian Ad Litem*, BLACK'S LAW DICTIONARY 713 (7th ed. 1999) (defining guardian *ad litem* as "[a] guardian, usu. a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party").

205. See, e.g., *Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642 (2d Cir. 1999); see also Alberto Bernabe, *The Right to Counsel Denied: Confusing the Roles of Lawyers and Guardians*, 43 LOY. U. CHI. L.J. 833, 837 (2012) (exposing the problem of how an attorney should proceed where a ward's expressed interest conflicts with a guardian's perceived "best" interest).

206. See Fed. R. Civ. P. 17(c).

207. The individual is placed in a psychiatric hospital for no longer than four months. If the individual's mental health has not been restored, another hearing is held to determine whether to terminate the case based on mental incompetency. See 18 U.S.C. § 4241(d) (2006).

208. See *Atkins v. Virginia*, 536 U.S. 304, 305 (2002) ("Clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial, but, by definition, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions.").

209. See Fed. R. Civ. P. 17(c) ("The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.").

assist in the case, waiving the respondent's appearance in court, or reserving an unrepresented respondent's appeal rights.²¹⁰

Importantly, what are called "safeguards" in immigration proceedings resemble the "accommodations" made for mentally deficient parties in civil and criminal proceedings. As one stark contrast, however, appointment of a GAL is not expressly mandated in immigration court. As a result, some IJs have declined to appoint GALs for mentally impaired respondents, citing a lack of express authority (such as in *Gojira's* proceeding).²¹¹ Other IJs disagree and have opted to appoint GALs in such cases.²¹² The latter is the better approach. EOIR has not issued an express directive to appoint GALs for the mentally impaired. However, several factors considered together create an implied directive to appoint a GAL upon a finding of incompetence. These factors include the IJ's duty to ensure a fair and just hearing,²¹³ the elevated expectations required of the respondent in immigration court,²¹⁴ and the loose and generous language in *Matter of M-A-M* and the Immigration Judge's Benchbook.²¹⁵

The American Bar Association's Model Rules of Professional Conduct also support appointing GALs. Those Rules advocate the appointment of a GAL as a protective measure when a litigant with a mental disorder "is at risk of substantial physical, financial or other harm."²¹⁶ Deportation has been characterized by the Supreme Court as a "particularly severe 'penalty,'"²¹⁷ similar to banishment or exile,²¹⁸ and often entails substantial physical, financial, or other harms. Thus, the ABA's suggested ethical rules support appointment of GALs in the context of immigration and removal proceedings. The major value of a GAL is that when a respondent is incapable of assisting her attorney, of expressing subjective fear, of understanding options and

210. See *Matter of M-A-M*, 25 I. & N. Dec. 474, 483 (B.I.A. 2011).

211. See *supra* Part III.

212. See *Wilson & Prokop*, *supra* note 4, at 10–11 (detailing the cases of two mentally ill respondents in different courts who had GALs appointed by their respective IJs to assist with proceedings).

213. See U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, <http://www.justice.gov/eoir> (last visited Mar. 8, 2015) ("The primary mission of the Executive Office for Immigration Review (EOIR) is to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws.").

214. See *supra* note 190.

215. See *Wilson & Prokop*, *supra* note 4, at 29–31 (noting that *Matter of M-A-M* gave IJs wide discretion in determining what safeguards are appropriate for mentally ill respondents with the goal of ensuring that proceedings are as fair as possible, and that the Immigration Judge Benchbook Guidelines on Mental Health Issues provides IJs with wide discretion in handling the cases of mentally ill respondents).

216. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2002).

217. *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010).

218. *Id.* at 373 (citing *Delgado v. Carmichael*, 332 U.S. 388, 390–91 (1947)).

participating in the decision-making, or is even simply uncooperative,²¹⁹ the GAL can stand in for the client. In a removal proceeding with a mentally competent respondent, the respondent is endowed with agency and self-determination; while an attorney can apprise the respondent of her legal options and possible outcomes, the attorney must ultimately obey the client's wishes.²²⁰ However, where a respondent either does not understand the nature and object of the proceedings or is incapable of effectively participating in mounting a defense, an attorney essentially lacks a client with whom to consult. A GAL, however, can intervene and serve as a proxy for the respondent's best interest.²²¹

The necessity of a respondent's testimony in immigration court in order to defend against removal further illustrates the need for a GAL. Because the respondent bears the burden of proof in all applications for relief before the immigration court, she must testify. For example, to succeed in an asylum hearing, a respondent must express a subjective fear of persecution.²²² An attorney is generally prohibited from testifying on behalf of her client not only as a matter of trial procedure²²³ but as a matter consistent with client confidentiality requirements. Without testimony by the applicant for relief, therefore, an attorney cannot effectively satisfy the burden of proof. Appointment of a GAL addresses this problem because the GAL can testify on the respondent's behalf.²²⁴

Based on our experience, a family member is not the best choice for a judge to select as a GAL. Often there is no family member to adopt the role, or if identified, the family member does not understand the role.²²⁵ Even if available and able to understand the complex role, a family member will likely not be able to perform as well as a social worker, lawyer (other than the one representing the respondent in the litigation),²²⁶ or other vetted professional. Such a professional,

219. The Guidelines envision situations where a mentally incompetent respondent is unwilling to cooperate with her attorney. *See supra* Part IV.G.

220. *See* MODEL CODE OF PROF'L RESPONSIBILITY, at EC 7-12 (1983) ("[A] lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself [if] competent, or by a duly constituted representative if legally incompetent.").

221. *See* Marcia M. Boumil, Cristina F. Freitas & Debbie F. Freitas, *Legal and Ethical Issues Confronting Guardian Ad Litem Practice*, 13 J.L. & FAM. STUD. 43, 44 n.48 (2011).

222. *See* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 430-32 (1987).

223. *See* MODEL CODE OF PROF'L RESPONSIBILITY R. 5-101(b) (1980). The authors acknowledge that certain narrow exceptions to this prohibition exist.

224. *See, e.g.*, Memorandum from Jeff Weiss, Acting Dir., Office of Int'l Affairs, to Asylum Officers, Immigration Officers & Headquarters Coordinators (Dec. 10, 1998), *available at* <http://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/Ancient%20History/ChildrensGuidelines121098.pdf> (authorizing a parent or other trusted adult to testify on behalf of a child in asylum requests).

225. *See* Wilson & Prokop, *supra* note 4, at 10-14 (detailing the cases of two respondents whose family members were incapable of meeting their responsibilities as GALs).

226. *See id.* at 17-19 (detailing the inherent conflicts of interest that arise where the attorney in the proceeding also acts as GAL).

who is over the age of 18 and has completed training on serving as a GAL, is preferable.

The GAL should confer with the respondent's attorney to discuss possible forms of available relief. The attorney should explain what each potential form of relief would afford the respondent in terms of medical and other social service benefits, opportunities for work authorization, ability to leave detention, propensity for recidivism, and other factors to be weighed. The GAL should also interview the respondent, review the forensic evaluation, and conduct research on the respondent's background. The research could include interviewing family members and friends, reviewing mental health records, assessing country conditions, meeting with former employers, or visiting educational or housing institutions that the respondent may have attended. This research should then inform the GAL's assessment of which course of action would be in the respondent's best interest. Recognizing that this involvement will be time-intensive, we recommend that GALs be paid for their services.

A GAL would have proven particularly useful in the case of Haddock, profiled in Part III, *supra*. Haddock had no family or friends, had been homeless for many years, and had severe speech and cognitive impairments. A GAL could have assisted Haddock's attorney with both preparation of the request for relief and testimony. A GAL could have also provided critical assistance in Lenny's case, also profiled in Part III, *supra*, by testifying on his behalf with respect to a claim for asylum. Winning asylum requires expression of the respondent's subjective fear. Lenny himself was incapable of appreciating the potential harm he could face if deported to Jamaica, but a GAL could have expressed that fear on his behalf. Winning asylum, and all its attendant benefits, would have been a better outcome for Lenny than the termination of his case that occurred, which merely returned him to homelessness and no legal status.

In all cases involving an incompetent respondent, therefore, a GAL serves the indispensable function of proxy. The GAL allows these cases to go forward, while both safeguarding the incompetent respondent's right to a fair hearing and preserving the integrity of the attorney-client relationship.

B. Remedies

Once a GAL is appointed, the attorney should work closely with the GAL to choose the path that will best benefit the respondent. Sometimes, as in the case of Haddock, (who, prior to his removal proceeding, already had immigration status and was receiving benefits),²²⁷ that path will be termination. Other times, it will be relief in the form of asylum, withholding of removal, or protection under the Convention Against Torture.²²⁸ Still other times, deportation may

227. See *supra* Part III.

228. See *Immigration Judge Benchbook*, EXECUTIVE OFFICE OF IMMIGRATION REVIEW, U.S. DEPT' OF JUSTICE, <http://www.justice.gov/eoir/immigration-judge-benchbook-section-241b>

actually be in the respondent's best interest. However, in other instances, the GAL and lawyer may face a conundrum—a case in which termination harms the respondent because it deprives her of resolution (and in turn status), no form of relief (such as asylum or cancellation of removal) is available, and deportation is injurious to the respondent. In these circumstances we propose expanding to the mentally incompetent the use of an already existing option—an exercise of “Prosecutorial Discretion” (“PD”). PD exists in multiple forms, but Deferred Action is the most appropriate form of PD for the mentally incompetent. All of these options are explored below.

i. Termination

The lure of termination can be enticing for IJs.²²⁹ Indeed some immigration practitioners might believe that termination is the only correct result. In criminal law, no safeguards exist aside from termination after an individual has been formally adjudicated “incompetent”²³⁰ because prosecution of the mentally incompetent is prohibited.²³¹ The case is terminated and can only be reinstated if the defendant is restored to competence through medication or treatment.²³²

(describing the three forms of relief offering protection to individuals fearing harm and torture in their home country if removed).

229. See, for example, the case examples of Gojira, Haddock, and Lenny in Part III, *supra*.

230. See 18 U.S.C. § 4241(d) (2012); *Competency to Stand Trial*, 41 GEO. L.J. ANN. REV. CRIM. PROC. 463, 468 (2012) (“If, after conducting the competency hearing, the trial court finds by a preponderance of the evidence that the defendant is presently incompetent to stand trial, the court must commit the defendant to the custody of the Attorney General for treatment in a suitable facility.”).

231. See 18 U.S.C. § 4241 (2012); *Medina v. California*, 505 U.S. 437, 446 (1992) (“The rule that a criminal defendant who is incompetent should not be required to stand trial has deep roots in our common-law heritage.”); *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (“It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.”); *Dusky v. United States*, 362 U.S. 402, 402 (1960) (holding that a defendant may stand trial unless he “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as factual understanding of the proceedings against him”); *Youtsey v. United States*, 97 F. 937, 940 (6th Cir. 1899) (“If a man in his sound memory commits a capital offense, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such frenzy, but be remitted to prison until that incapacity be removed. The reason is, because he cannot advisedly plead to the indictment. . . . And if such person of nonsane memory after his plea, and before his trial, become of nonsane memory, he shall not be tried; or, if, after his trial, he becomes of nonsane memory, he shall not receive judgment, or, if after judgment he becomes of nonsane memory, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution.” (quoting 1 Hale, P.C. 34, 35)).

232. See 18 U.S.C. § 4241(d) (2012) (requiring that once a defendant is declared incompetent, “[t]he Attorney General shall hospitalize the defendant for treatment in a suitable facility” for a reasonable period while a determination is made whether the defendant can be restored to competence and the case can proceed); *Sell v. United States*, 539 U.S. 166, 179 (2003) (“[T]he Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent

However, the premise that immigration proceedings may nonetheless continue where the respondent is incompetent has a long history. The premise originates in section 240(b)(3) of the INA, which provides that, “[i]f it is impracticable by reason of an alien’s mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.”²³³ Even before *Matter of M-A-M-*, regulations were promulgated incorporating section 240(b)(3)’s notion that proceedings against incompetent respondents are appropriate with certain prescribed safeguards. For example, the CFR contains a requirement that an incompetent respondent be served a charging document in person.²³⁴ Another example is the CFR provision directing IJs not to accept admissions by incompetent, unrepresented respondents.²³⁵

While on the surface continuing proceedings against a mentally incompetent respondent may seem categorically unfair, in reality a sound basis exists for allowing proceedings to continue, when they can, with appropriate safeguards. While immigration law carries an undeniable resemblance to criminal law (particularly the potential negative impacts on an individual’s life), the spirit and justification for terminating charges against mentally incompetent criminal defendants is falsely analogous in an immigration context for two reasons.

First, in criminal law, the notion that it is improper to proceed against an incompetent defendant is born not only out of the principle of meaningful participation²³⁶ but also out of the principles of culpability and punishment.²³⁷ In order to be guilty of a crime, an accused must know the difference between right and wrong, and if guilty, an appropriate punishment should be assigned.²³⁸

to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.”); *Riggins v. Nevada*, 504 U.S. 127, 129 (1992) (determining whether forcing a criminal defendant to take medication to stand trial is a constitutional violation).

233. INA § 240(b)(3); 8 U.S.C. § 1229a(b)(3) (2012).

234. See 8 C.F.R. § 103.8(c)(2) (2014).

235. See 8 C.F.R. § 1240.10(c) (2014).

236. See *Drope v. Missouri*, 420 U.S. 162, 171 (1975); *Dusky v. United States*, 362 U.S. 402, 403 (1960).

237. See MODEL PENAL CODE § 4.01 (2013); Geoffrey C. Hazard, Jr. & David W. Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. REV. 381, 382 (1962) (“The law, however, recognizes mental condition or ‘insanity’ as affecting criminal liability in a third way, namely, by providing that a defendant who is insane may not be punished.”); see also *Ford v. Wainwright*, 477 U.S. 399, 407 (1986) (holding that the Eighth Amendment prohibits the execution of the mentally ill and noting the death penalty’s lack of deterrence value in the context of mentally ill defendants).

238. See *Clark v. Arizona*, 548 U.S. 735, 766 (2006) (“The presumption of sanity is equally universal in some variety or other, being (at least) a presumption that a defendant has the capacity to form the *mens rea* necessary for a verdict of guilt and the consequent criminal responsibility.”); *Leland v. State of Oregon*, 343 U.S. 790, 800 (1952); *M’Naghten’s Case*, 8 Eng. Rep. 718, 722 (H.L. 1843).

Immigration law, meanwhile, does not require that a respondent know the difference between right and wrong in order to be deportable from the United States.

Second, the immigration system is not only punitive; many benefits and rewards can flow from a removal proceeding. For example, an individual without immigration status can actually win permanent residence as a result of an immigration proceeding;²³⁹ others can seek and be afforded protection in the United States in the form of asylum,²⁴⁰ withholding of removal,²⁴¹ or relief under the United Nations Convention Against Torture.²⁴² From these successes in immigration court flow many benefits²⁴³ including the opportunity to seek health benefits,²⁴⁴ work authorization,²⁴⁵ a social security number,²⁴⁶ a state issued ID,²⁴⁷ food stamps,²⁴⁸ financial assistance,²⁴⁹ English language training,²⁵⁰ and more.

As a result, in some instances, terminating proceedings can harm a respondent where she otherwise might have gained such benefits. Lenny serves as one such example.²⁵¹ Upon the termination of his case, he returned to a state of homelessness, without medication, immigration status, or eligibility for benefits. Many respondents who have their cases terminated return to a similar liminal state with no right to the social benefits they desperately need. The

239. 8 U.S.C. § 1229b(b) (2012) (providing for cancellation of removal for certain non-permanent residents).

240. INA § 208; 8 U.S.C. § 1158 (2012).

241. INA § 241(b)(3); 8 C.F.R. § 208.16 (2014).

242. 8 C.F.R. § 208.18 (2014); *see also* 8 C.F.R. § 208.16(c) (2014); 8 C.F.R. § 208.17(a) (2014).

243. *See* 8 U.S.C. § 1612 (2014).

244. *See Asylee Eligibility for Assistance and Services*, U.S. DEP'T OF HEALTH & HUMAN SERVS, OFFICE OF REFUGEE RESETTLEMENT [hereinafter *Asylee Eligibility*], <http://www.acf.hhs.gov/programs/orr/resource/asylee-eligibility-for-assistance-and-services> (last visited Mar. 8, 2015).

245. *See* U.S. DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGRATION SERVS., I AM A REFUGEE OR ASYLEE (2013), available at <http://www.uscis.gov/USCIS/Resources/D2en.pdf>.

246. *See Program Operations Manual System (POMS): Evidence of Asylee Status for an SSN Card*, U.S. SOC. SEC. ADMIN., <https://secure.ssa.gov/poms.nsf/lnx/0110211205> (last visited Mar. 8, 2015).

247. *See Asylee Eligibility*, *supra* note 243.

248. *See* Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 4401, 116 Stat. 134, 333–34 (2002); *see also* Food Stamp Program: Eligibility and Certification Provisions of the Farm Security and Rural Investment Act of 2002, 75 Fed. Reg. 4912, 4913 (Jan. 29, 2010).

249. *See Benefits and Responsibilities of Refugees*, U.S. DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/benefits-and-responsibilities-asylees> (last visited Mar. 8, 2015) (“If you are granted asylum, you are authorized to work in the United States whether or not you have an Employment Authorization Document (EAD).”).

250. *See id.*

251. *See supra* Part III.B.

situation can be even more dismal for so-called “arriving aliens”²⁵² who arrive at a U.S. border wishing to seek asylum. “Arriving aliens” are subject to mandatory detention²⁵³ and are ineligible for bond,²⁵⁴ meaning that a terminated case could result in the individual residing in a permanent state of limbo without relief before an IJ (for example, in the form of asylum) or release from detention.

ii. Relief

As explained above, obtaining some form of immigration relief is often preferable to termination. For example, Lenny may have had a valid claim for asylum.²⁵⁵ He was from Jamaica, a country known for its abhorrent and even persecutory treatment of the mentally ill, both by the police²⁵⁶ and community

252. An “arriving alien” is an “applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transportation.” 8 C.F.R. § 1001.1(q) (2014).

253. *See* 8 U.S.C. § 1225(b)(2)(A) (2012) (“[I]f the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained [for removal proceedings.]”); *see also* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (2012) (providing for mandatory detention of individuals who have expressed a “credible fear” of returning to their home country until resolution of their request for asylum or a determination that they do not possess a credible fear).

254. *See* 8 C.F.R. § 1003.19(h)(2)(i)(B) (2014).

255. INA §101(a)(42)(A), 8 U.S.C. § 1101 (a)(42)(A) (2012) (providing for asylum where a person is “unable or unwilling” to return to his or her country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion); *see also* *Guo v. Ashcroft* 386 F.3d 556, 561 (3d Cir. 2004) (quoting 8 C.F.R. § 208.13(b)(2)(i)).

256. *See, e.g.*, BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: JAMAICA 4 (2012) (“Police officers at the facility reported that the mentally ill detainees were locked up in the bathroom of the holding section. Some detainees also were held in the prison’s medical facility.”); AMNESTY INTERNATIONAL, JAMAICA: KILLINGS AND VIOLENCE BY POLICE: HOW MANY MORE VICTIMS? (Apr. 2001) (noting that homeless persons, many with mental illnesses, have been arbitrarily detained and ill-treated by being tied with rope and pepper sprayed); *Unfit for Prison—Human Rights Group Says 400 Mentally Ill Persons Behind Bars*, JAMAICA GLEANER (Dec. 13, 2000), <http://old.jamaica-gleaner.com/gleaner/20001213/lead/lead2.html> (“M[ore than] 400 persons deemed mentally ill have been languishing in island’s prisons, where they are being assaulted and sexually abused by other inmates, chairman of the Independent Jamaica Council for Human Rights, Dr. Lloyd Barnett, reported yesterday.”); Rachel Miller Moreland, *Lost and Forgotten: Mental Illness, Prisons and Homelessness*, A COMMON PLACE, July/August 2004, available at http://acommonplace.mcc.org/acp/2004/Jul_Aug/aCP_JulAug2004.pdf (reporting that government officials ordered the police to “clean up the streets” in a touristy part of town by throwing the mentally ill homeless persons into the back of a truck and dumping them “like garbage” at a waste site three hours out of town); Glenroy Sinclair, *Prison Sex Scandal*, JAMAICA GLEANER (Apr. 15, 2006), <http://jamaicagleaner.com/gleaner/20060415/lead/lead1.html> (“He said mentally-challenged inmates were being targeted by other inmates, so too were prisoners who were serving long sentences for non-violent crimes ‘There are instances where prisoners are knocked out cold and gang raped,’ said Dr. Notice, who worked in the penal system for seven years.”).

members in general.²⁵⁷ He may have had a colorable claim based on his mental illness²⁵⁸ since at a minimum he would have faced a life in Jamaica with little opportunity for treatment.²⁵⁹ The termination order foreclosed any opportunity in this proceeding to seek asylum on this basis. If, instead of terminating, the IJ had appointed a GAL to work with the attorney on his meritorious asylum application, and the application were granted, Lenny would have received financial and other benefits that would have resulted in a more just result. Instead, he was returned to his prior status—undocumented, untreated, and ineligible for benefits of any kind (albeit in a better situation than had he been removed to Jamaica where he had no family or support).

iii. Removal to the Respondent's Country of Origin

In some instances a respondent's best interest may actually be served by removal. Some mentally incompetent respondents are nationals of a country where no deleterious treatment of the mentally ill exists, and the respondent is not eligible for any form of relief such as Cancellation of Removal.²⁶⁰ In such cases, deportation may in fact be the appropriate option (with provisions for safe repatriation). We offer two brief examples. First, a woman from the Netherlands had been in the United States for a short time and detained by ICE for unknown reasons. A social worker at a non-profit organization in Elizabeth, New Jersey,²⁶¹ learned that the woman had a large support system in Holland of both

257. See Eulalee Thompson, *Homeless and Mentally Ill*, JAMAICA GLEANER, Jan. 21, 2004 (telling the story of a deportee with mental illness who becomes homeless in Jamaica and is physically assaulted and threatened as a result of being homeless and mentally ill).

258. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (holding that the characteristic that defines a particular social group “must be one that members of this group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences”).

259. See, e.g., DEP'T OF MENTAL HEALTH & SUBSTANCE ABUSE, WORLD HEALTH ORG., MENTAL HEALTH ATLAS, JAMAICA (2011), available at http://www.who.int/mental_health/evidence/atlas/profiles/jam_mh_profile.pdf (reporting that there are roughly three beds in mental hospitals per 100,000 people); Dionne Jackson Miller, *Health: Plan to Close Jamaican Mental Hospital Under Fire*, INTER PRESS SERV., Mar. 4, 2003 (reporting that plans to close the country's only psychiatric hospital caused alarm among mental health professionals who feared that the closure would eradicate all mental health care, particularly for the most vulnerable persons with mental illness).

260. To be eligible for cancellation of removal for non-permanent residents under INA § 240A(b), a Respondent must establish continuous presence in the United States for a period not less than 10 years immediately preceding the application; “good moral character during [this] period”; that he or she “has not been convicted of an offense under section 212(a)(2), section 237(a)(2), or section 237(a)(3), subject to paragraph (5)” of the Act; and “that removal would result in exceptional and extremely unusual hardship to [a qualifying relative].” INA § 240A(a) defines cancellation of removal for permanent residents.

261. The non-profit organization First Friends runs a visitation program for immigrant detainees in New Jersey. The American Friends Service Committee, where one of the authors of this article is the Senior Detention Attorney, routinely collaborates with First Friends. The social worker reached out to AFSC seeking guidance on this case.

family and doctors, who sought her return for care and treatment. The family explained that the woman feared spirits and believed that they could not pursue her across the ocean, prompting her to escape from a hospital to the United States. The family further explained that, in the United States, she did not have family, medication, or the ability to access care.

Second, a man from the United Kingdom suffering from a mental disorder arrived at JFK airport and was placed in removal proceedings after he expressed a fear of returning on account of his believed persecution at the hands of the Dental Association of Britain.²⁶² He remained detained in New Jersey for over a year while he pursued asylum *pro se*, which had been denied by the IJ, and then appealed (also *pro se*) to the BIA. This man never had an attorney and had no resources or contacts in the United States to assist him. Ultimately he was removed.

In both of the above examples, removal to the country of origin best served the respondent's interests. In the former, the respondent had extensive assistance awaiting her in Holland; in the latter, the respondent would not be detained and could access the British health care system. Had either of these respondents had an attorney and a GAL, the GAL would have assessed the personal circumstances of the respondent and likely determined that the respondent's interest was best served in the home country, while the attorney would have assessed the relief options of the respondent and determined that there were none. The two interests—the personal and the legal—would then work in conjunction to result in a decision by the attorney and the GAL to accept a removal order. Ancillary benefits that flow from this collaboration include the promotion of judicial economy (by avoiding lengthy, frivolous appeals that crowd an already overburdened docket) and the minimization of a respondent's time detained at government expense.

iv. Deferred Action: When All Else Fails

For mentally incompetent non-citizens for whom no relief exists, we propose expanded use of a type of discretionary relief called Deferred Action. In this Part we describe each of the four types of discretionary relief and explain why Deferred Action is the most appropriate.

DHS has long held the administrative power to forgo removal when it either considers removal a low priority or where some other compelling reason exists (i.e., a humanitarian one) to warrant the favorable exercise of discretion.²⁶³ This

262. This individual was encountered by one of the authors of this article during a "Know Your Rights" presentation at an immigration detention center in New Jersey.

263. See Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All ICE Employees (Mar. 2, 2011), available at <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>; STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 630–32 (5th ed. 2009).

discretionary relief takes various forms, most of which are granted administratively by DHS (rather than the IJ) and yield different benefits to the recipient.²⁶⁴ None accord permanent residence or other official “status” in the United States, and all can be revoked.²⁶⁵

One form of discretionary relief is “Prosecutorial Discretion” (“PD”). In 2000, Doris Meisner, then-Commissioner of the Immigration and Naturalization Service, issued a memorandum creating PD for certain foreign nationals who would otherwise be subject to removal following the 1996 passage of harsh immigration laws,²⁶⁶ whereby DHS and its agencies agreed not to pursue removal proceedings or to execute an order of removal on a case-by-case basis.²⁶⁷ Congress directed DHS to “prioritize the identification and removal of aliens convicted of a crime by the severity of that crime”²⁶⁸ permitting the non-pursuit of certain individuals based on a totality of the circumstances analysis.²⁶⁹ A positive exercise of PD does not, however, create an independent right to seek work authorization.²⁷⁰

A similar form of deliberate inaction against those in removal proceedings is called “administrative closure.” Upon a motion by either party, the court in its discretion may remove a case from its active docket “to await an action or event that is relevant to immigration proceedings but is outside the control of the parties or the court and may not occur for a significant or undetermined period of time.”²⁷¹ The general concept behind administrative closure is that proceedings will resume at a later date upon request by either party.²⁷² Until recently, IJs

264. See LENNI B. BENSON, LINDSAY A. CURCIO, VERONICA M. JEFFERS & STEPHEN W. YALE-LOEHR, *IMMIGRATION AND NATIONALITY LAW: PROBLEMS AND STRATEGIES* 847–48 (2013).

265. See *id.*

266. See *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended at 8 U.S.C. § 1101 (2012)).

267. See Memorandum from Doris Meisner, Comm’r, Immigration & Naturalization Serv., to Reg’l Dirs., Dist. Dirs., Chief Patrol Agents & Reg’l & Dist. Counsel (Nov. 17, 2000), available at <http://www.legalactioncenter.org/sites/default/files/docs/lac/Meisner-2000-memo.pdf>.

268. Department of Homeland Security Appropriations Act, 2009, Pub. L. No. 110-329, div. D, 122 Stat. 3652, 3659 (2008).

269. See Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge & All Chief Counsel 2 (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> (“In light of the large number of administrative violations the agency is charged with addressing and the limited enforcement resources the agency has available, ICE must prioritize the use of its enforcement personnel, detention space, and removal resources to ensure that the removals the agency does conduct promote the agency’s highest enforcement priorities, namely national security, public safety, and border security.”).

270. See *Administration’s Announcement Regarding a New Process to Further Focus Immigration Enforcement Resources on High Priority Cases*, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/repatriation-faq> (last visited June 7, 2015).

271. *Matter of Avetisyan*, 25 I. & N. Dec. 688, 692 (B.I.A. 2012).

272. See *id.* at 695 & n.5; see also *EOIR Notice Regarding Prosecutorial Discretion and Administrative Closure*, U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW (July 23,

were prohibited from granting administrative closure over DHS objection and even now have limited ability to override what essentially constitutes a DHS veto-power.²⁷³ Most importantly, administrative closure does not guarantee release from detention²⁷⁴ and, like PD, does not confer any legal status or give rise to an independent basis to seek work authorization.²⁷⁵

For those with final orders of deportation, the regulations permit an individual to make a formal request to ICE for a “Stay of Removal.”²⁷⁶ The request must be made in person at the individual’s local Enforcement and Removal Operations (“ERO”) office and requires the submission of Form I-246, a filing fee of \$155, and the presentation of a valid passport.²⁷⁷ Those granted a Stay of Removal are placed on an Order of Supervision²⁷⁸ and are required to appear at regular intervals at the ERO office. The Stay can be revoked at the discretion of ICE at any time without warning, justification, or review.²⁷⁹

The last and most important category of discretionary relief is called “Deferred Action.” Deferred Action is created largely by internal memoranda,²⁸⁰ which extend temporary protection to certain classes of individuals whom ICE has identified as warranting a favorable exercise of discretion, such as those with

2012), <http://www.justice.gov/eoir/fact-sheet-prosecutorial-discretion> (“If the court orders your case administratively closed, it simply means you will have no further hearings unless you or DHS specifically ask the court to schedule a hearing.”).

273. See Kristen Bohman, *Avetisyan’s Limited Improvements Within the Overburdened Immigration Court System*, 85 U. COLO. L. REV. 189, 201 (2014) (“With the decision in *Avetisyan*, DHS can no longer prevent an immigrant’s request for administrative closure by arbitrarily objecting to it. Instead, *Avetisyan* provides that immigration judges can override an objection if they find that administrative closure is in the best interests of the immigrant and if there will be some palpable final resolution to the case in the near future.” (citations omitted)).

274. See, e.g., Petition for Writ of Habeas Corpus at 3, *Gomez-Sanchez v. Baker*, No. 10-CV-0652 (S.D. Cal. Mar. 26, 2010) (petitioner with mental disabilities who had been detained for over four years following administrative closure).

275. See *Prosecutorial Discretion: A Statistical Analysis*, AM. IMMIGRATION COUNCIL (June 11, 2012), <http://www.immigrationpolicy.org/just-facts/prosecutorial-discretion-statistical-analysis> (“Immigrants whose cases are administratively closed do not receive any lawful immigration status, and DHS has refused to grant employment authorization documents (EADs) to such immigrants unless they would otherwise be eligible.”).

276. See 8 C.F.R. § 241.6 (2014). Such a Stay may be granted at the discretion of ICE (e.g., for humanitarian reasons).

277. See DEP’T OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, APPLICATION FOR A STAY OF DEPORTATION OR REMOVAL 1 (Dec. 2010), available at https://www.ice.gov/sites/default/files/documents/Document/2014/ice_form_i_246.pdf.

278. See *id.* (“You will be issued an Order of Supervision (OSUP) and be required to comply with the conditions as set forth within the OSUP.”).

279. See *id.* at 2 (“The Field Office Director may at his/her discretion revoke the approval of this application and execute the order of removal at a date and time of his/her choosing. No advance notice is required for the execution of a final order of removal.”); Memorandum from Victor X. Cerda, Acting Dir., U.S. Immigration & Customs Enforcement, to All Field Office Directors 2 (Nov. 12, 2004), available at http://www.ice.gov/doclib/foia/dro_policy_memos/ordersofsupervisionsep282006.pdf (detailing reporting requirements).

280. See LEGOMSKY & RODRIGUEZ, *supra* note 263, at 632.

humanitarian concerns, prior military service, lengthy periods of residence in the U.S., unfavorable conditions in their country of origin,²⁸¹ and other compelling circumstances.²⁸² Internal memoranda authorize a grant of Deferred Action for individuals in removal proceedings. A grant of Deferred Action effectively closes the proceedings without prejudice.

Deferred Action can be and has been extended to particularly vulnerable groups, such as victims of domestic violence or other serious crimes²⁸³ and nursing mothers.²⁸⁴ A recent example of Deferred Action is “Deferred Action for Childhood Arrivals” (“DACA”), which extends relief for certain young individuals without status who entered the United States prior to the age of 16 and who were educated in the U.S. or are currently matriculating toward a high school (or equivalent) diploma.²⁸⁵ Those granted Deferred Action under DACA are given a two-year reprieve from deportation and are entitled to seek work authorization.²⁸⁶ However, DACA relief—like all forms of Deferred Action—does not confer permanent residence, a visa, a benefit, or a pathway to citizenship.²⁸⁷

Of the four forms of discretionary relief, Deferred Action provides the most suitable remedy for mentally incompetent respondents who do not have alternative relief and are ill-served by termination or deportation. As an example, a respondent may have family in the U.S. capable of supporting her or have an origin country without per se persecution but with an unstable social or political environment that presents a hazard.²⁸⁸ Deferred Action would afford such a

281. See 8 U.S.C. § 1254a (2012).

282. See Memorandum from William J. Howard, Principal Legal Advisor, Office of Homeland Security, to Chief Legal Counsel of the Department of Homeland Security (Oct. 24, 2005), available at <http://www.legalactioncenter.org/sites/default/files/docs/lac/Howard-10-24-2005-memo.pdf>.

283. See Memorandum from Peter S. Vincent, Principal Legal Advisor, U.S. Immigration & Customs Enforcement, to Office of the Principal Legal Advisor Attorneys (Sept. 25, 2009), available at http://www.ice.gov/doclib/foia/dro_policy_memos/vincent_memo.pdf.

284. See Memorandum from Julie L. Myers, Assistant Sec’y, U.S. Immigration & Customs Enforcement, to All Field Office Dirs. & All Special Agents in Charge (Nov. 7, 2007), available at <http://www.ice.gov/doclib/foia/prosecutorial-discretion/custody-pd.pdf>.

285. See Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Protection, Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs. & John Morton, Dir. U.S. Immigration & Customs Enforcement (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

286. See *id.* at 3 (“For individuals who are granted deferred action by either ICE or USCIS, USCIS shall accept applications to determine whether these individuals qualify for work authorization during this period of deferred action.”).

287. See *id.* (“This memorandum confers no substantive right, immigration status or pathway to citizenship.”).

288. One example of a respondent who could have benefited from Deferred Action was a schizophrenic woman from Antigua and Barbuda, whose family was in the U.S. She committed suicide in ICE detention in October 2013 after her request for prosecutorial discretion was denied by ICE. See Matza, *supra* note 22 (quoting the Antigua deputy consul general: “If she has a

respondent the opportunity to gain valuable documentation such as a work permit, state-issued ID, and social security number—none of which can be obtained through PD or administrative closure.

Deferred Action is recommended over the other types of discretionary relief for several reasons. It is preferable to administrative closure because the respondent does not face potential indefinite detention and is unburdened by the expectation that proceedings will reopen. It is more appropriate than a Stay of Removal because the Stay process contains an onerous documentation requirement that includes presentation of a valid, unexpired passport—a document that would likely be difficult for a mentally incompetent individual to obtain. The Stay also involves reporting requirements that an incompetent individual would likely find challenging. Deferred Action carries neither of these requirements. As with all types of discretionary relief, DHS could attach conditions—for example, a supervision component or biannual renewal similar to that required under DACA. However, such conditions are not advisable because it may prove difficult for mentally incompetent individuals to comply with them. DHS could also in theory renew a case upon a showing that a mentally incompetent individual had been restored to competence, but in reality this course of action may not be practical.

Finally, a decision to pursue Deferred Action should be made jointly by the attorney and the GAL. The GAL's value in these instances is clear, as she would be instrumental in assessing whether the best interests of the individual are served by remaining in the U.S. or returning to the home country. While Deferred Action is not an ideal solution, as it still affords no true status, it comports with current immigration laws of eligibility while satisfying the more humanitarian need to protect vulnerable populations from continued injury. Expanding Deferred Action to encompass this group requires no congressional action and is not administratively onerous, as it already exists for other vulnerable groups. It therefore presents a pragmatic solution that can easily be implemented within the existing immigration law framework.

CONCLUSION

In an attempt to comply with its obligations under *Franco*, the government has invested tremendous effort in creating a process to identify mentally impaired respondents. While the result is an improvement over the current system, it is both insufficient to comply with *Franco* and to ensure that the proceedings against the mentally impaired are fair. As the Guidance is amended and refined, more attention must be paid to the impact of these procedures on the respondents themselves and the equity of the outcomes. Specifically, the Guidance should be amended to provide for appointment of paid counsel at the

diagnosis of schizophrenia and her family is here, who am I sending her home to? It's like sending her home to die.”).

indicia stage, mandatory competency hearings, appointment of a GAL once a respondent has been adjudicated incompetent, and expanded use of discretion to grant Deferred Action to mentally impaired respondents in appropriate cases. These changes are critical to protecting the rights of this uniquely vulnerable population and to preserving the integrity of the immigration system.