DISABLED, DEFENSELESS, AND STILL DEPORTABLE: WHY DEPORTATION WITHOUT REPRESENTATION UNDERMINES DUE PROCESS RIGHTS OF MENTALLY DISABLED IMMIGRANTS

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I. INTRODUCTION

Xiu Ping Jiang, a Chinese immigrant with a history of attempted suicide, sat through her immigration hearing silently with her "arms folded, [and] her eyes downcast."[1] Without a court-appointed lawyer, and without the mental wherewithal to communicate with the immigration judge, she was treated by the court as if she had failed to appear.[2]

Jose Fernandez Sanchez, a forty-five-year-old Mexican immigrant who suffers from schizophrenia, was so catatonic during an immigration proceeding that he was unable to answer the immigration judge's most basic questions.[3] Nonetheless, Fernandez Sanchez was expected to represent himself in his deportation hearing.[4]

The experiences of Jiang and Fernandez Sanchez are not unique. Their stories illustrate the obstacles facing mentally disabled immigrants when they are unable to afford an attorney. Under the Sixth Amendment, mentally disabled criminal defendants receive vigorous protections, including the right to counsel.[5] In contrast, there is no

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1 Nina Bernstein, *Mentally Ill and in Immigration Limbo*, N.Y. TIMES, May 4, 2009, at A21.

2 *Id.* at A17.

3 *See* Emily Ramshaw, *Mentally Ill Immigrants Have Little Hope for Care When Detained*, DALLAS MORNING NEWS, July 13, 2009, *available at* http://www.justice.gov/eoir/vll/benchbook/tools/MHI/library/Emily%20Ramshaw,%20The%20Dallas%20Morning%20News,%20July%2013,%202009.pdf (describing the hurdles facing mentally ill immigrants, such as Fernandez Sanchez, who are not afforded the right to counsel).

4 *Id.*

5 *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."); *see also* Massey v. Moore, 348 U.S. 105, 108 (1954) ("We have not allowed convictions to stand if the accused stood trial without ben-

comparable right to court-appointed counsel for noncitizens during immigration hearings, even when an immigrant's mental impairments render him delusional, unable to understand the consequences of his hearing, or incapable of presenting arguments in his favor.[6]

In December 2010, a federal judge in the Central District of California held that to receive a fair hearing, two immigrants with mental disabilities should be provided with counsel.[7] This decision, the first to recognize a right to counsel for mentally disabled immigrants, underscores the need for further clarity about the rights of this vulnerable population.

This Comment examines the barriers confronting mentally disabled immigrants who struggle to represent themselves in the immigration system without the right to counsel and argues that the Due Process Clause of the Fifth Amendment guarantees a right to counsel for these detainees. While the law does not currently recognize a right to counsel for immigrants in immigration hearings, detainees are entitled to protections under the Due Process Clause of the Fifth Amendment.[8] Additionally, the law recognizes that both criminal and immigration sanctions have the potential to curtail personal li-

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efit of counsel and yet was so unskilled, so ignorant, or so mentally deficient as not to be able to comprehend the legal issues involved in his defense.").

6 *See* HUMAN RIGHTS WATCH, DEPORTATION BY DEFAULT: MENTAL DISABILITY, UNFAIR HEARINGS, AND INDEFINITE DETENTION IN THE US IMMIGRATION SYSTEM 46, 53–56 (2010), *available at* http://www.aclu.org/files/assets/usdeportation0710_0.pdf (documenting cases where noncitizens with mental disabilities represented themselves in immigration court).

7 Franco-Gonzalez v. Holder, 767 F. Supp. 2d 1034, 1061 (C.D. Cal. 2010). In this class action suit, the judge held that a reasonable accommodation for detainees with mental disabilities included the appointment of counsel. *Id.* When asked if he understood what was happening after waiving his right to appeal his removal, one claimant in the case, who was diagnosed as suffering from paranoid schizophrenia, stated to the immigration judge, "Yes. But I don't understand anything now." *Id.* at 1041. Although the detainees raised due process claims, the judge did not address these claims and instead relied on the need to comply with regulatory requirements to reasonably accommodate incompetent aliens. *Id.* at 1055. *See* First Amended Complaint at 30, *Franco-Gonzalez*, 767 F. Supp. 2d 1034 (No. 10-CV-02211) (arguing on behalf of the claimants that "the [U.S.] Constitution requires the Government to (1) conduct competency evaluations for all those who the Government knows or should know may be incompetent to represent themselves, [and] (2) appoint attorneys for those found to be in need of counsel").

8 *See* Bridges v. Wixon, 326 U.S. 135, 161 (1945) ("But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment."); *see also* Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 101 (1903) (holding that the Due Process Clause requires that aliens receive a fair hearing before they are deported).

berty and impose similar hardships on individuals.[9] While mentally disabled immigrants do have the right to a fair hearing, those who find themselves responsible for their own defense may lack the capacity to recognize the significance of their proceedings. The complexities of presenting a case and asserting a claim for asylum or withholding of removal will likely be impossible for a mentally disabled detainee to grasp.[10] Therefore, the immigration system's current standard of denying a right to counsel for mentally disabled detainees jeopardizes constitutional due process and unfairly deprives those most in need of the protections of a fair hearing.

Part II of this Comment discusses the prevalence of mental disabilities within the immigrant detainee population and explains the importance of legal representation for avoiding deportation. Part III argues that the current system of self-representation violates the Fifth Amendment due process rights of mentally disabled immigrants. A necessary context for this argument is the vigorous protections that exist in the criminal justice system to determine a criminal defendant's competency to stand trial and capacity to represent himself. The immigration court could use the criminal justice system as a model if it were to adopt a right to counsel. Next, Part III details the constitutional protections currently afforded to immigrants and contends that a system of default self-representation by the mentally disabled undermines fundamental fairness. This Part further defines what process is due by balancing the individual and governmental interests, and the risk of erroneous deprivation of rights. Part IV draws from federal regulations, agency actions, and human rights laws to present policy arguments that favor recognition of a right to counsel. Part V concludes by recommending reforms to federal law and the immigration court and detention system to protect immigrant due process rights.

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9 *See Bridges*, 326 U.S. at 147 (emphasizing that although the denial of asylum is not a criminal penalty, it still imposes a great hardship).

10 *See generally* U.S. DEP'T OF JUSTICE, FACT SHEET: ASYLUM AND WITHHOLDING OF REMOVAL RELIEF CONVENTION AGAINST TORTURE PROTECTIONS (2009), *available at* http://www.justice.gov/eoir/press/09/AsylumWithholdingCATProtections.pdf (describing the process for asserting a claim for asylum and for asserting a claim for withholding of removal).

II. THE PREVALENCE OF MENTAL DISABILITIES AND THE IMPORTANCE OF COUNSEL

Mental disabilities pervade the detainee population.[11] These disabilities place immigrants at a distinct disadvantage when they attempt to present a case for asylum or withholding of removal, and their prevalence highlights the need to enact safeguards that address the current deficiencies of the immigration court system.

A. The Incidence of Mental Disability in Immigration Detention

The immigration detention network is vast. In fiscal year 2009, U.S Immigration and Customs Enforcement ("ICE") detained between 380,000 and 442,000 immigrants.[12] Detained immigrants include individuals who entered the United States without authorization, individuals seeking asylum, and U.S. permanent resident aliens facing criminal charges.[13] To determine whether noncitizens will be deported or receive a grant of asylum, detainees attend hearings in immigration court.[14] The immigration court system is overseen by the Executive Office for Immigration Review ("EOIR"), a division of the Department of Justice.[15] Since immigration courts are notoriously overburdened, immigration judges resolve the influx of cases by deciding an average of four cases each day.[16] In 2008, individual immi-

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11 For the purposes of this Comment, the phrase "mental disability" will refer to mental, behavioral, and emotional conditions, and intellectual disabilities that undermine an individual's ability to prepare a case and represent himself during a court proceeding. This analysis excludes mental disabilities such as anxiety disorders that do not implicate an individual's capacity to understand the charges against him and fairly represent himself. If Congress adopts a right to counsel for mentally disabled immigrants, regulations can provide guidance to immigration judges charged with making capacity determinations. *See infra* Part II.A for a discussion of the widespread presence of mental disability in immigration detention.

12 TEXAS APPLESEED, JUSTICE FOR IMMIGRATION'S HIDDEN POPULATION: PROTECTING THE RIGHTS OF PERSONS WITH MENTAL DISABILITIES IN THE IMMIGRATION COURT AND DETENTION SYSTEM 9 (2010), *available at* http://www.texasappleseed.net/index.php?option=com_docman&task=doc_download&gid=313.

13 *Id.* at 10.

14 *See* HUMAN RIGHTS WATCH, *supra* note 6, at 3 (describing the crimes for which an alleged violator, who could be mentally disabled, may be brought into immigration court).

15 *See generally Executive Office for Immigration Review: About the Office*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/eoir/orginfo.htm (last updated Sept. 2010) (providing background information about the EOIR, its creation, and its organization).

16 *See* TEXAS APPLESEED, *supra* note 12, at 14 (noting that in fiscal year 2009, it was estimated that each immigration judge had to decide four cases per business day); *see also* AM. BAR ASS'N, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES ES-19 (2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/

gration judges issued an average of 1014 decisions a piece. By contrast, Veterans law judges issued on average 729 decisions and Social Security Administration law judges decided an average of 544 cases.[17] For immigration judges, the difficulties of rendering decisions are exacerbated by the absence of administrative support staff—there is on average one law clerk for every four immigration judges.[18] Therefore, immigration judges must balance the competing pressures of rising caseloads and limited resources.

Mental health disabilities are widespread among the detainee population. Neither ICE nor the EOIR keeps comprehensive records about immigrant mental health, but ICE estimates from 2008 suggest that between 7571 and 18,929 detainees suffered from a "serious mental illness" and that between 38,000 and 60,000 detainees had some contact with the immigrant mental health system.[19] Additionally, the international advocacy group Human Rights Watch estimates that 57,000 detainees have a mental disability.[20] The widespread use of psychotropic medicine within ICE detention facilities further highlights the prevalence of mental disability among the detainee population.[21]

When immigrants are first brought into detention, ICE requires that detainees receive an initial medical and mental health screening.[22] However, overcrowding strains ICE staff and often impedes recognition of detainees' mental health disabilities.[23] In one Massachusetts study, overcrowding in ICE facilities created backlogs of several weeks before medical staff addressed detainees' health complaints.[24] While ICE has standards in place for treating immigrants,

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media/nosearch/immigration_reform_executive_summary_012510.authcheckdam.pdf (explaining that between fiscal year 1996 and fiscal year 2008, there was a 23% increase in the number of cases commenced in immigration court to expel noncitizens).

17 AM. BAR ASS'N, *supra* note 16, at ES-28.

18 *Id.*

19 HUMAN RIGHTS WATCH, *supra* note 6, at 17.

20 *Id.* at 3.

21 *See* TEXAS APPLESEED, *supra* note 12, at 12 (explaining that between January 1, 2005 and June 1, 2009, 14,859 detained immigrants received prescriptions for an average of more than five psychotropic drugs).

22 *See* Lisa A. Cahan, *Constitutional Protections of Aliens: A Call for Action to Provide Adequate Health Care for Immigration Detainees*, 3 J. HEALTH & BIOMEDICAL L. 343, 350 (2007) (criticizing immigrants' inadequate access to health care).

23 *See id.* at 348 n.21 (explaining how overcrowding at facilities undermines the timeliness and availability of care).

24 *See* ACLU OF MASS., DETENTION IN THE AGE OF ICE: IMMIGRANTS AND HUMAN RIGHTS IN MASSACHUSETTS 49 (2008), *available at* http://www.aclum.org/ice/documents/aclu_ice_detention_report.pdf (detailing the impact of overcrowding on immigrants who are held in detention facilities in Massachusetts).

these standards are not regulations and do not provide concrete requirements for ICE employees.[25] Given this backdrop, mentally disabled immigrants confront a system that is unable to recognize individual vulnerabilities and provide the support necessary to ensure fair representation.

B. Detainee Self-Representation

In immigration court, access to counsel can be the single factor that determines the success or failure of an asylum claim. Immigrants have the right to be represented by an attorney in immigration court but do not have the right to a government-funded attorney.[26] Thus, mentally disabled immigrants with limited resources face a high likelihood of deportation.

Given that most immigrants come from indigent backgrounds, hiring a lawyer is often infeasible.[27] As a result, 61% of immigrants represent themselves in immigration court.[28] This statistic includes both detained and non-detained immigrants. For detained immigrants, the incidence of self-representation grows precipitously, as approximately 84% of detained immigrants do not have representation during removal proceedings.[29] In some Texas detention facilities, 97% of immigrants lack representation during hearings.[30]

Self-representation puts immigrants at a significant disadvantage. Most detainees are unfamiliar with court procedures and do not have training in immigration law. Asylum seekers who have legal representation are four to six times more likely to receive asylum than un-

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25 *See Detention and Removal: Immigration Detainee Medical Care: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. 56–60 (2007), (statement of Tom Jawetz, ACLU Nat'l Prison Project, Presentation on Medical Care and Deaths in ICE Custody).

26 *See* 8 U.S.C. § 1229(a)(b)(4)(A) (2006) ("[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings . . . .").

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, 548 (2009) (explaining that foreign-born immigrants, who often come from underprivileged communities, rarely have the financial means to hire counsel).

28 HUMAN RIGHTS WATCH, *supra* note 6, at 5.

29 *See* AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 30 (2009), *available at* http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf (describing the barriers immigration detainees face in obtaining counsel).

30 *See* TEXAS APPLESEED, *supra* note 12, at 13.

represented detainees.[31] Studies suggest that individuals who proceed pro se are simply unaware of defenses that would result in successful asylum claims.[32] Self-represented immigrants face the additional burden of having to confront experienced government attorneys on the opposing side.[33] This combination of obstacles means that individuals who are not represented by counsel experience a heightened risk of deportation. Beyond a lack of representation, insufficient access to information about the charges against them and language barriers also contribute to adverse outcomes for immigrants who proceed without an attorney.[34]

Mental disability exacerbates the burdens already facing detainees during court proceedings. Even a mentally sound immigrant without legal training would have trouble grasping the complexities of an asylum defense. The challenge is that much greater for a detainee with mental disabilities who lacks the capacity to understand the charges against him, let alone present a coherent case for asylum.[35] Without representation, these immigrants have little hope of avoiding deportation.

III. DUE PROCESS DEPRIVATIONS WITHOUT THE RIGHT TO COUNSEL FOR MENTALLY DISABLED IMMIGRANTS

The right to fairly present a case is a critical component of constitutional due process. Yet, mentally disabled immigrants are at a distinct disadvantage. Their disability prevents effective self-representation, and thus, mandatory self-representation conflicts with immigrants' due process rights. This Part argues that immigrant due process rights should include the right to counsel for mentally disabled immigrants. It first describes the framework of constitutional protections for immigrants and compares these protections with those afforded to criminal defendants. Next, it shows how the cur-

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31 *See* Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 740 (2002) (discussing asylum seekers' lack of access to legal representation).

32 *See* Michael J. Churgin, *An Essay on Legal Representation of Non-Citizens in Detention*, 5 INTERCULTURAL HUMAN RIGHTS L. REV. 167, 171 (2010) (citing a study of New York detainees that found "that few detainees had any knowledge of possible defenses to removal, while almost 40% had colorable claims as determined by the project attorneys").

33 *See* TEXAS APPLESEED, *supra* note 12, at 5.

34 *See* Schoenholtz & Jacobs, *supra* note 31, at 751–52 (discussing efforts to provide asylum seekers with information in multiple languages about their rights).

35 *See* HUMAN RIGHTS WATCH, *supra* note 6, at 40 (describing a mentally ill man who told the judge "just deport me" believing that deportation meant he would be able to leave detention, but not that he would be sent out of the country).

rent system of self-representation by the mentally disabled implicates fundamental fairness concerns and undermines immigrant due process. This Part concludes by analyzing what process should be due to mentally disabled immigrants.

A. Immigrant Constitutional Protections

In contrast to the criminal justice system, immigration proceedings are classified as civil in nature.[36] The Sixth Amendment guarantees that the accused in criminal proceedings has the right "to have the Assistance of Counsel for his defence."[37] Yet, Sixth Amendment protections are often confined to the criminal justice system.[38] Thus, although a mentally disabled immigrant facing criminal charges would have a right to counsel, the same immigrant facing deportation would not because of the civil nature of the proceeding.[39]

While there is no right to counsel for immigrants in deportation proceedings, detainees do receive substantial due process protections under the Fifth Amendment.[40] In *Yamataya v. Fisher*, the Court rec-

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36 *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action . . . .").

37 U.S. CONST. amend. VI.

38 *See* Turner v. Rogers, 131 S. Ct. 2507, 2516 (2011) (describing the track record of uncertainty about the Sixth Amendment's application outside of the criminal context); *see also* Gideon v. Wainwright, 372 U.S. 335, 339 (1963) (holding that the Sixth Amendment provides a right to counsel in all criminal prosecutions).

39 A recent Supreme Court decision, *Turner v. Rogers*, introduces new due process considerations for determining the rights of civil defendants who face the possibility of incarceration. 131 S. Ct. 2507 (2011). The defendant in *Turner* faced civil contempt charges for failure to pay child support. *Id.* at 2513. He challenged the constitutionality of the proceeding based on his denial of the right to counsel. *Id.* at 2514. Applying the *Mathews v. Eldridge* balancing test, the Court assessed whether denying him access to counsel was fundamentally unfair under the Due Process Clause. *Id.* at 2517. For a discussion of this test, see *infra* Part III.E. The *Turner* Court recognized that the private interest at stake—the deprivation of liberty through imprisonment—argued "strongly for the right to counsel." *Id.* However, the Court found that "substitute procedural safeguards" used in civil contempt proceedings reduced the risk of erroneous deprivation and negated the constitutional challenge. *Id.* at 5219. The case suggests that there is a right to counsel when a civil defendant faces a potential deprivation of liberty, and safeguards would not remedy fundamental fairness concerns. The Court referenced protections in civil contempt proceedings including the use of forms to identify financial information, and an opportunity for the civil defendant to respond to statements about his financial status. *Id.* For a mentally disabled individual, the use of forms or the opportunity to respond to claims about immigration status would still present accuracy problems and would not reduce the likelihood of an erroneous deprivation of liberty. Thus, the holding in *Turner* supports the right to counsel for mentally disabled immigrants. *See infra* Part III.B for a discussion of the potential deprivation of liberty that mentally disabled immigrants confront.

40 *See* Bridges v. Wixon, 326 U.S. 135, 161 (1945) (finding that due process protections extend to immigrants).

ognized that immigrants have protected liberty interests and that the Due Process Clause prevents these interests from being denied arbitrarily.[41] *Yamataya* laid the foundation for extending constitutional protections to noncitizens. The Court explained:

> [T]his court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution.[42]

Even in the context of burgeoning immigration to the United States, immigrant due process protections still remain forceful.[43] In *Woody v. INS*, the Court again asserted that to protect immigrants' rights, there must be "clear, unequivocal, and convincing" proof before a person can be deported.[44] Federal regulations reinforce these legal protections and ensure that an immigrant receives "a reasonable opportunity to examine and object to the evidence against him or her, to present evidence in his or her own behalf and to cross-examine witnesses presented by the government."[45] Both federal courts and federal regulators have thus made clear that due process protections mandating a fair hearing apply equally to immigrant detainees and criminal defendants.

B. Mental Health Protections in the Criminal Justice System

The absence of a right to counsel in the immigration system contrasts with the due process rights afforded mentally disabled criminal defendants. In the criminal system, individuals with mental disabilities receive robust protections.[46] Although the criminal system and

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41 *See* Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 101 (1903) (applying the Due Process Clause to aliens present in the United States).

42 *Id.* at 100.

43 According to the Center for Immigration Studies, 13.1 million legal and illegal immigrants arrived in the United States in the last ten years. *See Census: Population Up 27 Million in Just 10 Years*, CTR. FOR IMMIGRATION STUDIES (Dec. 2010), http://cis.org/2010CensusPopulation. Further, the Pew Research Center estimates that unauthorized immigrants who would be subject to deportation proceedings comprise 4% of the country's adult population. JEFFREY S. PASSEL & PAUL TAYLOR, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANTS AND THEIR U.S.-BORN CHILDREN 1 (2010), *available at* http://pewhispanic.org/files/reports/125.pdf.

44 385 U.S. 276, 285 (1966).

45 8 C.F.R. § 1240.10(a)(4) (2006).

46 *See* 18 U.S.C. § 4241(a) (2006) (prescribing the process for determining an individual's mental competency to stand trial). Under the Federal Rules of Civil Procedure, the civil system also includes protections for incompetent persons who are the subject of civil suits. FED. R. CIV. P. 17(c).

the civil immigration system are distinct, both systems offer parallel due process protections. The same due process arguments that support the rights of mentally disabled criminal defendants should apply with equal force to mentally disabled detainees. Thus, a comparison between the respective systems helps to frame the argument for enacting a right to counsel for mentally disabled immigrants.

There are two levels of protection for criminal defendants based on (1) whether they are competent to stand trial, and (2) whether they have the capacity to represent themselves a trial.

The first level of inquiry when a criminal defendant's mental status is at issue examines the defendant's competence to stand trial.[47] In *Pate v. Robinson*, the Court explained that "[w]here the evidence raises a '*bona fide* doubt' as to a defendant's competence to stand trial, the judge on his own motion must impanel a jury and conduct a sanity hearing."[48] According to the Court in *Drope v. Missouri*, "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required."[49]

The trial court next applies the well accepted *Dusky v. United States* standard for determining competence to stand trial, a standard that asks whether the individual 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."[50] Thus, central to a criminal defendant's case is the possession of rational understanding and the ability to engage with counsel—either hired or appointed.[51]

Since *Dusky* was a sparsely worded opinion providing minimal guidance, state legislatures have added their own criteria to clarify the competency evaluation.[52] One method often used in practice involves competency checklists that help judges evaluate whether a defendant understands the legal process, consistent with the *Dusky*

47 *See* Pate v. Robinson, 383 U.S. 375, 378 (1966) (observing that it is constitutionally impermissible to try a mentally incompetent defendant).

48 *Id.* at 385.

49 Drope v. Missouri, 420 U.S. 162, 180 (1975).

50 *See* Dusky v. United States, 362 U.S. 402, 402 (1960) (developing the test to determine an individual's competence to stand trial). This standard is codified at 18 U.S.C. § 4241(a).

51 *See* United States v. Boigegrain, 155 F.3d 1181, 1189 (10th Cir. 1998) (including whether a defendant is able to consult with counsel as an element of the competence determination).

52 *See* GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS 128 (2007) (discussing efforts by legislators, courts, and clinicians to add content to the *Dusky* standard).

standard.[53] Regardless of mental health or economic status, all criminal defendants have a right to counsel.[54] A criminal defendant who is found competent to stand trial always has access to representation.

When a criminal defendant is found competent to stand trial, the Constitution may nevertheless preclude self-representation to protect procedural fairness. In *Massey v. Moore*, a suicidal defendant, who had been held in a psychiatric facility, was not represented by counsel during trial.[55] The Court identified this lack of representation as procedurally unfair and created a distinction between competence to stand trial and competence to proceed without counsel during trial. The Court explained that "one might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without the benefit of counsel."[56] The Court further emphasized:

> [I]f he is insane, his need of a lawyer to tender the defense is too plain for argument. We have not allowed convictions to stand if the accused stood trial without the benefit of counsel and yet was so unskilled, so ignorant, or so mentally deficient as not to be able to comprehend the legal issues involved in his defense.[57]

The Court similarly emphasized the need to provide counsel for the mentally disabled in *Wade v. Mayo*:

> There are some individuals who, by reason of age, ignorance or mental capacity, are incapable of representing themselves adequately in a prosecution of a relatively simple nature. This incapacity is purely personal and can be determined only by an examination and observation of the individual. Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the Fourteenth Amendment.[58]

Thus, in criminal cases, the Court vehemently opposes self-representation by the mentally disabled.

The issue of capacity for self-representation was recently addressed by the Court in *Indiana v. Edwards*.[59] The Court found that the Constitution allows states to place restrictions on an individual's decision to represent himself, even if he has been found competent

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53 *See id.* at 129–30 (providing an example of a judicial checklist used to assess competency).

54 *See* Gideon v. Wainwright, 372 U.S. 335, 348 (1963) (finding a right to counsel under the Sixth Amendment in all criminal proceedings).

55 348 U.S. 105, 106–07 (1954).

56 *Id.* at 108.

57 *Id.*

58 Wade v. Mayo, 334 U.S. 672, 684 (1948).

59 554 U.S. 164, 177–78 (2008).

to stand trial.[60] Further, the Court noted that the *Dusky* competence standard presumes that an incompetent individual has access to counsel with whom he can consult.[61] When a mentally disabled individual proceeds without counsel, the *Edwards* Court explained that "insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial."[62] Thus, the assignment of counsel for an individual who lacks capacity promotes fairness and preserves the integrity of the justice system.

Separate from a competency determination, a capacity determination focuses on the threat of an "improper conviction."[63] An individual can only represent himself if he has the ability to waive counsel "voluntarily and intelligently."[64] Thus, the standard for voluntary representation pro se is higher than the *Dusky* standard for competence to stand trial.[65] Even if an individual is competent to stand trial, safeguards may be necessary to ensure that a defendant recognizes the significance of the proceedings and can fairly and intelligently represent his interests.[66]

In addition to fairness concerns, the Court in *Indiana v. Edwards* invokes individual dignity as a reason to prevent self-representation by the mentally disabled.[67] Accordingly, for individuals who lack

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60 *Id.* ("We consequently conclude that the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so.").

61 *See id.* at 165; *see also* 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.").

62 *Edwards*, 554 U.S. at 176–77.

63 *Id.* at 176.

64 Faretta v. California, 422 U.S. 806, 807 (1975).

65 *See* Joanmarie Ilaria Davoli, *Physically Present, Yet Mentally Absent*, 48 U. LOUISVILLE L. REV. 313, 322–23 (2009) ("[T]he Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits [s]tates to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." (quoting *Edwards*, 554 U.S. at 177–78)).

66 *Cf.* John T. Broderick, *The Choice Is Ours*, JUDGES' J., Fall 2008, at 5, 5–8 (challenging the court system to consider whether self-representation can ever be fair and concluding that self-representation has a disproportionate impact on the poor).

67 *See Edwards*, 554 U.S. at 176 ("[A] right of self-representation at trial will not 'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel.").

mental capacity, "the spectacle that could well result from . . . self-representation at trial is at least as likely to prove humiliating as ennobling."[68] Therefore, provisions preventing the mentally disabled from representing themselves protect dignitary concerns in addition to fair outcomes.

These rigorous competency standards and limits on self-representation are absent from the immigration court system. Efforts to safeguard mentally disabled immigrants' rights should therefore draw on the protections offered by this parallel system.

C. Comparing the Stakes of Criminal Prosecution and Deportation

The criminal and immigration systems are characterized as legally distinct, yet the functional consequences of the systems are similar. The comparative impact of deportation and criminal sanctions calls into question the constitutionality of providing criminal defendants and detainees different procedural protections. The Supreme Court recognizes that "although deportation technically is not criminal punishment it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or calling."[69] In *Ng Fung Ho v. White*, the Court explained that the law extends Fifth Amendment protections to deportation hearings because deportation "may result . . . in loss of both property and life; or of all that makes life worth living."[70] While the immigration system is civilly and legally distinct from the criminal system, the sanctions imposed by both systems are similarly severe.

In *Padilla v. Kentucky*, the Court addressed whether an attorney is legally required to inform a client that a guilty plea would lead to deportation.[71] The Court described criminal convictions and immigration penalties as "enmeshed," because of the impact of a criminal conviction on an immigrant's legal residence in the United States.[72] Although *Padilla* confronted the consequences of a criminal plea, the case reinforces the Court's views about the gravity of immigration sanctions. Understanding the comparative weight of deportation and criminal punishment supports applying the same safeguards used in

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68 *Id.*

69 Bridges v. Wixon, 326 U.S. 135, 147 (1945).

70 259 U.S. 276, 284 (1922).

71 130 S. Ct. 1473, 1486 (2010) (determining that the Sixth Amendment right to counsel requires attorneys to inform their clients about the immigration consequences of a criminal conviction).

72 *See id.* at 1481 ("Although removal proceedings are civil in nature, deportation is intimately related to the criminal process.").

the criminal system to the immigration system—including the criminal system's recognition of the unique concerns confronting the mentally disabled.

D. Due Process Deprivations for Mentally Disabled Immigrants

The current system of compelling the mentally disabled to represent themselves violates the Due Process Clause by failing to provide mentally ill detainees with access to fair procedure.

In the criminal context, *Massey v. Moore* raised concerns about an individual who was "so unskilled, so ignorant, or so mentally deficient as not to be able to comprehend the legal issues involved in his defense."[73] The same critique applies to mentally disabled immigrants, like Jose Fernandez Sanchez and Xiu Ping Jiang. In spite of their status as immigrants, Fernandez Sanchez and Jiang still have due process rights and face sanctions that could deprive them of "all that makes life worth living."[74] If either individual were brought into criminal court, it would be clear under the guidance of *Wade v. Mayo* that because an "incapacity" was present, "the refusal to appoint counsel [was] a denial of due process of law under the Fourteenth Amendment."[75] To respect due process protections, immigrants should have access to a fair hearing. Requiring mentally disabled immigrants to represent themselves undermines these constitutional protections.

While the Court is still developing a precise definition for due process in the right to counsel context, it is clear that due process requires fundamental fairness.[76] Fundamental fairness concerns exist when there is an absence of "one of the elements deemed essential to due process."[77] In *Torres-Chavez v. Holder*, the Ninth Circuit assessed whether a proceeding was "so fundamentally unfair that the alien [was] prevented from reasonably presenting her case."[78] Thus, fundamental fairness concerns protect the presentation of a coherent legal defense in immigration proceedings.

An increasing number of circuit courts now acknowledge that preserving immigrant due process rights requires fair representation by

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73 Massey v. Moore, 348 U.S. 105, 108 (1954).

74 *Ng Fung Ho*, 259 U.S. at 284.

75 Wade v. Mayo, 334 U.S. 672, 684 (1948).

76 *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 24 (1981) (noting that due process has no "precise definition" in a case rejecting a right to counsel in parental custody hearings, and explaining that due process requires fundamental fairness).

77 United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 157 (1923).

78 Torres-Chavez v. Holder, 567 F.3d 1096, 1102 (9th Cir. 2009) (quoting Hernandez v. Mukasey, 524 F.3d 1014, 1017 (9th Cir. 2008)).

counsel. In *Lin v. Ashcroft*, the Ninth Circuit reasoned that "[i]neffective assistance of counsel in a deportation proceeding is a denial of due process under the Fifth Amendment if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case."[79] The court was willing to find prejudice "when the performance of counsel was so inadequate that it *may* have affected the outcome of the proceedings."[80] Similar legal logic applies when self-representation is "so inadequate" because of the individual's mental deficiency that it prejudices the outcome of a hearing. Representation by a mentally ill detainee who lacks the capacity to present a cogent case should be categorized as unconstitutional, inadequate representation.

Further, in *Prichard-Ciriza v. INS*, the Fifth Circuit assessed whether an immigration judge erred by not appointing counsel for a detainee who did not have a mental disability.[81] In its analysis, the court assessed whether the absence of counsel demonstrated "prejudice which implicates the fundamental fairness of the proceeding."[82] The court concluded that Prichard-Ciriza's lack of counsel did not implicate fundamental fairness because he was repeatedly told of opportunities to access "free or low-cost" legal aid.[83] Even so, the *Prichard-Ciriza* fundamental fairness framework raises the question of whether self-representation by the mentally disabled prejudices a detainee's case in a way that is fundamentally unfair.

Going beyond the concerns attached to inadequate representation by an attorney, some courts have found that the absence of counsel for an immigrant may violate the Due Process Clause. For example, in *United States v. Torres-Sanchez*, the Eighth Circuit stated that, "in some circumstances, depriving an alien of the right to counsel may rise to a due process violation."[84] The court explained that because the detainee was informed of his statutory right to seek counsel, the hearing did not violate the Due Process Clause.[85] However, a mentally ill individual who is informed of his right is unlikely to have the capacity to understand the significance of the information or the importance of representation. Thus, safeguards that exist

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79 377 F.3d 1014, 1023 (9th Cir. 2004) (citation omitted) (internal quotation marks omitted).

80 *Id.* at 1024 (citation omitted) (internal quotation marks omitted).

81 978 F.2d 219 (5th Cir. 1992) (suggesting that fundamental fairness is a requirement in deportation hearings).

82 *Id.* at 222 (quoting Michelson v. INS, 897 F.2d 465, 468 (10th Cir. 1990)).

83 *Id.*

84 68 F.3d 227, 230 (8th Cir. 1995).

85 *Id.* at 231.

to protect the rights of mentally sound immigrants are insufficient to protect the mentally disabled.[86] For this reason, special rules are needed to support the mentally disabled and ensure they have access to a fair hearing.

While some courts have concluded that self-representation by a mentally sound detainee does not violate fundamental fairness principles,[87] the analysis must change when applied to a mentally disabled detainee. The purpose of the fundamental fairness doctrine is to determine whether an individual has the opportunity to reasonably present his case. Requiring a delusional or catatonic individual to represent himself upends the fundamental fairness doctrine because mental deficiency renders a reasonable presentation impossible. Thus, the status quo supported by the current immigration system is fundamentally unfair.

E. Determining What Process Is Due

Applying a due process balancing test provides further support for protecting the rights of mentally disabled immigrants. The dominant standard for determining what process is due was established by the Court in *Mathews v. Eldridge*.[88] The *Eldridge* test balances the interest of the individual, the risk of erroneous deprivation without procedure, and the government's interest in avoiding the procedure.[89] The following analysis examines each of these three considerations in turn.

1. The Interest of the Individual

Mentally disabled immigrants have an undeniably critical interest in fair representation. Without representation, there is a high likelihood that a disabled immigrant will not understand the charges against him and will not have the opportunity to fairly present his case. The immigrant has a profound interest in accessing counsel

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86 The insufficiency of these safeguards implicates the previously discussed logic from *Turner v. Rogers*, 131 S. Ct. 2507, 2516 (2011). *See* discussion *supra* note 38. If safeguards do not remedy a fundamental fairness violation, then a civil complainant should have a right to counsel.

87 *See, e.g.*, Michelson v. INS, 897 F.2d 465, 468 (10th Cir. 1990) (dismissing an alien's challenge that the lack of appointed counsel was a valid ground for reversing a deportation order).

88 424 U.S. 319, 340 (1976).

89 *Id.*

who can present cogent legal arguments and increase the likelihood of a successful asylum claim.[90]

2. The Risk of Erroneous Deprivation

Self-representation increases the risk of an erroneous deprivation. As previously noted, individuals who do not have access to counsel are significantly less likely to succeed in their asylum claims.[91] The fact that many asylum claims fail because detainees lack information about available defenses illustrates the value of adequate representation.[92] Thus, adequate representation protects immigrants against wrongful deportation. The risk of erroneous deprivation is only exacerbated by the existence of cognitive disabilities that obfuscate the effectiveness of self-representation.

Further, appointing counsel protects American citizens from erroneous deportation. Mentally disabled American citizens often come in contact with immigration authorities and lack the capacity to identify themselves as citizens. For example, in one case, a severely mentally ill woman from Indiana was nearly deported to Russia after she told authorities that she was a Russian immigrant.[93] Similarly, in 2008 Mark Lyttle was deported to Mexico after authorities denied his asylum claim.[94] Lyttle was a United States citizen who suffered from bipolar disorder and developmental disorders.[95] These examples demonstrate that enacting safeguards for the mentally disabled in the immigration system would protect the needs of both citizens and noncitizens and serve the public interest. Thus, under the *Eldridge* balancing test, requiring the appointment of counsel as an element of an immigrant's due process rights serves the immigrant's individual interest in promoting fair procedure and supports the public interest in preventing erroneous deportations.

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90 *See infra* Part II.B for a discussion of how access to counsel improves the likelihood of presenting successful claims to avoid deportation.

91 *See* Schoenholtz & Jacobs, *supra* note 31, at 740 (noting the increased likelihood of success in immigration proceedings with proper representation).

92 *See* Churgin, *supra* note 32, at 171 (explaining research that indicates that "few detainees had any knowledge of possible defenses to removal").

93 *See* Ramshaw, *supra* note 3, at 2.

94 *See* HUMAN RIGHTS WATCH, *supra* note 6, at 4 (describing instances of wrongful deportation of mentally ill United States citizens).

95 *Id.*

3. The Government Interest

The government's resource-based argument for not providing counsel to mentally ill noncitizens is not sufficiently significant to overcome the profound individual interest and the pronounced risk of erroneous deprivation. Admittedly, requiring publicly funded lawyers for mentally disabled immigrants would create additional public expense. There is also precedent for distributing government resources differently between immigrants and citizens. In *Mathews v. Diaz*, the Court reasoned that government resources do not need to be provided equally to citizens and noncitizens alike.[96] In that case, the Court denied eligibility for Social Security benefits to a noncitizen, explaining that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[97] The Court also explained that the fact that an act of Congress treats aliens and citizens differently does not mean that government actions are "invidious."[98] Therefore, the government can treat immigrants and citizens differently without implicating concerns about unjust discrimination.

However, even though aliens and citizens are legally distinct from a resource-based perspective, both groups are entitled to due process protections. An individual's status as a citizen or noncitizen should not degrade the strength of constitutional protections. In *Lassiter v. Department of Social Services*, the Court explained that even if the state had a pecuniary interest in not extending the right to counsel to all those whose parental rights were at issue, "it is hardly significant enough to overcome private interests as important as those here."[99] The Court therefore rejected the notion that the cost of implementing the right to counsel can subvert constitutional rights. Since immigrants and citizens have equal due process rights, financial concerns should not justify the decision to deny mentally disabled immigrants a right to counsel.

Furthermore, there are resource-based reasons to support the right to counsel for mentally disabled immigrants. Unrepresented

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96 *See* Mathews v. Diaz, 426 U.S. 67, 79–80 (1976) (finding that it was not a due process violation to create a five-year residency requirement before aliens who were permanent residents could receive Medicare benefits).

97 *Id.*

98 *Id.* at 80.

99 452 U.S. 18, 28 (1981) (asserting that the conservation of government resources is not a sufficiently important reason to prevent the government from protecting a constitutional right, but ultimately deciding that there is not a right to counsel in every parental status termination proceeding).

mentally disabled immigrants often "languish" in detention facilities because judges will not accept pro se admissions of deportability from these immigrants.[100] In fact, many judges keep these detainees in detention for prolonged periods of time by issuing multiple continuances.[101] These immigration judges may hope that, over time, additional evidence will arise to supplement what the mentally disabled immigrant is able to communicate.[102] While judicial sympathy may stall deportation or prevent self-representation for some, providing counsel would create a more efficient process for determining eligibility for asylum instead of expending government resources during prolonged periods of detention. This further bolsters the conclusion that the individual interests at stake and the threat of erroneous deportations outweigh the government's pecuniary interest. On balance, the *Eldridge* test supports enacting a right to counsel for immigrants.[103]

IV. POLICY SUPPORT FOR ADOPTING A RIGHT TO COUNSEL FOR THE MENTALLY DISABLED

The policy arena provides further support for the constitutional argument for enacting a right to counsel for mentally disabled immigrants. Federal regulations, agency actions, and international human rights law prove that there is policy-based support for granting men-

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100 *See* Am. Bar Ass'n, *Due Process for People with Mental Disabilities in Immigration Removal Proceedings*, 33 MENTAL & PHYSICAL DISABILITY L. REP. 882, 885 (2009) (presenting arguments in favor of appointing counsel for mentally disabled immigrants).

101 *Id.*

102 *Id.*

103 One argument not included in this Part is that enacting a right to counsel for mentally disabled immigrants promotes the value of individual freedom. The Court previously recognized the need to appoint counsel outside of the criminal context when an individual's freedom is at risk. In *In re Gault*, the Court found that in juvenile delinquency hearings, when a child faces the possibility of institutional commitment, the Due Process Clause requires that a family that cannot afford representation be informed of its right to counsel. 387 U.S. 1, 36 (1967). The Court recognized commitment as a "deprivation of liberty. . . . whether it is called 'criminal' or 'civil.'" *Id.* at 50. Thus, the Court disregarded civil and criminal labels and supported a right to counsel because of the potential impact of the juvenile adjudication on individual freedom. *Id.* The seriousness of the consequences of juvenile commitment motivated the Court in its decision. *Id.*

Since the Supreme Court already recognizes that deportation has significant consequences for individual freedom and because of the Court's willingness to extend the right to counsel outside of the criminal context when individual freedom is at stake, the Due Process Clause should extend to protect the right to counsel for mentally disabled immigrants. Without the ability to adequately present a case, current law undermines immigrants' individual freedom and fails to provide them with recourse under the law.

tally disabled immigrants fair procedure instead of mandating compulsory self-representation.

A. The Immigration System Already Recognizes the Unique Needs of the Mentally Disabled

Federal regulations provide protections for mentally incompetent individuals who cannot appear at trial and prevent immigration judges from accepting admissions of deportability from unrepresented respondents who are incompetent. Under 8 U.S.C. § 1229a(b)(3), "[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."[104] Thus, Congress recognizes the unique needs of mentally disabled immigrants. This is not a new development, but part of a long legislative history of protecting the needs of mentally challenged immigrants.[105] Further, under 8 C.F.R. 1240.48(b) "[t]he immigration judge shall not accept an admission of deportability from an unrepresented respondent who is incompetent."[106] This regulation demonstrates that the immigration system is already set up to be responsive to the unique needs of mentally impaired immigrants. A logical extension of the policy that motivates these protections supports enacting safeguards against compelling mentally disabled immigrants to represent themselves in immigration court.

B. Recent Policy Developments Support Enacting Safeguards for Mentally Disabled Immigrants

Further, although the immigration system has traditionally rejected the right to counsel, there are signs that policymakers are beginning to recognize the importance of effective assistance. This change may have implications for self-representation by the mentally disabled. Attorney General Holder's recent decision to vacate *In re*

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104 8 U.S.C. § 1229a(b)(3) (2006); *see also* Franco-Gonzalez v. Holder, 767 F. Supp. 2d 1034, 1055 (C.D. Cal 2010) (relying on § 1229a(b)(3) to conclude that reasonable accommodations for mentally disabled immigrants include the right to counsel).

105 *See A Brief History of Those Provisions in the Act and Regulations Addressing Respondents with Mental Health Issues*, DEP'T OF JUSTICE, http://www.justice.gov/eoir/vll/benchbook/tools/MHI/history.htm (last visited Oct. 28, 2011) (describing the enactment of safeguards for incompetent immigrants from 1952 until the present).

106 8 C.F.R. § 1240.48(b) (2004).

Compean signals a possible sea change for immigration proceedings.[107] In *Compean*, former Attorney General Mukasey issued an order stating that there was no right to effective assistance of counsel for immigrants because there was no right to counsel for immigrants.[108] In addition to vacating the decision, Attorney General Holder decided to initiate a rulemaking process to evaluate the framework for determining whether an immigrant was prejudiced by the action or inaction of counsel.[109] This demonstrates additional support for ensuring that immigrants have effective representation. The recognition that immigrants may have a right to effective assistance contrasts with the incontrovertible fact that self-representation by mentally disabled immigrants is ineffective.

Finally, the EOIR itself acknowledges that no formal guidelines exist for recognizing mental health concerns during removal proceedings and that judges need more guidance for how to fairly treat mentally disabled detainees.[110] ICE is currently considering the absence of standards to assess detainee competence.[111] This suggests additional policy support for reforms to more effectively protect the mental health needs of detainees.

C. Human Rights Law Support for the Right to Counsel

Policymakers look to international law as a framework for understanding international standards of procedural fairness. While international law does not impose positive obligations on the United States, it does provide guidance for how to treat noncitizens with dig-

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107 *In re* Compean, 25 I&N Dec. 1 (A.G. June 3, 2009) (dismissing Attorney General Mukasey's earlier conclusion that, in removal proceedings, there is no constitutional guarantee to effective assistance of counsel).

108 *In re* Compean, 24 I&N Dec. 710, 714 (A.G. Jan. 7, 2009) (concluding that an immigrant does not have a right to challenge the ineffective assistance of counsel and that the decision to reopen a proceeding based on ineffective assistance is a matter of discretion for the Board of Immigration Appeals).

109 *In re Compean*, 25 I&N Dec. at 2 (directing "the Acting Director of the Executive Office for Immigration Review to initiate rulemaking procedures as soon as practicable to evaluate the *Lozada* framework," thereby allowing the Department of Justice to publish a final rule with respect to claims of ineffective assistance of counsel in immigration proceedings).

110 *See* TEXAS APPLESEED, *supra* note 12, at 52 (noting that, in response to a letter to Attorney General Holder in which more than seventy mental health and immigration advocacy organizations submitted recommendations for reforms to the immigration court system, the EOIR explained that it was "presently focusing on providing training to all appropriate EOIR legal staff on mental health issues in removal proceedings").

111 *See* Bernstein, *supra* note 1, at A21 (explaining that Secretary of Homeland Security Janet Napolitano is conducting a review of immigration practices and that, according to a spokesman, "ICE recognizes the need to address mental health issues among its detainees").

nity and procedural fairness.[112] International human rights law provides additional support for enacting safeguards to protect mentally disabled immigrants. In 1977, the United States signed the American Convention on Human Rights, which states: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law . . . for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."[113]

The Inter-American Commission on Human Rights has interpreted the meaning of the due process protections of the American Convention on Human Rights broadly to include the right to be represented by counsel.[114] Additionally, in 2006 the United States signed the Convention on the Rights of Persons with Disabilities.[115] Although the Convention was never ratified, it requires that nations "ensure effective access to justice for persons with disabilities."[116] This includes "appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."[117] Finally, general United Nations principles for detained noncitizens require immigrants to have access to counsel when they cannot afford representation.[118] Thus, international human rights law provides additional persuasive support for creating a right to counsel for mentally disabled immigrants.

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112 *See* United Nations High Comm'r for Refugees, *The State of the World's Refugees 1993: The Challenge of Protection*, *in* REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH 56–57 (Karen Musalo et al. eds., 4th ed. 2011) (providing background information about the protections that international human rights law offers refugees).

113 American Convention on Human Rights ("Pact of San Jose, Costa Rica") art. 8, Nov. 22, 1969, T.S. No. 36, *available at* http://www.oas.org/juridico/english/Sigs/b-32.html.

114 *See* HUMAN RIGHTS WATCH, *supra* note 6, at 41 (discussing the Commission's analysis that the American Convention on Human Rights commands a sufficiently broad construal of due process guarantees for individuals facing deportation).

115 Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 13, 2006).

116 *Id.* at art. 13.

117 *Id.* at art. 12.

118 *See* Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, U.N. Doc. A/43/173, Annex (Dec. 9, 1988) ("If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.").

V. RECOMMENDATIONS FOR PROTECTING IMMIGRANT DUE PROCESS RIGHTS

To ensure that the immigration system respects the constitutional rights of mentally disabled immigrants, this Part presents numerous recommendations to improve the experience of mentally disabled immigrants during immigration proceedings.[119]

A. Develop Reliable Screening Techniques to Recognize Mental Disabilities

Identifying mental disabilities prior to court proceedings will ensure that immigrants receive appropriate mental health care and prevent guesswork in the courtroom. Judges often lack the training necessary to identify mental disabilities. Further, an individual's courtroom behavior may not clearly reveal his need for mental health precautions. This illustrates the importance of appropriate mental health screening for all detainees. Currently, ICE does not have uniform standards, and this piecemeal approach impedes identification of mental health problems.[120] ICE should ensure that mental health professionals perform screenings consistently and frequently. Once a mental disability is identified, ICE officials should inform the immigration court. Consistent identification and coordination will allow the immigration court to assess the detainee's competency and capacity during a hearing.

Furthermore, immigration judges and the EOIR staff should be given additional training in identifying mental disabilities. If an immigrant's mental health is in question, the judge should make sure that the immigrant receives appropriate mental health care instead of continuing with the immigration proceedings.

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119 Many of these recommendations draw on suggestions promoted by other commentators. *See* HUMAN RIGHTS WATCH, *supra* note 6, at 83 (advising, among others, the Assistant Secretary of ICE to continue "exercising favorable prosecutorial discretion in cases where it appears the non-citizen has a mental disability" that hinders her ability to present or prevail in court); TEXAS APPLESEED, *supra* note 12, at 7 (suggesting the United States Department of Justice undertake procedural reforms to establish consistency in immigration court and thereby ensure the fair treatment of mentally disabled immigrants facing deportation).

120 *See Detention and Removal: Immigration Detainee Medical Care: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int'l Law of the H. Comm. on the Judiciary*, *supra* note 25, at 5–6 (explaining the variation in standards applied by ICE staff for assessing and treating detainee mental health).

B. Develop Clear Standards for Assessing Competency to Stand Trial and Capacity for Self-Representation

1. Competency Standards

There are no uniform standards by which an immigration judge can determine if a person is competent to stand trial or has the capacity to represent himself. This is true even though an immigration judge cannot accept an admission of deportability from an incompetent individual.[121] Using the criminal *Dusky* standard as a guide, the EOIR should adopt new regulations to clarify the test for competence in immigration court. Guidance will ensure that immigration judges apply standards consistently, instead of speculating about how best to evaluate competency. One option, similar to the approach adopted by many state legislatures in the criminal law context, is to give immigration judges formal checklists and other clear standards to apply.

2. Capacity Evaluation

Once an individual's capacity to represent himself is at issue, a capacity hearing should be held to determine whether he has the ability to represent himself. The criminal standard could be applied through regulations that analyze whether the individual decides to represent himself "voluntarily and intelligently."[122] Additionally, the court should assess whether, considering the individual's mental abilities, allowing self-representation would increase the chance of a wrongful conviction.[123] This assessment could be conducted through specialized mental health dockets with training for judges in recognizing psychological and developmental disabilities. Given that a large proportion of detainees suffer from mental disabilities, an efficient system for recognizing capacity issues will facilitate the EOIR's work.

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121 8 C.F.R. § 1240.48(b) (2006) ("The immigration judge shall not accept an admission of deportability from an unrepresented respondent who is incompetent.").

122 *See* Faretta v. California, 422 U.S. 806, 807 (1975) (holding that a state criminal defendant may waive his right to counsel if he does so voluntarily and intelligently).

123 *See* Indiana v. Edwards, 554 U.S. 164, 176 (2008) (describing the risk that self-representation by an individual with a mental disability will result in an improper sentence).

C. *Appoint Counsel for Immigrants with Mental Disabilities*

Congress should amend the Immigration and Nationality Act to require the appointment of counsel for mentally disabled immigrants who do not have the capacity to represent themselves. Congress should also appropriate the necessary funds to support this provision.[124]

After a capacity hearing, immigration judges should have the authority to appoint counsel. To clarify the procedure for appointing counsel, the EOIR can develop regulations to guide immigration courts.

To ensure the availability of appointed counsel, the EOIR should coordinate closely with the American Bar Association and other community organizations. The purpose of this coordination is to develop relationships with immigration lawyers who will be responsible for representing mentally disabled detainees.[125] Establishing a right to counsel for mentally disabled immigrants will advance the goals of fairness, protect American citizens, and uphold the basic tenets of constitutional due process.

VI. CONCLUSION

The December 2010 district court decision recognizing that two mentally disabled immigrants had a right to counsel was the first of its kind.[126] And while this view may still be far from the mainstream, legal and policy support for creating a right to counsel for mentally disabled detainees continues to grow. Under the Due Process Clause, immigrants like Xiu Ping Jiang and Jose Fernandez Sanchez are

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124 The Court has been unwilling to create a civil right to counsel. *See, e.g.*, Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 28, 31–32 (1981) (holding that there is no categorical right to counsel in parental termination hearings, but noting that cost considerations should not motivate the decision whether to fund representation when it is constitutionally required). However, Congress should recognize that immigrants receive due process protections; the consequences of immigration can be tantamount to a criminal conviction; the mentally vulnerable need unique protections; and the current system jeopardizes the rights of American citizens. *See* discussion *supra* Parts III–IV.

125 Ninety-three community leaders signed a letter to Attorney General Holder supporting the creation of safeguards for mentally disabled detainees, including new regulations that require the appointment of counsel for individuals with mental disabilities facing removal proceedings. Am. Bar Ass'n, *supra* note 100, at 882, 897–900.

126 *See Immigrants Win Right to Representation*, ACLU OF SAN DIEGO & IMPERIAL COUNTIES, http://www.aclusandiego.org/news_item.php?article_*id*=001096 (last visited Oct. 28, 2011) (detailing Judge Gee's decision to require "the government to provide representation for any individual in immigration proceedings").

guaranteed the right to a fair trial.[127] In the criminal system, the Court supports appointing counsel for criminal defendants who lack the capacity to represent themselves, and the Court has consistently expressed its view that criminal penalties and deportation impose similarly severe sanctions.[128] Thus, equivalent due process safeguards should apply to mentally disabled criminal defendants and mentally disabled immigrants. Congress and the immigration court system already recognize the unique needs of mentally ill immigrants,[129] and recognizing the need for court-appointed representation is just another logical step to protect this vulnerable population.

Further, efficiency arguments support appointing counsel to save the government the expense of prolonged detention. There is also a strong governmental interest in preventing the erroneous deportation of American citizens.[130] Ultimately, it is fundamentally unfair to require immigrants who are so catatonic that they cannot fairly present their case to be responsible for their own defense when what is at stake is "all that makes life worth living."[131]

The country remains polarized about immigration reform, but the right to counsel for mentally disabled immigrants would not be a guarantee of asylum. In fact, imposing the right to counsel protects rather than expands existing constitutional safeguards because it is already settled law that immigrants should receive basic due process rights. Forcing the mentally disabled to represent themselves renders these constitutional protections meaningless, and action should be taken to ensure that the mentally disabled do not face deportation without representation.

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127 *See* Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 101 (1903) (holding that, before deportation, aliens are entitled to receive a fair hearing as required by the Due Process Clause).

128 *See* Bridges v. Wixon, 326 U.S. 135, 147 (1945) (suggesting that deportation, though not criminal punishment, "may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling").

129 *See* 8 U.S.C. § 1229a(b)(3) (2006) ("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."); 8 C.F.R. § 1240.48(b) (2006) (directing an immigration judge to direct a hearing on deportability issues when an unrepresented respondent is not competent to offer an admission of deportability).

130 *See* HUMAN RIGHTS WATCH, *supra* note 6, at 4 (explaining that mentally disabled American citizens have been mistakenly deported because they could not accurately represent their citizenship status).

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