Commentary: Mental Health and Immigrant Detainees in the United States

Daniel Antonius, PhD, and Peter S. Martin, MD, MPH

In this commentary, we reflect on Korngold and colleagues' comprehensive review of the legal challenges encountered by mentally ill immigrant detainees in the United States. Specifically, we further review the competency question as it relates to detainees, as well as recent developments in the legal system. We expand the discussion to general treatment and care of mentally ill detainees in United States Immigration and Customs Enforcement (ICE) facilities. In addition, we provide an allegory to the juvenile justice system and discuss cultural considerations. We conclude by highlighting the significant implications changes in the immigration justice system may have for forensic examiners and competency evaluations.

J Am Acad Psychiatry Law 43:282–86, 2015

We commend Korngold and colleagues[1] for critically examining competency evaluations requested by courts for immigrant detainees. Much as the case of *Edwards v. Indiana*[2] illustrates a gray zone for competency evaluations, Korngold and colleagues highlight another area in which the basic rights of an individual who is not a United States citizen falls into a gray zone. They explore the murky waters that arise when evaluating immigrants involved in legal proceedings. Increasing numbers of immigrant detainees and skyrocketing removal proceedings (i.e., deportation proceedings), including incompetent individuals with serious mental illness, have elucidated the need for legal representation to ensure fair hearings. Most recently, a landmark ruling[3] from 2013 specified that individuals deemed incompetent in Arizona, California, and Washington are required to have a qualified representative in legal matters related to removal and detention proceedings. The Department of Justice's Executive Office for Immigration Review has also begun the enhancement of protections for detainees with mental health disorders.[4] As discussed by Korngold and colleagues, this emergent area of the law carries potentially significant implications for forensic psychiatrists, who would not only see a vast increase in requests for competency evaluations among immigrant detainees, but also would have to adjust to the two-fold standard for these evaluations, taking into account the criteria for both the *Dusky* standard and self-representation. To further expand on Korngold *et al.*, we will discuss other relevant aspects of civil and criminal law.

Additional Background Information

To gain a better understanding of the problems facing noncitizens, it is important to examine the scenarios that may result in removal proceedings. Under the Immigration and Nationality Act, Section 237, there are six classes of actions that could lead to individuals being identified as "deportable aliens": inadmissible at time of entry or of adjustment of status or violates status; criminal offender; failure to register or falsified documents; security risk or related grounds; public charge (i.e. becoming primarily dependent on the government for subsistence); and unlawful voter. There is a waiver from these classes for victims of domestic violence.[5] Of these classes, the most relevant to the discussion of detainees and competency is those who commit criminal offenses, which include: general crimes (i.e. crimes of moral

Dr. Antonius is Director, Division of Forensic Psychiatry and Assistant Professor of Psychiatry, and Dr. Martin is Director, Division of Community Psychiatry and Assistant Professor of Psychiatry, State University of New York, Buffalo, NY. Corresponding Author: Daniel Antonius, PhD, University of Buffalo, Department of Psychiatry, Erie County Medical Center, 462 Grider Street, Buffalo, NY 14125. E-mail: danielan@buffalo.edu.

Disclosures of financial or other potential conflicts of interest: None.

turpitude, multiple criminal convictions, aggravated felony, high speed flight from an immigration checkpoint, and failure to register as a sex offender); possession of controlled substances; certain firearm offenses; miscellaneous crimes (including being convicted of conspiracy); crimes of domestic violence, stalking, or violation of a protection order; crimes against children; and human trafficking. Other offenses within these six classes, such as terrorism activity (included in the class: security and related grounds), are also relevant, and any of these actions can initiate removal proceedings. As explained by Korngold and colleagues, when noncitizens are going through the legal proceedings for removal, they are typically held at United States Immigration and Customs Enforcement (ICE) detention centers. The authors note that these detention centers currently offer only limited mental health treatment, though screening procedures for psychiatric symptoms to determine who may require competency evaluations are under development. Advocates and scholars have raised serious concerns about the quality of care in these facilities.[6] These concerns include inadequate mental health screenings, poor quality of care for those with mental disabilities, with unnecessary exacerbation of mental illness symptoms while in custody, and poor release planning for those discharged from detention or removed from the United States.[7] Part of the problem is that individuals in ICE detention centers are being held in a setting essentially based on a criminal standard (i.e., equivalent to jail or prison); however, the current delivery of mental health care services is generally below what is considered to be the attainable standard for such settings, which is illuminated by a large disparity in staff-to-mentally ill detainee ratio in ICE detention centers compared with federal prisons.[8]

To complicate things further, noncitizens with mental disabilities face serious challenges in their court proceedings, including a lack of a formal process to identify those with mental health problems, no federal requirement to appoint counsel to these individuals, and an overloaded court system that is ill equipped to handle the increasing number of mentally ill immigrant detainees.[7] For example, in 2009, only 232 immigration judges were employed to adjudicate 391,829 immigration cases, of which approximately 15 percent involved persons with a bxmental illness.[9] Adding to the challenges faced by immigrant detainees is the convoluted and ambiguous nature of the related legal statutes. Ochoa and colleagues[10] note some of the inherent conflicts that are found in the Immigration and Nationality Act. They highlight specifically that Section 240(b)[3] protects the rights of those found incompetent during deportation proceedings by instructing the Attorney General to "prescribe safeguards to protect [their] rights and privileges." Yet even this language is unclear, as it is uncertain what, if any, safeguards are actually in place. When looking at the international community, the United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention and Imprisonment states: "legal assistance should be assigned without payment if the [detained] person does not have sufficient means to pay for it."[11] The European Court of Human Rights describes a standard for such proceedings in which legal assistance is considered indispensable.[12] With respect to improving legal proceedings related to immigration law, Bowen[13] discusses reforms initiated to provide free attorneys or guardians *ad litem* to mentally ill detainees facing removal proceedings and mental health training to immigration judges to ensure full and fair hearings. President Obama has also promised significant changes to the U.S. immigration system,[14] subsequently initiated by the Department of Justice's Executive Office for Immigration Review[4]; however, it remains to be seen how these changes will actually impact detainees with mental illness.

Competency to Stand Trial

As summarized by Korngold and colleagues, there are several landmark cases that address general standards for competency to stand trial, some of which extend to self-representation. In brief, *Dusky v. United States*[15] set the federal standard for competency to stand trial evaluations in the United States. *Dusky* determined that an individual was competent to stand trial if he had the "present ability to consult with his lawyer with a reasonable degree of rational understanding" and had a "rational as well as factual understanding of the proceedings against him" (*Dusky*, p 402).

Waiving the right to counsel (i.e., to proceed *pro se*) was first examined in *Faretta v. California*,[16] which held that the right to proceed without counsel is guaranteed by the Sixth and Fourteenth Amendments when the defendant does so "competently and

intelligently." *Godinez v. Moran*[17] explored whether there ought to be a higher standard of competency to waive the right to counsel (or plead guilty) compared with the *Dusky* standard. The Supreme Court concluded that the competence required of a defendant seeking to waive his right to counsel is the competence to waive the right, rather than the competence to represent himself. The Court further clarified the definition of competence to proceed *pro se* in *Edwards v. Indiana*,[2] ruling that a person can be incompetent to stand trial if he represents himself, yet is competent to stand trial if he has the assistance of counsel. In this scenario, the defendant can be ordered to have counsel despite the defendant's objections.

There are additional considerations for those cases where counsel is requested or necessary. The Sixth Amendment guarantees the right to counsel. This right is exemplified in *Gideon v. Wainwright*,[18] in which the Court noted that the right to an attorney is considered a "symbolic foundation of indigent defense." If counsel cannot be afforded, defendants must proceed *pro se*, even if they are not able to adequately represent themselves. This scenario applies to many noncitizens, as they often cannot afford counsel. Related to this, the United States Supreme Court has determined (*Padilla v. Kentucky*[19]) that defense counsel can be construed as ineffective if there is a failure to inform a criminal defendant of the risk of deportation upon pleading guilty. These cases highlight not only the need for representative counsel but also the responsibilities of such counsel. Adding to the complexity, deportation is a civil legal proceeding and therefore Sixth Amendment rights are typically not considered.[1,20]

Changes in the legal system have been initiated. For example, Korngold and colleagues note the *Franco* litigation,[3] which resulted in the requirement that detainees found incompetent in Arizona, California, and Washington must have a qualified representative. However, a qualified representative does not necessarily equal an attorney. Questions remain whether a qualified representative actually can perform the duty of an attorney who, by level of training, should be more knowledgeable in legal matters. This situation would be the equivalent of allowing medical students, without appropriate supervision of an attending physician, to treat patients independently. There may also be questions about who examines and makes a final determination about the qualifications and motivations of a qualified representative. This question becomes even more convoluted with the introduction of mental health problems and the possibility of self-representation.

Criminal Versus Civil Law

An inherent difficulty is that competency-to-stand-trial standards are meant for criminal proceedings and not immigration proceedings. However, immigration and removal proceedings are technically (and legally) considered civil proceedings, and criminal courts and their judges have no power to influence immigration consequences.[20] As pointed out by Ochoa and colleagues,[10] "'trial competence' does not yet exist conceptually under American immigration law." In fact, one can easily argue that many of the same protections found in criminal proceedings should apply to deportation proceedings, given the similarities of the proceedings and the significant, potentially life-altering ramifications of the outcomes. The serious nature of deportation was acknowledged by the Court in *Bridges v. Wixon*, in stating that while:

> . . . deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.[21]

Human Rights Watch has pointed out that, although not all noncitizens with mental illness are entitled to stay in the United States, they should be entitled to a fair hearing and a chance to defend their rights.[22]

There are several other examples from case law in which civil and criminal matters interface and have had significant impact on the practice of psychiatry. *Lessard v. Schmidt*[23] applied due process safeguards found in criminalized procedures to civil commitment standards, whereas *In re Richardson*[24] required due process procedures for direct rehospitalization. In *Addington v. Texas*,[25] the Supreme Court ruled to raise the standard for civil commitment to that of a clear-and-convincing standard of proof ("neither wholly at liberty nor free of stigma"). Despite these rulings, the implication for detainees in ICE detention centers continues to be blurred. For example, an unknown number of seriously mentally ill detainees are admitted to ICE custody, even though they have

been ordered by a criminal court to enter inpatient psychiatric care, and only a few of these individuals are eventually admitted to a psychiatric hospital.[26] It is not known how many of them would meet criteria for being deemed incompetent, though one may speculate that inpatient treatment for many of them would also help improve or restore competency and thus assist in legal proceedings. With respect to timing for competency restoration, in *Jackson v. Indiana*,[27] the Court placed a limit on the length of time a person can be retained in an inpatient hospital setting for this purpose. For those going through removal proceedings and who may be admitted to an inpatient psychiatric setting, there is no established time frame for restoration, as there is no maximum length of time for these proceedings to extend, creating the potential for an indefinite hospitalization in a fashion similar to that in *Jackson*.

Comparison to Family Court Proceedings

The notion of a separate court process for a different class of individuals is not novel in the United States. The creation of the juvenile justice system over a century ago created a separate court process for youths in which matters that were previously dealt with in the adult criminal court system would be handled according to the standards of civil proceedings. Over the past few decades, the pendulum has swung back to introducing more protections and oversight in the juvenile system, similar to that in the criminal system. *Kent v. United States*[28] introduced the idea that youths are entitled to a hearing with due process protections. *In re Gault*[29] specified due process protections to include many that are found in the criminal court system, including the right to counsel. One could argue that immigration proceedings are currently in the same state as that found in *Kent*, as immigrants are entitled to a hearing before deportation (*Yamataya v. Fisher*[30]). Immigrants have a legal precedent for a due process hearing (as in *Kent*), but do not have specified due process protection (as in *Gault).* In immigration proceedings, a change in legislation or a court ruling similar to *In re Gault* may be needed to bring additional protection to immigrants in these proceedings and ensure the integrity of the United States immigration justice system.[9]

The burden of proof for immigration proceedings is that typically seen in civil law: that is, a preponderance of the evidence. Looking again at the juvenile justice system for guidance, the United States Supreme Court determined in *In re Winship*[31] to increase the burden of proof to beyond a reasonable doubt, equal to that of criminal proceedings. Given the seriousness of immigration proceedings, it would not be unreasonable to consider raising the standard of proof necessary for deportation.

Cultural Considerations

There is a dearth of literature on the impact of culture on competency evaluations. As noted in the AAPL Practice Guideline for the Psychiatric Evaluation of Competency to Stand Trial, "competence to stand trial is also a cultural notion . . . or at least a notion that reflects a set of cultural values."[32] These guidelines may have direct implications for how immigrants approach the legal process in the United States. Immigrants may come from cultures that endorse uniform conformity where it is expected to defer to those in authority positions, or come from low-trust cultures and express suspiciousness toward anyone appointed in their legal case, including a defense attorney. They would be impaired in their ability to participate effectively in the adversarial nature of the legal process, including deportation proceedings, though not necessarily because they lack the capacity to do so. These concerns are congruent with the suggestion by Hicks[33] that historical experience and cultural perceptions may lead to differences in decision-making, rather than a lack of insight. Language barriers may also arise when dealing with detainees and court appointed interpreters, and the lack of mental health screens in languages other than English is well documented.[7] The reader is encouraged to review the "Knowledge, Skills and Attributes" portion of the Cultural Competency section in the AAPL Practice Guidelines for specific areas to focus on when working with individuals of various cultural backgrounds.

Conclusions

As comprehensively discussed by Korngold and colleagues,[1] detainees with mental illness in ICE detention centers are faced with an uphill legal battle that raises both legal and ethics-related questions. This concern is particularly true of those whose competency is in question, as they may not even have the assistance of an appointed attorney. However, a recent court ruling[3] and a commitment from the De-

partment of Justice's Executive Office for Immigration Review to enhance the protections of detainees with mental health disorders,[4] including providing qualified representatives, are likely to affect legal proceedings as they relate to immigration and deportation. For forensic evaluators, the consequence may be a significant increase in requests for competency evaluations; thus, understanding the underlying legal aspects of both competency and self-representation as it relates to immigration removal proceedings, as well as other legal points discussed here, is crucial.

Acknowledgments

The authors thank Tatiana Matlasz for her important input and editing of this commentary.

References

1. Korngold C, Ochoa K, Inlender T, *et al*: Mental health and immigrant detainees in the United States: competency and self-representation. J Am Acad Psychiatry Law 43:000–000, 2015
2. Edwards v. Indiana, 554 U.S. 164 (2008)
3. Franco-Gonzales v. Holder, No. CV 10–2211 DMG (DTB) (C.D. Cal. Aug. 19, 2011)
4. The Executive Office for Immigration Review: Phase I of plan to provide enhanced procedural protections to unrepresented detained respondents with mental disorders. Washington, DC: United States Department of Justice, August 2015. Available at https://immigrationreports.files.wordpress.com/2014/01/eoir-phase-i-guidance.pdf. Accessed August 31, 2015
5. U.S. Citizenship and Immigration Services: Immigration and Nationality Act, 8 § 237—General Classes of Deportable Aliens. Available at http://www.uscis.gov/iframe/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-5684.html/. Accessed on May 31, 2015
6. Gottschalk M: Caught: The Prison State and the Lockdown of American Politics. Princeton, NJ: Princeton University Press, 2014
7. Packer T: Non-citizens with mental disabilities: the need for better care in detention and in court. Special report. Washington, DC: Immigration Policy Center, American Immigration Council, November 2010
8. Florida Immigrant Advocacy Center: Dying for decent care: bad medicine in immigration custody. FIAC, Miami, FL: February 2009. Available at http://archive.tallahassee.com/assets/pdf/CD131100321.pdf
9. Human Rights Watch: Deportation by default: mental disability, unfair hearings, and indefinite detention in the U.S. immigration system. New York: Human Rights Watch, July 2010. Available at http://www.hrw.org/reports/2010/07/26/deportation-default
10. Ochoa KC, Pleasants GL, Penn, JV, *et al*: Disparities in justice and care: persons with severe mental illness in the U.S. immigration detention system. J Am Acad Psychiatry Law 38:392–9, 2010
11. U.N. body of principles for the protection of all persons under any form of detention and imprisonment, Principle 17(2), G.A. Res. 43/173, Annex, U.N. Doc. A./Res/42/173 (Dec 9, 1988)
12. No author listed: Due process for people with mental disabilities in the immigration removal proceedings. Ment Phys Disabil Law Rep 33:882–900, 2009
13. Bowen M: Avoiding an "unavoidably imperfect situation": searching for strategies to divert mentally ill people out of immigration removal proceedings. Wash U L Rev 90:473–503, 2012
14. Office of the Press Secretary (The White House). Immigration Accountability Executive Action. November 2014
15. Dusky v. United States, 362 U.S. 402 (1960)
16. Faretta v. California, 422 U.S. 806 (1975)
17. Godinez v. Moran, 509 U.S. 389 (1993)
18. Gideon v. Wainwright, 372 U.S. 335 (1963)
19. Padilla v. Kentucky, 130 S. Ct. 1473 (2010)
20. Davoli JI: You have the right to an attorney; if you cannot afford one, then the government will underpay an overworked attorney who must also be an expert in psychiatry and immigration law. Mich St L Rev 1149:1149–87, 2012
21. Bridges v. Wixon, 326 U.S. 135 (1945)
22. Human Rights Watch: the failure to provide fair removal hearings to persons with mental disabilities. Amicus Curiae provided in response to request from the US Department of Justice. Available at http://www.hrw.org/news/2010/09/08/us-failure-provide-fair-removal-hearings-persons-mental-disabilities/. New York: Human Rights Watch, September 2010
23. Lessard v. Schmidt, 349 F. Supp. 1078 (E.F. Wis. 1972)
24. In re Richardson, 481 A.2d 473 (D.C. 1984)
25. Addington v. Texas, 441 U.S. 418 (1979)
26. Venters H, Keller AS: Diversion of patients with mental illness from court-ordered care to immigration detention. Psychiatr Serv 63:377–9, 2012
27. Jackson v. Indiana, 406 U.S. 715 (1972)
28. Kent v. U.S., 383 U.S. 541 (1966)
29. In re Gault, 387 U.S. 1 (1967)
30. Yamataya v. Fisher, 189 U.S. 86 (1903)
31. In re Winship, 397 U.S. 358 (1970)
32. Mossman D, Noffsinger SG, Ash P, *et al*: AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial. J Am Acad Psychiatry Law 35(Suppl 4):S3–S72, 2007
33. Hicks JW: Ethnicity, race, and forensic psychiatry: are we color-blind? J Am Acad Psychiatry Law 32:21–33, 2004