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September 2012

# The Kafkaesque Experience of Immigrants with Mental Disabilities: Navigating the Inexplicable Shoals of Immigration Law

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## Recommended Citation

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### PARAGRAPH OF ORIGINALITY

Law and literature comes in two forms: law *as* literature and law *in* literature, the latter referring to the exploration of legal issues in great literary texts.<sup>1</sup> Law in literature scholars place a high value on the "independent" view of the literary writers as he or she sees the law. They believe that these authors have something to teach legal scholars and lawyers about the human condition. "The Trial" by Franz Kafka, concerns human beings caught up in social and political dilemmas. Kafka offers readers an insight to the nature of totalitarianism and forces us to ask hard questions about our system of justice: is it fair? Is it humane? Is it inevitable? This Note will focus primarily on the parallels between Kafka's famous book, "*The Trial*", and the experiences of immigrants with mental disabilities in American immigration courts. The six plaintiffs in an ongoing federal district court lawsuit against the United States, *Gonzalez v. Holder*, are individuals who suffer from mental disabilities that render them incompetent to defend themselves, and yet are nevertheless forced to do so without counsel in immigration proceedings. Just like Joseph K. who experiences prosecution in a bizarre world and attempts to prove his innocence, the Gonzalez Six, too, face prosecution in a bizarre world that has no place in American jurisprudence.

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<sup>1</sup> The former, law *as* literature, refers to understanding legal texts by reference to methods of literary interpretation, analysis, and critique. Law as literature is a term used to illustrate how the legal text is a form of literary art that can be analyzed in a way that any normal book can be.

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***THE KAFKAESQUE EXPERIENCE OF IMMIGRANTS WITH MENTAL DISABILITIES:  
NAVIGATING THE INEXPLICABLE SHOALS OF IMMIGRATION LAW***

**BY JENNIFER L. ARONSON<sup>2</sup>**

**INTRODUCTION**

The American legal system is a puzzling structure of policies and procedures, standards, loopholes and exceptions. The common petitioner has difficulty navigating this structure absent adequate counsel. Imagine that common petitioner with a mental disability or illness. The difficulty of navigation is compounded, and in immigration courts nearly impossible. These courts operate in a parallel universe with their own rules and procedures, and to immigrants with mental disabilities, these courts are a paradigm of bewilderment, alienation and persecution. These themes are prevalent in the work of Franz Kafka, one of the most influential literary figures of the 20<sup>th</sup> century. The term, “Kafkaesque,” has come to mean bewildering and senseless<sup>3</sup>, and, Kafka's work, perhaps a reflection of his own struggles, is also a reflection of how people struggle in an unjust world.<sup>4</sup>

The connection between Kafka’s fiction and the real world of American immigrant courts is neglected within legal scholarship, and as former Justice Richard

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<sup>2</sup> Many thanks to Professor Michael A. Schwartz, the Director of the Disability Rights Clinic at Syracuse University College of Law, whose guidance and assistance were invaluable in the creation of this Note and whose own work in the disability law field has been fundamental to the understanding of the issues discussed herein.

<sup>3</sup> See Merriam-Webster Dictionary, *Kafkaesque* (2011) available at <http://www.merriam-webster.com/dictionary/kafkaesque> (last visited Mar. 9, 2011).

<sup>4</sup> See, e.g., BBC News UK, *M15 Russian Claims ‘truly Kafkaesque’* (Dec. 24, 2010) available at <http://www.bbc.co.uk/news/uk-12075184> (last visited Mar. 5, 2011)(describing the experience of an alleged Russian spy who was arrested and detained and is now under stringent bail conditions with no inkling as to the Home Security’s case against her. She is unlikely to ever know the case against her because her case is to be heard in closed courts with special advocates appointed by the Attorney General dealing with the evidence. She describes her present situation as “truly Kafkaesque.”).

Posner has pointed out, most lawyers do not consider scholarship about law in the form of fiction to have any relevance to the understanding of the practice of law.<sup>5</sup> This is a fundamental mistake in the legal profession, and this Note seeks to rectify that mistake by using Kafka's "*The Trial*" to illuminate what is essentially an absurd and patently unfair system of law.

## I. GONZALEZ V. HOLDER

*"Someone must have been telling lies about Joseph K., for without have done anything wrong he was arrested one fine morning."*<sup>6</sup>

### A. THE GONZALEZ SIX

Jose Antonio Franco-Gonzalez, 29 years old, is a citizen of Mexico.<sup>7</sup> His parents are lawful permanent residents of the United States.<sup>8</sup> Mr. Franco-Gonzalez ("Franco-Gonzalez") and some of his siblings have pending family petitions that will ultimately permit them to adjust to Lawful Permanent Resident Status.<sup>9</sup> However, Franco-Gonzalez has been diagnosed with moderate mental retardation.<sup>10</sup> He did not learn to speak at all until the age of six or seven years old, he does not know his own birthday or age, he has trouble recognizing numbers and counting, and he cannot tell time.<sup>11</sup> Although twenty-nine years old, Franco-Gonzalez functions at the cognitive level of a two-year old.<sup>12</sup> Despite his incapacity, Franco-Gonzalez pled guilty in criminal court to possession of a

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<sup>5</sup> See RICHARD POSNER, *LAW & LITERATURE*, 21 (Harvard University Press, 3<sup>rd</sup> ed. 2009)(1988).

<sup>6</sup> FRANZ KAFKA, *THE TRIAL* 1 (Max Brod ed., Schocken Books 1974) (1925) [hereinafter "*The Trial*"].

<sup>7</sup> *Gonzalez v. Holder* Compl. ¶ 30 (Aug. 10, 2010) available at <http://www.aclu.org/immigrants-rights/franco-gonzales-et-al-v-holder-et-al-first-amended-class-action-complaint> (last visited Feb. 26, 2011) [hereinafter Compl.].

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at ¶ 31.

<sup>11</sup> *Id.*

<sup>12</sup> Compl. at ¶ 31.

deadly weapon (not a firearm).<sup>13</sup> Removal proceedings were commenced shortly thereafter. Franco-Gonzalez remained unrepresented by counsel during those proceedings. An immigration judge ordered a psychiatrist to evaluate Franco-Gonzalez and on June 6, 2005, the Judge ordered the closure of Franco-Gonzalez’s removal proceedings due to his incompetence.<sup>14</sup> Despite the fact that there were no removal proceedings against him, Franco-Gonzalez remained detained for four and a half years—no hearing was ever conducted to determine whether he presented a danger or a flight risk sufficient to justify his lengthy detention.<sup>15</sup> Five other plaintiffs in *Gonzalez v. Holder* (“The Gonzalez Six”) suffer from mental disabilities that render them incompetent to defend themselves, and yet, like Franco-Gonzalez, they are forced to do so in immigration proceedings.<sup>16</sup>

The United Nations Convention on the Rights of Persons with Disabilities (“CRPD”) recognizes people with disabilities as “those who have long-term physical, mental, intellectual or sensory impairments whose interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”<sup>17</sup> The American Civil Liberties Union (“ACLU”) found that a large number of detained immigrants have serious mental disabilities and are not competent to represent themselves in their immigration proceedings.<sup>18</sup> The six plaintiffs in *Gonzalez v. Holder*, along with many others immigrants with mental disabilities suffer long delays in their

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<sup>13</sup> *Id.* at ¶ 32.

<sup>14</sup> *Id.* at ¶ 33.

<sup>15</sup> *Id.* at ¶34.

<sup>16</sup> *Compl.*, *infra* note 19.

<sup>17</sup> Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, G.A. Res. 61/106, U.N. Doc. A/61/49 (2006), entered into force May 3, 2008, art. 1 [hereinafter CRPD].

<sup>18</sup> Sarah Mehta, *Deportation by Default*, HUMAN RIGHTS WATCH, 2 (July 2010) available at [http://www.aclu.org/files/assets/usdeportation0710\\_0.pdf](http://www.aclu.org/files/assets/usdeportation0710_0.pdf) (last visited Mar. 4, 2011)[hereinafter “HRW”].

removal cases due to their mental health and, as a result, they languish in detention for months, and often for years, without a hearing where the government bears the burden of proof to show that their detention remains justified.<sup>19</sup> This is indeed Kafkaesque.

Neither the Department of Justice nor the Department of Homeland Security (“DHS”) have any concrete procedures to identify the exact number of persons in removal proceedings who have mental disabilities that would render them incompetent to defend themselves. The resulting system is “paradigmatically arbitrary.”<sup>20</sup> As the Department of Immigration Health Services (“DIHS”) found, in 2008, two to five percent of all immigration detainees—or between 7,571 and 18,929 detainees—had a “serious mental illness.”<sup>21</sup> Due to the high costs of legal representation and the difficulty in finding attorneys for detained persons without mental disabilities, government data shows that approximately 60%<sup>22</sup> of respondents in immigration proceedings have no legal representation, which is comparably low when looking at the number of respondents with mental disabilities without representation—close to 97%.<sup>23</sup> Without legal representation, many immigrants with mental disabilities remain in detention for years, are precluded from obtaining fair hearings, and are erroneously deported.<sup>24</sup> Immigrants with mental

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<sup>19</sup> Compl., *supra* note 7 at ¶22.

<sup>20</sup> *Id.* at ¶5.

<sup>21</sup> *Id.* at ¶23.

<sup>22</sup> See US Department of Justice, Executive Office for Immigration Review, *FY 2009 Statistical Year Book* (Washington, DC March 2010) available at <http://www.justice.gov/eoir/statspub/fy09syb.pdf> (last visited Nov. 20, 2010).

<sup>23</sup> Texas Appleseed, Justice for Immigration’s Hidden Population: Protecting the Rights of Persons with Mental Disabilities in the Immigration Court and Detention System pg. 13 (Mar. 2010) available at [http://www.texasappleseed.net/index.php?option=com\\_docman&task=doc\\_download&gid=313](http://www.texasappleseed.net/index.php?option=com_docman&task=doc_download&gid=313) (last visited Feb. 26, 2011).

<sup>24</sup> See for example ACLU, *ACLU Files Lawsuits After Government Wrongfully Deports U.S. Citizen with Mental Disabilities* (Oct. 13, 2010) available at <http://www.aclu.org/immigrants-rights/aclu-files-lawsuits-after-government-wrongfully-deports-us-citizen-mental-disabili> (last visited Feb. 26, 2010) (stating that Mark Lyttle, a U.S. citizen with mental disabilities, of Puerto Rican descent was wrongfully deported to

disabilities have difficulty presenting evidence or arguments in support of their claims to remain in the United States on their own behalf and are at the mercy of the DHS which lacks clear policies and procedures concerning when to release detainees with mental disabilities.<sup>25</sup> As of this writing, the Gonzalez Six remain in indefinite incarceration.<sup>26</sup>

There are some instances when an immigration judge recognizes that a respondent with a mental disability needs assistance, but the typical procedure is to delay the legal proceedings, thereby subjecting the detainee to prolonged incarceration precisely because that person suffers from a mental disability.<sup>27</sup> Evaluators of the person's mental capacity have no standards or procedures to use in their assessments, which only adds to the arbitrary and capricious nature of the current regime.<sup>28</sup> The government's inability to employ basic procedural protections for detained immigrants with mental disabilities results in unnecessary prolonged detention is violative of the most fundamental right to due process and human dignity. Again, it is Kafkaesque.

#### *B. NAVIGATING THE SHOALS OF IMMIGRATION AND CUSTOMS ENFORCEMENT PROCEEDINGS*

Approximately 392,000 individuals go through immigration proceedings in the United States each year.<sup>29</sup> The Immigration and Customs Enforcement ("ICE") brings non-citizens to immigration court for removal proceedings when they fall under a category necessary for deportation.<sup>30</sup> "Some of these non-citizens are asylum seekers fleeing persecution in their home countries; others come to ICE's attention through

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Mexico after North Carolina officials referred him to ICE as an undocumented immigrant. Lyttle had never been to Mexico, shared no Mexican heritage, spoke no Spanish and did not claim to be from Mexico.).

<sup>25</sup> Compl., *supra* note 7, at ¶28.

<sup>26</sup> *Id.* at ¶5.

<sup>27</sup> See HRW, *supra* note 18, at 47-49, 72-74 noting that Immigration Judges are not authorized to release detainees, notwithstanding their serious mental disabilities and the prolonged length of detention).

<sup>28</sup> Compl., *supra* note 7, at ¶5.

<sup>29</sup> *Statistical Year book 2009*, *supra* note 21.

<sup>30</sup> HRW, *supra* note 18, at 18.

referrals from local law enforcement agencies, during workplace raids or border crossings; still others, including legal permanent residents, are transferred to ICE after serving sentences for a variety of crimes.”<sup>31</sup>

Legal permanent residents with a criminal conviction may find themselves in deportation proceedings after the completion of the criminal proceedings against them.<sup>32</sup> In some instances, ICE detains legal permanent residents in deportation proceedings immediately after their criminal conviction, and in other cases, ICE may not begin initial removal proceedings until several years after a person was convicted and sentenced.<sup>33</sup>

Non-citizens may find themselves in immigration proceedings if they are asylum seekers arriving at the border in an attempt to enter without legal authorization.<sup>34</sup> Immigration judges with the Executive Office for Immigration Review (“EOIR”) hear asylum applications only in the context of “defensive” asylum proceedings, in which, applicants request asylum as a defense against removal from the United States.

“The [judge] hears the applicant’s claim and also hears any arguments about the applicant’s eligibility raised by the U.S. Government, which is represented by an [ICE] attorney. The [Immigration Judge] then makes an eligibility determination. If the applicant is found eligible, the judge orders asylum to be granted. If the applicant is found ineligible for asylum, the [Judge] determines whether the applicant is eligible for any other forms of relief from removal and, if not, will order the individual removed from the United States.”<sup>35</sup>

According to the Ninth Circuit, “Immigration laws have been termed second only

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> U.S. Citizens and Immigration System, *Obtaining Asylum in the United States: Two Paths* (Oct. 14, 2008) available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=e3f26138f898d010VgnVCM10000048f3d6a1RCRD> (last visited Nov. 2, 2010).

to the Internal Revenue Code in complexity.”<sup>36</sup> For a person without any legal background suffering from “long-term physical, mental, intellectual or sensory impairments,”<sup>37</sup> undergoing immigration proceedings alone is an exercise in confusion, bewilderment and danger. This is quite contrary to the version of the American philosopher, John Rawls, who envisioned a society where all citizens held equal basic rights.<sup>38</sup> In *Justice as Fairness*, Rawls sets forth two principles of justice that are to be implemented with the “greatest benefit to the least advantaged”<sup>39</sup>: (1) each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and (2) social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society”<sup>40</sup> Rawls defines the least-advantaged as those with the fewest “social ‘primary goods’ which ‘are generally necessary to enable citizens adequately to develop and fully exercise their two moral powers...”<sup>41</sup> Applying Rawls’ analysis to ICE proceedings, it is clear that most non-citizens with mental disabilities facing deportation proceedings have few or no social primary goods. Many are spent in and out of psychiatric hospitals and institutions; their disabilities affect their capacity to grasp legal proceedings or concepts. Many hold menial jobs in their adult lives, and some have committed crimes after failing to take their medication because of their impaired capacity to know right from wrong. Additionally,

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<sup>36</sup> *Baltazar-Alcazar v. INS*, 386 F.3d 940, 948 (9<sup>th</sup> Cir. 2004).

<sup>37</sup> CRPD, *supra* note 17.

<sup>38</sup> Stanford Encyclopedia of Philosophy, *John Rawls*, (Mar. 25, 2008) available at <http://plato.stanford.edu/entries/rawls/> (last visited Feb. 8, 2011).

<sup>39</sup> MARK STEIN, *DISTRIBUTIVE JUSTICE AND DISABILITY* 104 (Yale University Press 2006).

<sup>40</sup> JOHN RAWLS, *JUSTICE AS FAIRNESS*, 42 (Erin Kelly, Harvard University Press 2001).

<sup>41</sup> STEIN, *supra* note 38, at 105.

some were alienated from family members who feared their mental disability.<sup>42</sup>

Reflecting the lack of procedural due process, ICE does not conduct removal proceedings in a way such as to provide the “greatest benefit to the least advantaged.”<sup>43</sup> It bears repeating to note that the ICE is Kafkaesque.

### C. *THE IMMIGRATION AND NATIONALITY ACT AND MENTAL DISABILITIES*

The Immigration and Nationality Act (“INA”) requires that all persons in immigration court have a “reasonable opportunity” to present, examine and object to evidence.<sup>44</sup> Additionally, all persons have the right to be advised of the charges against them,<sup>45</sup> and to have the privilege of being represented, at no expense to the Government, by counsel of the person’s choosing.<sup>46</sup> The INA also requires the Attorney General to provide procedural “safeguards” for people in removal proceedings who are incompetent due to serious mental disability.<sup>47</sup> There are such safeguards, including:

- 8 C.F.R. § 1240.10(c), which prohibits immigration judges from accepting admissions by unrepresented, incompetent persons, but allows admissions by friends or relatives of the person and allows the Department of Homeland Security (“DHS”) to prove removability without involvement of the incompetent person;
- 8 C.F.R. § 103.5(a)(c)(2), which requires the DHS to serve charging documents upon a person with mental illness by service upon the

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<sup>42</sup> HRW, *supra* note 18, at 14-15. For example, Nguyen was transferred into the Department of Homeland Security (DHS) custody after she violated an order of protection. The order of protection was to keep her away from her father and older sister, which one can infer from the facts, that her violation of the no-contact orders was directly related to her auditory hallucinations and need for help from her family in a foreign place. *See* Compl., *supra* note 7, at ¶ 57-63.

<sup>43</sup> RAWLS, *supra* note 39. Note: Many commentators have thought that Rawls erred in identifying the least advantaged, and that the disabled, rather than the poor, should indeed be considered the least advantaged under a Rawlsian system. I do not accept the position that the disabled should be considered the least advantaged. In this case, immigrants with mental disabilities are the least advantaged of the detained non-citizens for reasons set forth in this Note.

<sup>44</sup> 8 U.S.C. § 1229(a)(b)(4)(B) (2010); 8 C.F.R. § 1240.10(a)(4) (2005).

<sup>45</sup> 8 U.S.C. § 1229(a) (2010); 8 C.F.R. § 239.1 (2003).

<sup>46</sup> 8 U.S.C. § 1229(a)(b)(4)(A) (2010); 8 C.F.R. § 1240.10(a)(1) (2005).

<sup>47</sup> *See* 8 U.S.C. § 1229(a)(b)(3) (2010).

custodian of the facility where the person is housed and, if possible, “the near relative, guardian, committee, or friend;” and;

- 8 C.F.R. §1240.4, which allows a “mentally incompetent person” to be represented by any of those individuals, including the custodian of the facility where the person is housed.

Surprisingly, none of the regulations—“nor any other rules, regulations, policies or procedures adopted by the Attorney General, DHS, ICE or [Executive Office for Immigration Review]—defines mental incompetence, sets forth procedures for evaluating whether or not any given person lacks competence to represent himself, requires a review of readily available information to determine if the detainee has a serious mental disability or states what, if any, additional safeguards should be provided to a non-citizen to be found incompetent.”<sup>48</sup> The regulations do not specify appointment of counsel in cases where individuals are not competent to represent themselves, and make no provision for altering the custody status of individuals whose cases have been delayed or stopped entirely due to their mental disability.<sup>49</sup> Instead, the regulations authorize the appointment of an ICE “custodian”—warden of the detention facility, if the person is detained—to appear on behalf of the individual as their legal representative.<sup>50</sup> But, this regulation violates the right to a fair and impartial proceeding since the warden is employed by ICE, or acting under contractual authority to detain immigrants on behalf of ICE, which is also the prosecuting authority.<sup>51</sup> Kafka would have enjoyed this bizarre scenario.

Furthermore, the safeguards in the regulations assume that a finding of

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<sup>48</sup> Compl., *supra* note 7, at ¶ 85.

<sup>49</sup> *Id.*

<sup>50</sup> HRW, *supra* note 18, at 44.

<sup>51</sup> *Id.*; *See also* Universal Declaration of Human Rights (UDHR), G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948), art. 10.

incompetency has already been made.<sup>52</sup> However, no authority provides when or how an immigration judge should make a competency finding.<sup>53</sup> Given the procedural uncertainty surrounding the competency issue, an immigration judge may choose to assume the alien is competent without holding a hearing.<sup>54</sup> Alternatively, he or she may move forward based upon a cursory examination as to whether the respondent understands the nature of the proceedings, thereby avoiding a competency finding or hearing altogether.<sup>55</sup> Additionally, there is no statutory authority for an immigration judge to appoint counsel or a guardian on behalf of a person going through immigration courts who has a mental illness.<sup>56</sup> Again, this is Kafkaesque.

#### D. DUE PROCESS

Respondents in immigration and removal proceedings, including those with mental disabilities, are entitled to a fair hearing and a chance to defend against the charges.<sup>57</sup> Indeed, [incompetency] doctrine has been characterized by the Supreme Court as “fundamental to an adversary system of justice.”<sup>58</sup> This doctrine bars a defendant from standing trial if he does not understand the charges against him, cannot effectively consult with counsel and cannot assist in his own defense due to incompetency.<sup>59</sup> The

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<sup>52</sup> Executive Office for Immigration Review, *Competency Standards Report*, pg 2, available at [http://www.justice.gov/eoir/vll/benchbook/tools/MHI/library/EOIR%20Competency%20Standards%20Report%20\(May%2011,%202010\).pdf](http://www.justice.gov/eoir/vll/benchbook/tools/MHI/library/EOIR%20Competency%20Standards%20Report%20(May%2011,%202010).pdf) (last visited Feb. 8, 2011)[hereinafter *Competency Standards Report*].

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Supra* note 48.

<sup>57</sup> In the Matter of: L-T, Amicus brief at 4 (Sept. 3, 2010) available at <http://www.americanimmigrationcouncil.org/sites/default/files/docs/lac/Matter-of-L-T-9-14-10.pdf> (last visited Mar. 6, 2011).

<sup>58</sup> Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. Rev. 921, 950 (1985) (quoting *Drope v. Missouri*, 420 U.S. 162,172 (1975)).

<sup>59</sup> *Id.*; See generally Human Rights Watch, *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States*, Dec. 2009, p. 43 (Table 14 illustrates the number of non-citizens appearing in immigration court without counsel between 2000-2008).

notion of “due process” illustrates a certain normative ideal for decisions regarding the exercise of power.<sup>60</sup> Due process has come to mean decisions that are not arbitrary, but are aligned with publicly accepted aims and values; and are not oppressive, but treat those affected with respect.<sup>61</sup>

The law distinguishes between substantive and procedural due process. Procedural due process is “the set of procedures, epitomized by the judicial trial, whereby governing rules and standards are brought to bear on individuals in specific cases.”<sup>62</sup> When a set of procedures is not fairly implemented, the entity is said to be in violation of procedural due process as guaranteed by the Fifth and Fourteenth Amendment.<sup>63</sup>

Although procedural due process is required, the inquiry of “how much process is due” remains in question. Due process entails, at a minimum, some kind of hearing for the individual.<sup>64</sup> The type of hearing is dependent on a judicial assessment balancing the gravity of the individual interest at stake, the utility of the requested procedures in avoiding factually misinformed or legally erroneous decisions, and the cost of those procedures to the pursuit of legitimate state objectives.<sup>65</sup>

Franco-Gonzalez was held for approximately four and a half years before a hearing was held on his behalf.

“[His] continued detention...without a hearing violates the Immigration and Nationality Act, because no immigration detention statute authorizes [his] detention for a prolonged period of time, absent a hearing where the government bears the burden to prove that [its] prolonged detention

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<sup>60</sup> WAYNE LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTEENTH AMENDMENT*. CIVIL PROCEDURAL DUE PROCESS OF LAW, 1465 (West Publishing Company) [hereinafter LAFAVE].

<sup>61</sup>*Id.*

<sup>62</sup>*Id.*

<sup>63</sup> Fifth Amendment forbids the United States to deprive any person of life, liberty, or property without due process of law. The fourteenth Amendment imposes the same prohibition on the states.

<sup>64</sup> LAFAVE *supra* note 60, at 1467.

<sup>65</sup> *Mathews v. Eldridge*, 424 U.S. 319 (1976).

remains justified in light of [Franco-Gonzalez'] mental disabilities and the attendant delays in removal proceedings.”<sup>66</sup>

In administrative proceedings, although the right to counsel is a statutory right granted under the Administrative Procedure Act (“APA”),<sup>67</sup> it is not a guarantee of the U.S. Constitution.<sup>68</sup> According to the provisions of the APA, a person compelled to appear in person before an agency or a representative of the agency is entitled to be accompanied, represented, and advised by counsel, or if permitted by the agency, by another qualified representative.<sup>69</sup> A Florida appellate court held that the constitutional guarantee of right to counsel is not applicable to administrative proceedings.<sup>70</sup> Therefore, although there appears to be no constitutional basis for the right to counsel, the individual in an administrative proceeding (such as ICE) has a statutory right to counsel.<sup>71</sup>

Some courts have argued that “due process does not protect an incompetent defendant from deportation.”<sup>72</sup> However, a decision by the Ninth Circuit asserts the immigration court must ensure due process for persons who may be mentally incompetent.<sup>73</sup> In *Nee Hao Wong v. INS*, respondent not only had counsel, but benefited from the state court appointed conservator who was able to testify accurately to the relevant facts and assisted in the attorney-client relationship.<sup>74</sup>

Providing legal counsel for the six plaintiffs in the ACLU’s suit against the ICE

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<sup>66</sup> Compl., *supra* note 7, at ¶ 126.

<sup>67</sup> *United States v. Agronics, Inc.*, 164 F.3d 1343 (10th Cir. N.M. 1999).

<sup>68</sup> *Smith v. United States*, 250 F. Supp. 803, 806 (D.N.J. 1966).

<sup>69</sup> 5 U.S.C. § 555 (1993).

<sup>70</sup> *Thompson v. Department of Professional Regulation, Bd. of Medical Examiners*, 488 So. 2d 103 (Fla. Dist. Ct. App. 1st Dist. 1986).

<sup>71</sup> *Supra* note 69; *See Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1998); *Colandres-Aguilar v. INS*, 819 F.2d 259, 261 (9th Cir. 1987)(holding that in a deportation hearing, “[p]etitioner’s right to counsel is a statutory right granted by Congress under 8 U.S.C. §1362, and it is a right protected by the fifth amendment due process requirement of a full and fair hearing”).

<sup>72</sup> *United States v. Mandycz*, 199 F.Supp. 2d 671, 675 (E.D. Mich. 2002).

<sup>73</sup> *Nee Hao Wong v. Immigration & Naturalization Service*, 550 F.2d 521, 523 (9<sup>th</sup> Cir. 1977).

<sup>74</sup> *Id.*

would have benefitted the detained individuals greatly. For example, Aleksandr Khukhryanskiy, one of the six named plaintiffs in the ACLU case, is a victim of paranoid schizophrenia and psychosis, along with major depression.<sup>75</sup> He believes that he is being brainwashed by the United States government, and this blocks his ability to remember information from his past.<sup>76</sup> Mental illnesses for those individuals who are detained without counsel blocks their ability to think clearly, understand the charges against them, and escape this nightmare of detention.<sup>77</sup> “[Plaintiff Aleksandr Petrovich] Khukhryanskiy is indigent and unable to find *pro bono* counsel. Should counsel be appointed for Mr. Khukhryanskiy, counsel could assist him in making critical legal and tactical decisions about his case that he appears presently unable to make on account of his mental illnesses.”<sup>78</sup> Legal counsel could explain to the judge that he is eligible to renew his application for refugee adjustment and to receive a waiver that would allow him to overcome the grounds of inadmissibility triggered by his convictions.<sup>79</sup>

Fair treatment and due process are, unfortunately, absent for detained individuals with mental disabilities. As in Franco-Gonzalez’ situation, a psychiatrist noted that he “had no clue as to what type of court Your Honor presided over, what the possible outcomes might be, or how to defend himself at trial...In view of this, it is impossible for him to stand trial.” With that in mind, the immigration judge ordered the administrative closure of Franco-Gonzalez’ removal proceedings. Yet Franco-Gonzalez waited in detention for approximately four and a half years for his next hearing. No explanation

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<sup>75</sup> Compl., *supra* note 7, at ¶ 65.

<sup>76</sup> *Id.*

<sup>77</sup> Telephone Interview with Sarah Mehta, Aryeh Neier Fellow, ACLU Human Rights Watch (Oct. 27, 2010).

<sup>78</sup> Compl., *supra* note 7, at ¶ 69.

<sup>79</sup> *See* 8 U.S.C. § 1159 (2005).

was given as to why he remained detained. Franco-Gonzalez was incompetent to stand trial, to represent himself and to understand the charges against him. He was also unable to obtain any legal counsel. The inability to obtain legal counsel and the indefinite detention violated Franco-Gonzalez' due process rights.

## **II. INTERNATIONAL LAW AND THE RIGHTS OF DETAINED IMMIGRANTS WITH MENTAL DISABILITIES**

This state of affairs in ICE proceedings is contrary to the requirements of the International Covenant on Civil and Political Rights which states that an immigrant in the territory of another State Party to the Covenant may be deported if that person violates the State's laws, but the person may submit reasons against deportation and have a review by a competent authority.<sup>80</sup> The United Nations Human Rights Committee has interpreted Article 13 to cover non-citizens seeking to challenge a deportation order.<sup>81</sup> Further, the Human Rights Committee has said "if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13...an alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one."<sup>82</sup> The Human Rights Committee also states that a detainee should receive legal assistance if she is unable to afford a lawyer.<sup>83</sup> As previously mentioned, detainees do not have a constitutional right to counsel, but the Inter-American

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<sup>80</sup> *International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 U.N.T.S. 171, Art. 13, U.N. Doc. A/6316 (1966).

<sup>81</sup> See U.N. Human Rights Committee, *The Position of Aliens Under the Covenant*, C.C.P.R. General Comment No. 15, U.N. Doc. HRI/GEN/1/Rev. 7 (May 12, 2004), available at [http://www.unhcr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/\\$FILE/G0441302.pdf](http://www.unhcr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/$FILE/G0441302.pdf) (last visited Feb. 5, 2011).

<sup>82</sup> *Id.*

<sup>83</sup> Body of Principles for the Protection of All Persons under Any form of Detention or Imprisonment, G.A. Res. 43/173, 43rd Sess., Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988) available at <http://www.unhcr.org/refworld/docid/3b00f219c.html> (last visited Mar. 10, 2011).

Commission on Human Rights ("IACHR") has concluded that deportation proceedings require an interpretation of due process requirements that is "as broad as possible."<sup>84</sup> Specifically, the IACHR states that the rights to meaningful defense and representation by an attorney are included among due process rights.<sup>85</sup>

Furthermore, the IACHR has interpreted the American Declaration of the Rights and Duties of Man ("American Declaration"), which applies to the United States due to its membership of the Organization of American States, to mean that a State that fails to provide an adequate and effective remedy of a fundamental right under the American Declaration violates international law.<sup>86</sup> The American Declaration requires that any person accused of an offense receive an impartial and public hearing.<sup>87</sup> The IACHR has recently observed that deportation requires the application of "heightened due process protections" and warns that the current deportation system in the United States fails to offer detainees "an effective remedy, if merited, to preserve their fundamental rights."<sup>88</sup>

The United Nations Convention on the Rights of Persons with Disabilities ("CRPD"), signed by the United States in 2009, requires that individuals with mental disabilities "are not deprived of their liberty unlawfully or arbitrarily." The CRPD recognizes that individuals with mental disabilities may need additional support in court, and therefore, due process requires that State Parties shall ensure effective access to

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<sup>84</sup> Inter-American Commission on Human Rights, *Loren Laroye Riebe Star, Jorge Alberto Baro Guttlein and Rodolfo Izal Elorz v. Mexico*, Report No. 49/99, Case 11,610 (Apr. 13, 1999).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*, at ¶ 244.

<sup>87</sup> American Declaration of the Rights and Duties of Man, May 2, 1948, O.A.S. Official Rec., Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev.9 (2003), at art. XXVI *available at* [http://www.oas.org/dil/access\\_to\\_information\\_human\\_right\\_American\\_Declaration\\_of\\_the\\_Rights\\_and\\_Duties\\_of\\_Man.pdf](http://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf) (last visited Feb. 8, 2011).

<sup>88</sup> Inter-American Commission on Human Rights, *Wayne Smith, Hugo Armendariz, et al. v. United States*, Report No. 81/10, Case No. 12, 562, paras. 63-65 (July 12, 2010).

justice for persons with disabilities on an equal basis with others in all legal proceedings, including investigative and other preliminary stages.<sup>89</sup> The CRPD requires parties to “take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”<sup>90</sup> The Convention provides for the right to access to the legal process so that individuals with mental disabilities can adequately participate in proceedings concerning their rights.<sup>91</sup> Without access to the legal process, persons with mental disabilities are left without counsel and detained for an indefinite time period left to hope that the legal system will eventually save them from such arbitrariness. Despite international law that requires access and fairness, the ICE system is both unfair and Kafkaesque.

### **III. CHAPTER 1: THE ARREST AND FIRST INTERROGATION<sup>92</sup>**

#### *THE UNEXPECTED ARREST OF JOSEPH K.*

The Gonzalez Six experienced confusion and feelings of helplessness just as the main character in *The Trial* did. In his famous opus, Franz Kafka opens with the unexpected arrest of the protagonist, Joseph K. (“K.”).<sup>93</sup> Following his unexpected arrest, K. received a phone call that a brief inquiry into his case will be made the following Sunday.<sup>94</sup> A location is given in this phone call, but not a specific time for when K. should arrive to this location. K. assumed that 9 a.m. would be an appropriate

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<sup>89</sup> CRPD, *supra* note 17 at art. 13.

<sup>90</sup> CRPD *supra* note 17 at art. 12.

<sup>91</sup> *See also* CRPD at art. 12-14.

<sup>92</sup> This section of the Note is divided into “chapters.” The chapter names are from the “*The Trial*” and will be used throughout to illustrate how the experiences of immigrants with mental disabilities parallel the experience of Joseph K. as he attempts to navigate an unfathomable legal system.

<sup>93</sup> *See The Trial* at 1.

<sup>94</sup> *See Id.*, at 31.

start time for court.<sup>95</sup> This is just one of the many examples of the confusion that K. will face throughout legal proceedings against him.

Once K. reaches the courtroom, he begins to “dominate” the meeting by essentially mocking the way in which he was arrested and how this must all be one giant mistake.<sup>96</sup> To K.’s dismay, the entire courtroom was actually filled with officers adorned with official badges.<sup>97</sup> K. had been tricked. He was talking negatively about the system when he was in a room filled with only people on the other side. They pretended to be interested, when in fact they were merely amusing themselves with the declarations of an innocent man.<sup>98</sup> He headed for the door, but before he could exit, the Magistrate said, “I merely wanted to point out that today...you have flung away with your own hand all the advantages which an interrogation invariably confers on an innocent man.”<sup>99</sup> K. claimed all those who were in the audience to be “scoundrels” and heads out.<sup>100</sup>

K.’s first arrest and experience in the courtroom are similar to that of the Gonzalez Six. Just as K. was unclear of the exact reasons why he was arrested, many immigrants with mental disabilities are also confused about why they are in detention, and some were even unsure how long they had been in a detention facility.<sup>101</sup> For example, in an interview with a detained individual, Human Rights Watch reported that one woman “...was unable to understand a single question asked of her. She stared into space during the interview, shook her head repeatedly, and rocked nervously in her

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<sup>95</sup> *See Id.*, at 34.

<sup>96</sup> *See Id.*, at 40-45.

<sup>97</sup> *See Id.*, at 47.

<sup>98</sup> *See The Trial*, *supra* note 6, at 47.

<sup>99</sup> *See Id.*, at 48.

<sup>100</sup> *See Id.*

<sup>101</sup> HRW, *supra* note 18, at 25.

chair.”<sup>102</sup> Human Rights Watch terminated the interview because it was unclear whether or not the woman was actually consenting to the interview. It was also not clear whether or not this woman knew the reasons for her detention.

Deportation proceedings can be implemented at the onset of criminal behavior, yet individuals with mental disabilities may not have the ability to understand the collateral consequences of that behavior, which may be a direct result of the mental disability itself. For example, one of the plaintiffs in the *Gonzalez* case, Yen Thi-Thanh Nguyen, had a history of psychotic disorders including auditory hallucinations resulting from schizophrenia, personality disorder with prominent borderline features and epilepsy.<sup>103</sup> Due to the medication she took, she often appeared non-communicative and was not able to remember information.<sup>104</sup> Her prior convictions were directly tied to her mental disorder because she was arrested for misdemeanor assault charges and violation of no-contact orders, where she was prohibited from contact with her primary caretakers, specifically her father and older sister.<sup>105</sup>

The plaintiffs in the *Gonzalez* case face similar bewilderment as Joseph K. did when he was arrested for no apparent reason.<sup>106</sup> Just as the Gonzalez Six did not have the capacity to understand the ICE proceedings against them, K. did not understand the reasons for his arrest and prosecution.<sup>107</sup> It remained a mystery for K., as well as the

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<sup>102</sup> *Id.*

<sup>103</sup> Compl., *supra* note 7, at paras. 58-61.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> See *The Trial*, *supra* note 6, at 1.

<sup>107</sup> *Id.*

Gonzalez Six, to protect himself from a world that looked upon him as a guilty man for a crime that nobody could explain.<sup>108</sup>

## CHAPTER 2: THE OFFICES AND THE WHIPPER

### *JOSEPH K. ATTEMPTS TO FIGHT THE LEGAL SYSTEM*

When K. attempted to gain some knowledge of the law through books in the law library, he was told "...These books are probably law books, and it is an essential part of the justice dispensed here that you should be condemned not only in innocence but also in ignorance."<sup>109</sup> In other words, a person convicted in the legal system confronting K. shall have no knowledge of the rules under which they are condemned.<sup>110</sup> K. is left in the dark about his conviction. While it is not the case that every detained immigrant with mental disabilities is unaware of the reason why they are being detained, their disability will likely prevent them from effectively representing themselves in a court of law. In *The Trial*, K. learns that even if he attempted to speak with the Law Student, who he assumed would have some influence over the outcome of his case, "...as a rule, all of [the court's] cases are foregone conclusions."<sup>111</sup> Rather than innocent until proven guilty, this legal hierarchy demonstrated to K. that there was no room to maneuver and that decisions were often made prior to any evidence being offered. K. was guilty until proven innocent, which was indefinitely in the future.

The stigma of mental illness is a terrible burden for immigrants in ICE proceedings. In the *Gonzalez* case, Human Rights Watch argues that the stigma surrounding mental illness may actually prevent individuals from self-identifying due to

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<sup>108</sup> See, e.g., *The Trial*, *supra* note 6, at 45-46.

<sup>109</sup> *Id.*, at 50.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*, at 62.

the fear that the ICE would use their disability to argue for deportation.<sup>112</sup> One man, Pacifico G., a lawful permanent resident from Mexico with schizophrenia admitted in court that he heard voices which sometimes told him to harm people. The ICE trial attorney used this evidence to argue that Pacifico was dangerous and should be denied relief even though he had never attempted or committed a violent crime, and even though he testified that he would never act upon the voices.<sup>113</sup>

“The DA says that I am 100 percent individually responsible for my actions. That I am completely accountable for what I do. He made me sound like I was a murderer or made it look like I was a potential murderer. That I could kill at any second...[t]he legal system exposes me as if I am the one to blame, but I don’t think this is the fact. I did my best for 17 years to be a person under control and they make it seem like I am a person who cannot control myself. As if I am a threat to society.”<sup>114</sup>

As to make this entire experience even more confusing for K., an usher invites K. to accompany him upstairs to the Law Offices.<sup>115</sup> As he and the usher walk on, K. suddenly begins to feel very tired.<sup>116</sup> He asks the usher to lead him out, but the usher is reluctant to do so.<sup>117</sup> K.’s raised voice attracts the attention of a woman in a nearby office, who asks his business. K. feels faint and is unable to respond.<sup>118</sup> The woman offers him a chair and assures him that the stuffy air similarly affects many people on their first visit to the offices.<sup>119</sup> K.’s swoon intensifies to a near-paralysis. The woman suggests to a smartly dressed man who shares her office--and who turns out to be the

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<sup>112</sup> HRW, *supra* note 18, at 38.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *See The Trial*, *supra* note 6, at 62.

<sup>116</sup> *See Id.*, at 66.

<sup>117</sup> *See Id.*

<sup>118</sup> *See Id.*, at 67.

<sup>119</sup> *See Id.*

Clerk of Inquiries--that they take K. to the sick room.<sup>120</sup> K. manages to request that they instead help him to the door. He is scarcely able to walk, even with the two officials half carrying him.<sup>121</sup> He is ashamed as they pass before the accused man with whom he had been impatient before.<sup>122</sup> That man meekly makes excuses for his presence to the Chief of Inquiries.<sup>123</sup>

At last, K. is at the threshold of the offices.<sup>124</sup> The air from outside revives him. He shakes hands with the man and woman who assisted him until he notices that the fresh air seems to have on them the debilitating effect that the office air had on him.<sup>125</sup> Rejuvenated but bewildered by his body's betrayal, K. bounds down the stairs and resolves to find a better use for his Sunday mornings.<sup>126</sup>

Stale, suffocating air is once more the hallmark of the Court in *The Trial*. The interrogation atmosphere affected K.'s judgment and he is physically incapacitated in the Offices.<sup>127</sup> He is rendered speechless and powerless, utterly at the mercy of the Court.<sup>128</sup> The Court like bad air in a closed room, and like bad air, the court seems to be everywhere, invisible, insidious, known by its effects.

In Kafka's *The Trial*, the Court appears to have access to every place--it can set up shop in a company's closet, or in a tenement attic--yet it still conducts its business in dark, sealed, uncomfortable, makeshift or out-of-the-way places.<sup>129</sup> This is surely not

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<sup>120</sup> See *The Trial*, *supra* note 6, at 68.

<sup>121</sup> See *Id.*, at 70-71.

<sup>122</sup> See *Id.*, at 72.

<sup>123</sup> See *Id.*

<sup>124</sup> See *Id.*, at 73.

<sup>125</sup> See *The Trial*, *supra* note 6, at 73.

<sup>126</sup> See *Id.*

<sup>127</sup> See *Id.*, at 68-73.

<sup>128</sup> See *Id.*, at 69.

<sup>129</sup> See *Id.*, at 65.

coincidental; rather it is an essential characteristic of an impenetrable and unaccountable bureaucracy. Likewise, immigration courts mirror an impenetrable and unaccountable bureaucracy because although there are policies and procedures to guide the immigration judges, the law to an immigrant who is mentally disabled and without counsel is bewildering just as it was for Joseph K.<sup>130</sup> There are many pieces to the immigration law puzzle that only an experienced attorney could comb through and sort out. The detained may feel suffocated by the system which detains them indefinitely just as K. felt suffocated by the bad air of the court.<sup>131</sup>

*THE TRIAL AND ICE VIOLATE INTERNATIONAL LAW*

If Joseph K. brought a lawsuit against ICE for what happened to him in *The Trial*, there is a good possibility, indeed probability, of an international court concluding K.'s rights were violated based on international law just as the human rights of the Gonzalez Six were violated.<sup>132</sup> The IACHR, interpreting the American Declaration to provide that a State that fails to provide an adequate and effective remedy of a fundamental right under the American Declaration violates international law, would most likely find the absence of an impartial and public hearing for K goes against what the American Declaration represents.<sup>133</sup> In *The Trial*, K. was told by his lawyer to remember that the legal proceedings were, by law, not public.<sup>134</sup> As a result, the legal records of the case, and above all the actual charge-sheets, were inaccessible to the accused and his counsel,

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<sup>130</sup> *Supra* note 48.

<sup>131</sup> *The Trial*, *supra* note 123.

<sup>132</sup> Ironically, Joseph K. would be just as unlikely to succeed against the ICE in an American courtroom. There are too many barriers to enforcement of his rights given the political questions doctrine American courts use to avoid ruling on questions where the U.S. Constitution has committed decision-making on this subject to a coordinate branch of the federal government; or there are inadequate standards for the court to apply; or the court feels it is prudent not to interfere. *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>133</sup> *Supra* note 84.

<sup>134</sup> *See The Trial*, *supra* note 6, at 115.

consequently one did not know what charges to meet in the first plea.<sup>135</sup> One could draw up genuinely effective and convincing pleas only later on, when the separate charges and evidence on which they were based could be merely guessed from the interrogations.<sup>136</sup> Therefore, under the Human Rights Committee and the IACHR, Joseph K. would receive free legal assistance if he were unable to afford counsel; under the United Nations Human Rights Committee interpretation of Article 13, Joseph K. would be given full facilities for pursuing his remedy against expulsion; and, under the American Declaration, Joseph K. would have the right to an impartial and public hearing.

The CRPD requires that individuals with mental disabilities “are not deprived of their liberty unlawfully or arbitrarily.”<sup>137</sup> Although K. was not explicitly labeled with a particular mental disability in *The Trial*, one could argue that K’s confusion of the legal process was due to a mental default. Everyone else involved in the system appeared to have a solid handle on what was expected of them in legal proceedings, but the law was unattainable to K. As someone potentially suffering from a mental disability, K. was arbitrarily deprived of his access to the Law. There is not a single instance in *The Trial* when the State ensures that K. has effective access to justice just as the Gonzalez Six were deprived effective access to their legal proceedings through lack of adequate counsel and lack of policies and procedures to instruct the immigration judges to provide assistance to the plaintiffs.<sup>138</sup> Therefore, under the CRPD, K. would be the beneficiary of measures providing access to the support required to adequately participate in proceedings concerning their rights.

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<sup>135</sup> *See Id.*

<sup>136</sup> *Id.*

<sup>137</sup> CRPD, *supra* note 17.

<sup>138</sup> *Supra* note 25.

### CHAPTER 3: THE LAWYER, THE MANUFACTURER AND THE PAINTER

#### *STIGMA OF “THE ACCUSED” IN THE TRIAL*

Joseph K. sits in his office on a wintry morning thinking about his case.<sup>139</sup> He goes into a sixteen-page reverie in which he inwardly expresses his frustrations with his lawyer and recounts all the information his lawyer has conveyed to him about the tangled workings of the Court.<sup>140</sup> K. has grown weary of his lawyer's endless talk and seemingly minimal action. The lawyer defends himself by saying that in these cases it is often better to do nothing overt, at least not at this stage.<sup>141</sup> K. is intensely exhausted and recognizes in himself the symptoms of mental strain due to worrying about his case.<sup>142</sup> He can no longer pretend to take the high road and ignore it. On his way out of the lawyer's office, K. encounters a manufacturer who has heard of his case (K. will learn that many people know of his case even though he does not know much about the current status of his own case).<sup>143</sup> The manufacturer suggests that K. visit the Painter of the Court, a position which he inherited from his father, who may have some helpful information in representing himself in Court proceedings.<sup>144</sup>

K. goes to visit the Painter who lives in a poor section of the city.<sup>145</sup> The Painter describes three possible acquittals that may be hoped for, all of which amount to a person having to maintain good relations with subordinate officials in hopes that they may

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<sup>139</sup> See *The Trial*, *supra* note 6, at 113.

<sup>140</sup> See *Id.*, at 113-129.

<sup>141</sup> See *Id.*, at 115.

<sup>142</sup> See *Id.*, at 129.

<sup>143</sup> See *Id.*

<sup>144</sup> See *The Trial*, *supra* note 6, at 136.

<sup>145</sup> See *Id.*, at 141.

support you in your case and this is the case only because nobody knows who the higher officials are.<sup>146</sup> The higher officials are unreachable, so naturally all wheedling, supplication, and influence peddling goes through the lower courts. Yet, as the painter makes clear, the stakes are low.<sup>147</sup> In a meeting with another victim of the legal process, Block also mentions the "great lawyers," about whom every accused man dreams, but who are entirely inaccessible and unknown.<sup>148</sup> No one can really influence the outcome of the case--at most they can tinker with the trajectory, to drag out the proceedings indefinitely *while the mantle of guilt hovers above the accused*.<sup>149</sup>

The mantle of guilt hovers over K. throughout the entire book. He is labeled as the accused by members of the court without any explanation.<sup>150</sup> When K.'s uncle visits him to discuss the rumor of K.'s guilt, K.'s uncle asserts that K. should not flee the country because "it would look like flight and therefore guilt."<sup>151</sup> This assertion emphasizes K.'s internal belief and everybody else's wrongful idea that K. is guilty and is not part of normal society. Furthermore, when K. visits the tradesman, a worker of the court, the tradesman tells K. that people are too tired and distracted to think clearly about the proceedings and so they take refuge in superstition.<sup>152</sup> One of the superstitions is that you're supposed to tell from a man's face, especially the line of his lips, how his case is going to turn out.<sup>153</sup> Although this judgment is dumbfounded and has no valid backing, the tradesman further states that "if you live among these people, it's difficult to escape

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<sup>146</sup> See *Id.*, at 154-155.

<sup>147</sup> See *Id.*, at 158-159.

<sup>148</sup> See *Id.*, at 178.

<sup>149</sup> See *The Trial*, *supra* note 6, at 158. (emphasis added).

<sup>150</sup> *The Trial*, *supra* note 107.

<sup>151</sup> See *The Trial*, *supra* note 6, at 97.

<sup>152</sup> See *Id.*, at 174.

<sup>153</sup> See *Id.*

the prevailing opinion.”<sup>154</sup> The stigma attached to a person guilty of a crime directly parallels the stigma attached to persons with mental disabilities, such as the Gonzalez Six.

*THE STIGMA OF MENTAL ILLNESS IN OUR SOCIETY*

“This childish fear [of the mentally ill] is a sublime mental process compared with the unreasoning dread of insanity that prevails in the minds of most adults throughout the civilized world. Under certain conditions an insane person is, without doubt, the unhappiest of men, but...he is indeed happier—than a sane person under the most favorable conditions.”<sup>155</sup> Founder of the American Mental Hygiene movement, Clifford Beers argues that the unhappiness of a person with mental illness may be directly due to the lack of consideration in which they are treated.<sup>156</sup> Stigma amongst persons with mental disabilities is very common; it originally derived from the idea that mental illness may actually be manifested in an individual through a possessive demon.<sup>157</sup> There are many reasons that explain why stigma against mentally ill is so persistent. People find it difficult to accept behavior that is different from the norm, and often hold an expectation that a person with a mental disability is dangerous.<sup>158</sup> Human Rights Watch found the

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<sup>154</sup> *See Id.*, at 174.

<sup>155</sup> CLIFFORD W. BEERS, *A MIND THAT FOUND ITSELF: AN AUTOBIOGRAPHY*, para. 35 (Longmans, Green, and Co. 1910) available at <http://www.disabilitymuseum.org/lib/docs/1672.htm?page=print> (last visited Feb. 8, 2011).

<sup>156</sup> STEVE TAYLOR, *ACTS OF CONSCIENCE: WORLD WAR II, MENTAL INSTITUTIONS, AND RELIGIOUS OBJECTORS*, 153 (Syracuse University Press. 2009) (describing when Beers reflected on the kind of book he wanted to write “Uncle Tom’s Cabin...had a very decided effect on the question of slavery of the Negro race. Why cannot a book be written which will free the helpless slaves of all creeds and colors confined today in the asylums and sanitariums throughout the world? That is, *free them from unnecessary abuses to which they are now subjected.*” (emphasis added) [hereinafter STEVE TAYLOR].

<sup>157</sup> *See* HuffingtonPost, Elyn Saks, *Why is Mental Illness so Stigmatized* (Jan. 13, 2011) available at [http://www.huffingtonpost.com/elyn-saks/post\\_1603\\_b\\_811249.html](http://www.huffingtonpost.com/elyn-saks/post_1603_b_811249.html) (last visited Feb. 27, 2011).

<sup>158</sup> ALLAN TASMAN, *STIGMA AND MENTAL ILLNESS 2* (Paul J. Fink, e.d. American Psychiatric Press 1992).

stigma of mental disability is highly prevalent in the courtroom.<sup>159</sup> For example, a detained man who suffered post traumatic stress disorder from a sexual assault he endured as a prisoner of war in Afghanistan showed great difficulty testifying about his mental disability not only because he did not want to relive the experience, but because “...[f]or a lot of people, left to themselves, they wouldn’t have the will or the ability to face these things.”<sup>160</sup>

Psychiatrist and author Allan Tasman describes what stigma means to a person with mental illness:

“[S]tigma means fear, resulting in lack of confidence. Stigma is loss resulting in unresolved mourning issues. Stigma is not having access to resources, resulting in lack of useful coping skills. Stigma is being reviled, resulting in conflicts regarding being seen. Stigma is lowered family esteem and intense shame, resulting in decreased self worth. Stigma is secrecy resulting in lack of understanding. Stigma is judgment resulting in lack of spontaneity. Stigma is divisive, resulting in distrust of others. Stigma is anger resulting in distance. More importantly, stigma is hopelessness resulting in helplessness.”<sup>161</sup>

#### *LEGAL CONSEQUENCES OF STIGMA*

Sarah Mehta of the Human Rights Watch reported the legal consequences that stigma may have on a person with mental disabilities in immigration proceedings.<sup>162</sup> According to Mehta, stigma may prevent individuals from self-identifying in a detention facility or immigration court.<sup>163</sup> For example, a legal permanent resident, Jorge, who has certain cognitive disabilities was facing deportation for driving without a license, drug

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<sup>159</sup> HRW, *supra* note 18, at 36.

<sup>160</sup> *Id.*

<sup>161</sup> Advances in Psychiatric Treatment, Peter Byrne, *Stigma of Mental Illness and ways of diminishing it* (2000) available at <http://apt.rcpsych.org/cgi/content/full/6/1/65> (last visited Mar. 10, 2011) (quoting what stigma means according to Fink & Tasman 1992).

<sup>162</sup> HRW, *supra* note 18, at 31.

<sup>163</sup> *Id.*, at 36.

possession and violation of probation.<sup>164</sup> Jorge did not have a lawyer during his immigration hearings, and the immigration judge never questioned his cognitive disabilities. Fortunately, Jorge was able to find an attorney to represent him on appeal and his attorney was able to get him a psychiatric evaluation. However, Jorge was reluctant to reveal his disability to the court. He "...didn't want to tell the court about the issue that has hurt him his entire life. The last thing he wants to tell the judge is that there is something wrong with him, even though that is the one thing that might have helped."

Stigma reaches not only detained immigrants with mental disabilities, but also American citizens. Pedro Guzman is a California man who has a mental disability.<sup>165</sup> Guzman was picked up by the ICE and mistakenly deported to Mexico, where he wandered for three months before being returned to his family.<sup>166</sup> Obviously the fear and stigma associated with mental illness led to the deportation of an American citizen with mental disabilities.

Some individuals are afraid that disclosing their mental disabilities may have repercussions for their legal claims. In an interview with the Director of the Mental Health Advocacy Services, James Preis said, "Sharing information is important to get good services but there needs to be protections so that information doesn't get misused in violation of due process." There is no system in place to protect medical information if a person going through the immigration courts were to disclose about mental illness. There is also no place to separate its use for treatment purposes from misuse in court. "Since ICE oversees both the detention and prosecution of non-citizens accused of immigration

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<sup>164</sup> *Id.*, at 37.

<sup>165</sup> New York Times, *Detention and the Disabled*, July 30, 2010 available at <http://www.nytimes.com/2010/07/31/opinion/31sat3.html?pagewanted=print> (last visited Feb. 8, 2011).

<sup>166</sup> See Daniel Hernandez, *Pedro Guzman's Return*, LA WEEKLY NEWS, available at <http://www.laweekly.com/2007-08-09/news/pedro-guzman-s-return/> (last visited Feb. 8, 2011).

violations, there is a real danger that medical information can be used against a detainee.”<sup>167</sup> Indeed, what is more Kafkaesque than this state of affairs?

*HISTORY OF THE INSANE*<sup>168</sup>

In the early nineteenth century, persons with mental illness filled the jails and prisons of the United States. At that time, a reform movement, spearheaded by American activist of the indigent insane Dorothea Dix, led to a more humane treatment of mentally ill persons.<sup>169</sup> Dix’s journey began when she visited a jail in East Cambridge, Massachusetts to provide Sunday-school instruction to women inmates.<sup>170</sup> Dix was shocked by what she saw: “filth, lack of heat, signs of brutality, and neglect. Especially troubling to Dix was the presence of insane people locked in cells.”<sup>171</sup> This sparked Dix’s advocacy for the movement of insane people to mental hospitals and institutions. Dix was successful in convincing both the houses of Congress to pass the “12,225,000 Acre Bill,” but President Franklin Pierce vetoed the act, characterizing the bill as an “unwarranted federal intrusion on state affairs.”<sup>172</sup> Head of women nurses for the Union army, Dix resumed her efforts on behalf of the mentally ill after the Civil War ended. While the federal government failed to fund care of the “indigent, insane and idiotic,” Dix’s efforts, together with the help of emerging professionals devoted to working with mentally disabled people, ultimately led the states to assume responsibility for caring for people

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<sup>167</sup> HRW, *supra* note 18, at 39.

<sup>168</sup> This language does not reflect my personal opinion on this particular group, but rather reflects the historical usage of terms relating to persons with mental disabilities. I am going to use this terminology for the sake of readability and to enforce that this language is unavoidably manifest in the history although these words may be currently offensive.

<sup>169</sup> Treatment Advocacy Center, *More Mentally Ill Persons Are in Jail and Prisons Than in Hospitals: A Survey of the States*, at 4, available at [http://www.treatmentadvocacycenter.org/storage/tac/documents/final\\_jails\\_v\\_hospitals\\_study.pdf](http://www.treatmentadvocacycenter.org/storage/tac/documents/final_jails_v_hospitals_study.pdf) (last visited Feb. 8, 2011).

<sup>170</sup> STEVE TAYLOR, *supra* note 156 at 155.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*, at 158.

with mental illness by establishing specialized hospitals and asylums.<sup>173</sup>

For over a hundred years, mentally ill individuals were treated in hospitals and asylums.<sup>174</sup> Sadly, however, America has now returned to the conditions of the 19<sup>th</sup> Century by large numbers of mentally ill persons in jails and prisons.<sup>175</sup> As one advocate put it, “Although a government's expressed intent may be to take care of its citizens with disabilities, the conditions and treatment to which they are subjected may constitute persecution.”<sup>176</sup> Studies of mentally ill individuals in jails and prisons done since the late 1990s have reported higher numbers than earlier studies had. A widely publicized study done by the U.S. Department of Justice in 1998 reported that 16.3 % of inmates in jails and 16.2 % in state prisons were “estimated to be mentally ill,” based on the self-report of symptoms or of having been admitted to a psychiatric hospital.<sup>177</sup> The mentally ill individuals in prisons were also said to be more likely than other prisoners to have been convicted of violent crimes, including homicides, and to spend an average of 15 months longer in prison than other inmates.<sup>178</sup> Based on interviews and visits to state and federal prisons in 2003, Human Rights Watch estimated that approximately 20% of the prisoners were seriously mentally ill. A 2006 Department of Justice survey, based on a selected sampling of inmates, reported that 24% of jail inmates and 15% of state prison inmates “reported at least one symptom of a psychotic disorder.” Thus, these studies all concluded that between 15-20% of jail and prison inmates had a serious mental illness.

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<sup>173</sup> *Id.*

<sup>174</sup> Treatment Advocacy Center, *supra* note 169, at 108.

<sup>175</sup> *Id.*

<sup>176</sup> Arlene Kanter, The Right to Asylum and Need for Legal Representation of People with Mental Disabilities in Immigration Proceedings, 25 *Mental and Physical Disability Law Reporter* 511, July 2001.

<sup>177</sup> P. M. Ditton, Mental health and treatment of inmates and probationers, *Bureau of Justice Statistics Special Report*, July 1999.

<sup>178</sup> Treatment Advocacy Center, *supra* note 169, at 6.

With the number of persons with mental illness rising, our jails are becoming the new mental institutions. In 2004 in the United States, there were 100,439 psychiatric beds available in public and private psychiatric hospitals and in the psychiatric units of general hospitals.<sup>179</sup> Since the population of the country was just over 300 million, that means that there was approximately one psychiatric bed available for every 3,000 people.<sup>180</sup> This contrasts to the situation in the United States in 1955, when there was one public psychiatric bed available for every 300 people.<sup>181</sup> Thus, an individual with a serious mental illness was ten times more likely to find a psychiatric bed for treatment in 1955 than in 2004.<sup>182</sup> Mental illness is not a problem that is vanishing into thin air; rather, the population of those who are mentally ill are now being pushed from one institution (psychiatric hospitals) into another (jails and prisons). This has ramifications for ICE proceedings where a number of immigrants will be mentally ill or disabled.

The mentally ill have historically been perceived as animals that need to be caged and locked away. Despite the disability rights movement, the passage of the Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act in 1990, and the sight of many public figures opening up about their struggles with mental illness, a dark shadow still falls on those who struggle with mental illness. “Shame” becomes a central perception of one’s own attributes.<sup>183</sup> Shame, whether in *The Trial* or in an ICE proceeding, becomes a regulatory tool that reinforces the sense of the unreal—these proceedings.

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<sup>179</sup> *Id.*, at 8.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Erving Goffman, *Stigma and Social Identity* (1963) available at [http://courses.washington.edu/intro2ds/Readings/7\\_Goffman-stigma.doc](http://courses.washington.edu/intro2ds/Readings/7_Goffman-stigma.doc) (last visited Mar. 9, 2011).

## CHAPTER 4: DISMISSAL OF THE LAWYER, IN THE CATHEDRAL

### *JOSEPH K. AND THE GONZALEZ SIX-INDEFINITELY DENIED ACCESS TO THE LAW*

An influential Italian client is coming to town and K. has been charged with escorting the man to the city's cultural points of interest.<sup>184</sup> K. receives a message to meet the Italian at the Cathedral at ten o'clock.<sup>185</sup> As K. waits in the cathedral, he notices a preacher climb up to the pulpit and thinks that this is a strange time for a sermon.<sup>186</sup> In fact, it is actually the prison chaplain who has summoned for K.<sup>187</sup> Joseph K. tells the chaplain that he feels he can speak openly to the chaplain, unlike anyone else associated with the Court.<sup>188</sup> The chaplain explains how such an assertion is actually deluded by way of an allegory in a brief tale:

“Before the Law stands a doorkeeper. To this doorkeeper there comes a man from the country who begs for admittance to the Law. But the doorkeeper says that he cannot admit the man at the moment... The doorkeeper says: ‘if you are so strongly tempted, try get in without my permission. But note that I am powerful. And I am only the lowest doorkeeper. From hall to hall, keepers stand at every door, one more powerful than the other.’ These are difficulties which the man from the country has not expected to meet, the Law, he thinks, should be accessible to every man and at all times, but when he looks more closely at the doorkeeper in his furred robe, with his huge, pointed nose and long, thin, beard, he decides that he had better wait until he gets permission to enter.”<sup>189</sup>

Just as the man strived to attain the Law, so too do detained immigrants with mental disabilities strive to attain their freedom from ICE proceedings.

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<sup>184</sup> See *The Trial*, supra note 6, at 197.

<sup>185</sup> See *Id.*, at 203.

<sup>186</sup> See *Id.*, at 207.

<sup>187</sup> See *Id.*, at 209.

<sup>188</sup> See *Id.*, at 213.

<sup>189</sup> See *The Trial*, supra note 6 at 213.

#### IV. RECOMMENDED ACTION FOR THE CURRENT IMMIGRATION SYSTEM

The INA provides for the statutory right to counsel in removal proceedings by counsel of respondent's choosing.<sup>190</sup> However, persons who are incompetent may not be capable of representing their own interests or exercising their right to choose counsel.<sup>191</sup> Thus, in order to satisfy the statutory duty to protect the rights and privileges of aliens with mental health issues, the Attorney General, arguably, should appoint a guardian to represent the applicant in his or her defense in a removal proceeding.<sup>192</sup> It is "a denial of due process to hold proceedings to deport an unrepresented [incompetent] incapable of representing herself," preliminarily enjoining execution of deportation order, and ordering appointment of a guardian *ad litem* to represent incompetent in further proceedings.<sup>193</sup> Disability Rights advocate and scholar, Professor Arlene Kanter suggests that the INS, the Executive Office for Immigration Review, and pro bono immigration groups should establish training as to competency and other relevant issues pertaining to applicants with mental disabilities.<sup>194</sup> Such training will improve the likelihood that the treatment needs of these individuals will be met and the conditions of their confinement will be improved.<sup>195</sup>

To ensure fair immigration proceedings for people with mental disabilities, Human Rights Watch has developed a list of recommendations for Congress, the

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<sup>190</sup> 8 C.F.R. §§292.5(b), 316(b) (2001).

<sup>191</sup> 8 C.F.R. §240(b)(3) (2001) (codified at 8 U.S.C. §1229(b)(3) (2001) (stating "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").

<sup>192</sup> *Kanter, supra* note 176.

<sup>193</sup> *Nelson v. INS*, 232 F.3d 258, 261-62 (1<sup>st</sup> Cir. 2000); *Johns v. Dep't. of Justice of United States*, 624 F.2d 522, 524 (5<sup>th</sup> Cir. 1980).

<sup>194</sup> *Kanter, supra* note 176.

<sup>195</sup> *Id.*

Department of Justice, the EOIR and ICE.<sup>196</sup> Such recommendations range from “amend[ing] INA to provide immigrations judges with authority to terminate proceedings in cases where the severity of a person’s mental disability makes ensuring fair proceedings impossible,”<sup>197</sup> to conducting periodic mental health screening and evaluations in immigration detention facilities.<sup>198</sup> Reforms in current immigration proceedings could substantially improve both the fundamental fairness and the efficiency of removal proceedings—proceedings that can result “in loss of both property and life, or of all that makes life worth living.”<sup>199</sup>

Russian novelist, Fyodor Dostoyevsky said “the degree of civilization of a society can be judged by entering its prisons.”<sup>200</sup> To Dostoyevsky, prison serves as a window into the soul of a society. ICE, responsible for this country’s detained immigrants, mirrors the unfairness of our legal system. The lack of rights for immigrations with mental disabilities should not be the message that the United States wants to send to other nations in our handling of homeland security. If ICE is a mirror of who are, if we believe in the rule of law, and if the United States is in touch with common principles of humanity, then what happened with the Gonzalez Six and hundreds of other immigrants with disabilities should “shock the conscience.”<sup>201</sup> Convictions cannot be brought by measures that “offend a sense of justice.”<sup>202</sup> It is totally irresponsible and unfair for the

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<sup>196</sup> HRW, *supra* note 18, at 82-86.

<sup>197</sup> *Id.*, at 82.

<sup>198</sup> *Id.*

<sup>199</sup> *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

<sup>200</sup> FYODOR DOSTOYEVSKY, *HOUSE OF THE DEAD*, (Paul Nigri, e.d., Dover Publications 2004) (1915).

<sup>201</sup> *Rochin v. California*, 342 U.S. 165, 172 (1952).

<sup>202</sup> *Id.* at 173.

Court in the *Gonzalez* case to detain immigrants with mental disabilities without procedural due process of law.<sup>203</sup>

For now, the six plaintiffs in the ACLU case will remain in detention not knowing what is to come of the road ahead just as Joseph K. blindly wandered through his own legal proceedings.

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<sup>203</sup> *Id.*