

## SYSTEMIC FAILURE: MENTAL ILLNESS, DETENTION, AND DEPORTATION

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### INTRODUCTION

Our detention and deportation system failed Tatyana Mitrohina. She was born in Russia with heart defects and deformed hands. She was rejected by her parents for many years, spending her infancy in hospitals and institutions. Though she was later able to move back home, her parents abused her and then abandoned her. She immigrated to the United States as a young teen, adopted by U.S. citizens. After more than a decade, she had a child of her own, whom she abused. Tatyana was diagnosed with mental

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\* Professor of Law, University of San Francisco; Professor Emeritus, University of California, Davis School of Law. My daughter, Julianne Hing, first introduced me to and wrote about Tatyana’s plight. I regret that I could not do much to help Tatyana. I hope that Tatyana’s tragedy can serve as a catalyst for change in the deportation and detention system. Victoria Hassid and Pia Johnson provided important research for this article. I also received important input from the USF faculty at a scholarship lunch presentation. Special thanks for the insight from the hardworking students and staff attorneys of the UC Davis Immigration Law Clinic who take on the most difficult removal cases imaginable. If only every client could receive such high quality assistance.

illness. Although she was convicted of child abuse, the state court recommended medication, counseling, and a chance to regain custody of her child instead of imposing a penal sentence. But when Immigration and Customs Enforcement (“ICE”) took over, Tatyana was removed from the country, and her child was taken away from her permanently. She should not have lost her child. She should not have been removed.

This Article discusses the victimization of Tatyana Mitrohina by the U.S. detention and removal system. However, this Article also recounts some of the choices made along the way in Tatyana’s life, including choices that were manifested in the outcome of her removal proceedings. The choices include those made by her parents, the state court, ICE, the immigration judge, her lawyers, and policymakers. Of course, Tatyana’s own choices and even the choices made by the immigration clinic I helped direct are also relevant.

In this Article, I describe Tatyana’s background, the incidents that led up to her being taken into ICE custody, and her removal proceedings. As she was in detention and suffering from mental illness, I describe some of the special challenges that detained respondents in removal proceedings encounter, as well as the special challenges faced by those who are suffering from mental illness. I describe how different choices made along the way affected the outcome of the case, and finally, I make note of how alternative choices could very well have resulted in a better outcome for Tatyana.

## I. TATYANA’S STORY

### A. *Immigration Proceedings*

Tatyana, an immigrant from Russia, faced deportation charges in late 2007, stemming from two convictions: a misdemeanor battery conviction for kicking her boyfriend, and a conviction for child abuse. In neither case did she spend more than a month in prison. Tatyana, a disabled orphan, had immigrated almost fifteen years earlier, at the age of fourteen, when she was adopted by an elderly couple living in Sonoma, California. By the time of her removal proceedings, her adoptive father had passed away, and Tatyana was estranged from her adoptive mother.

Tatyana applied for cancellation of removal, a form of deportation relief, requesting that the immigration judge, in essence, forgive her transgressions and allow her to remain in the United States. Tatyana had the burden to establish that she was rehabilitated and worthy of a favorable exercise of discretion. In such cases, immigration judges are instructed to consider the following factors: family ties in the United States; length of residence in the United States; evidence of hardship to the respondent and family if deportation occurs; service in the U.S. military; employment

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history; business or property ties; value and service to the community; rehabilitation; and evidence of good character.<sup>1</sup> Tatyana faced a brutal cross-examination from Erin Lopez, the attorney for the Department of Homeland Security (“DHS”), who was not sympathetic to Tatyana’s plight:

Q. So when did your baby become first [in your life]?

A. He’s been first from the day he was born. I just have not been able to care for him.

Q. What has kept you from being able to care for him?

A. Not getting help when it was available. I spent time trying to get the father involved and I wanted some help from my friend as opposed to turning to the Government which the Government was providing the, was offering that help. But I wanted very much the father to be involved and I failed. It failed and —

Q. So you’re saying this is the father’s fault?

A. What I’m saying is I will take the Government’s help at this time. I will not, I will no longer pursue trying to get the father involved.

Q. Well what happened to your baby in the past, you’re saying that it’s the father’s fault?

A. Honestly, I feel that if he had been there for the child or me if he had been supportive that probably a lot of what I have done could have been avoided, prevented. Yes, I do feel that way.

Q. And are you saying it’s your friend’s fault what happened to the baby?

A. No, it’s not their fault. I just was hoping I could get their help.

Q. And if this Court orders you removed from the United States at this hearing your baby will be put up for adoption. Is that your understanding?

A. That’s correct.

Q. And other than the baby you have no other family in the United States, Correct?

A. That’s correct.

Q. Never served in the United States Armed Forces?

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<sup>1</sup> Matter of Marin, 16 I. & N. Dec. 581 (B.I.A. 1978); *see also* Matter of C-V-T-, 22 I. & N. Dec. 7 (B.I.A. 1998).

A. No.

Q. Do you own any real property meaning any land or home or anything in the United States?

A. No.

Q. Do you own a business in the United States?

A. No.

Q. Have you ever done any volunteer work or service to the community that was not court ordered?

A. Once at a shelter for animals a long time ago.

Q. When was that?

A. It was a long time ago, years ago when I was still living with my parents by adoption.

Q. Is there any other evidence, good character that you would like the Government and this Court to know about?

A. I haven't, honestly I haven't known anyone here long enough who could say, who could say to some extent something positive.

Q. So basically, it would be an accurate statement to say that in the 14 years that you've been in the United States you have done absolutely nothing of value to this country. Correct?

A. That's correct.<sup>2</sup>

Things went downhill for Tatyana after that cross-examination. The immigration judge denied her request for cancellation, and the Board of Immigration Appeals affirmed. In the process, because Tatyana was in ICE custody, she could not fulfill the conditions of the family court to regain custody of her child.

*B. Tatyana's Childhood*

Tatyana was born in Russia in 1978. She was born with multiple health problems, including heart defects. Both of her hands are small and partially deformed. She has a similar problem with her feet. Her parents abandoned Tatyana immediately after birth. She spent the first ten years of her life in hospitals, rehabilitation facilities, and a boarding school for disabled children without contact with her parents. She underwent several surgical

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<sup>2</sup> Transcript of Record at 45-47.

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procedures to correct her birth defects, but the abnormalities of her hands and feet were never fully corrected.

As with most children, these first ten years of Tatyana's life had a profound impact on her emotionally and psychologically. She had multiple caretakers and had no one to whom she felt attached. She felt rejected and abandoned by her biological family. When asked about the effect this period of her life had on her, Tatyana explained: "I didn't like to be touched, I couldn't stand to be touched or hugged."<sup>3</sup> A psychologist who evaluated Tatyana observed: "Ms. Mitrohina demonstrates a range of psychopathology frequently observed as a sequel of early neglect, abandonment and institutionalization, emotional rejection, and physical trauma."<sup>4</sup>

When she was about seven years old, after she was released from the hospital, Tatyana's maternal grandmother took responsibility for her. At the time, Tatyana was unaware that she had a family. A year or so later, her father began to visit, and about three years later, he decided to bring Tatyana back into the family.<sup>5</sup>

Her father brought Tatyana home to live with family because that made the family eligible for a better apartment in Russia. The atmosphere in the home was hostile, chaotic, and filled with conflict.<sup>6</sup> Tatyana's mother was opposed to her return and was openly hostile and critical of Tatyana. Tatyana was constantly beaten by both parents.<sup>7</sup> Her parents continually told her that she was "inadequate and worthless."<sup>8</sup> The psychological evaluation reported a "history of neglect, physical and verbal abuse as a child and one attempted molestation between the age of 8 and 10."<sup>9</sup>

The tense home life led to the disintegration of the family. Her parents divorced when Tatyana was twelve. Her father departed, and Tatyana was left with a mother who did not want her. So when Tatyana turned fourteen, her grandmother, who had legal custody, signed adoption papers. Oldrich and Ruth Gann, who were 68 and 63 years old, respectively, at the time, adopted Tatyana and brought her to the United States in 1993.

### C. *Tatyana's Life After Immigration*

Tatyana had difficulty adapting to her new family. She constantly felt

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<sup>3</sup> Evaluation at 4.

<sup>4</sup> *Id.* at 8.

<sup>5</sup> Transcript of Record at 10-11.

<sup>6</sup> Evaluation at 4.

<sup>7</sup> *Id.*

<sup>8</sup> Julianne Hing & Seth Wessler, *When an Immigrant Mom Gets Arrested*, COLORLINES MAGAZINE, July-Aug. 2008, at 23.

<sup>9</sup> Evaluation at 6.

that she could not live up to her adoptive parents' expectations.<sup>10</sup> Her dislike of being touched or held persisted into her late teens. She had difficulty addressing her new parents as "mom" and "dad."<sup>11</sup> To Tatyana, the relationship was a "mismatch" and she did not get along with her adoptive parents from the start.<sup>12</sup>

Concerned with the conflict, Tatyana's adoptive parents had her evaluated by a psychologist. The psychologist prescribed medication, and her parents threatened to send Tatyana back to Russia if she did not take the medication. Tatyana did not appreciate the psychological treatment and argued with her parents; her parents often called the police after these altercations erupted.<sup>13</sup> Tatyana felt trapped and became depressed and angry. An argument in 1999 led to a call to the police. When the police arrived, Tatyana was so upset that she kicked her adoptive father in the leg in front of the police officer.<sup>14</sup> Tatyana was taken into custody, but charges were later dismissed.

In 2000, while still living with her adoptive parents, Tatyana threatened to kill herself. She was not arrested, but she was taken to a mental health facility for three days. She eventually moved out of her parents' house.<sup>15</sup> Since then, Tatyana's adoptive father passed away and she did not maintain contact with her adoptive mother.

#### *D. Post-Adoption*

After moving out, Tatyana rented a room from a young man with whom she later became emotionally involved. She soon noticed that he mistreated his six-year-old son. On one occasion, the child was complaining about a stomach pain, and the father refused to do anything, so Tatyana called an ambulance.

After that, the landlord was abusive toward her for eighteen months. In 2002, after an argument, Tatyana kicked him several times. He called the police, and she was arrested and pled guilty to a misdemeanor battery. Tatyana received thirty-six months formal probation, and was ordered to pay fines and fees, complete a 52-week batterer's program, maintain employment, and complete community service.<sup>16</sup> She successfully completed all the terms of her sentence.

Tatyana held a variety of jobs in the United States and attended junior

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<sup>10</sup> *Id.*

<sup>11</sup> Transcript of Record at 18.

<sup>12</sup> *Id.* at 18.

<sup>13</sup> *Id.* at 19.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 20.

<sup>16</sup> Report at 2.

college. She worked at the Sonoma Market, Baskin Robins, and provided care for the elderly through an agency. She lost these jobs because of anger management problems.<sup>17</sup> She worked for a time caring for elderly residents at an assisted living facility. Tatyana admitted that she had kicked an elderly patient three or four times while working at this facility. The patient did not report the incident because she suffered from Alzheimer's Disease. Tatyana took classes at a junior college over a two-year period from Spring 2005 to Spring 2007.<sup>18</sup>

Tatyana became pregnant by a man named John Carter Goode. The baby was born on October 17, 2005. Despite Tatyana's repeated attempts, Goode was never involved in the child's life. Tatyana had no one to rely on for financial help or other assistance in the child's upbringing.<sup>19</sup> Her probation officer noted that Tatyana lacked "a support system for parenting and when she need[ed] a break, she ha[d] been unable to secure a reliable babysitter."<sup>20</sup> Although Tatyana was eventually convicted of child abuse, the child protective services investigator observed that the child was "healthy, had suffered no long-term injury, and appeared to be slightly advanced for his chronological age."<sup>21</sup> When her son was a year-and-a-half old, Tatyana got a job at Metro PCS, a wireless phone company, in an attempt to get off of welfare assistance. She lost that job when she was later arrested in June 2007.<sup>22</sup>

#### *E. Child Abuse-Related Arrest*

On June 26, 2007, when the child was just under two years old, the child spilled some water and then grabbed a roll of paper towels to clean up the mess. He scattered paper towels all over the floor. According to a presentence report:

Mitrohina then grabbed the victim, took him to the bedroom, and threw him on the bed to give him a "time out." She then began to slap the victim with her hands, on his head and legs, approximately ten times. Mitrohina stated: "I was yelling at him like he was 20," even though she knew he could not understand. The defendant explained that she did not stop when she should have, and left a bruise and mark on his face. Victim John Doe

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<sup>17</sup> Decision of the Immigration Judge (Memorandum and Order), File No. A44 027 958, at 2 (Dec. 4, 2007) [hereafter IJ Decision].

<sup>18</sup> Transcript of Record at 14.

<sup>19</sup> *Id.* at 21-22.

<sup>20</sup> Report at 7.

<sup>21</sup> *Id.* at 5.

<sup>22</sup> *Id.*

was screaming and crying as she hit him.

Mitrohina commented that the instant matter was not the first time she slapped victim Joe Doe, but indicated that it was the worst because it left a mark. She said she would become angered when John Doe, as a newborn, “threw up” or “pooped” too much. She admitted that she had been hurting victim John Doe since he was born, and had become more physical with him as he grew older. At times, she slapped him and threw him on the ground. She also admitted that approximately one year earlier, she had hit John Doe in the face and caused a large, visible bruise under his eye.<sup>23</sup>

Tatyana then took her child to a day care center, explained to an employee that she had become frustrated with her son at home and had struck him with her bare hands. She left the child at the day care and went to her job. The child was visibly bruised on his left temple. A county worker interviewed Tatyana later that day, noting that she “did not cry, and appeared very cold and nonchalant about the abuse. She was only concerned about being arrested and not about the condition of her son, and never once asked if he had gone to the hospital or if he was alright.”<sup>24</sup>

As a result of this incident, the child was removed from Tatyana’s care, and child abuse charges were brought. Tatyana pleaded guilty and was sentenced to 120 days in jail and four years on probation. Ultimately, she was only required to serve about a month in jail. A probation officer who interviewed Tatyana while she was in custody noted that she was very remorseful and forthcoming throughout the interview, noting that she “has struggled with shame and guilt while in custody, and has spent much time in introspection.”<sup>25</sup> When she was first taken into custody, Tatyana was very upset and cried a lot. The mental health staff in the county jail determined that she was likely suffering from depression, perhaps due to a chemical imbalance in her brain. She was prescribed Zoloft,<sup>26</sup> an antidepressant drug used to treat depression, obsessive-compulsive disorder, panic disorder, anxiety disorders, and post-traumatic stress disorder (“PTSD”).<sup>27</sup>

While she was in jail for the child abuse conviction, Tatyana was on a “no mix” status, and was unable to avail herself of counseling and other resources normally offered to inmates. Despite that status, she sought to participate in anger management correspondence courses.<sup>28</sup> She took

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<sup>23</sup> IJ Decision, *supra* note 17, at 2-3.

<sup>24</sup> *Id.* at 3.

<sup>25</sup> Report at 3.

<sup>26</sup> Transcript of Record at 47-48.

<sup>27</sup> DRUGS.COM, Information on Zoloft, 2009-10, <http://www.drugs.com/zoloft.html>.

<sup>28</sup> Report at 4.



responsibility and showed remorse for her actions. She was committed to doing whatever was required to successfully reunite with her son.<sup>29</sup> She testified, “My baby is first in my life now. I know I need to get help myself in order to take care of my baby.”<sup>30</sup>

The child was placed into foster care and became the subject of juvenile court proceedings.<sup>31</sup> In early October 2007, the juvenile court ordered that family reunification services be offered to Tatyana. Tatyana was ordered to participate in a number of different services, including counseling and domestic violence programs.<sup>32</sup> The problem was that, by then, Tatyana was in ICE custody, unable to comply with the juvenile court’s order.

If Tatyana had been a U.S. citizen, she would have been released from custody after her month in jail. However, she was a lawful permanent resident alien who now had committed a deportable offense, so ICE officials took custody of Tatyana upon her release from jail and kept her in custody pending removal proceedings. By the time her removal hearing took place, she had been in custody for four months.<sup>33</sup>

Tatyana wanted to abide by the juvenile court’s mandate because she had the utmost desire to resolve her personal problems and regain custody of her son. Therein lies the rub. The problem, of course, was that Tatyana was in ICE custody facing removal proceedings,<sup>34</sup> so she could not follow the juvenile court’s order. Being out of ICE custody would have given her the opportunity to straighten out her affairs and have a chance at reunifying with her son. And, as we will see below, if she had been able to do that, her posture in the deportation case would have been far better.

## II. TATYANA’S CLAIM FOR RELIEF AND HER ARGUMENT

As with most low-income immigrants in detention, Tatyana had a difficult time obtaining legal representation. Although a respondent has the right to counsel in removal proceedings, the respondent does not have the right to counsel at government expense. In custody, Tatyana was transported to her first hearing in San Francisco on September 21, 2007. She was provided with a list of free legal services, and the hearing was continued for two weeks.<sup>35</sup> On October 5, her hearing was again postponed to October 19 to give her time to seek representation.<sup>36</sup> On October 19, a private attorney

<sup>29</sup> *Id.* at 5; Transcript of Record at 34, 36-37.

<sup>30</sup> Transcript of Record at 45.

<sup>31</sup> Report at 7.

<sup>32</sup> Exhibit 4, Letter from Jennifer Hall, Child Welfare Services, Nov. 2, 2007.

<sup>33</sup> Transcript of Record at 21.

<sup>34</sup> *Id.* at 1.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 3.

in the building was apparently convinced by the immigration judge to enter an appearance for Tatyana; the attorney gave Tatyana an application for deportation relief to complete.<sup>37</sup> A hearing was then commenced on November 5, 2007, and Tatyana – still in custody – was represented by a pro bono attorney.

The law required ICE to detain Tatyana. Under 8 U.S.C. § 1226(c), mandatory ICE detention is required when the immigrant has been convicted of a crime of moral turpitude where the maximum sentence is more than one year, even if the person was not sentenced to more than one year.<sup>38</sup> Tatyana's child abuse conviction fell into that category, even though she was actually only sentenced to a few months of incarceration, and neither of her convictions were regarded as an aggravated felony. Congress made this harsh choice of mandatory detention in 1996.<sup>39</sup>

Tatyana's detention in this case radically affected the complexion of her deportation proceedings. Her attorneys could not meet and prepare with her in noncustodial settings and she could not assist in the gathering of and assembling of helpful evidence. Perhaps most importantly, she also could not abide by the family reunification order of the state court.

Because neither of Tatyana's convictions were an aggravated felony for immigration law purposes, she was, however, eligible to apply for cancellation of removal under 8 U.S.C. § 1229b(a). However, to be granted cancellation relief, she had to convince the immigration judge that she was deserving of relief as a matter of discretion. That meant building a case that was centered around her rehabilitation, length of residence in the United States, employment history, hardship to herself or to her child if she were to be deported, and her character.<sup>40</sup> Given her convictions, her poor relationship with her adoptive parents, and her erratic work history, Tatyana faced an uphill battle — especially under the constraints of detention.

The burden of Tatyana's battle was taken on by pro bono counsel, the law firm of John Ricci and Frank Sprouls. The firm took on the case at the request of the immigration judge. Frank Sprouls appeared before the judge on a different matter on October 19, and the judge asked Sprouls if he would represent Tatyana as a favor to the court.<sup>41</sup> Prior to that day, Tatyana called the immigration clinic at the University of California, Davis, School of Law. However, the clinic was unable to take on her case because staff attorneys

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<sup>37</sup> *Id.* at 4.

<sup>38</sup> 8 U.S.C. §§ 1182(a)(2), 1226(c)(1).

<sup>39</sup> *See Demore v. Kim*, 538 U.S. 510, 517-18 (2003) (citing 8 U.S.C. § 1226(c) (1996) (mandating detention during removal proceedings for limited class of deportable aliens, including those convicted of aggravated felony)).

<sup>40</sup> *See supra* note 1 and accompanying text (discussing factors that immigration judges consider in determining whether to exercise favorable discretion in cancellation cases).

<sup>41</sup> Interview with Frank Sprouls, Attorney at Law, in San Francisco, Cal. (Apr. 16, 2010).

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and students were already carrying a full docket. Sproul's office was in San Francisco and Tatyana was being detained in a facility in the Yuba County Jail in Marysville, California, some 125 miles away.<sup>42</sup> Consequently, Sproul prepared for trial with Tatyana via telephone and in brief face-to-face opportunities prior to the actual hearing.

The trial brief submitted on Tatyana's behalf portrays Tatyana as a tragic figure – a “deeply wounded, deeply troubled, fragile personality,”<sup>43</sup> who “suffers from dark, irrational and mysterious urges that will require years of therapy.”<sup>44</sup> With reference to the state court's reunification plan, Tatyana's counsel requested favorable relief so that the process could begin.<sup>45</sup> The trial brief reasoned that the immigration judge should not be concerned with potential danger that Tatyana would pose to her child because state child protective service officials assured that she would not be allowed unsupervised visits or custody until they were satisfied that Tatyana would no longer be a danger to the child.<sup>46</sup> In a post-hearing memorandum, her counsel pointed out that at “slightly over five feet tall,” and weighing slightly more than a hundred pounds, with deformed hands, Tatyana was not a danger to the adult population.<sup>47</sup> She was unlikely to pose a danger to her adoptive mother given their estrangement, nor was she likely to ever be hired to provide elderly care again.<sup>48</sup> Tatyana's incentive to rehabilitate was strong, given her “moral incentive to reform” in order to “be reunited with her child.”<sup>49</sup> Moreover, if relief was granted, for the first time Tatyana would be “deeply immersed in the mental health system” where proper counseling and medication could cure her of her delusional problems.<sup>50</sup>

In another filing, Tatyana's counsel emphasized that removal to Russia would constitute severe hardship. As an orphan, she had no family there “to assist her upon forced repatriation.”<sup>51</sup> She was in severe need of the psychological treatment that likely would not be available to her in Russia. California state officials were now offering her such treatment, but immigration officials had “taken her off her psychotropic medication [precipitating] mental deterioration.”<sup>52</sup> She had now lived in the United States for more than half her life, having entered at the young age of

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<sup>42</sup> Hing & Wessler, *supra* note 8, at 22.

<sup>43</sup> Trial Brief at 1.

<sup>44</sup> *Id.* at 7.

<sup>45</sup> *Id.* at 8.

<sup>46</sup> *Id.* at 7-8.

<sup>47</sup> Post-Hearing Memorandum at 1-2.

<sup>48</sup> *Id.* at 2.

<sup>49</sup> *Id.* at 3.

<sup>50</sup> *Id.* at 3-4.

<sup>51</sup> Submission of Additional Evidence at 2.

<sup>52</sup> *Id.*

fourteen. She was “not immersed in a criminal lifestyle, [rather] she is a deeply troubled, destructive and self-destructive young lady who has led a lonely and unhappy life.”<sup>53</sup>

In a letter that Tatyana wrote to the immigration court before her hearing, she made this plea:

Dear Honorable Judge Anthony Murry:

The truth is I’ve hurt my baby so much I don’t deserve to have him. Whenever I think about what I’ve done, the question that comes to mind is, “How did my baby manage to live through it all?” In regards to my conduct on June 25<sup>th</sup> of this year, I didn’t know until after the incident that a person can die from blows to the temple. What is also true is that I love my baby very much. Not so long ago I never thought myself capable of ever loving another human being. I held this opinion of myself because years of hardship left me scarred. And the worst part about all this is I didn’t take the opportunities for rehabilitation seriously. Because of my own stupidity, I turned my baby’s world upside down instead of following through with my goal to give him a life I was deprived of. I recognize that I’ve been on the path of self-destruction for too long. Now I’m ready to get off that path and I’m determined to take the necessary steps toward my recovery, so that I am then able to look after my baby’s well-being. Thank you for your time and consideration Your Honor.

Sincerely,

Tatyana Y. Mitrohina<sup>54</sup>

At Tatyana’s final hearing on November 26, 2007, the immigration judge revealed that he was choosing an interpretation of the facts that were not favorable to Tatyana:

[T]here are a lot of factors about this young lady’s past that generate a lot of sympathy; the years in the orphanage; she was born with a deformity. The difficulties that she had growing up, the multiple surgeries. All that is true. The difficulty that I see though is that when I look at all the documents and I look at the pattern of behavior I honestly believe this young lady is a danger. She’s a danger to other people in the community and the ties to the United States are not extensive. . . . But more than anything else, I’m just being honest with you I really believe

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<sup>53</sup> *Id.* at 3.

<sup>54</sup> Letter from Tatyana Y. Mitrohina, ICE Detainee, to Hon. Anthony Murry, Immigration Judge, San Francisco Immigration Court (Oct. 29, 2007).

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looking at the whole record that she poses a real danger and I don't think . . . there's really any justification . . . for authorizing a person who is dangerous to remain in the United States. I am very much mindful of the fact that she had real difficulties growing up. She's got difficulties that leave [sic] her to this day because of the physical problem. And it is no easy task at all for her to reorient herself to a different country. But the physical abuse to the parent, the physical abuse to the ex-husband [sic], the physical abuse to the child which is not an isolated incident, not to mention the fact that the blows were so potentially lethal because the blows went to the temple, and I just don't see anything other than her assertion that she's made before that she won't do it again. And I think there's a real impulse control problem. And she's dangerous.<sup>55</sup>

Tatyana's counsel responded:

Sure . . . there is danger. . . . [O]ne of the important things . . . in the shrink report which is clearly not altogether positive [is that] in the modern world [we have] psychotropic medicine. He says she's never, ever, ever had a diagnosis and then put together the proper cocktail of drugs. These things work [today]. [The Court should consider] that she hasn't really taken advantage of things that have been offered to her, but her crimes haven't been so serious that she needed to. The problems with the parents were never prosecuted. The misdemeanor, domestic violence with the boyfriend was not anything that raised these problems so the probation department had no reason to look at her. [The child abuse prosecution and ensuing removal proceedings were] really the great wake up call. This is the first time the entire system has gotten behind her. So . . . I think that's one of the things we have to look at. I mean 120 days county jail is serious but not terribly serious. . . . I think one of the things we have to look at here is she's really asking for her first chance. It's not like she's been given an opportunity, [or that] she's gotten a lot of therapy, a lot of drugs, [and] refused to take them. I think this is her asking this Court for her first chance, not that she's betrayed other chances. . . . There's no question that she is deeply troubled and she's done some dangerous things. But I mean we have much more serious criminals in here everyday. People immersed in criminal lifestyles. This is not something coming from a depraved heart. This is coming from a slightly diseased psyche. . . . That doctor said no one's [tried] yet. It's time for

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<sup>55</sup> Transcript of Record at 58-59.

somebody to do it. It's like somebody with a drug problem who has never . . . been in the program. And it's hard to wean that program if they've never had the chance. That's what we're asking for. This is the psychological equivalent of a drug program. Let us try it once. Let's see if it works. She's never had that opportunity.<sup>56</sup>

The immigration judge felt that Tatyana already had a "first chance," and again expressed his concern over the "repeated instances of physical violence" and that Tatyana was "simply too dangerous."<sup>57</sup> His words suggest that Tatyana had a choice and had chosen to engage in physical violence. Her attorney countered:

[T]hat child is at nobody's risk if [Tatyana] were to win her case. She's not getting anywhere near – do you think that Sonoma County is going to blissfully put her back with that kid unless they're 100 percent sure? . . . And I do think the most important thing is the psychotropic medicine. It's never been done for her. . . . [L]et the system work. People who take their meds can really live long and productive lives who are otherwise schizophrenic. . . . [W]e're asking her to have that chance because the system has never really gotten involved.<sup>58</sup> . . . She's taking much more responsibility for the actions. She understands that she needs to take advantage of what the system has to offer, an opportunity she's never had before. . . . I think the real danger here is to the child, not to the society at large. No one is really quaking in fear at this 4 foot 90 pound woman being a danger to the rest of us. It's the child we're worried about and I think that's where the concerns of the Court are a little overblown because she has not been anywhere near that kid. . . . [M]aybe it could be years before it happened. But I think custody in the interest of that child to ultimately be with the biological mother. . . . [T]here's a terrible symmetry of what might happen here. She was orphaned herself. This child will be orphaned. . . . I believe the real danger is to the child and I think if we hand this off to the Sonoma County courts and psychological services I think we can. . . rest assured they're going to do the right thing.<sup>59</sup>

In arguing that Tatyana was not deserving of a favorable exercise of discretion, the government attorney revealed her choice and argued:

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<sup>56</sup> *Id.* at 59-61.

<sup>57</sup> *Id.* at 61.

<sup>58</sup> *Id.* at 61-63.

<sup>59</sup> *Id.* at 65-67.

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[There are] no family ties here except for the baby that she has physically abused for most of the 21 months of his life. By her own admission she abused her adopted parents. But her adopted father is now deceased and [she] has no contact with her adopted mother. She does have in her favor residence of 14 years. In terms of . . . hardship to the child, he will [actually] benefit from her deportation. He will get a new home where he is not beaten. She's never served in the U.S. military. She has no property or business ties, no visible service to the community, proof of rehabilitation none, after going through anger management class and in-house parenting instruction. She again beat her son. . . . She admitted on the stand that she kicked an 80 year old woman who was in her [care] three to four times knowing that this woman could not and would not complain because she was suffering from dementia. She's admitted on the stand . . . that in the 14 years she's been in the United States she's done absolutely nothing of value to this country. . . . [She] has not taken responsibility for her actions. . . . Now she says that the baby comes first but it's only now that she's facing deportation that she says she's willing to "take anger management classes seriously" and seek counseling and take her medication. . . . [It's in] the best interests of baby Roman, this country and this respondent that this respondent be removed to Russia without further delay.<sup>60</sup>

Tatyana's attorney responded that "anti-psychotropic" medical therapy should be pursued instead, that deportation would "essentially" result in "send[ing] an orphan to a substandard medical situation consigning her to probably homelessness." He urged the "the court to show a little compassion and take a little risk."<sup>61</sup>

At the end of the hearing, Tatyana was permitted to read this statement to the Court:

Dear Honorable Judge Anthony Murry,

My son is my only family. Having him, I feel truly blessed for the first time in my life. He is a big, beautiful, healthy baby with a good-natured disposition. I am devastated to have inflicted so much pain on my own son. I thought I could take on parenting all by myself, and I made a very bad choice not to accept help with it. I was wrong. There is nothing I want more than to make it up to him.

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<sup>60</sup> *Id.* at 70-71.

<sup>61</sup> *Id.* at 71-72.

While in custody under the DHS, I read two parenting books mailed to me by the CPS department of Sonoma County. *Screamfree Parenting* by Hal Edward Runkel and *Parenting from the Inside Out* by Daniel J. Siegel and Mary Hartzell. Both share powerful messages. I was moved by the knowledge that we don't have to be prisoners to our past and that it's never too late to repair what's broken. I do need help. I want to do whatever it takes to become the best parent I can be to my son. I know it's not going to be easy for me, but I'm up for the challenge.

Parenting is a lifelong learning experience. My parents turned their backs on theirs. I want to learn to embrace mine. Thank you, Your Honor.<sup>62</sup>

The immigration judge thanked Tatyana's pro bono attorneys for their efforts, then stated: "But ultimately the behavior at least in my view was too much for her to overcome."<sup>63</sup> Hearing that, Tatyana had to be heard again, and pleaded that she was ready to make a new choice in her life:

Your Honor, I know I've hurt a lot of people, but from the parenting books that I've read they specifically say that old patterns can be broken and new healthy ones established . . . . I never applied myself. . . . I'm not a lost [cause]. [W]ith hard work and dedication I can . . . overcome my past, make sense of it. . . . [T]his is a chance I want. . . . I would not be able to live [with] myself knowing my baby [is not living with a] real family member, a blood family member. It is affecting me and it's going to affect him. . . . And I don't want to do that to him.<sup>64</sup>

### III. THE IJ'S ANALYSIS

In determining whether Tatyana merited a favorable exercise of discretion, the immigration judge felt that he had to balance the positive factors in Tatyana's case against the negative ones to determine whether the granting of relief was "in the best interests" of the country.<sup>65</sup> In choosing to interpret the balance unfavorably and conclude that Tatyana was not deserving of a waiver, the judge used the following reasoning:

There are factors about the respondent's life that evoke genuine sympathy. She has to live her life with visibly deformed hands.

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<sup>62</sup> *Id.* at 73.

<sup>63</sup> *Id.* at 74.

<sup>64</sup> *Id.* at 74-75.

<sup>65</sup> IJ Decision, *supra* note 17, at 3-4.



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She spent her first seven years in a hospital, and was essentially abandoned by her birth parents. She was in an abusive relationship, and she testified that the father of her child has never played any meaningful role in his life. In addition, if the respondent is removed to Russia, she may find it difficult to support herself, and has no real family to rely upon. She also points out that if she is removed her son will grow up as an orphan, in much the same way she did. She wrote letters to the sentencing judge in the Superior Court and to this court, expressing her remorse for what she has done and vigorously arguing that she will not break the law or hurt her son again. Sonoma County, where the most recent offense occurred, has ordered respondent (if she is released) to participate in a number of counseling programs in order to see whether respondent can be reunited safely with her child.

Balanced against those factors, however, is the fact that respondent has repeatedly decided to address her frustrations and disappointments with violence. She assaulted her stepfather, her ex-boyfriend[,] an elderly disabled patient who was entrusted to her care, and on many occasions her very young child. She said she got physical with this baby “a few times a month.” She hit him in the face and caused a bruise under his eye. She threw him on the bed and beat him while he screamed. She struck him in the temple, an extraordinarily dangerous act, and did so with such force that it caused visible swelling and bruising. The victim was only twenty months old.

This was not an isolated incident, but a repeated response to situations of stress. The difficulty is that no person can eliminate situations of stress from their lives, and this pattern of behavior gives this court grave concern that the respondent may act in a violent or dangerous way in the future. Of particular concern is the fact that not only has the respondent assaulted able-bodied adults, but highly vulnerable persons, namely the elderly patient at the nursing home and, with frequency, her small child.

The respondent’s most recent psychological evaluation revealed that she had gone through a course of anger management in 2002 along with psychotherapy on a weekly basis, but that she had resisted previous therapeutic interventions. She “perceived parenting instructions as an intrusion and interference with her doing things her own way.” The psychologist who interviewed her found “a chronic angry undercurrent during the interview as well as some difficulty with an overly idiosyncratic way of perceiving. She [respondent] tended to distort reality to meet her

needs or misidentify the salient aspects of a situation. It wasn't at the level of psychosis, but was at a level that would significantly interfere with her ability to accurately perceive and cope with everyday life and interactions." She had no symptoms of underlying neurological impairment, but "evidenced very little insight regarding her thoughts, feelings and behaviors." The report states that persons with respondent's psychological profile have "a tendency to act out in an impulsive, aggressive manner, display poor judgment, and do not seem to learn from their experiences." Such persons "often agree to treatment to bring about an outcome they desire or avoid some consequences, but are likely to terminate their participation in interventions before they can have an effect." The report concludes "[o]verall, the prognosis for Ms. Mitrohina benefiting from services is poor."

Respondent owns neither property nor a business; she has not served in the Armed Forces; and her only community service was volunteering at an animal shelter "years and years ago" . . . . While her disabilities will no doubt make it more difficult to find work in Russia than otherwise, the fact remains that respondent has demonstrated her ability to cope with this issue by managing to obtain several jobs in the United States. And she lost these jobs not because of her disability, but because she did not conduct herself appropriately.

Respondent asserted in a post-hearing memorandum that she poses no[] [sic] meaningful risk of violence because with her disability she cannot "inflict real damage on the adult population." But this contention is belied by the fact that she assaulted two adults. Moreover, . . . the overriding concern is respondent's willingness to use violence against persons who are very vulnerable and in her care.

Lastly, respondent asserts that if she is given a "cocktail" of "mood stabilizing and anti-psychotic medicine" coupled with mental health care, her behavior just might change. This is a tacit admission that respondent has not shown yet rehabilitation. Just as important, however, the test . . . is not whether we can imagine a set of circumstances in which the respondent might conform her conduct to the law. The real test is whether the respondent through her criminal conduct has forfeited her legal permission to live in this country.

After considering all relevant factors, this Court finds that the negative factors far outweigh the positive in the present case. The respondent has not shown that it is in the best interests of

the community that she remain in the United States. Indeed there is a real concern that she is a danger to others.<sup>66</sup>

The Board of Immigration Appeals chose to affirm the immigration judge's ruling because he "balanced all material and relevant factors and reasonably denied the application for cancellation of removal in the sound exercise of discretion."<sup>67</sup>

The immigration judge's interpretation of the facts essentially served as an order to sever the parent-child relation. That is troubling to say the least. By not granting relief, Tatyana was foreclosed from following the Sonoma County Superior Court's family reunification order. That is a shame, because presumably the juvenile/family law court of Sonoma County was in a better position to determine whether or not Tatyana was deserving of a chance to be reunited with her son. The Sonoma court ordered Tatyana to participate in counseling and medication therapy that would put her on a path to reunification with her child. That determination was certainly within the expertise and experience of the state court. However, the immigration judge – who had no expertise in family law – effectively overruled the state court decision. On a purely merit-based level, the immigration judge's decision could be criticized.

The BIA generally considers long residence in the United States and the existence of a U.S. citizen minor dependent child as "unusual and outstanding equities."<sup>68</sup> While the judge mentioned Tatyana's fourteen-year residence in the United States, he did not discuss her child in terms of the hardship of separation on her as an effect of deportation. The decision lacks any discussion of the possible hardship to the child if Tatyana is deported. Tatyana was the only family that the child had. The presumption on which family reunification law is based is that it is in the best interest of the child to be raised by biological parents. We might guess what was going through the immigration judge's mind on this issue, but with such an important interest at stake, the immigration judge should have addressed this issue in his decision and set forth his reasoning.

The immigration judge's discussion of rehabilitation is also troubling. He states that Tatyana "tacit[ly]" admitted that she had not demonstrated rehabilitation because she felt that she needed mental health care for her behavior to change. Rehabilitation is one of many factors to consider and should not be controlling, one way or the other. Additionally, her statements of remorse, her admission of guilt, honesty, efforts to enroll in parenting classes while in custody, reading parenting literature, commitment to comply

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<sup>66</sup> *Id.* at 4-6.

<sup>67</sup> Decision of the Board of Immigration Appeals, at 2, Mar. 26, 2008.

<sup>68</sup> *See, e.g.*, Matter of Arreguin, 21 I. & N. Dec. 38, 41 (B.I.A. 1995).

with prescribed conditions and programs, and the favorable presentence recommendations made on her behalf by probation officials are entirely relevant to rehabilitation.<sup>69</sup>

In discussing Tatyana's psychological evaluation, the immigration judge focused on the sentence that "[o]verall, the prognosis for Ms. Mitrohina benefiting from services is poor." However, the judge neglected to mention that the psychiatrist actually concluded that a number of treatments had never been offered to Tatyana and that prior to testing them, no conclusion could be drawn that she would not benefit from such services in the psychiatrist's statement that follows:

However, there are some interventions that would be appropriate prior to a decision that Ms. Mitrohina is unable to benefit from services. Ms. Mitrohina is not receiving and hasn't received either mood stabilizing or antipsychotic medications that might reduce her irritability and impulsivity, diminish paranoia, improve her perceptual accuracy, and improve her ability to make use of services. A medical evaluation is respectfully recommended to ascertain if there is psychopharmacologic regimen that would adequately and consistently control symptoms.<sup>70</sup>

Thus, the psychiatrist did not conclude that the situation was hopeless for Tatyana. Instead, the report actually calls for certain measures to be considered and possibly implemented before any such conclusion is drawn.

A central part of the immigration judge's decision is this conclusion: "The difficulty is that no person can eliminate situations of stress from their lives, and this pattern of behavior gives this court grave concern that the respondent may act in a violent or dangerous way in the future. . . . [T]here is a real concern that she is a danger to others."<sup>71</sup> The judge essentially proclaimed that because of her bad behavior in the past, Tatyana has little chance of ever changing her behavior. He made no mention of Tatyana's health condition, the possibility that appropriate medication may make a difference, nor her expression of willingness to reform.

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<sup>69</sup> "[I]n order for us to give meaningful review to a finding regarding rehabilitation, we must understand what factors the INS considers in making such a determination. Obvious considerations include the lack of commission of any crimes; enrollment in and attendance at rehabilitation programs; statements of remorse; and letters of good character. The salience and weight of these and other factors may vary from case to case, but where some of these factors exist, the Board must offer more than a bald statement that there is no evidence of rehabilitation." *Yepes-Prado v. INS*, 10 F.3d 1363, 1372-73 (9th Cir. 1993); *see also Georgiu v. INS*, 90 F.3d 374, 377 (9th Cir. 1996).

<sup>70</sup> Evaluation at 9.

<sup>71</sup> IJ Decision, *supra* note 17, at 4-6.

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As mentioned above, one of the more troubling aspects of the immigration judge's decision is that his order essentially was a family law decision to sever the parent-child relationship. The denial of Tatyana's cancellation application foreclosed her from following the reunification conditions of the state court, thereby making termination of the relationship a *fait accompli*. The sad irony is that had we been able to hit a pause button on the removal proceedings and release Tatyana to follow the reunification plan (parenting classes, anger management, mental health medication), and if she had been able to regain custody of her son or at least make clear progress, the outcome of the deportation case might have been different once the hearing resumed. The immigration judge's decision blocked these possibilities, even though he lacked the necessary family law expertise to make such conclusions.

Unlike the immigration court, the state superior court was acting in one of its areas of expertise in conjunction with the probation department. In making their determination, the probation officer and state court made their choices, taking into account Tatyana's criminal history and concluding that offering reunification services was appropriate.<sup>72</sup> This is important because terminating parental rights is a grave matter, and the state's main concern is the best interest of the child.<sup>73</sup> Significantly, reunification services are not to be provided if a parent is suffering from a mental disability that renders him or her incapable of utilizing those services.<sup>74</sup> In essence, the immigration court decided not to defer to the expertise of the state court, instead making its own decision – without the benefit of experience or special expertise – to determine that it was in the best interests of Tatyana's child to be taken from Tatyana permanently.

No one can know for sure what would have occurred if Tatyana was granted relief in her removal hearing. However, in discussing the facts and circumstances of the case with family law experts, in non-sexual child abuse cases such as Tatyana's, the prospects for rehabilitation and transformation are very good, especially when mental health is a factor that can be

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<sup>72</sup> Report at 9.

<sup>73</sup> CAL. WELF. & INST. CODE § 361.5 (West 2009). Under California law, parental rights can be terminated only under the severest of circumstances such as abandonment or extreme parental disinterest, abuse/neglect, mental illness or deficiency, alcohol or drug induced incapacity, felony conviction/incarceration, sexual abuse, failure to provide support, murder/manslaughter of sibling child, or the child is suffering from extreme emotional damage. CAL. WELF. & INST. CODE §§ 361, 361.5(b), (h), (i), 366.26(c)(1). David Thronson writes about how sad it is that while generally the "best interest of the child" standard is used in family law, that is not the standard used in removal cases where deportation will have a great impact on the child. *See generally*, David. B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family in the Context of Child Custody*, 59 HASTINGS L. J. 453 (2008).

<sup>74</sup> CAL. WELF. & INST. CODE § 361.5(b)(3).

controlled through medication. One family law specialist presented with the facts is confident that Tatyana could have reformed and regained custody of her son within two years.<sup>75</sup>

#### IV. REPRESENTATION PROBLEMS IN DETENTION CASES

Individuals facing removal who are in detention suffer a distinct disadvantage in pursuing a viable claim for relief. Depending on the location of the detention facility, access to counsel can be severely limited. Some detention facilities are located in remote areas where few immigration attorneys are available. Being in custody itself can be very demoralizing, and detained individuals can be discouraged from pursuing viable claims due to the circumstances of confinement; they may think of deportation as a way of getting out of custody. Moreover, communication with attorneys (if available), friends, family, and potential witnesses is hampered.

For an attorney representing a cancellation client in ICE detention, the challenge to effective communication is severe.<sup>76</sup> In cases involving applications for relief, adequate representation requires hours and hours, if not days and weeks, of preparation. Developing a trusting and open relationship with the client is essential. Both the attorney and the client need to be able to speak with candor. Each element of a defense or claim for relief is important, and the explanation can be complicated due to nuances of the law. Preparing the respondent for direct examination in a responsible manner can take many hours over the course of a few days. Discussing case strategies and tactics is also important. When a client is detained, all of these efforts are truncated and compromised.

Tatyana was being held in the Yuba County Jail more than three hours from San Francisco. By the time the removal hearing took place, Tatyana had been in custody for four months.<sup>77</sup> Tatyana was represented by pro bono counsel. In the San Francisco District, detainees are not brought into San Francisco to facilitate case preparation for local pro bono attorneys.<sup>78</sup> Tatyana's counsel primarily prepared her for the hearing by speaking with her on the phone and visiting with her for some time on the day of the hearing.<sup>79</sup>

In contrast, in cases where the respondent is not detained, removal

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<sup>75</sup> Interview with Krystal Jaime, California Family Law Specialist, in Davis, Cal. (Dec. 3, 2009).

<sup>76</sup> Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 561 (2009).

<sup>77</sup> Transcript of Record at 21.

<sup>78</sup> Frank Sprouls Interview, *supra* note 41.

<sup>79</sup> *Id.*

respondents are commonly asked to help speak to potential witnesses and gather documentary evidence. Clients who are in detention cannot help much in that regard. While relatives and friends may be able to assist in some cases, in Tatyana's case, those resources were not available. Under the circumstances, Tatyana was fortunate to at least have a pro bono attorney, because many attorneys will not volunteer to handle clients in detention because of the communication challenges.<sup>80</sup>

The history of immigration detention policies reveals that immigration officials did not always detain noncitizens contesting deportation:

Immigrants were not detained at all until the 1890s when the United States opened its first federal immigration detention center in Ellis Island, New York. A shift in immigration policy occurred in 1952 when Congress passed the Immigration and Nationality Act (INA), which eliminated detention except in cases in which an individual was a flight risk or posed a serious risk to society. Ellis Island subsequently closed.<sup>81</sup>

The 1980s saw the beginnings of a shift in detention policy, largely influenced by Cuban, Haitian, and Central American refugees. In the 1990s the United States made a monumental shift in immigration policy, using detention as a primary means of enforcement, regardless of whether the individual was a flight risk or serious risk to society. In 1996, the United States enacted legislation that dramatically expanded the use of detention. The Antiterrorism and Effective Death Penalty Act ("AEDPA") and the Illegal Immigrant Reform and Immigrant Responsibility Act ("IIRIRA") expanded mandatory detention without bond to large categories of non-citizens.<sup>82</sup>

The drastic expansion of mandatory detention also combined with skyrocketing detention budget appropriations to the Department of Homeland Security ("DHS") and changes in DHS policies and priorities favoring detention. As a result, the number of individuals detained has grown dramatically since the 1990s. In 2001, the U.S. detained approximately 95,000 individuals. By 2007, the number of individuals detained annually in the U.S. had grown to over 300,000. The average daily population of detained immigrants has grown from approximately 5,000 in 1994, to 19,000 in 2001, and to 32,000

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<sup>80</sup> Markowitz, *supra* note 76, at 561.

<sup>81</sup> Detention Watch Network, The History of Immigration Detention in the U.S., <http://www.detentionwatchnetwork.org/node/2381> (last visited June 1, 2010).

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

by the end of 2008.<sup>83</sup> In 2004, Congress authorized the creation of 40,000 new detention beds by 2010, which will bring detention capacity close to 62,000.<sup>84</sup>

Today, conditions at ICE detention facilities leave a lot to be desired. Numerous international and national human rights organizations, scientific journals, and newspapers have published reports documenting different aspects of immigration detention conditions in heartbreaking detail. While all detainees endure inexcusably harsh conditions, some problems disproportionately affect those with mental disabilities. Mentally ill detainees are especially vulnerable because they cannot advocate for themselves when they are not competent, and because they may be punished for behavior that they cannot control.

A 2008 Amnesty International investigation found:

International standards require that administrative detention should not be punitive in nature. However. . . conditions of detention in many facilities do not meet either international human rights standards or ICE guidelines. Immigration detainees are often detained in jail facilities with barbed wire and cells, alongside those serving time for criminal convictions. They are not able to wear their own clothes but instead wear prison uniforms. Immigrants are unnecessarily exposed to inappropriate and excessive restraints including handcuffs, belly chains, and leg restraints. Amnesty International received reports that some individuals have been subjected to physical and/or verbal abuse while held in immigration detention, in violation of international standards. Individuals in detention also have inadequate access to exercise and find it very difficult to get timely and, at times, any treatment for their medical needs.<sup>85</sup>

Appalling medical conditions at U.S. detention facilities have been well documented. An investigative series by the Washington Post documented a

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* The 1996 laws also established a new procedure called “Expedited Removal” that allows immigration inspectors to summarily remove immigrants arriving without proper documentation. This is done without a hearing, and detention is mandated for the time it takes to remove that person from the United States. Asylum seekers and people claiming to have status in the United States are held without bond until they have established a “credible fear” of return to their country or until their status is determined. Originally, Expedited Removal was required only at the border, but was expanded in 2004 to include all undocumented immigrants apprehended within 14 days of entry and 100 miles of the border in some Border Patrol sectors. It was expanded again in 2006 to include all areas within 100 miles of U.S. borders, including coastal areas. *Id.*

<sup>85</sup> IMMIGRATION DETENTION REPORT, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA, Executive Summary (2008), <http://www.amnestyusa.org/print.php>.



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number of cases in which seriously ill detainees died days or even weeks after requesting medical care and receiving ineffective, inappropriate care, or no care at all.<sup>86</sup> A staggering dearth of health-care resources was documented. In one example, the Willacy County detention center in South Texas – the largest compound, with 2,018 detainees – had no clinical director, no pharmacist, and only a part-time psychiatrist. The investigation found a hidden world of flawed medical judgments, faulty administrative practices, neglectful guards, ill-trained technicians, sloppy record-keeping, lost medical files, and dangerous staff shortages. Evidence revealed infectious diseases, including tuberculosis and chicken pox, spreading inside the centers.<sup>87</sup> The investigation reported frightening details affecting detainees suffering from mental illness:

Suicidal detainees can go undetected or unmonitored. Psychological problems are mistaken for physical maladies or a lack of coping skills. In some cases, detainees' conditions severely deteriorate behind bars. Some get help only when cellmates force guards and medical staff to pay attention. And some are labeled psychotic when they are not; all they need are interpreters so they can explain themselves.<sup>88</sup>

Records obtained by the Washington Post revealed that detention officials tracked the cost savings for denial of treatment for medical conditions – roughly half of which are mental illnesses. For example, denial of treatment for four detainees with “manic-depressive psychosis unspec” resulted in cost-savings of \$18,145.36.<sup>89</sup> Based on confidential medical records and other sources, the Washington Post identified eighty-three deaths of immigration detainees between March 2003, when the Immigration and Customs Enforcement agency was created, and March 2008. The Post found that thirty of the deaths were questionable.<sup>90</sup> Fifteen were suicides. Sebastian Mejia Vincentes was one example. He hung himself in August 2004 while detained in a Virginia jail. Obviously, as a mentally ill person, he was not adequately supervised. He was dead from four to six hours before his body was discovered, despite a jail rule that

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<sup>86</sup> Dana Priest & Amy Goldstein, *Careless Detention: System of Neglect*, WASH. POST, May 11, 2008, available at <http://www.washingtonpost.com/wp-srv/nation/specials/immigration/index.html>.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> See Justin Ferrell, et al., *Map: A Closer Look at 83 Deaths*, WASH. POST, May 10, 2008, available at <http://www.washingtonpost.com/wp-srv/nation/specials/immigration/map.html>.

detainees must be checked on every thirty minutes.<sup>91</sup>

Workers at the Florida Immigration Advocacy have witnessed similar problems. In one case, a detainee, after slitting her wrists, was placed in isolation – a move that is more likely to exacerbate suicidal tendencies and mental illness than to stabilize or improve mental health. Worse, officers ordered the woman to strip naked so they could place her in a restraint smock. She refused and threatened to bang her head against the wall. Eventually, she took off all her clothes except her underpants. Two officers then restrained her arms while another forcibly removed her undergarment. Officers wrapped her in the restraint smock and placed her in a restraint chair. All this was documented in a jail incident report. The report also said that the detainee was seen and cleared by medical. It was unclear what, if any, follow-up care was given to her.<sup>92</sup>

An additional concern is that because so many people are taken into detention under the mandatory detention law, DHS personnel cannot do proper background checks of everyone who is placed in detention. There have been many cases of legal permanent residents (“LPR’s”) and even U.S. citizens who have been illegally detained and deported.<sup>93</sup>

Those suffering from mental illness are likely to have difficulty helping to prepare for their deportation case. Even detainees who are competent face difficulties advocating for themselves, attempting to acquire counsel, and accessing critical documentation because of the complexities of immigration law. A person who is not competent from the beginning, and who further deteriorates in detention due to lack of medical care, is not likely to be capable of doing anything to protect himself or herself from being deported. Consider Xiu Ping Jiang, a mentally ill woman from China with a legitimate claim to asylum who spent a year and a half in detention and was ordered deported. She could not manage any paperwork and her first attorney withdrew because he was unable to communicate with her due to her illness. Fortunately, her plight came to the attention of the *New York Times* and a Florida judge reopened her case and released her on bond.<sup>94</sup> The case of

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<sup>91</sup> Amy Goldstein & Dana Priest, *Five Detainees Who Took Their Lives*, WASH. POST, May 13, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/12/AR2008051202694.html>.

<sup>92</sup> FLORIDA IMMIGRATION ADVOCACY CENTER (FIAC), DYING FOR DECENT CARE: BAD MEDICINE IN IMMIGRATION CUSTODY 1 (2009), <http://www.fiacfla.org/reports/DyingForDecentCare.pdf>.

<sup>93</sup> Susan Gamboa, *Citizens Held as Illegal Immigrants*, ABC NEWS/AP IMPACT, Apr. 12, 2009, <http://abcnews.go.com/US/wireStory?id=7318392>. In *Flores-Torres v. Holder*, No. 09-CV-3569-WHA (N.D. Cal. Dec. 23, 2009), the UC Davis Immigration Clinic was able to successfully establish that the respondent in removal proceedings had actually derived U.S. citizenship through a parent.

<sup>94</sup> Nina Bernstein, *Immigrant Finds Path Out of Maze of Detention*, N.Y. TIMES, Sept. 10,

Pierre Bernard, a Haitian immigrant, is also relevant. He was illegally detained by ICE just one day after he arrived at a psychiatric hospital for what was supposed to be a six-month stay at the hospital. Bernard was fortunate enough to have been represented by a zealous pro bono attorney. His attorney was persistent, even though Bernard was difficult to communicate with and was not competent to sign a release that would allow the attorney to gain access to necessary records.<sup>95</sup>

U.S. citizens suffering from mental illness have also been mistakenly taken into immigration detention and deported. Pedro Guzman, born in California, has a mental illness and suffers from psychosis. One day he tried to board a private plane using lottery tickets for passage. He had also taken someone else's car because, he said, his mother's car was broken. He was sentenced to three years' probation and three months in jail for vandalism. At the jail, he told an employee that he was born in California, but he complied with an ICE officer when asked to sign a document – written in Spanish, which he could not read – agreeing to be deported. ICE removed him and he was lost and homeless in Mexico for three months before his family managed to find him.<sup>96</sup>

Legal services attorneys at the ICE detention facilities in Arizona have witnessed many of the problems faced by detainees suffering from mental illness up close.<sup>97</sup> The attorneys often see immigration clients with mental competency issues face multiple hurdles at every stage of the process as they attempt to adequately represent their clients. The problems include challenges related to communication, ensuring adequate representation, judicial efficiency, and ultimately a general lack of resources for attorneys, clients, and the courts.

The lack of procedural safeguards for detainees – especially those who are acting pro se – causes tremendous problems that present a ripple effect throughout the system. Immigration judges do not have authority to do anything with a detainee who lacks mental competency. Not having the power to terminate for lack of competence is a huge problem. During the proceedings, if the person cannot even communicate with the judge, the proceedings become time consuming. Because detainees suffering from mental issues are unable to easily comprehend what is happening, and typically lack a guardian, all parts of the process take much longer than normal. The mentally ill often refuse to sign documents, more than most

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2009, available at [http://www.nytimes.com/2009/09/11/nyregion/11mental.html?\\_r=1](http://www.nytimes.com/2009/09/11/nyregion/11mental.html?_r=1).

<sup>95</sup> Laura Tillman, *America's Immigration Gulags Overflowing with Mentally Ill Prisoners*, BROWNSVILLE HERALD, Feb. 19, 2009, available at <http://www.alternet.org/story/12745>.

<sup>96</sup> Gamboa, *supra* note 93.

<sup>97</sup> Interview by Victoria Hassid, U.C. Davis Law Student, with Thalassa Kingsnorth, Attorney at Law, in Eloy, Ariz. (Dec. 4, 2009).

people. Refusal to sign is a huge problem in terms of filing applications for relief, notices of appeal, acknowledging proper service of the Notice to Appear, doing FOIA requests, and other similarly necessary filings.

Mentally ill clients' cases are particularly vulnerable not only because clients struggle to comprehend what is occurring, but also because of complications with their medications. If the person is fighting to remain in the country, they will be detained for at least six months, though realistically, much longer. When a person in detention is receiving medication, they tend to be heavily medicated. This makes case preparation particularly challenging.<sup>98</sup>

Because of the difficulties associated with these cases, *pro se* litigants who have mental competency issues and are in immigration proceedings face a dearth of attorneys who are willing and able to take their cases. These cases are less appealing to pro bono and private counsel even if there is a good form of relief because they may appear to be less sympathetic, the clients are difficult to access, and more preparation is required.

Immigration judges, particularly in rural areas, manage large dockets and have a limit on the time and resources they can provide to detainees. In Eloy, Arizona, the immigration judge may have only ten to fifteen minutes to spend on a client's Master Calendar hearing. Judges have little time to spend on detainees suffering from mental disability or illness.

## V. TWO DETENTION CASES FOR COMPARISON

The Immigration Clinic at UC Davis was not able to accept Tatyana's case. Certainly, no one can say for sure that the outcome would have been different if Tatyana had different representation. And while no two cases are precisely the same, and outcomes can vary irrespective of the amount of time spent on case preparation, two other detention cases in which the Clinic participated provide some anecdotal food for thought.

### A. *Fento's Case*<sup>99</sup>

The Mendesha family was from Ethiopia. All of the Mendesha family children had been orphaned due to the Ethiopian government's persecution of their family. During the war, all ten children had been separated and had fled in different directions. Two children, Mina and Gitau, lived for years in a refugee camp in Kenya without family. After years of searching, the children found their older brother and sister in Oakland, California. The older brother, Fento, raised the children like a father once they were reunited

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<sup>98</sup> *Id.*

<sup>99</sup> The account of Fento's case (a pseudonym) was provided by Holly Cooper, staff attorney at the UC Davis Immigration Clinic (on file with the author).

in the United States. The children eventually were granted political asylum.

Fento went on to pursue higher education at the University of California, Davis under a full scholarship. He was one of the first African American students from his high school to receive such a high honor and received awards for his academic excellence. Unfortunately, in his last year at UC Davis, he began to develop a serious mental illness and never graduated. He then began to self-medicate and had minor contacts with the criminal justice system due to his drug use. As a result of these encounters with the law, ICE arrested Fento and sent him to ICE detention facilities in Eloy, Arizona, for deportation proceedings.

In his eight months in Arizona, Fento received no mental health treatment and had completely decompensated. The UC Davis Immigration Law Clinic agreed to take on his case. A student flew to Arizona and spoke to the medical staff who confirmed that Fento was not receiving any treatment, but the medical staff refused to release the files to the Clinic.

A second student then drafted a request to change venue from Eloy to San Francisco so Fento could have family visits and the Immigration Clinic could monitor his treatment more closely. The immigration judge denied the request. The judge wanted solid proof that Fento was not receiving any treatment at all in Eloy and that California's detention system would provide better treatment. Despite repeated requests for the medical files, the Eloy prison would not budge. A third student working on FOIA requests that were being ignored filed a request for Fento's medical records under the Health Insurance Portability and Accountability Act (HIPAA) of 1996.<sup>100</sup> Finally, solid evidence was unearthed that Fento had never received any treatment in Eloy; in fact, he had never even spoken to a psychiatrist throughout his stay, despite repeated requests for treatment. The immigration judge finally granted the request for change of venue.

Fento was transferred to California and detained in the Santa Clara County Jail. He was immediately civilly committed. The law students then coordinated with the county mental health staff to ensure a proper treatment plan.

The Immigration Clinic then confronted a major legal issue: how could an incompetent individual be adequately represented in immigration proceedings when he does not have sufficient "ability to consult with his lawyer with a reasonable degree of rational" understanding?<sup>101</sup> The Immigration Clinic students consulted with the Mental Health Advocacy Institute in Los Angeles, where an attorney was working on the challenges that face mentally ill ICE detainees. The attorney became co-counsel in the

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<sup>100</sup> Health Insurance Portability and Accountability Act (HIPAA) of 1996, Pub. Law No. 104-191, 110 Stat. 1936 (1996).

<sup>101</sup> *Dusky v. United States*, 362 U.S. 402 (1960).

case and authored a motion for the appointment of a guardian ad litem on behalf of Fento. In spite of the fact that guardian ad litem is uncharted territory for most immigration courts, the immigration judge granted the motion, and Fento's sister was appointed his guardian ad litem.

The students secured five expert witnesses in the case. One provided expert testimony on Fento's mental illness. Two doctors in Ethiopia were found who work at the only psychiatric hospital in all of Ethiopia; they described psychiatric treatment conditions in Ethiopia. An Australian doctor, who had extensively studied the Ethiopian mental health care system, provided testimony regarding its deficiencies and the problems Fento would confront if he were deported back to Ethiopia.

The Clinic students authored a sixty-page trial brief on asylum law, the effects of persecution on the children, and whether Fento merited a favorable grant of cancellation of removal. One student prepared Fento's sisters' testimony and researched issues of eligibility. A second student prepared the testimony of Fento and that of the three expert witnesses who all lived abroad, and was prepared to argue asylum law. A third student prepared the testimony of the guardian ad litem and the volunteer psychologist. The same student was also prepared to state Fento's claim to severe past persecution.

A week prior to the hearing, Fento suffered adverse effects from the medication and had serious seizures due to a sodium imbalance in his brain. A Clinic student closely monitored his treatment. She visited him in the hospital and spoke with the medical staff regarding his past psychiatric history. For most prisoners or detainees, medical history is not provided to the new medical staff each time the prisoner is transferred. The student knew the hearing was fast approaching and wanted him to heal so that he would be physically able to attend his hearing. The family was incredibly grateful for the student's compassion and came to regard her as a sister in their family.

At the final hearing, Fento's family and the Immigration Clinic team were there to support him. One student conducted the direct examination of the sister who had been appointed guardian. The sister provided lengthy, powerful and emotional testimony regarding her brother's condition, the family's dramatic history of exile and persecution, and the likely hardship to Fento and her family if he were deported. Her testimony was deeply moving for everyone.

After the guardian's testimony, the government trial attorney determined that he did not need to hear more evidence, essentially conceding Fento's claim for relief. The immigration judge granted cancellation of removal for Fento. The family was ecstatic, declaring that it was the best day of their lives.

*B. JC's Case*<sup>102</sup>

JC, a native and citizen of Mexico, entered the United States when he was 19 years old in order to be with his family. He became a lawful permanent resident, and for the first several years, JC helped support his family by working to earn money. He also assisted his family by acting as an interpreter and taking on family responsibilities, such as interacting with teachers and parent groups at his younger siblings' schools.

When he was 25, JC was accepted as a student at a seminary in another state. For the first year, he worked hard and received good grades. In his second year, he began having emotional, behavioral, and functional difficulties. A priest at the seminary took him to a hospital emergency room where he received a diagnosis of schizophrenia. The seminary sent JC home, telling his family that he was ill, but not disclosing his diagnosis. JC's condition deteriorated, and six months later, his county's mental health department diagnosed him with psychotic disorder and approved him for treatment. He saw a psychologist once, but unfortunately, the county where he resided was having budget and staffing problems and JC's case was lost in the backlog of mental health cases.

Three months later, JC wandered away from home while in a psychotic state in which he had lost contact with reality. He thought that a woman was telling him that he owned some property and a house nearby, so he went to the house, opened the screen door, and jiggled the knob of the front door. The residents told him to go away and he went to the road, but then returned to the property and started to pick walnuts to eat. The residents called the police and JC was charged with first degree burglary. JC was placed in jail where, due to court continuances and disagreements about his clinical condition, he spent six months before he was found incompetent to stand trial and sent to a penal psychiatric facility. There, for the first time, JC received medication for his schizophrenia. It took a year for JC to recover enough to be found competent to stand trial.

JC was appointed a public defender to represent him at trial. When reviewing JC's records, the public defender failed to notice that he was using someone else's RAP sheet, someone with a different name and who had a number of serious prior convictions. The public defender then recommended that JC plead no contest to the burglary charge with a sentence of 365 days. The public defender was not aware that, under federal immigration law, a conviction with a sentence of 365 days is considered an aggravated felony, automatically making the defendant deportable. Since JC had already spent nearly two years in custody, he had credit for serving far more than 365

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<sup>102</sup> The account of JC's case was provided by Pia Johnson, one of the students who worked on his case (on file with author).

days' time (including credit for good behavior), and the judge finally released him with 3 years' probation.

However, JC's troubles were far from over. Four days after his release, ICE detained him, alleging that he had committed a crime for which he was deportable. At this point, his family contacted the Immigration Law Clinic at UC Davis. Law students from the Clinic reviewed his records and discovered that JC had grounds to withdraw his criminal plea and negotiate a fairer plea bargain; they helped JC file a motion to do so. At this point, JC should have been eligible for release on bail, but ICE did not inform his family of this fact, or acknowledge JC's rights.

Now JC was again held in a county jail, but as a detained immigrant, and not under criminal law. He needed to maintain his already fragile health in order to contest the criminal conviction that was the basis for his detention. Every time he appeared in court, he had to be transferred from the custody of one system to another and then back again. Each time he was transferred, his medical records were supposed to go with him. Each time he returned to a facility, the transferred records were supposed to be used to guide his treatment until his other records could be obtained. Unfortunately, JC's records were frequently not transferred, or were sent at a later time, or otherwise misplaced. Each time this happened, JC missed a few days of his medication. After several months in detention, JC was moved, without notice to anyone, to a detention facility several hundred miles away from his family and his legal team. At this new facility, JC did not receive any medication for weeks. When his family finally located him and the law students were able to visit, he was catatonic and completely unable to communicate or function. Despite persistent efforts of the law students, JC was not immediately treated or returned to his original detention center, and ended up spending thirteen days on suicide watch.

While this was taking place, ICE also began refusing to transport JC to court to contest the conviction upon which his immigration detention was based. This happened at least five times. By the time the Immigration Clinic and the Civil Rights Clinic at UC Davis were able to get a writ of habeas corpus in order for JC could be released on bond, JC had spent an additional year in jail as an immigration detainee. During his detention, attorneys and law students spent well over 400 hours on his case, attempting to get JC medical treatment, transportation to court, and the release on bond to which he was entitled in the first place.

With the help of the Immigration and Civil Rights Clinics, JC was ultimately able to convince the court to withdraw his plea, reinstate the charges, and allow him to make a much more reasonable plea bargain that did not jeopardize his immigration status. But now JC had to face a hearing before an immigration judge in order to convince the court that he was not deportable. JC had three grounds upon which he could argue that he was not



deportable, but it is unlikely that he would have been able to argue those grounds effectively on his own. In addition, even though he was fortunate enough to understand English reasonably well, it is unlikely that he would have been able to afford a competent translator to make sure that he understood everything taking place. Fortunately, with the assistance of the students and attorneys from the Immigration Clinic, JC prevailed at immigration court as well.

Despite the disastrous mistakes and misunderstandings in JC's criminal case, he was at least provided with certain protections while in criminal custody that he did not have while in immigration detention – despite the fact that California's penal medical system has been found to be so constitutionally substandard that it has since been removed from state control and placed in receivership.<sup>103</sup> JC had a public defender (albeit of questionable competence) provided at public expense at all stages of his criminal proceedings. He was also provided with a translator at every criminal hearing – again, at public expense. His medical condition was assessed by a psychiatrist before his hearing, and a hearing was held to decide whether or not he was competent to stand trial. When found to be mentally incompetent, he was not expected to proceed. He received continuous medical care, even after he left the psychiatric facility, which enabled him to maintain daily functioning and remain competent enough to understand and participate in his own legal proceedings. These protections ensured that JC received meaningful due process of law.

In marked contrast, the time that JC spent in the immigration system was characterized by treatment that unnecessarily compromised his right to due process. Although JC's schizophrenia was well documented, he was refused medication to the point that he became acutely suicidal. JC was not informed that he was eligible for release on bond. He was transferred between facilities a number of times, and most transfers resulted in a break in his medication regime. At one point JC was suddenly transferred to a facility hundreds of miles away, where he could only access his family and legal team with great difficulty. Immigration authorities refused to transfer JC to criminal court so he could participate in his hearings there – hearings in which he was contesting the very conviction that was the basis for his immigration detention. JC was indefinitely detained until the Immigration Clinic obtained a writ of habeas corpus for him.

Further, JC was not guaranteed an attorney at any point during his immigration proceedings. In fact, even though non-citizens have a right to legal representation, the non-citizen has to pay for his attorney or appear *pro se*. This is true even when the non-citizen is especially vulnerable, for example due to a mental disability that renders him utterly incompetent and

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<sup>103</sup> Plata v. Schwarzenegger, 2005 WL 2932253 (N.D. Cal. 2005).

unable to participate in his own defense at all.

If JC had not had representation, the immigration judge would have had the heavy burden of having to decide at the beginning of the hearing, on the spot, whether or not JC was mentally competent. *If* the immigration judge suspected incompetence, s/he *could* have referred JC to a list of non-profit organizations that provide free or low-cost representation. However, this does not mean that an attorney would have been available. Sometimes immigration judges will reschedule the hearing over and over, hoping that the non-citizen will get help, but also prolonging their detention. That is essentially what happened in Tatyana's case.

Non-citizens are also expected to provide their own translators during their hearings. If the translator does not do an adequate job, this is considered to be the responsibility of the non-citizen, and the non-citizen is given another chance to provide a competent translator.

#### VI. PROVIDING ICE AND IMMIGRATION JUDGES WITH NEW TOOLS

The setting is the Community Justice Center where San Francisco Superior Court Judge Ron Albers presides. The Community Justice Center is not a traditional court. "How are you today?" Albers asks 38-year-old Tenecia Gippson-Kent. "Great," she answers, beaming. Albers asks the room to give her a round of applause. Gippson-Kent was arrested a few months earlier for passing a bad check. She had been in and out of jail, mostly on drug charges. She said a cocaine addiction led to her losing her four kids and sleeping on the streets. Since coming to the Community Justice Center, she has been assigned a case manager. She is taking parenting classes, attending substance abuse support groups and seeing a therapist, and she has a bed in a shelter. It is all part of her sentence, handed down by Albers in exchange for no jail time and the charge being cleared from her record if she follows through with the program. She checks in with Albers regularly. "I love this judge," she said after discussing her progress with Albers. "It just boosts me like, 'Keep going. Keep going.' I think I'm going to become a real success."<sup>104</sup>

Defendants like Gippson-Kent have the right to choose whether to participate in the Community Justice Center or have their case handled at the Hall of Justice and face jail time. The option is not just for those who write bad checks. The program is made available even to defendants with serious charges – drug dealing, grand theft and assault – who have responded

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<sup>104</sup> Heather Knight, *Innovative Tenderloin Court Has Fans, Skeptics*, S.F. GATE, Nov. 30, 2009, available at [http://articles.sfgate.com/2009-11-30/news/17181467\\_1\\_crimes-charges-jail](http://articles.sfgate.com/2009-11-30/news/17181467_1_crimes-charges-jail).

favorably.<sup>105</sup>

The Community Justice Center is just one of the many options that have evolved in the criminal justice system over the years, including drug courts, mental health courts, community service options, and diversion programs. Why have these options evolved? Because criminal and juvenile courts are realizing that incarceration is not the answer for every defendant. They understand that in certain cases, a different option is worth trying for the sake of the defendant as well as the community.

Just like criminal courts, immigration courts need more tools. The problem with the immigration court system is that the immigration judge essentially only has two options: deportation or a grant of the full right to stay lawfully. Thus, if an immigration judge has some doubt or is not inclined to take a chance, the easy choice may be deportation. Allowing a so-called “criminal” alien to remain involves a risk of recidivism that an immigration judge may not want to take. The immigration judge loses immediate control over the life of the respondent who is granted a waiver, unless of course the person recidivates and ends up in deportation proceedings again. In the meantime, the immigration judge and DHS have no direct influence over the person. In contrast, drug courts, mental health courts, diversion programs, and community courts are constructed in a manner that involves regular reporting to probation departments, community partners, or directly to the court. Ironically, in Tatyana’s case, if relief had been granted, the immigration judge actually had a surrogate who would have taken control of Tatyana – the Superior Court of Sonoma County, which had a family reunification plan ready for her. In short, the state court would have monitored her behavior.

I have argued elsewhere that the removal process should include alternatives to deportation – such as restorative justice approaches – so that immigration judges might be able to monitor the progress of deportable aliens convicted of aggravated felonies in a probation-style system.<sup>106</sup> What the experiences of Tatyana, JC, and Fento teach us is that immigration judges need special options when a respondent is suffering from mental illness. Current procedures provide the judge with no assistance.<sup>107</sup>

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

<sup>106</sup> BILL ONG HING, *DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY* 108-15 (2006).

<sup>107</sup> Current regulations provide:

When it is impracticable for the respondent to be present at the hearing because of mental incompetency, the attorney, legal representative, legal guardian, near relative, or friend who was served with a copy of the notice to appear shall be permitted to appear on behalf of the respondent. If such a person cannot reasonably be found or fails or refuses to appear, the custodian of the respondent shall be requested to appear on behalf of the respondent.

Immigration judges need professional assistance in determining the nature and extent of the mental illness, a process for appointing guardians ad litem, funds for the appointment of counsel to represent respondents, and the discretion to release the person from detention and/or to order appropriate medical care for the respondent. When the mental illness is directly related to the ground of removal, as in Tatyana's case, the immigration judge needs the discretion to cancel the proceedings – with or without prejudice – or to hold the matter in abeyance while the respondent is able to avail himself or herself of appropriate care.

Tatyana's case is deeply disturbing on many levels. First, as mentioned above, the immigration judge should have deferred to the expertise of the state court on matters of family law. Second, recidivism was unlikely. Tatyana was motivated to rehabilitate herself. For one, she faced deportation. The fact that the threat of deportation was one motivating factor to control behavior is not bothersome because motivation is motivation. Further, Tatyana's motivation to rehabilitate in order to regain custody of her child was also strong, and her behavior would be constantly monitored by CPS.

While I strongly disagree with the immigration judge's reasoning and decision, obviously his position had objective support and some (most notably the BIA) could agree that his decision was reasonable. However, I and others would take a different approach. I have a strong belief in the ability of criminal offenders to rehabilitate. I have represented criminal clients who have rehabilitated themselves, and I have met countless other ex-offenders who are now rehabilitated. These include former gang members, attempted murderers, drug offenders, prostitutes, violent criminals, and even batterers. I have been told that child abusers can reform and be cured of negative impulses.<sup>108</sup> However, even if Tatyana could not be rehabilitated of her child abuse, I am confident that county officials would not return the child to her if she were not deported.

The immigration judge's focus on Tatyana's earlier opportunity with an anger management course and psychotherapy that was not successful was short sighted. The judge treated that experience as conclusive evidence that she would not reform. But that simply is not the way these processes work, and professional counselors would disagree with the immigration judge. This is the heart of the problem with the detention and removal system. There are no accommodations for the hard process of reformation and no

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8 C.F.R. § 1240.4; *see also* 8 U.S.C. § 1229a(b)(3). The federal courts have held that substantive due process rights are not violated if the immigration judge moves forward with a removal hearing involving a mentally incompetent respondent. *See Brue v. Gonzalez*, 464 F.3d 1227, 1232-34 (10th Cir. 2006).

<sup>108</sup> Krystal Jaime Interview, *supra* note 75.

behavioral or medical professionals to assist the immigration court.

Adding the fact that Tatyana was in detention during the course of her removal proceedings to the fact that she was suffering from clinical depression makes the justification for the immigration judge's decision even more complicated. Tatyana was in custody, and the only way the judge could let her out was to grant her relief. But the judge thought she was a danger to society. Once he made that factual finding, the statute left the judge with no choice. He had no creative options.

Tatyana was subject to removal because of her two convictions: one for child abuse and the other for simple battery against her former boyfriend. The underlying circumstances of the simple battery were the repeated acts of violence her boyfriend subjected her to. Her abuse or her child, while serious, arguably is consistent with her own history of abuse and abandonment. As such, Tatyana's criminal history is a derivative of her mental health problems and her need for mental health treatment.

Well aware of this history, the probation officer suggested that the state court consider the fact that Tatyana "voluntarily acknowledged wrongdoing prior to arrest and entered a guilty plea at an early stage of the criminal process," that she was "extremely remorseful," presented as "extremely forthright, and at times volunteering details of her conduct not previously known," and "displayed a level of insight that the CPS representative suggested may indicate that Mitrohina could benefit from further counseling and therapy."<sup>109</sup> This information and insight was drawn prior to the institution of deportation proceedings. The picture is not of a person who is trying to evade responsibility. Rather, Tatyana presented as a person who knew she had a problem, who wanted to come to grips with her shortcomings, and whom officials were not ready to write off. The probation officer thus concluded: "Considering the defendant's minimal criminal history, her past success on formal probation/conditional sentence, her willingness to comply with the terms of probation, and her current level of remorse, we will make a recommendation for a grant of formal probation."<sup>110</sup>

Rather than deportation, what seemed more appropriate was counseling and mental health therapy, which could include medication. Tatyana faced two substantial challenges: she was in detention<sup>111</sup> and she was suffering from depression. They each placed her at a severe handicap when it came to her ability to prevail in her deportation proceedings. Together, they made relief nearly impossible.

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<sup>109</sup> Report at 9.

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

<sup>111</sup> See supra notes 86-93 and accompanying text (discussing challenges posed by detention).

Tatyana's depression was diagnosed by the mental health staff at the county jail who prescribed Zoloft for treatment. The state court ordered Tatyana to participate in a number of different services: a domestic violence program, general counseling, a psychiatric/psychological evaluation, and a psychotropic medication evaluation/monitoring and parenting education program. However, because Tatyana was transferred to ICE custody, she was not able to take part in those services. In fact, once in the hands of ICE, she received no further medication or counseling.

When contemplating mental illness in the context of deportation proceedings, lessons from medical professionals are important to keep in mind. For example, the presence or degree of severity of mental illness is not always immediately apparent, even to psychologists and psychiatrists who have the luxury of performing a full assessment.<sup>112</sup> Furthermore, extreme stress such as that caused by the living conditions in immigration detention facilities may worsen or even trigger some mental illnesses in predisposed individuals, particularly in people with PTSD and depression.<sup>113</sup> Studies also suggest that psychosis can be caused or triggered by stress.<sup>114</sup>

Some people with mental disabilities need assistance to maintain their treatment regimes and function well in the community. Such assistance may include reminding the individual about doctor's appointments and, if necessary, providing transportation, ensuring that medications are obtained and taken consistently, making certain that the individual participate in an appropriate therapy program, and alerting a psychiatrist or hospital if the individual has a crisis.<sup>115</sup> Continuous treatment is critical for many people with mental disabilities. Breaks in medication may result in a relapse and unnecessarily lead to a return to mental incompetence.<sup>116</sup> In addition to recurrence of symptoms, breaks in medication may result in severe and dangerous side effects.<sup>117</sup> This break in continuity was a serious problem in

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<sup>112</sup> Kyung M. Song, *Diagnosis of Mental Illness Hinges on Doctor as Much as Symptoms*, SEATTLE TIMES, Oct. 22, 2003, available at <http://community.seattletimes.nwsources.com/archive/?date=20031022&slug=diagnosis22c0>.

<sup>113</sup> PHYSICIANS FOR HUMAN RIGHTS & THE BELLEVUE/NYU PROGRAM FOR SURVIVORS OF TORTURE, FROM PERSECUTION TO PRISON: THE HEALTH CONSEQUENCES OF DETENTION FOR ASYLUM SEEKERS 24 (2003), <http://physiciansforhumanrights.org/library>.

<sup>114</sup> R. Day, et al., *Stressful Life Events Preceding the Acute Onset of Schizophrenia: A Cross-National Study from the World Health Organization*, 11 CULTURE, MED. & PSYCHIATRY 123-205 (1987).

<sup>115</sup> Paolo del Vecchio, Larry Fricks & J. Rock Johnson, *Issues of Daily Living for Persons with Mental Illness*, 4 AM. J. OF PSYCHIATRIC REHABILITATION 410-23 (2000).

<sup>116</sup> Carol E. Adair, M.Sc., Ph.D., et al., *Continuity of Care and Health Outcomes Among Persons with Severe Mental Illness*, 56 PSYCHIATRIC SERVICES 1061-69 (2005), available at <http://www.psychservices.psychiatryonline.org/cgi/content/abstract/56/9/1061> (last visited June 1, 2010).

<sup>117</sup> Donald S. Robinson, MD, *Antidepressant Discontinuation Syndrome*, 13 PRIMARY

Tatyana's situation.

Treatment does not just mean medications. Medication is crucial in many cases, but it is certainly not always adequate in and of itself. People may also need counseling to learn how to manage the disability, collaborate in treatment decisions, and handle day-to-day issues as they arise.<sup>118</sup>

While the record does not provide enough information on Tatyana's personal situation to know for certain, the abuse she suffered as a child may have had something to do with her own mental illness. Many disabilities have a strong genetic component; others may be developmental or result from severe trauma or abuse.<sup>119</sup>

The danger posed by individuals suffering from mental disorders is usually misunderstood. When corrected for factors such as substance abuse, history of severe child abuse, and socioeconomic background, data show that additional risk due to mental illness is low.<sup>120</sup> While it is true that a high proportion of people in jail have a mental illness, that population has the same risk factors as offenders without mental illness.<sup>121</sup> The misperception arises in part because of sensationalized, negative media portrayals or because a person with a mental disability may behave in a way that makes others uncomfortable.<sup>122</sup> An alcoholic is more likely to commit a violent crime than is a person with a mental disability.<sup>123</sup>

Most people with mental illness who receive proper treatment can have successful lives and contribute to society. Some even recover completely. In short, individuals with mental illness need not be fated to be a drain on the medical and social welfare systems.<sup>124</sup>

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PSYCHIATRY 23-24 (2006), available at <http://www.primarypsychiatry.com/asp/articleDetail.aspx?articleid=625> (last visited June 1, 2010).

<sup>118</sup> NATIONAL INSTITUTE OF MENTAL HEALTH, SCHIZOPHRENIA 11-12, NIH Publication No. 09-3517 (2000).

<sup>119</sup> *Id.* at 6-7, 15; National Resource Center for Respite and Crisis Care Services, *Abuse and Neglect of Children with Disabilities*, <http://www.archrespite.org/archfs36.htm>.

<sup>120</sup> Eric B. Elbogen & Sally C. Johnson, *The Intricate Link Between Violence and Mental Disorder: Results from the National Epidemiologic Survey on Alcohol and Related Conditions*, 66 ARCHIVES GEN. PSYCHIATRY 152 (2009).

<sup>121</sup> *Id.*

<sup>122</sup> Jack K. Martin, et al., *Of Fear and Loathing: The Role of 'Disturbing Behavior,' Labels, and Causal Attributions in Shaping Public Attitudes toward People with Mental Illness*, 41 J. HEALTH & SOC. BEHAVIOR 208-23 (2000).

<sup>123</sup> "A diagnosis of a major mental disorder – especially a diagnosis of schizophrenia – was associated with a lower rate of violence than a diagnosis of a personality or adjustment disorder. A co-occurring diagnosis of substance abuse was strongly predictive of violence." MacArthur Research Network on Mental Health and the Law, *The MacArthur Violence Risk Assessment Study*, Sept. 2005, <http://www.macarthur.virginia.edu/risk.html> (last visited June 1, 2010).

<sup>124</sup> SCHIZOPHRENIA, *supra* note 118, at 6-7, 15.

## VII. CLOSING

Tatyana Mitrohina was deported from the United States and lost her child in the process because of a detention and deportation system that failed to address her needs as a person suffering from mental illness. The system that failed Tatyana represents the sum of the choices that were made by policymakers, enforcement officials, the immigration court, and the attorneys who represented her. A different choice made by any one of those entities or individuals could very well have resulted in a different outcome for Tatyana.

Tatyana's detention was the result of mandatory provisions that were inserted in the Immigration and Nationality Act by Congress in 1996. Congress chose to use language that resulted in the mandatory confinement of Tatyana, whose actions were calculated by the state court to warrant only ninety days in jail. If Tatyana were a U.S. citizen, she would have been on the road to recovery and reunification with her son through supervised psychiatric care, medication, and counseling after her release.

ICE officials chose to bring removal charges against Tatyana rather than explore a more favorable prosecutorial discretion route such as deferred action, which would have allowed her to remain in the United States based on sympathetic equities.<sup>125</sup> Not only did ICE officials choose not to view her case sympathetically, but rather the ICE attorney at trial aggressively pursued Tatyana's deportation. The government objected to a continuance to find out more about what was going on with the child, and complained that Tatyana had "ample opportunity" to prepare for the hearing even though she was in custody.<sup>126</sup> The ICE attorney argued that Tatyana had done "nothing of value" in the United States.<sup>127</sup> Further, she was not afraid to harangue Tatyana, knowing that deportation would result in the severance of parental rights: "Do you believe you don't deserve to have him, yes or no!"<sup>128</sup>

Tatyana was represented by counsel. The immigration judge gave her a continuance to speak with an attorney at the Immigration Clinic at UC Davis, and the judge eventually convinced a private firm to represent her pro bono. Tatyana's pro bono counsel chose to represent her, but the firm was operating under the constraints of Tatyana's confinement some 125 miles away. The Immigration Clinic at UC Davis could not represent Tatyana because the staff lacked resources to add another case at the time. These choices pertaining to representation – by the judge, by pro bono counsel, and by the Immigration Clinic – reflect a hit-and-miss system that results in

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<sup>125</sup> BILL ONG HING, HANDLING IMMIGRATION CASES 407-09 (1995).

<sup>126</sup> Transcript of Record at 53.

<sup>127</sup> *Id.* at 47.

<sup>128</sup> *Id.* at 38.



variations in the availability and quality of representation of individuals in ICE detention. Because deportation respondents have no right to counsel at government expense, counsel often is not available to detainees. Even though the private bar, legal services programs, and law schools have banded together to help, the efforts are not sufficient. The New York City Know your Rights Clinic reported that despite its “best efforts and the diligence of our volunteers, we were only able to help 10 detainees a week.”<sup>129</sup> This is particularly troubling because almost 40 percent of the detainees had possible meritorious claims for relief.<sup>130</sup>

The immigration judge chose to deport Tatyana. Arguably, he had little choice. On the other hand, counsel who represented Tatyana subsequently represented another mentally disabled client in custody suffering from mental illness with little family support, and the same immigration judge “rolled the dice” and granted that respondent cancellation relief.<sup>131</sup> Would the immigration judge have ruled differently in Tatyana’s case if more tools were available? Perhaps. Her counsel also had a sense that the immigration judge was concerned that with little family support, mentally challenged clients would be left on the street to fend for themselves.<sup>132</sup> Would the immigration judge have rendered a different decision if Tatyana was out of custody? Out of custody, pro bono counsel would have been able to prepare more thoroughly, work with Tatyana to gather more evidence, and build a stronger case for cancellation.<sup>133</sup>

Outcomes are often a matter of chance or circumstance. It may be said that the results of Tatyana’s case could have been quite different without changes in the law if the personalities were different. For example, a different immigration judge might have seen things differently. A different ICE attorney may have been more sympathetic and taken a more humanistic approach to the facts in the case. The UC Davis Immigration Clinic’s representation of Tatyana may have yielded a different result had there been an opening in the caseload for her. However, when the stakes are so high, do we really want to leave results to such speculative chance? Such matters should not be left to simple chance or circumstance; because the stakes are

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<sup>129</sup> CITY BAR JUSTICE CENTER, NYC KNOW YOUR RIGHTS PROJECT: AN INNOVATIVE PRO BONO RESPONSE TO THE LACK OF COUNSEL FOR INDIGENT IMMIGRANT DETAINEES 1 (2009), [http://www.nycbar.org/citybarjusticecenter/pdf/NYC\\_KnowYourRightsNov09.pdf](http://www.nycbar.org/citybarjusticecenter/pdf/NYC_KnowYourRightsNov09.pdf).

<sup>130</sup> *Id.*

<sup>131</sup> Interview with John Ricci, Attorney at Law, in San Francisco, Cal. (Nov. 23, 2009).

<sup>132</sup> *Id.*

<sup>133</sup> Tatyana’s attorney is vehement that the mandatory detention provisions of the immigration laws must be amended because they are too harsh. The case would have been stronger if Tatyana was out of custody. He represents many deportation clients in and out of custody, and the difference in representation and preparation is far better and fairer to the respondent who is out of custody. Frank Sprouls Interview, *supra* note 41.

so important in removal proceedings, processes must be institutionalized in order to better assure high standards of fairness and consistency.

One could argue that all of this could have been avoided if Tatyana had made her own choice to not abuse her child; that certainly was the implication of the tone of the immigration judge's decision and the ICE attorney's questioning and argument during the proceeding. However, don't we need to know more about the effect of mental illness on Tatyana's behavior before we can attribute her behavior to an exercise of free choice with such certainty? The shame of our current detention and removal system is that tools are not provided to the immigration court to adequately address the challenges posed by respondents suffering from mental illness – especially those in detention. Tatyana was a victim of that failure.