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## Sufficiently Safeguarded?: Competency Evaluations of Mentally Ill Respondents in Removal Proceedings

Sarah Sherman-Stokes

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# Sufficiently Safeguarded?: Competency Evaluations of Mentally Ill Respondents in Removal Proceedings

SARAH SHERMAN-STOKES\*

*In this Article, I examine the current regime for making mental competency determinations of mentally ill and incompetent noncitizen respondents in immigration court. In its present iteration, mental competency determinations in immigration court are made by immigration judges, most commonly without the benefit of any mental health evaluation or expertise. In reflecting on the protections and processes in place in the criminal justice system, and on interviews with removal defense practitioners at ten different sites across the United States, I conclude that the role of the immigration judge in mental competency determinations must be changed in order to protect the fundamental fairness of the proceeding. Specifically, I propose a central role for mental health professionals, whose expertise, evaluation, and testimony can inform the court and lead to a more thorough and fair decisionmaking process.*

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## INTRODUCTION

Jonathan<sup>1</sup> immigrated to the United States from Latin America at six years old with his mother, his father, and his younger sister, all of them lawful permanent residents. Beginning when he was just eight years old and continuing for the next ten years, Jonathan moved between psychiatric hospitals, inpatient programs, treatment centers, and special schools. A parade of diagnoses followed him—mild mental retardation, learning disabilities, speech and language processing disorders, ADHD, bipolar disorder, conduct disorder, and psychosis not otherwise specified. He was suicidal from a young age and suffered threatening visual and auditory hallucinations. He could not read or write and seemed unable to grasp basic concepts. After selling twenty dollars' worth of crack cocaine to an undercover police officer when he was eighteen years old, Jonathan was arrested. He was housed in the mental health unit of a large city jail and although a competency evaluation was recommended, it was not completed. After several months in criminal custody, Jonathan pled guilty to criminal sale of a controlled substance. Approximately six years later, Jonathan was arrested by Immigration and Customs Enforcement (“ICE”). On the basis of his conviction as a teenager, Jonathan was charged with having been convicted of an “aggravated felony”<sup>2</sup>—drug trafficking—and he was placed in removal proceedings by the Department of Homeland Security (“DHS”).

Jonathan was held in a remote detention center in New England, where he was kept in solitary confinement for weeks.<sup>3</sup> Jonathan was, by turns, gregarious—smiling widely and eager to play tic-tac-toe—and emotional—crying easily and liable to storm off mid-conversation.<sup>4</sup> Not only had Jonathan always believed that he was a U.S. citizen, but he could not understand the connection between his criminal conviction and his potential exile from his family in the United States. Still unable to read or write more than his own name, Jonathan did not understand the charges against him or the high stakes involved. He could not afford to hire an attorney and none was appointed for him. In initial court appearances, in which he was unrepresented, Jonathan could be heard

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1. “Jonathan” is a pseudonym for one of the Author’s former clients. Identifying details have been changed slightly to protect his identity.

2. Immigration and Nationality Act (INA) of 1965, Pub. L. No. 89-236, § 101(a)(43)(B) (codified at 8 U.S.C. § 1101(a)(43)).

3. ICE’s reliance on solitary confinement for the mentally ill and incompetent is widespread. In 2013, about 300 immigrants were held in solitary confinement at the fifty largest detention centers across the United States. Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES, Mar. 24, 2013, at A1. Nearly half of these detainees “are isolated for 15 days or more, the point at which psychiatric experts say they are at risk for severe mental harm.” *Id.*

4. The detrimental impact of incarceration on the mentally ill has been well documented. *See, e.g.*, Lorna Collier, *Incarceration Nation*, 45 AM. PSYCHOL. ASS’N 56 (2014) (noting “decreased psychological well-being and increased risk of suicide” of inmates).

crying, yelling at the judge or, during one encounter, getting up and leaving as the judge pleaded with him to return. Although Jonathan was prescribed psychiatric medication by the jail where he was held, DHS was not required to—and did not—share any of this information with the immigration judge, despite the immigration judge’s requests.<sup>5</sup> Nor did Jonathan volunteer this information. In fact, without counsel, Jonathan was unable to provide medical records, or any evidence of a diagnosed medical or mental health condition or disability. Jonathan was also unable to secure a psychological evaluation and neither DHS nor the immigration judge requested one. The Immigration Judge did not find Jonathan to be incompetent despite his profound inability to communicate with the immigration judge and his regular in-court outbursts. In short, in the absence of any consultation with or evaluation by a mental health professional—and without access to medical or mental health records—a determination was made that Jonathan was not only competent to proceed in his removal proceedings, but that he was competent to do so, *pro se*.<sup>6</sup>

Among the nearly 34,000 persons detained by ICE on any given day across the United States, confidential memorandums estimate that at least fifteen percent are, like Jonathan, believed to have a mental disorder.<sup>7</sup> In Fiscal Year (“FY”) 2012, ICE recorded 54,969 mental health interventions in ICE custody.<sup>8</sup> Despite this crisis, and recent case law, growing advocacy and litigation, and some action on the part of the Executive Office for Immigration Review (“EOIR”), protections for mentally ill and incompetent respondents<sup>9</sup> remain inadequate. While the

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5. Recent guidance from the Executive Office for Immigration Review notes that, “[i]deally, in a detained setting, DHS counsel will alert the Immigration Judge to any mental health issues discovered upon intake or based on information contained in the Department’s file.” *Immigration Judge Benchbook*, U.S. DEP’T OF JUST. (2015), <http://www.justice.gov/eoir/immigration-judge-benchbook-mental-health-issues>. This guidance goes on to suggest that should DHS refuse to share this information, the immigration judge may order DHS to do so. *Id.*

6. Ultimately, my colleagues and I represented Jonathan in removal proceedings where, following a competency evaluation and competency hearing, a finding of incompetence and the imposition of certain procedural safeguards, Jonathan was granted relief from removal and released from detention. At the time that I represented Jonathan, I was an Equal Justice Works Fellow at the Political Asylum/Immigration Representation (“PAIR”) Project, the premier provider of pro bono immigration legal services to asylum-seekers and detained noncitizens in Massachusetts. At the PAIR Project, the focus of my work was on the representation of detained, mentally ill noncitizens in removal proceedings and Jonathan was just one of many like him that I encountered, advised, or represented during my two-year fellowship.

7. Alonso Yáñez, *Living in the Shadows: Detention Centers Deaths Raise Immigrant Rights Questions*, NEW AM. MEDIA (Feb. 19, 2014), <http://newamericamedia.org/2014/02/living-in-the-shadows-detention-centers-deaths-raise-immigrant-rights-questions.php>.

8. *Detainee Health Care—FY2012*, U.S. CUSTOMS & IMMIGR. ENFT, <http://www.ice.gov/factsheets/dhc-fy12> (last visited Apr. 8, 2016).

9. “Respondent” is the title given to a defendant in removal proceedings. See 8 U.S.C. §§ 101(r), 1001.1(r) (2016) (“The term *respondent* means a person named in a Notice to Appear issued in

existing body of scholarship on this topic is strong, it is small, specifically as regards the process for competency evaluation and determination of mentally ill and incompetent respondents. This Article argues that the current system of competency determinations in removal proceedings—where such initial determinations are the exclusive province of an immigration judge—provide an inadequate protection that violates fundamental fairness. In light of comparisons to the protections and processes in place in the criminal justice system and in consideration of interviews with immigration practitioners at ten different sites across the country, this Article argues that the role of the immigration judge must be largely removed from the competency evaluation process and replaced by the evaluation and opinion of a certified and licensed mental health professional.

The treatment of incompetency in the criminal context makes for a worthwhile comparison to immigration removal proceedings, not least because both are decidedly adversarial proceedings.<sup>10</sup> As the Board of Immigration Appeals (“BIA” or “Board”) stated in *In re M-A-M-*, “the law regarding mental competency issues in criminal proceedings is well developed, and we consider it instructive.”<sup>11</sup> Other scholars have argued for myriad additional protections for mentally ill and incompetent respondents, including a substantive right to competence in removal proceedings;<sup>12</sup> appointed counsel for the mentally ill and incompetent;<sup>13</sup> and the provision of court appointed guardian *ad litem* for mentally ill respondents appearing pro se.<sup>14</sup> However, the role of mental health professionals in competency determinations has not yet been examined. This Article argues that mental health professionals must play a paramount role and further explains why other alternative fixes are insufficient to adequately protect the rights of mentally ill and incompetent noncitizens.

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accordance with section 239(a) of the Act, or in an Order to Show Cause issued in accordance with § 242.1 of 8 CFR chapter I as it existed prior to April 1, 1997.”).

10. Because it is most analogous to the immigration removal process, this Article contends with the competency standard to stand trial in a criminal proceeding. But it is worth noting that there are certainly other standards related to mental health and competency at play in criminal proceedings. *See, e.g.,* *Godinez v. Moran*, 509 U.S. 389, 402 (1993) (holding right to plead guilty requires same level of competence as that articulated in *Dusky v. United States*, 362 U.S. 402 (1960)); *Ford v. Wainwright*, 477 U.S. 399, 404–05 (1986) (regarding competence required for execution).

11. *In re M-A-M-*, 25 I. & N. Dec. 474, 478 (B.I.A. 2011).

12. Fatma E. Marouf, *Incompetent but Deportable: The Case for a Right to Mental Competence in Removal Proceedings*, 65 HASTINGS L.J. 929, 967–69 (2014).

13. *See, e.g.,* Alice Clapman, *Hearing Difficult Voices: The Due-Process Rights of Mentally Disabled Individuals in Removal Proceedings*, 45 NEW ENG. L. REV. 373, 373 (2011); Amelia Wilson & Natalie H. Prokop, *Applying Method to the Madness: The Right to Court Appointed Guardians Ad Litem and Counsel for the Mentally Ill in Immigration Proceedings*, 16 U. PA. J.L. & SOC. CHANGE 1, 2–3 (2013).

14. *See* Wilson & Prokop, *supra* note 13.

The context in which mentally ill and mentally incompetent respondents face deportation from the United States is a bleak one. Persons in removal proceedings with mental illness, developmental delays, and other cognitive and mental disabilities are detained for long periods of time with few rights available to them. Indeed, in a shift that has further disadvantaged mentally ill and mentally incompetent respondents, detention and deportation have grown significantly since the 1980s and under the Obama administration, more than two million persons<sup>15</sup> have been removed from the United States. Among those detained and deported are a growing number of mentally ill and mentally incompetent persons. Recent studies estimate the prevalence of mental illness in adults in the United States to be anywhere between 18.5% and 32.4%.<sup>16</sup> Mental health experts have noted that the percentage of mental health problems are even greater among immigrants and refugees, who are unique in the risks, stressors, and traumas they suffer.<sup>17</sup> Meanwhile, nearly two-thirds of jail inmates satisfy the criteria for a mental health problem.<sup>18</sup> This all adds up to a significant crisis for detained, mentally ill, and incompetent respondents.

Though immigration detention and deportation proceedings have historically been considered “civil,”<sup>19</sup> ICE detention for the mentally ill and incompetent looks a lot like criminal custody in jails and prisons. Indeed, it is in jails, prisons, and privately run detention centers that resemble correctional settings, where noncitizens are detained.<sup>20</sup> In 1952, with the passage of the Immigration and Nationality Act (“INA”),

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15. Although I will use the term “noncitizens” throughout this Article, it is worth mentioning that U.S. citizens have routinely, and unlawfully, been detained in, and deported from, the United States. See, e.g., Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL’Y & L. 606, 630 (2011) (finding that since 2003, more than 20,000 U.S. citizens have been detained or deported from the United States).

16. ERIN BAGALMAN & ANGELA NAPILI, CONG. RESEARCH SERV., PREVALENCE OF MENTAL ILLNESS IN THE UNITED STATES: DATA SOURCES AND ESTIMATES (2015).

17. See, e.g., Andrés J. Pumariega et al., *Mental Health of Immigrants and Refugees*, 41 COMMUNITY MENTAL HEALTH J. 581, 584–85 (2005).

18. See, e.g., *Inmate Mental Health*, NAT’L INST. OF MENTAL HEALTH, <http://www.nimh.nih.gov/health/statistics/prevalence/inmate-mental-health.shtml>.

19. See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) (“Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure.”).

20. DORA SCHRIRO, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 4 (2009) (“As a matter of law, Immigration Detention is unlike Criminal Incarceration. Yet Immigration Detention and Criminal Incarceration detainees tend to be seen by the public as comparable, and both confined populations are typically managed in similar ways. Each group is ordinarily detained in secure facilities with hardened perimeters in remote locations at considerable distances from counsel and/or their communities. With only a few exceptions, the facilities that ICE uses to detain aliens were originally built, and currently operate, as jails and prisons to confine pre-trial and sentenced felons. Their design, construction, staffing plans, and population management strategies are based largely upon the principles of command and control. Likewise, ICE adopted standards that are based upon corrections law and promulgated by correctional organizations to guide the operation of jails and prisons.”).

detention was largely eliminated except in cases where the noncitizen posed a flight risk or serious risk to the community. But since the 1980s, detention and deportation have exploded.<sup>21</sup> Feeding this deportation machine has been the rise of extended border control, increased expedited removal, and expanded mandatory detention.<sup>22</sup> These are just some of the results of two laws passed in 1996: the Antiterrorism and Effective Death Penalty Act (“AEDPA”) and the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”).<sup>23</sup> The impact has been simultaneously devastating to immigrant families<sup>24</sup> and a boon to enforcement and private corporations.<sup>25</sup> In 1995, there were 6785 immigrants detained in detention centers nationwide.<sup>26</sup> Over the next two decades, the number grew, more than quadrupling to 34,000 as of 2013.<sup>27</sup> A congressional “bed mandate” has kept this number steady—requiring, “[ICE] to keep an average of 34,000 detainees per day in its custody,” a number that has risen, almost relentlessly, since 2006.<sup>28</sup>

The mentally ill and incompetent in immigration detention are often first funneled through the criminal justice system. Indeed, collaboration, whether intentional or simply consequential, between the criminal justice system and immigration detention and removal proceedings is well

21. See DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 228–30 (2007).

22. See *id.* (discussing increased apprehensions by Customs and Border Patrol along the U.S.-Mexico border, the expansion of expedited removal to within 100 miles of U.S. land borders, north and south, and 1996 immigration laws that subjected more and more noncitizens to rigid rules of mandatory detention).

23. Antiterrorism and Effective Death Penalty Control Act (ADEPA) of 1996, Pub. L. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, 42 U.S.C.); Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8, 18 U.S.C.).

24. See, e.g., Kalina Brabeck & Qingwen Xu, *The Impact of Detention and Deportation on Latino Immigrant Children and Families: A Quantitative Exploration*, 32 *HISP. J. BEHAV. SCI.* 34 (2010) (using regression analyses to show the emotional and social impact of detention, deportation, and vulnerability of parents’ legal status on the growth and development of children); see also Joanna Dreby, *The Burden of Deportation on Children in Mexican Immigrant Families*, 74 *J. MARRIAGE & FAM.* 829 (2012) (describing study findings showing that children in Mexican immigrant households describe fear about their family stability and confusion over the impact legality has on their lives, and as a result suffer significant emotional distress).

25. See, e.g., ACLU, *WAREHOUSED AND FORGOTTEN: IMMIGRANTS TRAPPED IN OUR SHADOW PRIVATE PRISON SYSTEM*, 17 (2014); Suevon Lee, *By the Numbers: The Growing For-Profit Detention Industry*, MOTHERJONES (June 21, 2012, 6:00 AM), <http://www.motherjones.com/politics/2012/06/prison-profit-industry-corporation-money-jail> (discussing the growing billion dollar for-profit detention industry).

26. Yáñez, *supra* note 7.

27. *Id.*

28. Nick Miroff, *Controversial Quota Drives Immigration Detention Boom*, WASH. POST (Oct. 13, 2013), [https://www.washingtonpost.com/world/controversial-quota-drives-immigration-detention-boom/2013/10/13/09bb689e-214c-11e3-ad1a-1a919f2ed890\\_story.html](https://www.washingtonpost.com/world/controversial-quota-drives-immigration-detention-boom/2013/10/13/09bb689e-214c-11e3-ad1a-1a919f2ed890_story.html).

documented and longstanding.<sup>29</sup> The interconnectedness between the immigration removal system and the criminal justice system is present at nearly every stage of the process—from initial apprehension and arrest, to detention and interrogation by immigration officials of defendants in criminal custody and while on probation and parole.<sup>30</sup>

The increasing parallels between the criminal justice and immigration removal systems are significant, but stop short of concurrent enhanced procedural protections for noncitizen respondents in removal proceedings. Indeed, today respondents face an immigration removal system that is imbued with the “theories, methods, perceptions, and priorities associated with criminal enforcement while explicitly rejecting the procedural ingredients of criminal adjudication.”<sup>31</sup> Over the last several years in particular, even the Supreme Court has begun to give way in their historic classification of immigration removal as “civil,” acknowledging both that deportation is “intimately related to the criminal process”<sup>32</sup> and the “harsh consequences”<sup>33</sup> of a removal order. In fact, various criminal trial procedures and procedural safeguards have gradually been applied in immigration proceedings. Some of these include principles against

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29. See, e.g., Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. 135 (2009); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457; Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th “Pale of Law,”* 29 N.C. J. INT’L L. & COM. REG. 639 (2004); Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

30. See, e.g., Chacón, *supra* note 29 (exploring criminal prosecution of migration related offenses); Kanstroom, *supra* note 29, at 640 (examining the “convergence between the immigration and criminal justice systems”); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 471–72 (2007) (describing “growing convergence” of criminal justice and immigration law); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 83–86 (2005) (describing consequences of increasing interaction between fields of criminal justice and immigration law); Teresa A. Miller, *Citizenship and Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 616–20 (2003) (describing criminalization of immigration law); Stumpf, *supra* note 29, at 367–77 (noting “intense interest” in “crimmigration law”).

31. Legomsky, *supra* note 30, at 469; see also Bill Ong Hing, *Providing a Second Chance*, 39 CONN. L. REV. 1893, 1902 (2007) (arguing that deportation is not only “double punishment” but that removal is the “most final and permanent punishment an individual can face”); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution’s Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 339–40 (2000) (arguing that deportation is punishment and therefore respondents should be guaranteed a right to counsel and the government should be limited by the ex post facto clause and the ban on cruel and unusual punishment in carrying out its deportation power).

32. *Padilla v. Kentucky*, 559 U.S. 356, 357 (2010); see also Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461 (2011) (positing that *Padilla* opens the door for construction of a “Fifth-and-a-Half” Amendment that embodies both the flexible due process guarantees of the Fifth Amendment and the more specific protections of the Sixth Amendment).

33. *Padilla*, 559 U.S. at 360.

retroactivity,<sup>34</sup> analysis under the “void for vagueness” doctrine,<sup>35</sup> the rule of lenity,<sup>36</sup> and the exclusionary rule.<sup>37</sup> In addition, some scholars have suggested implementing quasi-criminal procedural safeguards.<sup>38</sup>

Mentally ill and incompetent respondents are further disadvantaged in immigration removal proceedings because immigration law is famously complex.<sup>39</sup> Circuit courts have not been shy in articulating the difficulty that even judges have in understanding and applying the INA, noting poetically that “morsels of comprehension must be pried from mollusks of jargon”<sup>40</sup> and that the INA constitutes a kind of “never-never land” where even “plain words do not always mean what they say.”<sup>41</sup> Against this backdrop of inscrutable law is an adversarial proceeding that is heavily imbalanced. Opposite the respondent is opposing counsel, represented by the DHS—trained immigration attorneys with a bevy of state and federal resources at their disposal.<sup>42</sup> Even when not accounting for mental illness, when respondents are not represented by counsel, this imbalance creates an asymmetry with devastating consequences. Indeed, one study found that of those respondents seeking asylum in removal proceedings, a meager 16.3% are successful without counsel.<sup>43</sup> By comparison, the same study found that 45.6% of those asylum seekers who *are* represented by counsel are granted asylum.<sup>44</sup> Add to this calculus an unrepresented respondent who is suffering from mental illness and/or mental incompetency, and what began an imbalance suddenly feels like an avalanche.

It is in this context of a “civil” system that feels and, is increasingly acknowledged to be, criminal, and at a time in this system where the

34. See *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 324 (2001).

35. *Jordan v. De George*, 341 U.S. 223, 231 (1951).

36. See *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

37. See *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1050–51 (1984) (applying the exclusionary rule, although only where there has been an “egregious” violation).

38. See, e.g., Mary Holper, *Confronting Cops in Immigration Court*, 23 WM. & MARY BILL RTS. J. 675, 677 (2015) (arguing that immigration judges should not admit police reports into evidence against a noncitizen unless the police officers are subject to cross-examination).

39. *Padilla v. Kentucky*, 559 U.S. 356, 377 (2010) (Alito, J., concurring) (explaining that, for example, “providing advice on whether a conviction for a particular offense will make an alien removable is often quite complex”).

40. See *Kwon v. Immigration & Naturalization Serv.*, 646 F.2d 909, 919 (5th Cir. 1981) (“Whatever guidance the regulations furnish to those cognoscenti familiar with INS procedures, this court, despite many years of legal experience, finds that they yield up meaning only grudgingly and that morsels of comprehension must be pried from mollusks of jargon.”).

41. *Yuen Sang Low v. Att’y Gen. of U.S.*, 479 F.2d 820, 821 (9th Cir. 1973).

42. DEP’T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2015, at 10 (2015) (showing budget request of \$38.2 billion for DHS for FY 2015).

43. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007).

44. See *id.*

rights and protections afforded to noncitizen respondents are particularly dynamic that this Article recommends that a mental health professional should play a paramount role in competency determinations for mentally ill respondents. This Article argues that the competency determination undertaken in immigration removal proceedings should be more akin to that in criminal proceedings, especially in light of the growing symmetry between them. Like immigration removal proceedings, criminal court proceedings are complex and adversarial. In this setting—where the stakes are high—we would not ask a criminal court judge to alone arrive at a competency determination; neither can we ask that of an immigration judge.

Part I of this Article begins by laying out the substantive criminal law and procedure around competency determinations in criminal court. Specifically, this Part discusses the landmark cases of *Dusky*, *Drope*, and *Edwards*, and the competency standard set out in contemporary criminal justice proceedings, including the role of both the criminal judge and mental health professionals in these proceedings. Part II outlines the current legal framework, legal protections, and landscape for mentally ill and mentally incompetent respondents in immigration removal proceedings. As well as detailing recent developments in the law, this Part examines the historic roots of protections for mentally ill and mentally incompetent respondents and how case law has added some—but not enough—weight to the statutes and regulations currently governing this area of law. Specifically, this Article breaks down the analysis laid out in the Board's decision in *In re M-A-M-* and subsequently successful litigation in *Franco-Gonzalez*.

Part II concludes with a discussion of recent interviews with immigration defense practitioners at ten different sites across the country. These interviews illuminate not only that the current protections offered to incompetent respondents are insufficient but, more troubling, that disproportionate weight is given to the determination of an immigration judge rather than that of a mental health professional.

Part III of this Article contends that the role of immigration judges in competency determinations must be deemphasized in favor of an evaluation by a mental health professional as soon as questions regarding competency arise. This is especially true in consideration of the rights and protections afforded to criminal defendants, the on-the-ground realities of respondents in removal proceedings, and the guarantee of fundamental fairness. This Part then grapples with possible alternatives to this recommendation, explains why they are insufficient, and makes suggestions for how to avoid the possible pitfalls of relying on expert testimony by mental health professionals as determinative.

## I. COMPETENCY PROCEEDINGS, RIGHTS, AND PROTECTIONS IN CRIMINAL LAW

Since 1949, the U.S. Code has included considerations for the evaluation and treatment of mentally ill defendants in criminal court.<sup>45</sup> Today, convicting an incompetent criminal defendant or failing to provide a legally adequate competency determination can amount to a violation of a criminal defendant's constitutional rights.<sup>46</sup> The right to be competent in order to stand trial has also been held to go to the integrity of the criminal justice system.<sup>47</sup> In reaching this point, the criminal courts have benefitted from more than sixty years of jurisprudence and scholarship,<sup>48</sup> wrestling all the while with how—and to what extent—the rights of mentally ill and incompetent defendants should be protected where liberty is on the line.

### A. THE COMPETENCY STANDARD FOR DEFENDANTS IN CRIMINAL COURT

In 1954, in the criminal case *Massey v. Moore*, the Supreme Court held that “[n]o trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court.”<sup>49</sup> This initial inclination to protect the rights of incompetent criminal defendants was made more robust with the Supreme Court's decision in *Dusky* just six years later. There, the Court decided what standard should be applied to criminal defendants who may lack competence to proceed.<sup>50</sup> The defendant in that case, Milton R. Dusky, was charged with kidnapping and transporting a girl across state lines.<sup>51</sup> Mr. Dusky entered a plea of not guilty, but at the suggestion of his defense counsel that his mental competency to stand trial might be in doubt, Mr. Dusky was immediately sent for evaluation by a mental health professional.<sup>52</sup> Court appointed psychiatrists subsequently found that the defendant suffered from schizophrenia and, though oriented to time and place, was unable to understand the nature

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45. 18 U.S.C. § 4244 (2016).

46. See *Drope v. Missouri*, 420 U.S. 162, 178–82 (1975).

47. See *Youtsey v. United States*, 97 F. 937, 947 (6th Cir. 1899) (reversing trial court judgment and ordering new trial to require “a thorough investigation of the sanity of the accused”).

48. See, e.g., Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539, 549–60 (1993); Ronald Roesch et al., *Conceptualizing and Assessing Competency to Stand Trial: Implications and Applications of the MacArthur Treatment Competence Model*, 2 PSYCHOL. PUB. POL'Y & L. 96, 101–02 (1996) (arguing that competency fits best in context rather than being understood as one unilateral concept). See generally Louis B. Schlesinger, *A Case Study Involving Competency to Stand Trial: Incompetent Defendant, Incompetent Examiner, or “Malingering by Proxy”?*, 9 PSYCHOL. PUB. POL'Y & L. 381 (2003) (providing case study of forensic evaluation involving competency to stand trial).

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

50. *Dusky v. United States*, 362 U.S. 402 (1960).

51. *Dusky v. United States*, 271 F.2d 385, 387 (8th Cir. 1959).

52. *Id.*

of the proceedings against him.<sup>53</sup> Despite this, the trial court found the defendant competent and the Eighth Circuit affirmed.<sup>54</sup>

Reversing that holding, the Supreme Court set forth a two-part test to determine whether a criminal defendant is competent to stand trial.<sup>55</sup> First, the defendant must have the sufficient present ability to consult with her lawyer with a reasonable degree of rational understanding.<sup>56</sup> Second, she must have a rational as well as a factual understanding of the proceeding against her.<sup>57</sup> The Court made clear that being “oriented to time and place” and having “some recollection of events” was insufficient if the defendant did not also satisfy this two-part test.<sup>58</sup> Further decisions have elaborated on *Dusky*, explaining that not only is orientation to time and place insufficient, but also that a defendant’s demeanor during the proceedings on the record should not allow the court to ignore the defendant’s history of irrational behavior—which is extremely relevant to competency determinations.<sup>59</sup>

In *Drope v. Missouri*,<sup>60</sup> the Supreme Court added to the *Dusky* analysis. The defendant in *Drope* was indicted for raping his wife and on the second day of trial, attempted to commit suicide.<sup>61</sup> The trial proceeded in his absence on the premise that his absence was “voluntary.”<sup>62</sup> The defendant was found guilty, his motion for a new trial was denied, and his guilt was later upheld by the Missouri Supreme Court. The defendant then filed a motion to vacate his conviction and sentence, arguing that the failure of the court to order a pretrial psychiatric evaluation violated his constitutional rights.<sup>63</sup> The Missouri Supreme Court denied this motion and the Appeals Court affirmed, holding that the evidence provided “did not create a reasonable doubt of his competence as a matter of law, that [he] had failed to demonstrate the inadequacy of the procedures employed for protecting his rights.”<sup>64</sup> The defendant appealed to the Supreme Court, which reversed and remanded in a unanimous decision. Relevant to the discussion in this Article, the Supreme Court held that the Missouri courts failed to give proper weight to the evidence suggesting that the defendant was

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53. *Id.*

54. *Id.*

55. *See Dusky*, 362 U.S. at 402.

56. *Id.*

57. *Id.*

58. *Id.*

59. *See Pate v. Robinson*, 383 U.S. 375, 385–86 (1966) (finding although demeanor at trial was relevant, it could not be relied upon to dispense with a competency hearing). The Court also noted that evidence of defendant’s history of irrational behavior required further inquiry. *Id.* at 385.

60. *Drope v. Missouri*, 420 U.S. 162 (1975).

61. *Id.* at 169.

62. *Id.* at 168.

63. *Id.* at 168–69.

64. *Id.* at 170.

incompetent, and that the trial should have been postponed until such time as a psychiatric evaluation could be completed.<sup>65</sup> In so holding, the Court stated with certainty and clarity that refusal to try an incompetent defendant “is fundamental to an adversary system of justice.”<sup>66</sup> The practical effect of the Court’s decision in *Drope*—a sort of gloss on *Dusky*—is that, in a criminal proceeding, any evidence of mental illness, even where such evidence appears minimal or solitary, should be considered in deciding whether the defendant should undergo a psychiatric evaluation for competency.

#### B. THE RIGHT TO SELF-REPRESENTATION FOR MENTALLY ILL AND INCOMPETENT CRIMINAL DEFENDANTS

Indigent criminal defendants are entitled, under the Fourteenth Amendment, to an attorney at trial, should they be unable to afford one.<sup>67</sup> However, in addition to guaranteeing a right to be represented by counsel, the Supreme Court has further held that this right encompasses the right of a criminal defendant to refuse counsel and represent herself.<sup>68</sup> But this right is not absolute. In 2008, the Supreme Court held that some defendants—though competent to proceed to trial—might not be competent to represent themselves at that criminal trial.<sup>69</sup> Building on its decision in *Massey*, the Supreme Court recognized in *Edwards* that “[i]n certain instances an individual may well be able to satisfy *Dusky*’s mental competence standard, . . . yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel.”<sup>70</sup> As the American Psychiatric Association (“APA”) pointed out in an amicus brief, “[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses can impair the defendant’s ability to play the significantly expanded role required for self-representation.”<sup>71</sup> In making its decision that a higher level of competence could be required for self-representation, the Court emphasized the need to ensure integrity, efficiency, and fairness in the trial process—goals that might be elusive where a defendant is not competent to represent herself.<sup>72</sup> Because the Supreme Court did not further expound on what this standard should be or what abilities should

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65. *Id.* at 179.

66. *Id.* at 172.

67. See *Gideon v. Wainwright*, 372 U.S. 335, 342–43 (1963).

68. *Faretta v. California*, 422 U.S. 806, 819 (1975).

69. *Indiana v. Edwards*, 554 U.S. 164, 177–78 (2008).

70. *Id.* at 175–76.

71. *Id.* at 176 (citing Brief for the Am. Psychiatric Ass’n et al. as Amici Curiae in Support of Neither Party, *Indiana v. Edwards*, 554 U.S. 164 (2008) (No. 07-208)).

72. *Id.* at 177.

be evaluated in reaching a decision regarding self-representation, the work of defining the parameters of a coherent test has been left to courts<sup>73</sup> and scholars<sup>74</sup>—and that work continues today.

### C. COMPETENCY EVALUATIONS IN CRIMINAL COURT AND THE ROLE OF THE CRIMINAL COURT JUDGE

While the Supreme Court has outlined the rights of incompetent or mentally ill criminal defendants, how does a criminal court even determine whether someone *is* mentally ill or incompetent? In 1985, the Court in *Ake v. Oklahoma* held that the Due Process Clause of the Fourteenth Amendment required the states to make psychiatric expert assistance available to indigent criminal defendants.<sup>75</sup> In the Court's decision, Justice Marshall explained that this was about "[m]eaningful access to justice" and "the probable value of the psychiatric assistance sought, and the risk of error in the proceeding if such assistance is not offered."<sup>76</sup> Of course, the Court left to the individual states the decision of how to implement this right, and what the scope and quality of this right would look like.<sup>77</sup>

Today, building on *Ake*, *Dusky*, *Drope*, and their progeny—and as codified in the U.S. Code<sup>78</sup>—once there is any question regarding a criminal defendant's competency, a competency evaluation is ordered.<sup>79</sup> What leads to this evaluation can be one or many factors: "evidence of a

73. See, e.g., *United States v. McKinney*, 373 F. App'x 74, 75 (D.C. Cir. 2010) (limiting application of *Edwards* to cases where the defendant suffers from a mental illness); *United States v. Carradine*, 621 F.3d 575, 577 (6th Cir. 2010) (affirming denial of the defendant's motion for self-representation because, while he was not suffering from a diagnosed mental illness, when asked if he understood the nature of his charges and his possible sentencing, the defendant was "obstinate and hostile" and said he did not understand); *United States v. Ferguson*, 560 F.3d 1060, 1068 (9th Cir. 2009) (holding that "[t]he standard for a defendant's mental competence to stand trial is now different from the standard for a defendant's mental competence to represent himself or herself at trial," but then remanding to the district court without articulating the standard to be applied).

74. See, e.g., E. Lea Johnston, *Representational Competence: Defining the Limits of the Right to Self-Representation at Trial*, 86 NOTRE DAME L. REV. 523 (2011); Douglas R. Morris & Richard L. Frierson, *Pro Se Competence in the Aftermath of Indiana v. Edwards*, 36 J. AM. ACAD. PSYCHIATRY L. 551, 555 (2008) ("[I]t is unclear what standard would differentiate a defendant who is merely competent to stand trial from one who is competent both to stand trial and to represent himself."); Christopher Slobogin, *Mental Illness and Self-Representation: Faretta, Godinez and Edwards*, 7 OHIO ST. J. CRIM. L. 391 (2009).

75. *Ake v. Oklahoma*, 470 U.S. 68, 78 (1985).

76. *Id.* at 77, 79.

77. *Id.* at 83; see also Pamela Casey & Ingo Keilitz, *An Evaluation of Mental Health Expert Assistance Provided to Indigent Criminal Defendants: Organization, Administration, and Fiscal Management*, 34 N.Y.L. SCH. L. REV. 19, 22 (1989).

78. 18 U.S.C. § 4241 (2016).

79. Of course, this does not mean there are not challenges and significant disparities that remain. As scholars have argued, the promise of *Ake* has often fallen short. See, e.g., Casey & Keilitz, *supra* note 77, at 22; Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305 (2004).

defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient."<sup>80</sup> The practical effect is that a relatively low bar exists for ordering a psychiatric evaluation.<sup>81</sup> Moreover, either party—the prosecutor or defense counsel—may make a motion for a competency evaluation, or the judge may act *sua sponte*. Once ordered, the question of who undertakes that evaluation seems almost obvious in hindsight—not the judge nor the attorney, but rather a mental health professional. The U.S. Code requires that

[a] psychiatric or psychological examination ordered pursuant to this chapter shall be conducted by a licensed or certified psychiatrist or psychologist, or, if the court finds it appropriate, by more than one such examiner. Each examiner shall be designated by the court, except that if the examination is ordered under section 4245, 4246, or 4248, upon the request of the defendant an additional examiner may be selected by the defendant.<sup>82</sup>

The U.S. Code goes on to outline the standard information that should be included in any psychiatric evaluation considered by the court, including the defendant's history and present symptoms; a description of any test used during the examination; the findings of the examiner; and the examiner's opinions as to diagnosis, prognosis, and whether the defendant is suffering from a mental disease or defect that would render her not competent.<sup>83</sup> Depending on the state and nature of the case, once a competency evaluation is ordered, the defendant is typically remanded to a mental health professional or state hospital for evaluation, and such evaluation may be inpatient or outpatient.<sup>84</sup> The process for evaluation—

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80. *See Drope v. Missouri*, 420 U.S. 162, 180 (1975).

81. *Id.* at 179–80 (finding error to deny motion for psychiatric exam because previous evaluation did not specifically address competence and defendant had history of irrational behavior). *See, e.g., United States v. Nicholson*, 550 F.2d 502, 504 (8th Cir. 1977) (finding error to deny motion for psychiatric exam because defense counsel requested exam based on defendant's inability to intelligently communicate, family history of mental disturbance, and severe head injury suffered six years before trial). *But see, e.g., United States v. Weathington*, 507 F.3d 1068, 1074 (7th Cir. 2007) (finding no error to deny competency exam because defendant's behavior suggested competency, defendant did not call attention to psychiatric records, and defense attorney did not doubt competency); *United States v. Minnis*, 489 F.3d 325, 329 (8th Cir. 2007) (finding no error to deny motion for psychiatric exam because defendant able to assist in defense and complaints of stress, lack of sleep, and depression not serious enough to render defendant incompetent); *United States v. Messervey*, 317 F.3d 457, 462–64 (5th Cir. 2002) (finding no error to deny competency exam *sua sponte* based solely on several minor episodes that occurred during trial because episodes not “sufficiently manifest”); *United States v. Oliver*, 626 F.2d 254, 258 (2d Cir. 1980) (finding no error to deny motion for psychiatric exam because defendant was responsive and not confused).

82. 18 U.S.C. § 4247(b) (2016).

83. *Id.* at § 4247(c)(1)–(4)(A).

84. *See, e.g., Bruce J. Winick, Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 623–24 (1995). For sample procedures in Massachusetts, see MASS. GEN. LAWS ch. 123, § 14–18 (2016).

which might, among other risks, put nondetained defendants at risk of custody and commitment—certainly has its detractors. But most relevant to the discussion in this Article is that once a question is raised as to a criminal defendant's competency, the role of a licensed or certified mental health professional is paramount, and the role of the judge—at least regarding the evaluation of a defendant's competency—is significantly diminished.

## II. SCOPE OF CURRENT PROTECTIONS FOR DETAINED, MENTALLY ILL, AND INCOMPETENT RESPONDENTS IN IMMIGRATION COURT

Like criminal defendants facing imprisonment, noncitizens also face high stakes in immigration removal proceedings, where removal could lead to the erroneous deprivation of the rights of a U.S. citizen, permanent exile, or return to persecution, torture or even death.<sup>85</sup> But in contrast to the more than sixty years of case law and consideration that mental incompetency has received in the criminal courts, it is only in the last several years that immigration courts have begun to confront the mentally incompetent respondents that, presumably, have always been before them.<sup>86</sup>

At baseline, although not subject to the full panoply of constitutional protections, the Supreme Court has recognized that immigration proceedings must meet the due process requirements laid out in the Fifth Amendment.<sup>87</sup> So while noncitizens facing removal from the United States are not provided with counsel,<sup>88</sup> they must have a reasonable opportunity to present, examine and object to the evidence presented in their cases.<sup>89</sup> For incompetent respondents, there is a regulation from 1952 providing for “safeguards” to be prescribed where “it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding.”<sup>90</sup> In 1965, the Board issued its first published decision interpreting this regulation, but offered no further gloss on the substantive protections, or absence thereof, afforded to

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85. Death by deportation is not hyperbole. In fact, many noncitizens who are removed from the United States—either because their claims for asylum or other protections were unsuccessful, they did not have a right to counsel, or they were unaware that any such protection could be available to them—return to face harm, torture, and even death in their home countries. *See, e.g.*, Armando Trull, *Deported from U.S., Honduran Immigrants Return to Death and Terror*, WAMU 88.5 (Aug. 20, 2014), [http://wamu.org/news/14/08/20/death\\_and\\_terror\\_await\\_many\\_deported\\_honduran\\_immigrants](http://wamu.org/news/14/08/20/death_and_terror_await_many_deported_honduran_immigrants).

86. *See, e.g.*, *In re H-, 6 I. & N. Dec. 358, 358* (B.I.A. 1954) (noting that the respondent was an “alien of unsound mind”).

87. *Reno v. Flores*, 507 U.S. 292, 306 (1993).

88. *See* INA § 292, 8 U.S.C. § 1362 (2016) (“In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.”).

89. *See* 8 C.F.R. § 1240.10(a)(4) (2016).

90. INA § 240a(b)(3), 8 U.S.C. § 1229a(b)(3).

mentally ill and mentally incompetent respondents.<sup>91</sup> Prior to a precedential Board decision in 2011, additional regulations provided for special procedural safeguards to be set in place, concerning the noncitizen's receipt of the Notice to Appear, presence at her hearing, and her admissions.<sup>92</sup> But immigration judges had no guidance on what form these safeguards should take, what standard should be applied in a competency hearing or even whether, when, or how a competency hearing should be held. Although policymakers and advocates made some rumblings in the late 1990s and into the 2000s about increased protections and safeguards for the mentally ill and incompetent, no meaningful action was taken.<sup>93</sup> Indeed, as will be discussed in greater depth *infra*, more than fifty years passed before the Board gave even a modicum of meaningful substance to the initial safeguard regulation.<sup>94</sup>

#### A. RIGHTS AFFORDED TO RESPONDENTS IN REMOVAL PROCEEDINGS GENERALLY

Despite recent Supreme Court decisions that have acknowledged the devastating consequences of removal proceedings<sup>95</sup> and immigration judges' own admissions that removal proceedings are akin to trying "death penalty cases" in "traffic court,"<sup>96</sup> immigration removal proceedings have long been characterized as civil, rather than criminal in nature.<sup>97</sup> Along

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91. *In re Stoytcheff*, 11 I. & N. Dec. 329, 332 (B.I.A. 1965) (holding that while the regulations pertain to deportation and not exclusion proceedings, where a mentally incompetent respondent was in exclusion proceedings the procedure was proper).

92. *See, e.g.*, 8 C.F.R. §§ 1240.4, 1240.10(c), 103.5a(c)(2) (2016).

93. *See* Clapman, *supra* note 13. In 1997, action by the Department of Justice ("DOJ"), soliciting comments on whether to promulgate regulations for appointing guardians ad litem in removal proceedings, was followed by over a decade in which DOJ took more time to "further examine" the "complex and sensitive" issue. *Id.* at 378–79. Furthermore, in 2009 members of Congress also acted and introduced language into an appropriations bill to encourage the development of standards and materials for competency evaluations in immigration court. *Id.* at 379. Subsequently, Congress instructed EOIR to report back on what steps DOJ had taken to safeguard the rights of mentally incompetent noncitizens, before finally noting additions to the nonbinding EOIR immigration judge Benchbook in 2011, which suggested "best practices" for communicating with respondents who might be mentally incompetent. *Id.*

94. Yáñez, *supra* note 26.

95. *See* Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1299 (2011) (arguing that *Padilla v. Kentucky* and other recent case law increasingly acknowledge that deportation proceedings are "quasi-criminal" rather than purely civil in nature); *see also* Fadiga v. Att'y Gen. of U.S., 488 F.3d 142, 157 n.23 (3d Cir. 2007) ("[W]e cannot treat immigration proceedings like everyday civil proceedings . . . because unlike in everyday civil proceedings, the liberty of an individual is at stake in deportation proceedings.") (citations and quotation marks omitted).

96. *Oversight Hearing on the Executive Office for Immigration Review: Hearing before Subcomm. on Immigration, Citizenship, Refugees, Border Sec. & Int'l Law of the H. Comm. on the Judiciary* 111th Cong. 55 (2010) [hereinafter *Oversight Hearing*] (written statement of Hon. Dana Leigh Marks, Pres. Nat'l Ass'n of Immigration Judges).

97. *See* *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (holding that "[t]he order of deportation is not a punishment for a crime"); *see also* *Reno v. American-Arab Anti-Discrimination*

with this distinction comes a concurrent deprivation of substantive and procedural protections for respondents facing the possibility of permanent exile—from their families, their communities, and their livelihoods—and possibly worse.

Under the INA, noncitizens are entitled to a limited number of rights. Indeed, under the section “alien’s rights in proceeding,” the INA tersely lists only three rights:

(A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings,

(B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien’s own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien’s admission to the United States or to an application by the alien for discretionary relief under this chapter, and

(C) a complete record shall be kept of all testimony and evidence produced at the proceeding.<sup>98</sup>

Of course, of these three rights, section A is limited and unavailable to most respondents. In FY 2014, only fifty-five percent of respondents—including both detained and nondetained respondents—were represented by counsel,<sup>99</sup> a four percent decline from the previous year.<sup>100</sup> This left more than 75,000 respondents to represent themselves, without counsel, in their removal proceedings.<sup>101</sup> And past studies have shown that detained noncitizens are much more likely to proceed without the assistance of counsel.<sup>102</sup> Though on paper representation at one’s own expense is a right, in practice it is nothing more than a privilege—extended to barely more than half of the more than 100,000 persons facing removal each year.<sup>103</sup>

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Comm., 525 U.S. 471, 491 (1999) (holding that removal is not punishment); *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (“A deportation proceeding is a purely civil action . . . [and is not intended] to punish.”); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) (“Deportation, however severe its consequences, has been consistently classified as a civil rather than criminal procedure.”).

98. INA § 240, 8 U.S.C. § 1229(b)(4)(A)–(C) (2016).

99. “Counsel” includes “[a]n attorney or other representative whom the Board of Immigration Appeals has fully accredited as well as reputable individuals or law students or graduates under the direct supervision of an attorney.” See EXEC. OFFICE OF IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2014 STATISTICS YEARBOOK F1 (2015).

100. *Id.*

101. *Id.*

102. See Andrew I. Schoenholtz & Hamutal Bernstein, *Improving Immigration Adjudications Through Competent Counsel*, 21 GEO. J. LEGAL ETHICS 55, 56 (2008); see also Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, a Case Study*, 78 FORDHAM L. REV. 541 (2009).

103. EXEC. OFFICE OF IMMIGRATION REVIEW, *supra* note 99, at I2 (showing a total of 167,774 respondents in removal proceedings in FY 2014).

In similar ways, section B can be limited by a respondent's circumstances. Child respondents,<sup>104</sup> who are unrepresented and unable to navigate a complex legal system *pro se*,<sup>105</sup> are likely unable to meaningfully execute that right. The same can be said for respondents who are detained, non-English speaking, or mentally ill or incompetent. Indeed, Jonathan was unable to secure evidence and documents, either domestically or abroad, and surely would have been unable to cross-examine any government witnesses proffered, without the assistance of counsel.

Finally, even section C presents a host of challenges. Until recently, immigration courts relied on the immigration judge herself to manually record all proceedings<sup>106</sup> with a cassette player, which, not surprisingly, led to a host of recording errors.<sup>107</sup> And even though digital audio recording has finally been implemented nationwide, "it is no panacea for many of the shortcomings that have long plagued [immigration court] transcripts."<sup>108</sup>

In terms of a noncitizen's due process rights, respondents in removal proceedings are entitled only to a "full and fair hearing" under the Fifth Amendment.<sup>109</sup> But, like the rights enumerated in the INA, and as other commentators have pointed out, mental incompetence directly undermines a noncitizen's ability to meaningfully exercise any of these rights.<sup>110</sup>

#### B. THE CURRENT COMPETENCY LEGAL FRAMEWORK FOR RESPONDENTS IN IMMIGRATION REMOVAL PROCEEDINGS

Immigration law has long recognized the existence of mental illness, reserving special animus for "idiots" and "insane persons" as far back as 1891.<sup>111</sup> But early recognition that some noncitizens might be mentally ill

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104. See, e.g., Ashley Ham Pong, *Humanitarian Protections and the Need for Appointed Counsel for Unaccompanied Immigrant Children Facing Deportation*, 21 WASH. & LEE J. C.R. & SOC. JUST. 69, 76 (2014) (explaining that "[e]ach side is presumed to have the ability to represent its own interests before the immigration judge, who then makes a determination in favor of the government or the child," an exceedingly challenging task for an unrepresented child).

105. As the Ninth Circuit noted, "[w]ith only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in its complexity.' A lawyer is often the only person who could thread the labyrinth." *Castro-O'Ryan v. U.S. Dep't of Immgr. & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (citations omitted).

106. In testimony before the House Judiciary Committee, Immigration Judge Dana Leigh Marks bemoaned the "spartan" conditions faced by immigration judges, noting for example, that immigration judges "are responsible for operating the recording equipment that creates the official administrative record of the proceedings." *Oversight Hearing*, *supra* note 96.

107. *Id.*

108. *Id.*

109. *In re Beckford*, 22 I. & N. Dec. 1216, 1225 (B.I.A. 2000); see also *Shaughnessey v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (explaining that immigration proceedings conform to traditional standards of fairness consistent with due process).

110. Marouf, *supra* note 12.

111. Immigration Act of 1891, ch. 551, 26 Stat. 1084 (excluding large classes of noncitizens including "[a]ll idiots, insane persons, paupers or persons likely to become a public charge").

or incompetent was outward looking and exclusionary—seen as a basis by which to keep them out, rather than a factor to consider in weighing whether they could stay or whether their rights, while here, were, or should be, protected. And indeed, because this early recognition was focused on exclusion—that is, preventing the admission of noncitizens into the United States—a consideration of what rights were afforded to the mentally ill and incompetent, let alone whether those rights were sufficient, was inapposite because historically, in exclusion proceedings,<sup>112</sup> noncitizens receive little due process.<sup>113</sup>

Because the only consideration of mental illness was in exclusion proceedings, immigration courts have been dramatically behind other adjudicatory bodies in recognizing the special needs of their most vulnerable respondents, identifying which bundle of rights might apply to them and ensuring that those rights are protected. In stark contrast to the body of law that has emerged and developed in the criminal justice context, the INA recognizes only that noncitizens in removal proceedings may be mentally incompetent, without providing further guidance as to how such a determination should be made or by whom.

In short, the INA states that if it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.<sup>114</sup> The INA fails to set a standard for competency, a process for competency determination, or details regarding the substance or implementation of appropriate safeguards. It was not until 2011—more than sixty years after *Dusky*—that the Board provided meaning to either the procedure for determining competency or the safeguards to be imposed in cases where competency is absent. Between the Supreme Court's

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112. Prior to 1996, there were two types of proceedings: (1) "deportation proceedings" that encompassed noncitizens who had been admitted to the United States, and (2) "exclusion proceedings" that were reserved for those noncitizens who were seeking admission. Today, both of these kinds of proceedings fall under the broader umbrella of "removal proceedings."

113. See *Shaughnessy*, 345 U.S. at 212 ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. . . . But an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'") (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)); *Kaoru Yamataya v. Fisher*, 189 U.S. 86, 98 (1903) (holding that noncitizens get procedural due process protection in deportation proceedings but stating that, with respect to noncitizens seeking initial entry, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law"). But see Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1394 (1953) ("Granting that the requirements of due process must vary with the circumstances, and allowing them all the flexibility that can conceivably be claimed, it still remains true that the Court is obliged, by the presuppositions of its whole jurisdiction in this area, to decide whether what has been done is consistent with due process—and not simply pass back the buck to an assertedly all-powerful and unimpeachable Congress.").

114. INA § 240(b)(3), 8 U.S.C. § 1229(c) (2016).

decision in *Dusky*, and the Board's decision in 2011, the Supreme Court would decide nearly a dozen additional cases concerning competency and mental illness in criminal proceedings.<sup>115</sup>

In 2011, the Board, in *In re M-A-M*,<sup>116</sup> set forth instructions for (1) when immigration judges should make competency determinations; (2) what factors they should consider and what procedures they should employ to make those determinations; and (3) what safeguards to prescribe when competency is not established.<sup>117</sup> This Subpart examines each in turn.

As a threshold matter, as in criminal proceedings, competency is presumed in immigration proceedings.<sup>118</sup> The Board has yet to hold that the due process rights of an incompetent respondent have been violated during removal proceedings.<sup>119</sup> And notwithstanding that immigration proceedings lack many of the baseline procedural protections afforded in criminal proceedings, including a right to counsel at government expense, the competency standard is borrowed heavily from the criminal law. The test is, whether the respondent in removal proceedings, "has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses."<sup>120</sup>

How might an immigration judge begin this inquiry? The Board proposes that immigration judges look for "indicia of incompetency" including observing behavior of the respondent that suggests competency concerns or examining record evidence of mental illness or incompetency.<sup>121</sup> Such inquiry assumes that, in the case of an unrepresented respondent who

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115. See *Indiana v. Edwards*, 554 U.S. 164 (2008); *Sell v. United States*, 539 U.S. 166 (2003); *Cooper v. Oklahoma*, 517 U.S. 348 (1996); *Godinez v. Moran*, 509 U.S. 389 (1993); *Medina v. California*, 505 U.S. 437 (1992); *Riggins v. Nevada*, 504 U.S. 127 (1992); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Estelle v. Smith*, 451 U.S. 454 (1981); *Drope v. Missouri*, 420 U.S. 162, 179 (1975) (finding in considering whether any doubt exists regarding the defendant's competency, any and all evidence should be considered); *Jackson v. Indiana*, 406 U.S. 715, 731 (1972) (holding where a criminal defendant is incompetent to stand trial, he cannot be subject to indefinite commitment on this basis alone); *Pate v. Robinson*, 383 U.S. 375, 377 (1966) (holding due process requires a competency hearing).

116. 25 I. & N. Dec. 474, 476 (B.I.A. 2011).

117. *Id.*

118. *Id.* at 477 (citing *Muñoz-Monsalve v. Mukasey*, 551 F.3d 1, 6 (1st Cir. 2008) (finding that it is the noncitizen's burden to first raise the issue of competency)).

119. Federal courts have been more willing to make this finding. See, e.g., *Bartolo v. Holder*, 495 F. App'x 825, 826 (9th Cir. 2012) (holding that an immigration judge, in excluding a noncitizen respondent from the courtroom, where he suffered from serious mental illness, out of concern that he might disrupt proceedings, and in then allowing the respondent's counsel to withdraw most of the grounds for asylum asserted in the respondent's application, without ever inquiring whether the respondent had consented to this withdrawal, violated the respondent's right to due process).

120. *In re M-A-M*, 25 I. & N. Dec. at 479.

121. *Id.* at 477.

cannot advocate for herself, either (1) mental illness or incompetency is obvious to an untrained eye, and/or (2) DHS provides the court with materials relevant to this inquiry. Because the former is a complex and dynamic assessment and the latter is not required by the regulations,<sup>122</sup> this initial inquiry is extremely problematic.

And even where incompetency is found in removal proceedings, a long line of cases establishes that removal may still move forward.<sup>123</sup> Only the baseline—complying with “fundamental fairness”—is required.<sup>124</sup> To that end, so long as a mentally incompetent respondent is provided an attorney (at no expense to the government), provided the opportunity to examine and present evidence, and provided an opportunity to cross-examine witnesses, then fundamental fairness is satisfied.<sup>125</sup>

Where an immigration judge finds indicia of incompetency, the next question is how an immigration judge—often with little mental health training—is to assess competency in the courtroom. The Board has made several recommendations including asking simple questions about proceedings, granting a continuance to allow parties to gather or submit relevant evidence, requesting a psychological evaluation, and allowing for a change of venue so that a respondent can receive medical care or counsel.<sup>126</sup> Subsequent to the Board’s decision in *In re M-A-M-*, EOIR expanded on this guidance in its “Phase I Plan to Provide Enhanced

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122. DHS also has an obligation to hand over relevant materials. See 8 C.F.R. § 1240.2(a) (2016).

123. See, e.g., *Muñoz-Monsalve*, 551 F.3d at 6 (holding that immigration judge’s failure to sua sponte order a competency evaluation of a represented alien did not violate alien’s due process rights as it is advocate’s role to broach issue of mental competence as alien’s incompetence was not evident from record of hearing); *Brue v. Gonzales*, 464 F.3d 1227, 1233 (10th Cir. 2006) (holding that immigration judge had no obligation under either statute or regulation to consider represented alien’s mental competency because procedural safeguards they envision were already in place); *Sanchez-Salvador v. Immigration & Naturalization Serv.*, No. 92-70828, 1994 WL 441755, at \*1 (9th Cir. Aug. 15, 1994) (internal citations omitted) (“Lack of competency, however, does not prevent a judge from determining either deportability or whether to grant relief. As we held in *Nee Hao Wong v. I.N.S.*, . . . an alien can obtain a full and fair hearing despite being incompetent. This was the case here. *Sanchez-Salvador*’s incompetence did not prevent him from presenting, through counsel, a strong case that relief is warranted.”); *In re James*, No. A040 015 111, 2009 WL 2171712, at \*2 (B.I.A. June 26, 2009) (citations omitted) (“In this instance, . . . the respondent’s counsel failed to request that an evaluation of the respondent’s competency be undertaken. The failure to raise the competency issue in a timely manner renders an ensuing appellate claim of error on this basis particularly weak. . . . Moreover, contrary to the substantive due process protection from trial and conviction to which a mentally incompetent criminal defendant is entitled, removal proceedings may go forward against incompetent aliens.”); *In re Vidal Sanchez*, No. A037 616 891, 2006 WL 2008263, at \*2 (B.I.A. May 24, 2006) (“The respondent was represented at the hearing [sic]; therefore, his rights were adequately protected.”); *In re H-*, 6 I. & N. Dec. 358, 358 (B.I.A. 1954) (holding that the requirements of a fair hearing had not been violated in deportation proceedings involving an alien of unsound mind, where notice of hearing has been served on the alien and his wife, arrangements were made to protect alien’s interests by having a doctor in attendance at the hearing, and alien was represented by legal counsel who was given the privilege of introducing evidence and cross-examining witnesses).

124. See, e.g., *Bridges v. Wixon*, 326 U.S. 135, 152–53 (1945).

125. 8 U.S.C. § 1229(a) (2016).

126. *In re M-A-M-*, 25 I. & N. Dec. at 481–82.

Procedural Protections to Unrepresented Detained Respondents with Mental Disorders.”<sup>127</sup> The Phase I Plan provides specific lines of questioning and phrasing, including questions about cognitive, emotional, and behavioral functioning; ability to respond to allegations and charges; understanding and ability to exercise rights and privileges; and ability to present information and respond to questions relevant to relief.<sup>128</sup>

Finally, if an immigration judge—regardless of whether she is relying on a mental health evaluation—finds that a noncitizen “lacks sufficient competency to proceed,” then she “shall impose” safeguards.<sup>129</sup> The Board has enumerated a nonexhaustive list of potential safeguards—any of which a judge may impose at her discretion—including refusal to accept an admission of removability from an unrepresented respondent; identification and appearance of a family member or close friend who can assist the respondent and provide the court with information; docketing or managing the case to facilitate the respondent’s ability to obtain legal representation and/or medical treatment in an effort to restore competency; participation of a guardian in the proceedings; continuance of the case for good cause shown; closing the hearing to the public; waiving the respondent’s appearance; actively aiding in the development of the record, including the examination and cross-examination of witnesses; and reserving appeal rights for the respondent.<sup>130</sup> Where safeguards are imposed, an immigration judge—must provide reasoning and rationale for her decision.<sup>131</sup> Finally, the Board acknowledges that there might be instances in which no safeguards are sufficient. In such circumstances, “alternatives” may be pursued between the parties, but the only suggestion provided by the Board is administrative closure.<sup>132</sup>

In the four years since the Board decided *In re M-A-M-*, there have been only two subsequent precedential Board decisions on competency, neither of which has explicitly considered the role of the immigration judge in competency determinations. In 2013, the Board decided *In re E-S-I-*, regarding service of the Notice to Appear on an incompetent respondent where such incompetency was “manifest.”<sup>133</sup> The Board held that in such cases, the Notice to Appear should be served on three individuals:

- (1) a person with whom the respondent resides, who, when the respondent is detained in a penal or mental institution, will be

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127. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, PHASE I OF PLAN TO PROVIDE ENHANCED PROCEDURAL PROTECTIONS TO UNREPRESENTED DETAINED RESPONDENTS WITH MENTAL DISORDERS (2013).

128. *Id.*

129. *In re M-A-M-*, 25 I. & N. Dec. at 481.

130. *Id.* at 483.

131. *Id.*

132. *Id.*

133. *In re E-S-I-*, 26 I. & N. Dec. 136, 144 (B.I.A. 2013).

someone in a position of demonstrated authority in the institution or his or her delegate and, when the respondent is not detained, will be a responsible party in the household, if available; (2) whenever applicable or possible, a relative, guardian, or person similarly close to the respondent; and (3) in most cases, the respondent.<sup>134</sup>

Where service is not proper, an immigration judge should grant a continuance to allow DHS to execute proper service.<sup>135</sup> Similarly, where indicia of incompetency arise at a later point in the proceedings, one safeguard that can be made available by an immigration judge is reservice of the Notice to Appear.<sup>136</sup>

In 2015, the Board decided *In re J-R-R-A-*, the first holding of its kind to address credibility assessments<sup>137</sup> in competency cases.<sup>138</sup> In *J-R-R-A-*, the Board considered the case of a Honduran respondent seeking asylum. Before the immigration judge, the respondent had provided testimony that was “disjointed,” “confusing” and “nonresponsive.”<sup>139</sup> While the respondent’s counsel raised a concern about the respondent’s mental competency, the record was not further developed and the immigration judge did not follow the steps outlined in *In re M-A-M-*. In fact, the immigration judge seemed to imply that the respondent’s potential mental deficiencies were irrelevant, stating that competency issues were “not a license to give incredible testimony.”<sup>140</sup> On appeal, the Board grappled with what kind of credibility assessment to apply where a respondent’s testimony might be impacted by mental disability. In an asylum claim, the respondent must demonstrate both a genuine subjective fear of persecution in the country of return and present evidence to establish that such fear is reasonable. A respondent’s testimony alone is sufficient to meet this burden only where such testimony is “credible, persuasive and refers to specific facts.”<sup>141</sup> As the Board explained, testimony that includes inconsistencies, implausible evidence, or is otherwise unreliable may be indicative not of fabrication but of a respondent’s mental illness. The Board held that,

where a mental health concern may be affecting the reliability of the applicant’s testimony, the Immigration Judge should, as a safeguard, generally accept that the applicant believes what he has presented,

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134. *Id.* at 145.

135. *Id.*

136. *Id.*

137. In 2005, President George W. Bush signed the Real ID Act into law, significantly affecting asylum seekers and refugees. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (2005). In short, the Real ID Act creates heightened standards for credibility and corroboration of asylum claims as well as changing certain standards of review. The practical effect of Real ID has been to make it easier for an immigration judge to find that a respondent lacks credibility in making her claim.

138. *In re J-R-R-A-*, 26 I. & N. Dec. 609 (B.I.A. 2015).

139. *Id.* at 610.

140. *Id.*

141. INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii) (2016).

even though his account may not be believable to others or otherwise sufficient to support the claim. The Immigration Judge should then focus on whether the applicant can meet his burden of proof based on the objective evidence of record and other relevant issues.<sup>142</sup>

Finally, and also in 2015, the Board decided *In re J-S-S-*, holding that neither DHS nor the respondent “bears a formal burden of proof in immigration proceedings to establish whether or not the respondent is mentally competent, but where indicia of incompetency are identified, the immigration judge should determine if a preponderance of the evidence establishes that the respondent is competent.”<sup>143</sup> In *In re J-S-S-*, the respondent had argued that he should bear the initial burden to raise a competency issue, but that once indicia of incompetency are established, the burden should shift to DHS to show, by a preponderance of the evidence that the respondent is competent to proceed or that adequate safeguards could be implemented to protect his due process rights.<sup>144</sup> The Board disagreed, preferring the framework suggested by the DHS in which neither party bears a formal burden and there is, the Board suggested, more of a “collaborative approach” to fully develop the record regarding the respondent’s competency.<sup>145</sup> In putting forth this framework for allocating the burden of proof, the Board specifically emphasized the “civil” nature of immigration removal proceedings.<sup>146</sup>

While the Board’s decisions in *M-A-M-*, *E-S-I-*, *J-R-R-A-*, and *J-S-S-* give some substance and meaning to the statute’s almost passing—and until now, seemingly empty—reference to the imposition of safeguards, big questions still remain unresolved. While not all of these questions can be addressed in this Article, subsequent subparts will contend with whether *In re M-A-M-* sets forth an adequate competency standard, how such standard should be applied, and what the role of the immigration judge and mental health evaluator should be, respectively.

### C. THE SUCCESS OF THE *FRANCO-GONZALEZ* LITIGATION AND INCREASED PROTECTIONS FOR SOME MENTALLY ILL AND INCOMPETENT RESPONDENTS

In August of 2010,<sup>147</sup> advocates<sup>148</sup> filed a class action complaint<sup>149</sup> in the Central District of California on behalf of “indigent individuals,

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<sup>142</sup> *In re J-R-R-A-*, 26 I. & N. Dec. at 612.

<sup>143</sup> *In re J-S-S-*, 26 I. & N. Dec. 679, 679 (B.I.A. 2015). In *In re J-S-S-*, the Board also held that a finding of competency is a finding of fact that the Board reviews under the clearly erroneous standard. *Id.*

<sup>144</sup> *Id.* at 681.

<sup>145</sup> *Id.* at 682.

<sup>146</sup> *Id.* at 683 (applying the same burden allocation employed in federal habeas proceedings, “which are also civil in nature”).

<sup>147</sup> Interestingly, *In re M-A-M-* was decided in 2011, shortly after the initial filing in *Franco-Gonzalez*.

detained by the United States, who suffer from mental disabilities that may render them incompetent to defend themselves, but who are nevertheless forced to do so in immigration court.”<sup>150</sup> Specifically, the claim was brought on behalf of detainees with mental disabilities in Arizona, California, and Washington State.

The Plaintiffs alleged (1) violations of the INA; (2) violations of the Due Process Clause of the Constitution; and (3) violations of Section 504 of the Rehabilitation Act.<sup>151</sup> On April 23, 2013, the court granted judgment in favor of the plaintiffs. The court held that appointment of a qualified representative is a reasonable accommodation under the Rehabilitation Act.<sup>152</sup> The court went on to clarify—and rebut DHS’s argument to the contrary—that provision of counsel is not an expansion of benefits but rather *the means* by which the plaintiffs in this case would be able to exercise *the same* benefits as other nondisabled detainees.<sup>153</sup> In short, the court’s order requires ICE, the Attorney General, and the EOIR to provide legal representation to immigrant detainees with mental disabilities who are facing deportation and who are unable to adequately represent themselves in immigration hearings. In addition to the provision of counsel, the court held that plaintiffs in the case are entitled to a custody determination hearing after 180 days in detention, at which time the government, rather than the respondent,<sup>154</sup> bears the burden of justifying continued detention by clear and convincing evidence.

Incidentally, the court’s ruling on April 23, 2013, came just one day after ICE and EOIR simultaneously issued new guidance for the handling of mentally ill and mentally incompetent detainees in removal proceedings.<sup>155</sup> Since the permanent injunction issued in April 2013, the

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148. The advocates were ACLU of Southern California, ACLU Immigrants’ Rights Project, Public Counsel, Sullivan & Cromwell LLP, ACLU of San Diego, ACLU of Arizona, Mental Health Advocacy Services, and the Northwest Immigrants Rights Project.

149. The class action was filed against Attorney General Eric H. Holder, Jr., Acting Director of the Executive Office of Immigration Review Thomas G. Snow, Secretary of Homeland Security Janet Napolitano, Assistant Secretary of U.S. Immigration and Customs Enforcement John Morton, and Field Office Director for the Los Angeles District of U.S. Immigration and Customs Enforcement Timothy S. Robbins.

150. First Amended Class-Action Complaint for Declaratory and Injunctive Relief & Petition for Writ of Habeas Corpus, *Franco-Gonzalez v. Holder*, No. 10-CV-02211 DMG (DTB) (C.D. Cal. Aug. 2, 2010).

151. *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, at \*1 (C.D. Cal. Apr. 23, 2013).

152. *Id.* at \*3.

153. *Id.* at \*7.

154. *Id.* at \*10.

155. See Memorandum from John Morton, Dir., Exec. Office for Immigration Review, U.S. Dep’t of Justice, to Thomas D. Homan, Acting Exec. Assoc. Dir., Enf’t & Removal Operations (Apr. 22, 2013) (on file with author); Memorandum from Brian M. O’Leary, Chief Immigration Judge, U.S. Dep’t of Justice, to All Immigration Judges (Apr. 22, 2013) (on file with author).

court has issued a second order, in October of 2014, further implementing the injunction and spelling out measures the defendants are required to implement, including protocols around (1) screening and information gathering; (2) information sharing; (3) competency evaluations<sup>156</sup> and (4) applicability of the order to released class members.

On March 2, 2015, the Court in *Franco-Gonzalez* appointed a monitor<sup>157</sup> to oversee the Government's compliance with (1) the district court's April 2013 order granting a Permanent Injunction requiring the Government to, *inter alia*, provide legal representation to any class member who is determined to be incompetent to represent herself by reason of a serious mental disability; and (2) the district court's October 2014 further order regarding implementation, which set forth both substantive and procedural rules for determining the competency of *Franco-Gonzalez* class members who have serious mental disabilities.<sup>158</sup>

As of this writing, the monitor is well underway in her comprehensive review of the district court's orders and while many plaintiffs in Washington State, California, and Arizona no doubt are benefitting from the court's orders, those outside the jurisdiction have been left waiting. Today, more than two years have passed since EOIR and ICE's Phase I announcements, which came on the heels of the *Franco-Gonzalez* litigation. And yet, the policies and procedures outlined in the EOIR and ICE memoranda have yet to be implemented in most cities across the United States.

Despite the unquestionable success of the *Franco-Gonzalez* litigation, and as discussed in Subpart II.D, below, the order still does not require what this Article advocates—a central role for a mental health professional in competency determinations.

#### D. ON THE GROUND REALITIES FOR MENTALLY ILL AND INCOMPETENT NONCITIZENS IN REMOVAL PROCEEDINGS

On December 31, 2013, EOIR announced expanded guidance on their “Phase I Plan to Provide Enhanced Procedural Protections to Unrepresented Detained Respondents with Mental Disorders.” Between

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156. Of particular note and importance, the order sets out a newly articulated “*pro se* competency standard.” The competency standard set out in *Franco-Gonzalez* requires not only that the respondent satisfy the “meaningful participation” standard outlined in *In re M-A-M-*, but also that the respondent possess sufficient present ability to perform additional functions necessary for self-representation including the ability to make informed decisions about if or when to waive certain rights, respond to charges and allegations, present information relevant to eligibility for relief, and act upon instructions and information presented by the immigration judge and government counsel. Order Further Implementing this Court's Permanent Injunction, *Franco-Gonzalez v. Holder*, No. CV-10-02211 DMG (DTBx), 2014 WL 5475097, at \*6 (C.D. Cal. Oct. 24, 2014).

157. Order Appointing Monitor, *Franco-Gonzalez v. Holder*, No. CV-10-02211 DMG (DTBx) (C.D. Cal. Mar. 2, 2015).

158. Order Further Implementing this Court's Permanent Injunction, *supra* note 156.

May 2015 and August 2015—approximately eighteen months after the announcement of this expanded guidance—the Author conducted interviews with removal defense practitioners<sup>159</sup> at ten different sites across the country, including both jurisdictions where the *Franco-Gonzalez* order is and is not in force.<sup>160</sup> At the eight sites where the *Franco-Gonzalez* order was not in force, the Author found enthusiasm about the prospects of enhanced protections, but did not find any evidence that the enhanced protections detailed in the December 31, 2013, guidance were being put in place on the ground.<sup>161</sup>

In interviews at these ten sites, one overarching trend that emerged was the increased role of immigration judges in competency determinations and a significantly smaller—if not absent—role for mental health professionals in helping judges to arrive at these decisions. The following summarizes the problem and the impact on respondents when immigration judges make competency determinations without the benefit of mental health expertise, evaluation, or in-court testimony.

*I. Immigration Judges Are Currently Ill-Equipped to Evaluate a Respondent's Mental Competency*

In contrast to the standard set out in *Dusky*, the standard set out in *In re M-A-M-* is less robust in articulation and is unevenly applied by immigration judges, who have received little, if any, training on mental illness and mental incompetence. Although *In re M-A-M-* includes language similar to that articulated in *Dusky*, requiring the respondent to have a “rational and factual understanding” of the nature and object of the proceedings against her, because there is no right to counsel at government expense in removal proceedings, unlike in *Dusky*, there is no similar requirement that a respondent be able to consult with a lawyer with a reasonable degree of rational understanding. The language in *In re M-A-M-* simply states that if there is a lawyer—a considerable and meaningful “if” in removal proceedings—that a respondent “can consult” with her. *In re M-A-M-* does not require that such consultation

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159. Author uses the term “practitioner” rather than attorney as several interviewees were BIA-accredited representatives, and while fully able to practice before the immigration court, they are not licensed attorneys. See 8 C.F.R. §§ 292.2, 1292.2 (2016).

160. Author interviewed immigration attorneys and practitioners at both *Franco-Gonzalez* and non-*Franco-Gonzalez* sites including in Arizona, Pennsylvania, Washington State, Virginia/Maryland, New Jersey, New York, Massachusetts, and three locations in Texas. All practitioners were interviewed by phone.

161. See, e.g., Interview with Pennsylvania Immigration Practitioner (July 7, 2015) (on file with author) (“I haven’t seen any changes since Phase I [was] announced.”); Interview with New Jersey Immigration Practitioner (June 10, 2015) (on file with author) (explaining that she has heard that the EOIR expects to roll out Phase I at fifteen sites by late summer but that, “they haven’t implemented it here yet”); Interview with Texas Immigration Practitioner (on file with author) (“The [Phase I] program hasn’t rolled out here.”).

be anything other than perfunctory—is it the ability to simply say hello? Relay critical case information? Articulate a cognizable defense to deportation? Demonstrate fear of return to a home country? None of this is spelled out, leaving a gaping hole in what is meant to be a protection against the removal of incompetent respondents. Even *Franco-Gonzalez* states, where protections for mentally ill and incompetent respondents are more robust, counsel is only provided *after* the *In re M-A-M*- hearing.<sup>162</sup> This means that protections that would otherwise be in line with the more robust standard articulated in *Dusky* and *Drope* begin to fall apart.

Even if strengthened, a lack of meaningful guidance and training of immigration judges means that application of the *In re M-A-M*- standard still varies widely across courtrooms. For example, some judges focus on whether the detainee has “a linear thought process”<sup>163</sup>—not a prong in the *In re M-A-M*- analysis and yet a litmus test for some adjudicators. Other judges, despite an admitted lack of specialized EOIR training on the subject, feel that their experience in the courtroom leaves them well poised to ascertain competence among unrepresented respondents.<sup>164</sup> Specifically, whether immigration judges are applying the rational and factual standard correctly remains an open question.<sup>165</sup>

Practitioners across the country also voice concerns about the ability of immigration judges alone to arrive at competency decisions.<sup>166</sup> In fact,

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162. *Franco-Gonzalez*, 2014 WL 5475097, at \*8; *see also* Interview with New Jersey Immigration Practitioner (June 10, 2015) (on file with author) (noting the problem of appointed counsel only *after* a competency determination is made and questioning, “if no attorney [is appointed] until after a finding of competency, how can an [immigration judge] evaluate [the respondent’s] ability to cooperate with an attorney?”).

163. Interview with Immigration Judge (July 16, 2015) (on file with author).

164. *See, e.g.*, Interview with Immigration Judge (July 16, 2015) (on file with author) (“I feel like I can sort this out . . . [T]hey don’t need to be devoid of paranoia, they just need to know what’s going on in [the courtroom].”).

165. Interview with Immigration Judge (July 16, 2015) (on file with author) (explaining that “if they tell you I could be deported—then they know [the nature of the proceeding]”); *see also* Interview with New Jersey Immigration Practitioner (June 10, 2015) (on file with author) (explaining instance in which a removal defense attorney struggled to help an immigration judge understand the difference between a “rational” and a “factual” understanding of the proceedings: “[I] was explaining the difference between rational versus factual understanding of proceedings—I agreed that my client had a factual understanding—he knew I was [his] lawyer, he knew the date—she didn’t see it”); Interview with New York Immigration Practitioner (June 9, 2015) (on file with author) (explaining that an immigration judge believed a client to be competent where “he could answer [questions about the] dates he came here and siblings’ names” and that it was not until the respondent’s counsel herself cross-examined the respondent that he “decompensated” and the immigration judge and DHS attorney were able to see his “disoriented thinking and delusions”).

166. Interview with Arizona Immigration Practitioner (June 3, 2015) (on file with author) (explaining that despite a lack of rigorous training, “from their perspective, they seem totally comfortable with [making competency determinations]”); Interview with Massachusetts Immigration Practitioner (May 28, 2015) (on file with author) (“I think that judges who may be very well trained in law and very intelligent, [and] might know a lot about the world, without that specific in depth training

practitioners themselves concede their own, at times, inability to reliably determine which of their clients are truly incompetent to proceed.<sup>167</sup> And practitioner and respondent experiences in courtroom application of the *In re M-A-M* standard remain wildly uneven.<sup>168</sup> Indeed, some practitioners have even articulated the exact fear that *Dusky* warns against—that orientation to time and place will be mistaken for a respondent’s competency.<sup>169</sup> Ultimately, in both states covered by the *Franco-Gonzalez* order and those without *Franco-Gonzalez* protections in place, the problem is not that immigration judges are the ultimate arbiters of competence, but that they too often arrive at their decisions having had little guidance in mental health law and without the benefit of a psychiatric evaluation or in-court testimony. In these ways, even in *Franco-Gonzalez* states—where counsel, if appointed, does not arrive until after a competency determination is made—mentally ill and incompetent detainees are left vulnerable and unprotected.

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and experience day in and day out of clinical work with mentally ill people, they may not understand mental health disorders and how they manifest [and they] can come away with a misimpression” that is, they “might dismiss something as relatively insignificant that is quite significant. [For example], something they might think is a bad memory or is lying, might actually be, for example, a characteristic of a certain disorder.”). *But see* Interview with New York Immigration Practitioner (June 9, 2015) (on file with author) (describing judges in her jurisdiction as “very uncomfortable making a decision” about competency and delaying making such decisions for weeks, even in the case of detained respondents); Interview with Maryland/Virginia Immigration Practitioner (May 21, 2015) (on file with author) (explaining that in her experience, most judges would “prefer to avoid a competency analysis if at all possible . . . because . . . [there] hasn’t been sufficient training on even basic things like what are indicia and different types of illnesses that might be appearing in front of them in addition to a lack of training about what the legal standard is and what legal safeguards it’s appropriate for them to be using once [a] competency determination has been made”).

167. Interview with Massachusetts Immigration Practitioner (May 28, 2015) (on file with author) (explaining the difficulty, even for an experienced practitioner who has worked with numerous mentally ill and mentally incompetent respondents, in identifying mental competence). That practitioner explained,

For a lay person like myself, [a respondent] might for example talk relatively fluidly, but only if you have particular expertise and knowledge do you find the gaps or realize that they might be talking fluidly but not based in reality or that they might be able to have a cogent, or what seems like a cogent, conversation and then really not very long after, have very little grasp of what transpired in that conversation.

*Id.*

168. Interview with Arizona Immigration Practitioner (June 3, 2015) (on file with author) (“Another thing the judges will do [is] if someone really struggles, they’ll keep asking questions, [until it] becomes more and more leading, until they elicit the ‘right’ answers.”).

169. Interview with Arizona Immigration Practitioner (June 3, 2015) (on file with author) (“I just think that if the judges talk to someone and basically feel like they’re oriented to place and time and that they’ve demonstrated a basic understanding that [the Immigration] Judge could either deport them or grant them relief or release . . . even if [the respondent] struggles, they’ll find them competent.”).

2. *Absent a Psychiatric Evaluation, Immigration Judges Are Equating Competence with Competence to Proceed Pro Se*

The standard set forth in *In re M-A-M-* presumes that any noncitizen competent to stand trial in removal proceedings is also competent to represent herself during those proceedings. Because noncitizens in removal proceedings are not provided counsel at government expense, this would in fact be the result of a favorable competency determination by an immigration judge—that a respondent would proceed to represent herself in a proceeding that could result in her permanent exile from the United States.<sup>170</sup> But successfully defending a respondent in an immigration removal hearing is challenging even for the most skilled attorneys.<sup>171</sup> At a minimum, a removal proceeding involves first, an initial determination of inadmissibility and deportability, deeply complex areas of law. Where a respondent has been charged with or convicted of a crime, an analysis of the impact of that criminal disposition on immigration status is both exceedingly relevant and uniquely complicated. Indeed, Justice Alito has opined that not even criminal defense attorneys—highly skilled and barred lawyers—should be required to understand or undertake such analysis.<sup>172</sup> If unrepresented by counsel, it is then up to a detained respondent to prepare applications for relief, gather evidence—which might be located abroad—identify lay witnesses, as well as country and medical experts, and prepare for direct and cross-examination by a skilled and highly trained government lawyer.

Fortunately, a pro se competency standard in removal proceedings is not without precedent. In the order further implementing the district court's permanent injunction in *Franco-Gonzalez*, a comprehensive pro se competency standard is laid out.<sup>173</sup> As articulated by the district court, the pro se competency standard includes satisfaction of two prongs. First,

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170. Interview with Massachusetts Immigration Practitioner (May 28, 2015) (on file with author) (Post-*M-A-M-*, "I've definitely seen individuals whose incompetence went under the radar" and who then proceeded *pro se* in their removal proceedings.).

171. See, e.g., *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003) ("This case vividly illustrates the labyrinthine character of modern immigration law—a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike."); see also Nurith C. Aizenman, *Md. Family Ensnared in Immigration Maze*, WASH. POST (Apr. 24, 2001), <https://www.washingtonpost.com/archive/local/2001/04/24/md-family-ensnared-in-immigration-maze/d3715174-1294-4a16-9743-02803b6f7c4f/>. According to INS spokeswoman Karen Kraushaar, "[i]mmigration law is a mystery and a mastery of obfuscation, and the lawyers who can figure it out are worth their weight in gold." *Id.*

172. *Padilla v. Kentucky*, 559 U.S. 356, 380–81 (2010) (Alito, J., concurring) (describing a number of immigration terms of art whose meaning is ambiguous or difficult to ascertain). "The professional organizations and guidebooks on which the Court so heavily relies are right to say that 'nothing is ever simple with immigration law'—including the determination whether immigration law clearly makes a particular offense removable." *Id.*

173. *Franco-Gonzalez v. Holder*, No. CV-10-02211 DMG (DTBx), 2014 WL 5475097, at \*6–7 (C.D. Cal. Oct. 29, 2014).

and as a threshold determination, the respondent must be able to meaningfully participate in the proceeding as set forth in *In re M-A-M*. Second, for an unrepresented respondent to be competent to represent herself in an immigration proceeding, she “must also be able to perform additional functions necessary for self-representation.”<sup>174</sup> These functions include: (1) an ability to exercise the rights listed in *In re M-A-M*; (2) the ability to make informed decisions about whether to waive these rights; (3) the ability to respond to the allegations and charges in the proceedings; (4) the ability to present information and evidence relevant to eligibility for relief; and (5) the ability to act upon instructions and information presented by the immigration judge and government counsel.<sup>175</sup> Such a standard should be implemented and applied nationwide in order to ensure the fundamental fairness of removal proceedings. Indeed, some immigration judges already seem to hold pro se respondents to a different standard, granting some “leeway” in these cases.<sup>176</sup> But because immigration judges are making competency decisions before counsel is appointed and without the benefit of a psychiatric evaluation, respondents are representing themselves pro se in their removal proceedings, when they are not competent to do so.

3. *Without the Benefit of a Comprehensive Psychiatric Evaluation, Immigration Judges Are Unable to Prescribe Appropriate and Adequate Safeguards*

In *In re M-A-M*, the Board articulates a list of nonexhaustive safeguards<sup>177</sup> that an immigration judge may impose when competency is not established. The decision to impose these safeguards—which ones, how many, and in what form—is left wholly to the immigration judge. An immigration judge is not required to receive or consider recommendations from a mental health professional before arriving at her decision. Making this determination in a vacuum, without the benefit of a professional who might be able to suggest safeguards that could, for example, mitigate a respondent’s delusions, alleviate a respondent’s paranoia or ensure a respondent’s meaningful participation at trial, results not only in a failure to protect the respondent’s rights, but also in

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174. *Id.* at \*6.

175. *Id.* at \*6–7.

176. Interview with Immigration Judge (July 16, 2015) (on file with author) (explaining that “especially for *pro se* Respondents” this immigration judge will “grant some leeway” and be more likely to impose safeguards absent an attorney).

177. *In re M-A-M*, 25 I. & N. Dec. 474, 483 (B.I.A. 2011) (“Examples of appropriate safeguards include, but are not limited to, refusal to accept an admission of removability from an unrepresented respondent; identification and appearance of a family member or close friend who can assist the respondent and provide the court with information; docketing or managing the case to facilitate the respondent’s ability to obtain legal representation and/or medical treatment in an effort to restore competency . . .”).

challenges, delays and added expense to an already overburdened immigration court system.<sup>178</sup> Regardless of whether they are in consultation with a mental health professional—and usually they are not—attorneys have described vastly different experiences with the imposition of safeguards in removal proceedings. One recurring experience seems to be an often limited view of what safeguards—or *safeguard*, singular—are sufficient. Indeed, some judges across the country are finding that simply appointing counsel is adequate.<sup>179</sup> Other judges, in contrast to the explicit language of *In re M-A-M-* stating otherwise, consider the safeguards listed therein as exhaustive and inclusive,<sup>180</sup> ruling out other possibilities.<sup>181</sup> On the other hand, some judges seem open to creative problem solving by attorneys, allowing a tweaking of legal standards, decreased reliance on video conferencing and generous continuances to pursue post-conviction relief, among other safeguards.<sup>182</sup>

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178. Immigration courts are notoriously overburdened and underfunded. One study revealed that in 2014, each immigration judge was responsible for an average of 1500 cases annually, and yet a backlog of approximately 375,500 cases remain adjudicated. Daniel Costa, *Overloaded Immigration Courts*, ECON. POL'Y INST. (July 24, 2014), <http://www.epi.org/publication/immigration-court-caseload-skyrocketing/>.

179. Interview with Washington State Immigration Practitioner (May 13, 2015) (on file with author) (stating plainly, “usually I am the safeguard”); Interview with Pennsylvania Immigration Practitioner (July 7, 2015) (on file with author) (explaining that the only safeguard he’s seen in his jurisdiction is an immigration judge reaching out to local pro bono counsel—the interviewee in this case—and asking that he represent the respondent); Interview with New York Immigration Practitioner (June 9, 2015) (on file with author) (“I think it’s the safeguard issue that makes judges really uncomfortable—they’ll say ‘well [the respondent] has you as an attorney . . .’” insinuating that that is sufficient.); Interview with Massachusetts Immigration Practitioner (May 28, 2015) (on file with author) (“The [safeguard] that has come up most frequently is . . . counsel.”).

180. Interview with Texas Immigration Practitioner (July 2, 2015) (on file with author) (describing an immigration judge imposing nine safeguards, each taken verbatim from *In re M-A-M-*); Interview with New York Immigration Practitioner (June 9, 2015) (on file with author) (“In the experiences I’ve had and conversations with colleagues, they really take *In re M-A-M-* at face value.”). See generally Interview with Maryland/Virginia Immigration Practitioner (May 21, 2015) (on file with author) (“[W]e have seen problems with the judges having what we believe to be too narrow of an understanding of the type of safeguards that should flow from a competency determination.”).

181. See, e.g., Interview with New Jersey Immigration Practitioner (June 10, 2015) (on file with author) (noting that this attorney’s request that the immigration court appoint a guardian *ad litem* is “routinely denied”).

182. Interview with Arizona Immigration Practitioner (June 3, 2015) (on file with author) (noting that judges have allowed respondents to limit their testimony, allow family members to fill in gaps in that testimony and to excuse [the respondent] where [she is] disruptive); Interview with New Jersey Immigration Practitioner (June 10, 2015) (on file with author) (“I’ve asked that testimony be waived by respondent; that the subjective fear portion of the [asylum] standard be waived, and converted to an objective [standard]; I’ve asked for physical production of the person—not over VTC [video teleconferencing].”); Interview with Washington State Immigration Practitioner (May 13, 2015) (on file with author) (describing generous continuances to pursue post-conviction relief, and U and T visas before U.S. Citizenship and Immigration Services); see also *In re J-R-R-A-*, 26 I. & N. Dec. 609, 609 (B.I.A. 2015) (finding that where an asylum applicant has competency issues, the immigration judge should generally accept the applicant’s fear of harm as subjectively genuine based on the applicant’s perception of the events).

Of particular note are the vastly differing experiences of respondents and practitioners who seek termination of removal proceedings when no safeguards are sufficient to protect the rights of their mentally ill and incompetent clients. In criminal court cases, judges have the authority to dismiss a case where a criminal defendant is not likely to become competent. In *Jackson v. Indiana*<sup>183</sup> the Supreme Court held that a criminal defendant's due process is violated where the individual "is committed solely on account of his incapacity to proceed to trial" and held that such defendant "cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future."<sup>184</sup> In *In re M-A-M-*, the Board lists only administrative closure, and not termination—the immigration removal proceeding analogue to dismissal—as a possible option. While administrative closure—removing the case from the docket, albeit temporarily—can be a positive outcome for some respondents, it does not ensure release from detention<sup>185</sup> for a detained respondent, and indeed can leave a respondent vulnerable and in limbo indefinitely.<sup>186</sup> At the same time, the EOIR Immigration Judge Benchbook ("EOIR Benchbook"), a nonbinding resource created by EOIR to provide substantive and procedural guidance for immigration judges, does offer that termination can be appropriate for those noncitizens found to be mentally incompetent, and for whom no other safeguards are sufficient.<sup>187</sup> But as DHS Counsel and immigration judges alike have argued,<sup>188</sup> the EOIR Benchbook is not binding legal authority and the Board has yet to issue a precedential decision upholding a case where proceedings were terminated based on the theory that the respondent was so incompetent as to render the proceedings unfair.

The result of an omission in the case law and a lack of clear statutory or regulatory guidance is that immigration judges have really varied in their willingness to terminate an incompetent respondent's removal proceedings. For example, some immigration judges believe they have no

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183. 406 U.S. 715 (1972).

184. *Id.* at 738.

185. Interview with Arizona Immigration Practitioner (June 3, 2015) (on file with author) (explaining that, in the past, DHS would often agree to release a mentally ill detainee upon administrative closure, but that they are increasingly resistant to this idea); Interview with Immigration Judge (July 16, 2015) (on file with author) (explaining that he has only agreed to administrative closure where the detained respondent was being released to a state mental hospital).

186. Interview with New Jersey Immigration Practitioner (June 10, 2015) (on file with author) (describing a case in which though the respondent was released to a psychiatric facility upon administrative closure by the immigration court, DHS has expressed a strong inclination to re-charge the respondent and place him, anew, in immigration removal proceedings).

187. Explaining that termination may be appropriate "where respondents are unable to proceed in light of mental health issues and a corresponding inability to secure adequate safeguards, as required by Section 240(b)(3) of the Act." *Immigration Judge Benchbook*, *supra* note 5.

188. Decision and Order of the Immigration Judge (Apr. 6, 2015) (on file with author).

authority to order termination<sup>189</sup> or that they can only order termination with the consent of DHS counsel.<sup>190</sup> Meanwhile, immigration judges in other jurisdictions are routinely ordering termination for incompetent respondents that appear before them.<sup>191</sup> Others, notably Fatma Marouf,<sup>192</sup> have written persuasively that termination can and should be a viable option and have made suggestions as to how and where the regulations can be amended in this regard.

In sum, the increased role of immigration judges, in lieu of meaningful consideration of the evaluation and testimony of mental health professionals, has significantly compromised the rights and protections afforded to mentally ill and incompetent respondents in removal proceedings.

### III. THE ROLE OF THE IMMIGRATION JUDGE IN REMOVAL PROCEEDINGS SHOULD BE DEEMPHASIZED IN FAVOR OF AN INCREASED ROLE FOR MENTAL HEALTH PROFESSIONALS

In order to ensure that the rights of mentally ill and incompetent respondents in removal proceedings are adequately protected and to ensure fundamental fairness, this Article proposes that the role of the immigration judge should be deemphasized in favor of an increased role for mental health professionals, similar to the procedures in place in criminal proceedings.

The suggestion that mental health professionals, in lieu of immigration judges, must be central to the competency evaluation process, is a novel one in immigration removal proceedings. Building on the insightful, much needed, and thought provoking recommendations of other scholars, this Part argues that in light of the procedures and protections in place in the criminal justice system, and in consideration of the present experiences of removal defense practitioners across the country, the role of certified or licensed mental health professionals must be primary, and their presence must come earlier in the proceeding.

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189. Decision of Immigration Judge (Apr. 6, 2015) (on file with author) (immigration judge arguing that he is “not vested with the legal authority” to order termination and citing to 8 C.F.R. §§ 1239.2(f), 1238.1(e), 1239.2(c) (2015)); *In re G-N-C-*, 22 I. & N. Dec. 281, 284 (B.I.A. 1998); *see also* Interview with New York Immigration Practitioner (June 9, 2015) (on file with author) (“I haven’t heard of a case yet where [the Immigration] Judge has agreed to terminate.”).

190. Interview with Immigration Judge (July 16, 2015) (on file with author) (explaining that he has only agreed to termination or administrative closure with the agreement of the DHS and has been “reluctant” to take such action “unilaterally”).

191. Interview with New Jersey Immigration Practitioner (June 10, 2015) (on file with author) (explaining that she has represented approximately fifteen respondents annually with competency evaluations each year for the last four years and had approximately ten to fifteen cases terminated on competency grounds).

192. Marouf, *supra* note 12.

A. THE TEST FOR DETERMINING WHETHER A MENTAL COMPETENCY EVALUATION IS NECESSARY SHOULD BE AMENDED

Presently, pursuant to *In re M-A-M-* and the Phase I guidance announced in 2013, an immigration judge—and an immigration judge alone—undertakes three separate stages of inquiry in order to determine the competency of a respondent. The stages include: (1) detecting indicia of incompetency; (2) conducting a judicial inquiry; and (3) conducting a competency review.<sup>193</sup> While an immigration judge may consider “health examinations” during the first two stages, such consideration is not required and indeed, will not always be available. It is only during the third stage—after an immigration judge has detected indicia of incompetency and conducted a thorough judicial inquiry, in which it is suggested that an immigration judge provide “advisals” and conduct a direct examination including nearly fifty substantive questions<sup>194</sup>—that an immigration judge may “consider” whether to refer the respondent for a mental health examination to help inform the court’s decision making.<sup>195</sup> This kind of protracted inquiry—which proceeds, in three separate stages absent any guarantee of the outside voice of a mental health professional—is insufficient to protect the fundamental fairness of the proceeding and the rights of mentally ill and incompetent respondents.

This Article proposes a new test for determining when a mental health examination should be performed. In order to protect the fundamental fairness of the proceeding and the rights of mentally ill and incompetent respondents, removal proceedings should operate more like criminal proceedings. As explained above, the bar in criminal proceedings for a mental health examination by a certified or licensed mental health professional is relatively low. There is no three-tiered inquiry by a criminal court judge and “evidence of a defendant’s irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required,” and “even one of these factors standing alone may, in some circumstances, be sufficient.”<sup>196</sup> The standard in immigration removal proceedings should be similarly modest. Where a respondent is detained, indigent, and determined with indicia of incompetency by an immigration judge, a mental health examination should be immediately performed.

Other scholars have written extensively about the “cascading constitutional deprivations” for criminal defendants and respondents in removal proceedings when counsel is not provided in the early stages of a

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193. EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 127, at 3.

194. *Id.* at Appendix A.

195. *Id.*

196. *See Drope v. Missouri*, 420 U.S. 162, 180 (1975).

trial proceeding.<sup>197</sup> So too in this context will a respondent in removal proceedings face cascading deprivation if a mental health examination, by a mental health professional—rather than an immigration judge—is not performed early in the proceedings. Two recent cases at the Board of Immigration Appeals—*In re J-R-R-A* and *In re G-G-S*—reveal why forgoing a mental competency evaluation early in the proceeding lead to this kind of “cascading constitutional deprivation.” It is disastrous to both the respondent and the integrity of the proceeding itself. In *In re J-R-R-A*,<sup>198</sup> an immigration judge found a respondent to be competent to proceed—but then it was the respondent’s very mental illness that led the immigration judge to an unfavorable credibility finding.<sup>199</sup> On appeal, the Board instructed the immigration judge to consider the respondent’s mental illness in making a credibility determination. Specifically, the Board held that the immigration judge should accept the respondent’s fear of harm as subjectively genuine based on the applicant’s perception of the events, despite it seeming otherwise not credible.<sup>200</sup>

By comparison, in *In re G-G-S*,<sup>201</sup> the Board considered the case of a respondent suffering from chronic paranoid schizophrenia. The respondent was convicted of assault with a deadly weapon and the immigration judge found that he had been convicted of an aggravated felony.<sup>202</sup> The immigration judge also found the respondent incompetent and several procedural safeguards were implemented, including the provision of legal counsel, appearance by the respondent’s mother on his behalf and the release of the respondent from custody. The immigration judge then held that the respondent was ineligible for withholding of removal because he had been convicted of a “particularly serious crime,” the determination of which is a factual inquiry.<sup>203</sup> On appeal, the respondent argued that his mental illness at the time of his offense should be a factor in determining whether his offense was a particularly serious crime. The Board disagreed, holding that mental illness is a consideration to be left to the criminal courts and cannot be considered in the determination whether an offense is particularly serious under Section 241(b)(3)(B) of INA.<sup>204</sup> In sum, two Board of Immigration Appeals’ decisions, within a year of one another, arrived at divergent conclusions, holding that the immigration judge should or, in the latter case, absolutely should not, consider the mental illness of the respondent.

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197. See Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63 (2012).

198. *In re J-R-R-A*, 26 I. & N. Dec. 609 (B.I.A. 2015).

199. *Id.* at 612.

200. *Id.* at 609.

201. *In re G-G-S*, 26 I. & N. Dec. 339, 340 (B.I.A. 2014).

202. INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (2016).

203. *In re G-G-S*, 26 I. & N. Dec. at 348.

204. *Id.* at 347.

The juxtaposition of these two cases is instructive, and if the recommendations of this Article were put into place—namely an early mental health evaluation by a mental health professional—the Board might be spared the need to grapple with these kinds of considerations, saving both time and money.

B. THE POTENTIAL CONCERNS OF RELYING ON MENTAL HEALTH EXPERTS CAN BE AVOIDED

As with all change, increased reliance on the opinion and evaluation of mental health experts could pose risks and challenges for immigration courts. Concerns about cost and bias in the criminal justice system are of equal concern in the removal defense context where expense is a central part of every conversation and impartiality carries important weight. But will an increased, early reliance on the opinion and evaluation of mental health experts actually add cost or introduce bias as some might fear?

First, is the issue of cost. Because removal proceedings are supposed to be “streamlined,”<sup>205</sup> concerns about additional costs—in both time and money—are frequently central to conversations about increasing rights and protections for all respondents in removal proceedings.

But any consideration of cost must take into account the basis for comparison. Presently, ICE’s annual budget for immigration detention is about \$2 billion. The daily cost of detention is about \$164 per person. With 34,000 detainees on any given day, the costs rapidly add up. Today, the federal government spends more than \$5 million a day to detain noncitizens in the United States.<sup>206</sup>

In the context of these astronomical expenses, the three stages of inquiry required by *In re M-A-M-* and the Phase I Plan are cumbersome and inefficient, requiring an immigration judge to often hold multiple hearings with a respondent who may be unable to effectively communicate or relay basic information about her life and any claims for relief. Most importantly, even these three stages of inquiry may still lead, ultimately, to referral for a mental health examination and potentially, to appointment of counsel. Just as studies have demonstrated that appointment of counsel earlier in the process can expedite proceedings and shorten the length of detention and costs incurred by DHS,<sup>207</sup> a mental health examination

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205. See *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1038–39 (1984) (“[A] deportation hearing is intended to provide a streamlined determination of eligibility to remain in this country, nothing more.”).

206. HUMAN RIGHTS FIRST, IMMIGRATION DETENTION: HOW CAN THE GOVERNMENT CUT COSTS? (2013).

207. NEW YORK IMMIGRANT REPRESENTATION, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDINGS 21 (2012) (explaining how a public defender model of deportation defense will “increase efficiency and fairness in the entire adjudication process”); see also Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 62 (2015).

early on would assist immigration judges and Courts to facilitate speedier proceedings and diminish the costs associated with prolonged detention and litigation. Further, it would be difficult to argue that the immigration courts—which are notoriously backlogged<sup>208</sup>—would not benefit from more focused and efficient proceedings.<sup>209</sup> Allowing telephonic, rather than in-court, testimony by mental health professionals could further reduce the cost of mental health examinations. While in-person testimony is always preferable, telephonic testimony is permissible and routinely utilized for other witnesses testifying in removal proceedings.<sup>210</sup>

A second concern of reliance on the testimony of mental health professionals is potential mental health examiner bias. The mental health professional may introduce bias<sup>211</sup> and an adjudicator may favor the evaluation done by one side over the other.<sup>212</sup>

Currently, in jurisdictions where the *Franco-Gonzalez* order is in force, the DHS will often submit a short evaluation completed by staff employed by either ICE or by the jail in which the respondent is being detained. At least anecdotally, immigration judges rely heavily on these evaluations in making initial competency determinations.<sup>213</sup> This is a moment in the proceedings where counsel has not yet been appointed and which, in *Franco-Gonzalez* jurisdictions and elsewhere, could be outcome determinative. If a judge finds that the respondent is competent, in reliance on this evaluation, typically no counsel will be appointed.

Where *Franco-Gonzalez* controls, there are orders in place that pertain to mental health evaluations both at the initial point of detention and later, at the order of an immigration judge.<sup>214</sup> When ordered by an

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208. The average length of a pending case in removal proceedings in FY 2015 (up through June 2015) is 619 days nationwide. *Immigration Court Backlog Tool*, TRAC IMMIGR., [http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/) (last visited Apr. 8, 2016). This is an increase from 455 days in 2012. See Noferi, *supra* note 197, at 81.

209. See LENNI B. BENSON & RUSSELL R. WHEELER, ENHANCING QUALITY AND TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATION 12–17, 22–31 (2012) (describing immigration court backlogs).

210. “In certain instances, witnesses may testify by telephone, at the Immigration Judge’s discretion.” EXEC. OFFICE OF IMMIGRATION REVIEW, IMMIGRATION COURT PRACTICE MANUAL 81 (2016).

211. Indeed, recent studies have shown that there may be some evidence of the “allegiance effect,” that is that experts hired by either side—defense or prosecution—may be impaired in their ability to handle cases objectively. See, e.g., DANIEL C. MURRIE ET AL., ASS’N FOR PSYCHOLOGICAL SCI., ARE FORENSIC EXPERTS BIASED BY THE SIDE THAT RETAINED THEM? (2013).

212. See, e.g., Interview with Washington State Immigration Practitioner (May 13, 2015) (on file with author) (explaining that in his jurisdiction, which is covered by *Franco-Gonzalez*, “judges give more weight to [evaluations done by the government] . . . they rely heavily on the ICE mental health evaluations”).

213. See *id.*; see also Interview with Arizona Immigration Practitioner (June 3, 2015) (on file with author) (“[I]n terms of competency evaluations, I think they should be finding more people to be incompetent.”). But see Interview with New Jersey Immigration Practitioner (June 10, 2015) (on file with author) (explaining that not only does ICE not submit an in-custody evaluation, but that they typically do not submit anything at all).

214. *Franco-Gonzalez v. Holder*, No. CV-10-02211 DMG (DBTX), 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014).

immigration judge, they include both “Judicial Competency Inquiries” and “Forensic Competency Evaluations” which are required to be conducted by mental health professionals, the latter “substantially in accordance with the procedures described in the American Academy of Psychiatry and the Law Practice Guideline for the Forensic Evaluation of Competence to Stand Trial.”<sup>215</sup> In contrast, in jurisdictions where the *Franco-Gonzalez* order is not in place, no practitioners interviewed have reported the use of an independent psychological evaluation ordered by an immigration judge.<sup>216</sup> While the ability of an immigration judge to order such evaluation is laid out in the Phase I Plan, it remains more of a promise than a practice in most, if not all, jurisdictions. In the meantime, like the attorneys in Jonathan’s case, immigration removal defense practitioners are on the hook to either pay for a psychological evaluation or secure one pro bono. This is not an easy task.<sup>217</sup>

But again, while still imperfect, the criminal justice system can provide some guidance on how to guard against bias, while also acknowledging that absolute objectivity is nearly impossible. Practices vary by state, but all jurisdictions have a mechanism that allows the criminal court to obtain an evaluation to determine a defendant’s competence to stand trial.<sup>218</sup> In Massachusetts for example, a defendant with questionable mental competency might first be referred to a “court clinician” for an initial competency screening. Such screening could take place at arraignment, inside the court itself. For a more determinative competency evaluation, each side may hire—or request funds from the court to hire—an evaluator to conduct an examination and provide written and oral testimony to the court. Similarly, in the immigration removal context, and as suggested in the Phase I Plan, EOIR can order an evaluation by a mental health professional that has undergone specific training for evaluation in an immigration court setting.<sup>219</sup> How evaluators are selected, the criteria used, and the training they are provided, are all areas ripe for debate—and contentious decisions not addressed by this Article. In the end, however, while there are challenges inherent in any of these scenarios, an initial screening by an evaluator employed not by

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215. *Id.* at \*9.

216. *See, e.g.*, Question: “Have you had any cases in which a mental health expert has been appointed at the court’s expense?” Eight out of eight practitioners operating in non-*Franco-Gonzalez* sites responded “no” to this question. Although practitioners did say that it “sounds great” and were hoping such practices would be implemented in their jurisdictions soon.

217. *See, e.g.*, Interview with Texas Immigration Practitioner (July 2, 2015) (on file with author) (explaining that because of a lack of available pro bono evaluators in her non-*Franco-Gonzalez* jurisdiction, attorneys are relying on New York City forensic examiners available to do evaluations by Skype).

218. William H. Fisher et al., *From Case Management to Court Clinic: Examining Forensic System Involvement of Persons with Severe Mental Illness*, 2 MENTAL HEALTH SERV. RES. 41, 49 (2000).

219. EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 127, at 8–10.

either side but by the immigration court may go a long way toward establishing some objectivity.<sup>220</sup>

After the question of *who* conducts the evaluation is resolved, there may also be concerns about process and procedure. Here, the *Franco-Gonzalez* litigation can be instructive. As the order in *Franco-Gonzalez* suggests, those in the immigration system can also turn to the *American Academy of Psychiatry and the Law Practice Guideline for the Forensic Evaluation of Competency to Stand Trial* for a thorough summary of best practices in evaluation, including sections devoted to ethics, objectivity and confidentiality.<sup>221</sup>

#### C. ALTERNATIVE SOLUTIONS ARE INSUFFICIENT TO PROTECT THE RIGHTS OF INCOMPETENT RESPONDENTS IN REMOVAL PROCEEDINGS

Few would argue that *In re M-A-M-* and the developments that have followed are not welcome additions to the protections afforded to mentally ill and mentally incompetent respondents in removal proceedings. Still, there remain outstanding challenges to protecting the rights of respondents and the fundamental fairness of removal proceedings. While this Article contends that the best next step is to emphasize the role of a mental health professional in the initial competency determination, over the singular determination of an immigration judge, there are other approaches that could also yield positive results. This Article argues, however, that these alternatives, while beneficial, are insufficient when standing alone.

One ready solution—or potential solution—to the criticisms voiced above, could be to make changes to the regulations requiring that counsel be appointed *before* a competency determination is made. Indeed, other scholars have made this very suggestion.<sup>222</sup> One could argue that only in this way could immigration judges be sure that a respondent's ability to consult with an attorney is meaningful and substantive, as *Dusky* requires. While this shift in standard would surely be meaningful for many respondents, it would not change the role of the

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220. However, so-called “Lamb Warnings” in Massachusetts requiring that a clinician advise a patient prior to a forensic evaluation that,

the individual's participation is voluntary and may be terminated at any time, and that any communications made during the course of the evaluation will not be privileged and may be disclosed in court proceedings. A Lamb Warning is only valid if the individual knowingly and voluntarily agrees to waive the privilege upon receiving such notification.

MASS. DEP'T OF HEALTH & HUMAN SERVS., DMH POLICY NO. 14-01 2 (2015); see *Commonwealth v. Lamb*, 311 N.E.2d 47 (Mass. 1974).

221. Douglas Mossman et al., *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 35 J. AM. ACAD. PSYCHIATRY & L. S3 (2007).

222. Amelia Wilson et al., *Addressing All Heads of the Hydra: Reframing Safeguards for Mentally Impaired Detainees in Immigration Removal Proceedings*, 39 N.Y.U. REV. L. & SOC. CHANGE 313 (2015).

immigration judge as central to the competency determination. This shift in standard would not require the evaluation or testimony of a mental health professional or that such mental health professional be consulted prior to an immigration judge's determination of competency. In practice then, while this change might lead to appointed defense counsel seeking out her own psychological evaluation, such evaluation would be discretionary, and not required. Indeed, in areas where pro bono services could not be secured or where defense counsel was otherwise unable to retain an evaluator, the result would be the same: an immigration judge alone would make any initial competency determination.

Another possible change that might positively impact the representation and rights of mentally ill and incompetent respondents is to create a separate, pro se competency standard akin to that in *Edwards*. As noted above, a pro se competency standard in removal proceedings is not without precedent. In fact, such a standard is part of the order further implementing *Franco-Gonzalez*<sup>223</sup> and provides a significant improvement in protecting the rights of mentally ill and incompetent respondents. Like in *Edwards*, a pro se competency standard in removal proceedings ensures that respondents are being assessed not only on their competence to proceed, but on their competence to proceed without counsel—and to perform all the necessary functions required in an individual, and highly complex, removal hearing. While this fix has been proposed by other scholars,<sup>224</sup> and would no doubt provide increased protections for noncitizen respondents, it is not alone an adequate remedy because it again leaves the initial competency determination to an immigration judge who, often in a vacuum, makes a determination that could be outcome dependent.

Finally, if the contention is that immigration judges are currently ill equipped to make competency determinations, one immediate remedy might be to simply provide them with more thorough training on mental competency and mental health issues. Practitioners certainly would be in favor of such action.<sup>225</sup> Indeed, the Immigration Judge Benchbook has, in recent years, attempted to provide additional guidance to immigration judges. The latest version of the Benchbook includes a summary of the current legal framework and suggested readings, including *Dusky* and *Edwards*, as well as resources from the *American Academy of Psychiatry*

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223. *Franco-Gonzalez v. Holder*, No. CV-10-02211 DMG (DTBx), 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014).

224. Marouf, *supra* note 12.

225. *See, e.g.*, Interview with Maryland/Virginia Immigration Practitioner (May 21, 2015) (on file with author) (lamenting that in her non-*Franco-Gonzalez* jurisdiction, “[there] hasn’t been sufficient training on even basic things like what are indicia and different types of illnesses that might be appearing in front of them in addition to a lack of training about what the legal standard is and what legal safeguards it’s appropriate for them to be using once [a] competency determination has been made”).

*and Law.*<sup>226</sup> But immigration judges are exceedingly busy and short on time. While the average federal district judge has a pending caseload of 400 cases and three law clerks to assist, in FY 2009, immigration judges completed over 1500 cases per judge on average, with a ratio of one law clerk for every four judges.<sup>227</sup> And even with the most robust support and training, asking immigration judges to make competency determinations without the benefit of a competency evaluation would be asking them to perform a task that we have never asked of criminal court judges.

#### CONCLUSION

A respondent who stands “helpless and alone before the Court” can have no fair trial at all.<sup>228</sup> And for respondents facing deportation from the United States, once there is any doubt about their competency, a mental health professional must conduct an evaluation before an immigration judge can render a decision as to competency. Immigration courts have made significant strides in recent years when it comes to the rights and protections afforded to the mentally ill and incompetent, but there remains significant work to be done. Fortunately, immigration judges and practitioners have the benefit of the lessons learned over more than sixty years of mental competency jurisprudence in the criminal justice context. Because immigration removal proceedings share the adversarial nature and high stakes, if not always the substantive and procedural protections present in the criminal context, it is instructive to draw on successes and challenges of mental competency determinations in the criminal justice context. In so doing, it is clear that the role of immigration judges in competency determinations should be deemphasized in favor of an increasingly prominent, and early, role for mental health professionals. Alternate solutions—including earlier provision of counsel, a pro se competency standard and increased training for immigration judges—are necessary but insufficient to ensure fundamental fairness for mentally ill and incompetent respondents in removal proceedings. Involvement by qualified mental health professionals once doubts about competency surface is the only way to protect the rights of these most vulnerable respondents, while also building toward an increasingly efficient removal process.

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226. *Immigration Judge Benchbook*, *supra* note 5.

227. *Oversight Hearing*, *supra* note 96.

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

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