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Incompetent but Deportable: The Case for a Right to Mental Competence in Removal Proceedings

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Articles

Incompetent but Deportable: The Case for a Right to Mental Competence in Removal Proceedings

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Important strides are currently being made toward increasing procedural due process protections for noncitizens with serious mental disabilities in removal proceedings, such as providing them with competency hearings and appointed counsel. This Article goes even further, arguing that courts should recognize a substantive due process right to competence in removal proceedings, which would prevent those found mentally incompetent from being deported. Recognizing a right to competence in a quasi-criminal proceeding such as removal would not be unprecedented, as most states already recognize this right in juvenile adjudication proceedings. The Article demonstrates that the same reasons underlying the prohibition against trial of incompetent defendants apply to removal proceedings. Competence is necessary to protect the fairness and accuracy of the proceedings, safeguard statutory and constitutional rights, uphold the prohibition against in absentia hearings, and preserve the moral dignity of the process. In addition removal can represent an extension of the criminal process. This Article explores potential concerns about recognizing a right to competence, such as exposing the respondent to indefinite civil commitment and forfeiting the opportunity to pursue applications that could lead to being granted legal status by the immigration court. A closer examination of these concerns suggests that they may be less serious than they initially appear. Finally, the Article explores some alternatives to recognizing a right to competence and explains why they fail to provide sufficient protection.

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INTRODUCTION

While the prohibition against trying mentally incompetent defendants has deep roots in Anglo-American jurisprudence, the rights of incompetent individuals in civil proceedings remains underexplored by both courts and scholars. Incompetent individuals have traditionally benefited from a spectrum of procedural due process protections in civil cases but generally have no substantive right to competence.[1] This dichotomous approach to competency in criminal and civil cases has led courts to downplay the real challenges posed by incompetency in high-stakes civil cases. "Quasi-criminal" cases, those that are technically civil but that can result in severe penalties akin to or even exceeding criminal punishment, present the toughest questions regarding the types of protections that mentally incompetent individuals should receive.[2] Removal proceedings represent one type of "quasi-criminal" case, as deportation is a "particularly severe penalty"[3] that may result in the "loss of both property and life, or of all that makes life worth living."[4]

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1. *See, e.g.*, Nee Hao Wong v. Immigration & Nationalization Serv., 550 F.2d 521, 522 (9th Cir. 1977) (holding that due process does not require deportation proceedings to be postponed until a noncitizen is competent to participate intelligently in the proceedings); Brue v. Gonzales, 464 F.3d 1227, 1233 (10th Cir. 2006) (finding that "aliens are entitled only to *procedural due process*, which provides the opportunity to be heard at a meaningful time and in a meaningful manner," and that "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" (emphasis added)); Mohamed v. TeBrake, 371 F. Supp. 2d 1043, 1045 (D. Minn. 2005) (finding, without explanation, that "[t]he substantive competency principle has no corollary in immigration proceedings").

2. *See, e.g.*, Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1797–98 (1992) (arguing that "the bifurcation of legal sanctions into two categories is misleading," as "punitive civil sanctions are rapidly expanding," which raises "serious doubt ... about whether conventional civil procedure is suited for an unconventional civil law"); Carol S. Steiker, *Foreward: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771, 774–77 (1998) (explaining how the state sometimes acts as "preventer of crime and disorder," rather than "punisher," through institutions such as the civil commitment process, and discussing the constitutional or policy limits that might apply to such "preventive" practices).

3. Padilla v. Kentucky, 559 U.S. 356, 365 (2010) (internal quotation marks omitted).

4. *See* Ng Fung Ho v. White, 259 U.S. 276, 284 (1922); *see also* Chaidez v. United States, 133 S. Ct. 1103, 1117 (2013) (quoting *Padilla*, 559 U.S. at 365–66); Bridges v. Wixon, 326 U.S. 135, 154 (1945) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That

Important strides are currently being made toward increasing the procedural due process protections for immigration detainees with serious mental disabilities, such as providing them competency hearings and appointed counsel.[5] Yet even these watershed changes do not go far enough.[6] Because a mentally incompetent individual cannot assist counsel, simply providing a representative fails to resolve troubling questions regarding the accuracy and reliability of the proceedings. Someone who does not know or cannot communicate where she was born, how she arrived in the United States, or how long she has lived here, much less her family's history, might derive little benefit from having an attorney. The attorney would need such basic information to determine if the person is actually deportable and assess her eligibility for relief from removal. To complicate matters, an incompetent client may even give the attorney wrong information, which could cloud the attorney's entire analysis. In numerous cases, U.S. citizens with serious mental disabilities have been wrongfully detained and deported, often based on their own inaccurate statements about their birthplace and nationality.[7]

One of the worst situations is where a noncitizen faces a real risk of persecution or torture in her country of origin, but her mental disabilities prevent her from being able to provide the type of consistent and credible testimony that is necessary to obtain asylum. A lawyer can certainly help prepare the case but stands largely powerless when it comes to a client's inability to testify coherently. In this scenario, the client's disabilities clearly render the proceeding unreliable, yet a deportation order could

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deportation is a penalty—at times a most serious one—cannot be doubted."); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 290–91 (2008) (arguing that only civil due process protections should apply to the determination of whether to exclude a noncitizen from entering the United States, but the full panoply of constitutional protections afforded to criminal defendants should apply to the determination of whether to deport a lawful permanent resident). *See generally* Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299 (2011) (examining the trajectory of Supreme Court cases regarding the quasi-criminal nature of deportation proceedings).

5. *See* Press Release, Dep't of Justice, Exec. Office of Immigration Review, Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions (Apr. 22, 2013), *available at* http://www.justice.gov/eoir/press/2013/SafeguardsUnrepresentedImmigrationDetainees.html.

6. This Article uses the term "mental disabilities" to include mental illnesses as well as cognitive or developmental delays, because both types of disabilities may lead individuals to be legally incompetent.

7. In 2007, for example, the U.S. Immigration and Customs Enforcement ("ICE") wrongfully deported Pedro Guzman, a U.S. citizen with development disabilities, who was lost in Mexico for almost three months before being located and returned to California. He allegedly told ICE officers, Customs and Border Patrol officials, and others that he was born in Mexico. *See* Paloma Esquivel, *Suit Filed Over Man's Deportation Ordeal*, L.A. TIMES, Feb. 28, 2008, at 4. In 2008, ICE deported a U.S. citizen named Mark Lyttle, who had bipolar disorder and development disabilities, after he signed a statement verifying that he was a Mexican national. *See* HUMAN RIGHTS WATCH, DEPORTATION BY DEFAULT: MENTAL DISABILITY, UNFAIR HEARINGS, AND INDEFINITE DETENTION IN THE US IMMIGRATION SYSTEM 4 (2010) [hereinafter DEPORTATION BY DEFAULT].

ensue with potentially life-threatening consequences. Criminal trials do not proceed if the defendant cannot assist with the defense because we recognize that any trial would be unfair if the defendant cannot communicate exonerating information. Yet we expect removal hearings to proceed even if the respondent cannot convey crucial information that could stop her deportation.

This Article argues that the same reasons underlying the prohibition against trial of incompetent defendants support recognizing a substantive right to competence in removal proceedings. The rationales for a right to mental competence in criminal cases include: preserving the accuracy and reliability of the proceedings; protecting other rights that cannot be exercised if incompetent, including the right to be present during the proceedings; and safeguarding the dignity of the process.[8] These same concerns apply in the removal context but removal has also become an extension of the criminal process, with immigration consequences flowing directly from arrest, investigation, detention, and conviction.[9] The integrated nature of immigration enforcement and criminal proceedings underscores the importance of adopting a consistent approach for questions of mental competence.

Mapping the spectrum of mental competence against the spectrum of due process protection provides a useful framework for analyzing issues of competence. On one end of the competence spectrum are individuals who are not competent to stand trial or face removal, even when represented by counsel. The Supreme Court defined this standard of competence in *Dusky v. United States*[10] and *Drope v. Missouri*.[11] Further along the spectrum are individuals who are competent to stand trial or face removal but lack the higher level of competence necessary for self-representation. The Supreme Court recognized the legitimacy of this category in *Indiana v. Edwards*, although it did not define the heightened standard of competence.[12] Finally, some individuals demonstrate the higher level of competence necessary to represent themselves.

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8. *See, e.g.*, Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 457–58 (1967).

9. *See, e.g.*, Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1143–56 (2013) (describing how the immigration system functions as part of the criminal system and how immigration enforcement and criminal punishment involve an "integrated process").

10. Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam) (holding that the standard for competence to stand trial "must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him")

11. Drope v. Missouri, 420 U.S. 162, 171 (1975) ("[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.").

12. Indiana v. Edwards, 554 U.S. 164, 177–78 (2008) (holding that states may impose a higher standard of competency for self-representation).

Each of these groups along the spectrum of competence corresponds to a different level of due process protection. For the first group, those who are not competent under *Dusky/Drope*, due process requires termination of the proceedings, which is analogous to dismissal.[13] For the middle group of individuals, those who are competent to stand trial but lack the higher competence necessary for self-representation, attorneys must be appointed. This would represent a significant change from the current removal system in which individuals have the privilege of obtaining representation at their own expense.[14] If an attorney could not be appointed, then the case would have to be terminated. Only members of the third group, those who demonstrate the heightened competence required for self-representation, would be allowed to proceed pro se.

Part I of this Article provides relevant background information about the prevalence of mental disabilities among individuals in removal proceedings and emphasizes that only a small fraction of these individuals would qualify as legally incompetent under the *Dusky/Drope* standard. Recognizing a right to competence would not, therefore, pose a major obstacle to immigration enforcement. Part II sets forth the standards for competency in both criminal and civil proceedings, exploring specifically how issues of incompetency are handled in two types of quasi-criminal cases: juvenile adjudications and habeas petitions. This discussion shows that recognizing a substantive right to competence in a technically civil proceeding is not unprecedented, as most states have already recognized this right in juvenile delinquency cases.[15] Moreover, the reasoning of state courts overlaps with the rationale for prohibiting the trial of incompetent defendants and helps shape the arguments for recognizing a right to competence in removal proceedings. This same rationale does not, however, apply to backward-looking habeas proceedings, which bear none of the trappings of a trial. The Supreme Court's recent decision finding no right to competence in capital habeas proceedings therefore poses no obstacle to the arguments proposed in this Article.[16]

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13. Termination differs from administrative closure, which simply involves taking the case off the docket and putting it on hold indefinitely. Requiring immigration judges to terminate cases based on mental incompetence creates tension with 8 C.F.R. § 1239.2 (2014), which appears to authorize immigration judges to terminate only in order to allow the respondent to pursue naturalization. One solution is for the regulation to be amended to authorize judges to terminate in cases of mental incompetency. Alternatively, courts could apply the doctrine of constitutional avoidance and construe the regulation as permitting immigration judges to terminate where the respondent is mentally incompetent. Courts could also simply find that the regulation conflicts with a constitutional due process right to competence and is therefore invalid.

14. 8 U.S.C. § 1229a(b)(4)(A) (2006) ("[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings.").

15. *See infra* notes 110–131 and accompanying text.

16. *See* Ryan v. Gonzales, 133 S. Ct. 696, 700 (2013).

Part III reviews how immigration courts currently handle issues of mental competence, explaining that removal proceedings resemble mini-trials, much like juvenile adjudications, yet provide minimal protections for incompetent respondents. Recent developments promise a change in procedural rights, such as appointment of counsel for mentally incompetent individuals who are detained, but there has been no discussion about whether incompetent individuals may be subjected to the removal process and ordered deported in the first place.[17] Reforms addressing procedural due process rights are important and necessary to identify which respondents are legally incompetent, but they do not address the problem of what to do after someone is deemed incompetent. The recent developments also fail to address appointment of counsel for non-detained incompetent individuals who lack the heightened competency necessary for self-representation.

Part IV argues that courts should recognize a substantive right to competence in removal proceedings, explaining how each of the arguments underlying the criminal prohibition applies equally to the removal context. This substantive right would have two tiers, such that a higher threshold of competence would be required for self-representation. Part V explores potential concerns with recognizing a right to mental competence, including the risk of civil commitment and the forfeiture of a chance to obtain lawful status from the immigration court. While these are important concerns, this Article offers some reasons why the risks may actually be lower than they initially appear. Finally, for those who remain wary of recognizing a right to competence, Part VI discusses some alternatives, including discretionary termination by immigration judges, prosecutorial discretion by the Department of Homeland Security ("DHS"), and a novel disability rights framework that utilizes a reasonable accommodation approach for advancing the right to counsel. Part VI explains why these alternatives may not provide sufficient protection. This Article concludes that recognizing a substantive right to competence, or creating an analogous statutory right, would be the best way to ensure across-the-board protection for mentally incompetent individuals in removal proceedings.

I. MENTAL DISABILITIES AMONG INDIVIDUALS FACING DEPORTATION

U.S. immigration law has never been welcoming toward individuals with mental disabilities. In fact, early immigration laws steadily expanded the list of mental disabilities that resulted in exclusion. The Immigration

17. In April 2013, the Department of Homeland Security ("DHS") and the Department of Justice ("DOJ") announced a brand new policy that promises competency hearings and appointed representatives to detained noncitizens with serious mental disabilities. *See* Press Release, Dep't of Justice, *supra* note 5.

Act of 1891, for example, excluded "[a]ll idiots" and "insane persons."[18] In 1907, the list included: "idiots, imbeciles, feeble-minded persons, epileptics, [and] insane persons."[19] By 1917, the United States excluded "[a]ll idiots, imbeciles, feeble-minded persons, epileptics, insane persons; persons who have had one or more attacks of insanity at any time previously; persons of constitutional psychopathic inferiority" and any other persons found to be "mentally ... defective."[20] Today, the Immigration and Nationality Act ("INA") excludes individuals with a mental disorder only if they pose a danger to themselves or others.[21] But tens of thousands of noncitizens with mental disabilities still face deportation each year.[22] Some of these individuals suffer from cognitive delays or traumatic brain injuries, while others have serious psychiatric disorders, such as schizophrenia, bipolar disorder, or posttraumatic stress disorder. They often must navigate the complex removal process alone, while detained, without access to proper medical or mental healthcare, and without the assistance of counsel. Some actively experience hallucinations while in court; others do not know the current date, their place of birth, or cannot grasp the concept of a judge, much less the notion of deportation.[23]

Only limited quantitative information is available regarding noncitizens with mental disabilities in removal proceedings.[24] In 2008, the Department of Immigrant Health Services reported that 2–5% of immigration detainees suffer from "a serious and persistent mental illness" and 10–16% of detainees had experienced "some form of encounter with a mental health professional or the mental health system."[25] In confidential memoranda, the U.S. Immigration and Customs Enforcement ("ICE") estimated that approximately 15% of the detained immigration

18. Immigration Act of 1891 § 1, ch. 551, 26 Stat. 1084 (excluding, among others, "[a]ll idiots, insane persons, paupers or persons likely to become a public charge, [and] persons suffering from a loathsome or a dangerous contagious disease").

19. Immigration Act of 1907, § 2, ch. 1134, 34 Stat. 898.

20. Immigration Act of 1917 § 3, ch. 29, 39 Stat. 874.

21. 8 U.S.C. § 1182(a)(1)(A)(iii)(I) (2013) (excluding individuals with mental disorders if they demonstrate "behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others," or if they have a history of such behavior that is likely to recur or lead to other harmful behavior).

22. *See infra* notes 25–30 and accompanying text.

23. *See* DEPORTATION BY DEFAULT, *supra* note 7, at 6, 25–26.

24. Neither ICE, which is part of DHS, nor the Executive Office for Immigration Review ("EOIR"), which is an agency within the Department of Justice that includes the immigration courts and the Board of Immigration Appeals ("BIA"), tracks these numbers. Attempts by Human Rights Watch to obtain this data through the Freedom of Information Act ("FOIA") requests have also proved inconclusive. *See* DEPORTATION BY DEFAULT, *supra* note 7.

25. *Selected Responses from ICE to Questions Posed by* The Washington Post *Regarding the Provision of Mental Health Care to Immigration Detainees*, WASH. POST (May 2008), http://media.washingtonpost.com/wp-srv/nation/specials/immigration/documents/day3_ice_mentalhealth.gif. The percentages indicate that around 7500 to 19,000 individuals detained in 2008 had a serious mental illness, and around 38,000 to 60,000 had a mental health encounter.

population includes noncitizens with a mental illness.[26] This is a significant number of people, given that over 400,000 individuals pass through ICE detention each year.[27] Consistent with the 15% figure, ICE performed 57,982 mental health interventions in 2011.[28] These numbers suggest that up to 60,000 detained individuals with some type of mental illness face deportation each year.[29] Many non-detained individuals in removal proceedings also have mental disabilities, although the rates are usually much lower among the general population compared to the incarcerated population.[30] About one in seventeen adults (6%) lives with a serious mental illness such as schizophrenia, major depression, or bipolar disorder.[31]

Of course, the mere existence of a mental disability does not render someone legally incompetent.[32] As the Supreme Court has recognized, mental illness "is not a unitary concept" but one that "varies in degree [and] can vary over time . . . interfer[ing] with an individual's functioning at different times and in different ways."[33] Only the most extreme cases tend to result in findings of legal incompetence to stand trial.[34] In the criminal context, 20–30% of defendants referred for competency evaluations are found to be incompetent.[35] While only a fraction of the

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26. Dana Priest & Amy Goldstein, *Suicides Point to Gaps in Treatment: Errors in Psychiatric Diagnoses and Drugs Plague Strained Immigration System*, WASH. POST, May 13, 2008, at A1.

27. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ERO FACTS AND STATISTICS (Dec. 12, 2011), *available at* http://www.ice.gov/doclib/foia/reports/ero-facts-and-statistics.pdf.

28. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FACT SHEET: ERO—DETAINEE HEALTH CARE—FY 2011, *available at* http://www.ice.gov/doclib/news/library/factsheets/pdf/dhc-fy11.pdf.

29. *Cf.* DEPORTATION BY DEFAULT, *supra* note 7, at 17 (estimating that the number of persons appearing in immigration proceedings who have mental disabilities is at least fifteen percent of the daily or annual total).

30. The National Alliance on Mental Illness reports that twenty-four percent of state prisoners and twenty-one percent of local jail prisoners have a recent history of a mental health disorder. According to one report, there are now three times as many people with serious mental illnesses in jails than in hospitals. *See* E. FULLER TORREY ET AL., TREATMENT ADVOCACY CTR., MORE MENTALLY ILL PEOPLE ARE IN JAILS AND PRISONS THAN HOSPITALS: A SURVEY OF THE STATES at II(b) (May 2010).

31. NAT'L ALLIANCE ON MENTAL ILLNESS, MENTAL ILLNESS: FACTS AND NUMBERS (2013).

32. *See, e.g.*, Wolf v. United States, 430 F.2d 443, 445 (10th Cir. 1970) ("The presence of some degree of mental disorder in the defendant does not necessarily mean that he is incompetent to . . . assist in his own defense.").

33. Indiana v. Edwards, 554 U.S. 164, 165 (2008).

34. Individuals with diagnosed psychotic disorders and histories of past psychiatric hospitalizations are particularly likely to be found incompetent. A meta-analysis of sixty-eight studies published between 1968 and 2008 that compared competent and incompetent criminal defendants using a number of variables found that those diagnosed with a psychotic disorder were eight times more likely to be found incompetent than defendants without this diagnosis, and that defendants with a previous psychiatric hospitalization were twice as likely to be found incompetent as defendants who had not been hospitalized. *See* Gianni Pirelli, William H. Gottdiener & Patricia A. Zapf, *A Meta-Analytic Review of Competency to Stand Trial Research*, 17 PSYCHOL. PUB. POL'Y & L. 1, 7, 16–17 (2011).

35. *See* Pirelli et al., *supra* note 34, at 3 (suggesting a figure of around 20%, although the rates vary across jurisdictions); GARY MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 141 (3d ed. 2007) (indicating a figure of

respondents in removal proceedings are therefore likely to qualify as legally incompetent, it is shocking that DHS requested competency evaluations in just 429 cases between 2004 and 2010.[36] This number indicates that the government has largely ignored questions of mental competency in the removal context. Given that over 300,000 people are placed in removal proceedings each year,[37] one would expect a much higher number of referrals for competency evaluations.

When serious mental disabilities are ignored, the consequences can be devastating. Recent investigations into deaths in immigration detention centers revealed significant numbers of suicides.[38] These suicides could be related to ICE's failure to provide detainees with appropriate mental healthcare.[39] After the suicides came to light, ICE's Office of Detention Oversight began paying closer attention to compliance with various standards. In 2011 and 2012, this office inspected detention facilities throughout the United States and found numerous deficiencies that impact the care of detainees with serious mental illnesses, ranging from failure to place medical grievances in files to involuntary administration of medical treatment.[40] The widespread mistreatment of mentally ill

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around 30%); RONALD ROESCH & STEPHEN GOLDING, COMPETENCY TO STAND TRIAL 48–49 (1980) (reporting a figure of 30% on average); *cf.* Geoffrey R. McKee, *Competency to Stand Trial in Preadjudicatory Juveniles and Adults*, 26 J. AM. ACAD. PSYCHIATRY & L. 89, 94–95 (1998) (finding, in a sample of 112 juveniles referred for competency evaluations, that 15% were found incompetent).

36. *See* DEPORTATION BY DEFAULT, *supra* note 7, at 12.

37. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2012 STATISTICAL YEAR BOOK, at C3, tbl. 3, *available at* http://www.justice.gov/eoir/statspub/fy12syb.pdf.

38. *See* Nina Bernstein, *Officials Say Detainee Fatalities Were Missed*, N.Y. TIMES, Aug. 17, 2009, at A10; *see also* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, LIST OF DEATHS IN ICE CUSTODY: OCTOBER 2003–DECEMBER 6, 2012 (showing 131 deaths total and suggesting that about nineteen deaths were suicides out of 119 for which the cause of death was confirmed).

39. ICE has kept track of how much money it has "saved" by denying treatment for various mental illnesses. For example, between 2005 and 2006, ICE reported that it saved $43,158 by denying treatment for depressive disorder, $18,145 by denying treatment for manic-depressive disorder, $11,688 by denying treatment for unspecified psychosis, $7402 by denying treatment for paranoid schizophrenia, $6402 by denying treatment for unspecified affective disorders, and $5920 by denying treatment for prolonged posttraumatic stress disorder. *Internal Document from Division of Immigration Health Services: TAR Cost Savings Based on Denials*, WASH. POST (2008), http://media.washingtonpost.com/wp-srv/nation/specials/immigration/day2_tardocs.pdf. ICE also "saved" hundreds of thousands of dollars by denying treatment for a host of other conditions that may be psychosomatic in nature, such as the $91,926 saved by denying treatment for "unspecified chest pain" and over $55,000 saved by denying treatment for various types of abdominal pain. *Id.*

40. The deficiencies included: inadequate staffing to address the health needs of detainees; failure to provide a health exam within fourteen days of the detainee's arrival at the facility; failure to meet healthcare needs in a timely manner; failure to treat chronic conditions properly; failure to place medical grievances in a detainee's file; inadequate procedures to ensure that slips requesting medical care reach the proper officials; failure to follow procedures in distributing medication; involuntary administration of medical treatment (including involuntarily administration of psychotropic medications); and failure to provide regularly scheduled "sick calls." *See* OFFICE OF DETENTION OVERSIGHT, COMPLIANCE INSPECTION: ENFORCEMENT AND REMOVAL OPERATIONS ATLANTA FIELD OFFICE: YORK COUNTY DETENTION CENTER YORK, SOUTH CAROLINA (2013); OFFICE OF DETENTION OVERSIGHT,

detainees makes it even more urgent to consider whether these individuals should be subject to deportation in the first place.

II. MENTAL COMPETENCE IN CRIMINAL AND CIVIL PROCEEDINGS

A. COMPETENCE IN CRIMINAL PROCEEDINGS

Dating back to the seventeenth century, authorities in English common law maintained that an incompetent defendant could not undergo a criminal trial, receive judgment, or be executed.[41] These authorities explicitly tied the requirement of competence to the defendant's capacity to communicate exonerating information to others. For example, Sir John Hawles observed that "a lunatick . . . is by an act of God . . . disabled to make his just defence," as there "may be circumstances lying in his private knowledge, which would prove his innocency, of which he can have no advantage, because not known to the persons who shall take upon them his defence."[42] William Blackstone

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COMPLIANCE INSPECTION: ENFORCEMENT AND REMOVAL OPERATIONS NEWARK FIELD OFFICE: ELIZABETH CONTRACT DETENTION FACILITY NEWARK, NEW JERSEY (2012); OFFICE OF DETENTION OVERSIGHT, COMPLIANCE INSPECTION: ENFORCEMENT AND REMOVAL OPERATIONS PHILADELPHIA FIELD OFFICE: CLINTON COUNTY CORRECTIONAL FACILITY MCELHATTAN, PENNSYLVANIA (2012); OFFICE OF DETENTION OVERSIGHT, COMPLIANCE INSPECTION: ENFORCEMENT AND REMOVAL OPERATIONS SAINT PAUL FIELD OFFICE: RAMSEY COUNTY ADULT DETENTION CENTER SAINT PAUL, MINNESOTA (2012); OFFICE OF DETENTION OVERSIGHT, COMPLIANCE INSPECTION: ENFORCEMENT AND REMOVAL OPERATIONS SAN FRANCISCO FIELD OFFICE: SACRAMENTO COUNTY JAIL SACRAMENTO, CALIFORNIA (2012); OFFICE OF DETENTION OVERSIGHT, COMPLIANCE INSPECTION: ENFORCEMENT AND REMOVAL OPERATIONS NEWARK FIELD OFFICE: ESSEX COUNTY CORRECTIONAL FACILITY NEWARK, NEW JERSEY (2012); OFFICE OF DETENTION OVERSIGHT, COMPLIANCE INSPECTION: ENFORCEMENT AND REMOVAL OPERATIONS MIAMI FIELD OFFICE: BROWARD TRANSITION CENTER POMPANO BEACH, FLORIDA (2012); OFFICE OF DETENTION OVERSIGHT, COMPLIANCE INSPECTION: ENFORCEMENT AND REMOVAL OPERATIONS CHICAGO FIELD OFFICE: JEFFERSON COUNTY JUSTICE CENTER MOUNT VERNON, ILLINOIS (2012); OFFICE OF DETENTION OVERSIGHT, COMPLIANCE INSPECTION: ENFORCEMENT AND REMOVAL OPERATIONS NEW YORK FIELD OFFICE: HUDSON COUNTY CORRECTIONAL FACILITY KEARNY, NEW JERSEY (2011), *available at* http://www.ice.gov/foia/library.

41. *See, e.g.*, 1 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 35 (Prof'l Books Ltd. 1971) (1736) ("[I]f [a] person after his plea, and before his trial, become of non sane memory, he shall not be tried; or, if after his trial he become of non sane memory, he shall not receive judgment; or, if after judgment he become of non sane memory, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution."); *see also* Medina v. California, 505 U.S. 437, 446 (1992) ("The rule that a criminal defendant who is incompetent should not be required to stand trial has deep roots in our common-law heritage."); Youtsey v. United States, 97 F. 937, 940 (6th Cir. 1899) (collecting common law authorities discussing the prohibition against the trial of incompetent defendants).

42. Sir John Hawles, *Remarks on the Trial of Mr. Charles Bateman* (1719), *reprinted in* 11 STATE TRIALS 473, 476 (T.B. Howell ed., 1816) ("[N]othing is more certain law, than that a person who falls mad after a crime supposed to be committed, shall not be tried for it; and if he falls mad after judgment he shall not be executed. . . . [T]he true reason of the law I think to be this, a person of 'non sana memoria,' and a lunatick during his lunacy, is by an act of God . . . disabled to make his just defence. There may be circumstances lying in his private knowledge, which would prove his innocency, of which he can have no advantage, because not known to the persons who shall take upon them his defence.").

likewise questioned how a person who is "mad" can "make his defence"[43] and receive a fair trial when "the law knows not but he might have offered some reason, if in his senses, to have stayed [the] proceeding."[44] Trials were therefore postponed until a date when the defendant "by collecting together his intellects, and having them entire, . . . shall be able to model his defense and to ward off the punishment of the law."[45]

By the nineteenth century, U.S. courts had also addressed the issue of competence to stand trial. In 1899, the Sixth Circuit explained in *Youtsey v. United States* that "[i]t is not 'due process of law' to subject an insane person to trial upon an indictment involving liberty or life."[46] In that case, "the defendant's mind and memory, as a consequence of epileptic attacks, had become so impaired as that he was unable to advise his counsel as to his defense, or recall transactions which ought to have been within his knowledge," and "he was unable, in consequence of his impaired mind and memory, to testify for himself."[47] The court remanded the case for "a thorough investigation of the sanity of the accused," explaining that "the learned trial judge should have adopted some method of satisfying himself that the accused was able to rationally defend himself, before putting him on trial under the plea of not guilty."[48]

Several rationales underlie the longstanding existence of the prohibition against the trial of incompetent defendants. Explicitly examining this rationale is helpful in considering whether a similar prohibition should apply in quasi-criminal contexts. First and foremost, the prohibition helps protect the accuracy and reliability of the proceedings.[49] An incompetent defendant may not understand what information is

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43. 4 WILLIAM BLACKSTONE, COMMENTARIES *24–25 (1769) ("[I]f a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.").

44. *See id.* at *389; *see also* Godinez v. Moran, 509 U.S. 389, 400 n.11 (1993) ("[T]he prohibition against the trial of incompetent defendants dates back at least to the time of Blackstone.").

45. Frith's Case, 22 How. State Trials 307 (1790).

46. *Youtsey*, 97 F. 937, at 941.

47. *Id.* at 942.

48. *See id.* at 947; *see also* United States v. Chisolm, 149 F. 284, 289 (C.C.S.D. Ala. 1906) ("Does the mental impairment of the prisoner's mind, if such there be, whatever it is, disable him . . . from fairly presenting his defense, whatever it may be, and make it unjust to go on with his trial at this time, or is he feigning to be in that condition . . . ?").

49. In 1906, a federal circuit court explained that it would be "a reproach to justice and our institutions, if a human being . . . were compelled to go to trial at a time when he is not sufficiently in possession of his mental faculties to enable him to make a rational and proper defense." *Chisolm*, 149 F. at 288. In other words, the competency rule is one of "the great safeguards which the law adopts in the punishment of crime and the upholding of justice." *Id.*

relevant to prove her innocence or may be unable to share that information with the court, which could contribute to an erroneous conviction.[50] Second, the prohibition helps protect other constitutional rights, "including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so."[51] An incompetent defendant's inability to meaningfully exercise these rights can also contribute to problems with accuracy.[52] For example, an incompetent defendant may not be able to identify lies told by adversarial witnesses, whereas a competent defendant could point these out to her attorney, which would assist with cross-examination.[53]

Third, the prohibition against subjecting an incompetent defendant to trial is closely related to the prohibition against in absentia trials.[54] Defendants have the right to be present at all stages of the criminal process. This right derives primarily from the Sixth Amendment Confrontation Clause, but also from the Fifth Amendment Due Process Clause.[55] A mentally incompetent person is deprived of this right because she "may be as far removed from the proceedings as if physically absent."[56] Finally, the prohibition against trying incompetent individuals helps preserve the "moral dignity" of the defendant and the criminal process. If a defendant behaves "insane" in court, the legal process may appear undignified and unfair.[57] Some scholars have also argued that

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50. *See supra* notes 42–47 and accompanying text.

51. Cooper v. Oklahoma, 517 U.S. 348, 354 (1996) (quoting Riggins v. Nevada, 504 U.S. 127, 139–40 (1992) (Kennedy, J., concurring)). In rejecting Oklahoma's clear and convincing evidence standard for proving incompetence, the Court emphasized that "the consequences of an erroneous determination of competence are dire," as a defendant who "lacks the ability to communicate effectively with counsel, he may be unable to exercise other 'rights deemed essential to a fair trial.'" *Id.* at 364.

52. *See* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 8.1(a) (2d ed. 2003).

53. *See, e.g.*, Kentucky v. Stincer, 482 U.S. 730, 750 (1987) (Marhsall, J., joined by Brennan, J. and Stevens, J., dissenting) (recognizing that the presence of the defendant "enhances the reliability of the factfinding process," as it is often the defendant, not counsel, who "possesses the knowledge needed to expose inaccuracies in the witness' answers," and "[h]aving the defendant present ensures that these inaccuracies are called to the judge's attention immediately.").

54. The Supreme Court has noted that "[s]ome have viewed the common-law prohibition [against the trial of incompetent individuals] 'as a by-product of the ban against trials in absentia; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself.'" Drope v. Missouri, 420 U.S. 162, 171 (1975) (quoting Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 834 (1960)).

55. *See* U.S. CONST. amend. V, VI; *see also* United States v. Gagnon, 470 U.S. 522, 526 (1985) ("The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment . . . but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him.").

56. *See* Thomas v. Cunningham, 313 F.2d 934, 938 (4th Cir. 1963); *see also* Mohamed v. Gonzales, 477 F.3d 522, 526 (8th Cir. 2007) ("A mentally incompetent person, although physically present, is absent from the hearing for all practical purposes.").

57. Indiana v. Edwards, 554 U.S. 164, 176–77 (2008).

dignity requires the defendant to have "a meaningful moral understanding of wrongdoing and punishment."[58] Various theories of punishment are premised on an understanding of wrongdoing, so the absence of such an understanding undermines the purpose of prosecution.[59]

The prohibition against the trial of an incompetent defendant has both procedural and substantive due process components.[60] Procedural due process, which involves the adequacy of the court's inquiry into the defendant's competence, requires a competency hearing whenever the evidence raises a "bona fide doubt" as to a defendant's competence.[61] While there are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed," the range of relevant factors that may be sufficient to trigger a competency hearing include "a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial."[62] Indeed, "even one of these facts, standing alone, may be sufficient."[63] A mental health

58. *See* Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond* Dusky *and* Drope, 47 U. MIAMI L. REV. 539, 543 (1993); *see also Incompetency to Stand Trial*, *supra* note 8, at 458 (connecting the prohibition to "the philosophy of punishment that the defendant know why he is being punished").

59. The Supreme Court's decisions to categorically exclude mentally retarded individuals and juveniles from the death penalty invoked similar reasoning based on penological purposes. *See* Atkins v. Virginia, 536 U.S. 304, 318–21 (2002) (finding that imposition of the death penalty on a mentally retarded person does not serve the penological purposes of retribution and deterrence); Roper v. Simmons, 543 U.S. 551, 553 (2005) ("Once juveniles' diminished culpability is recognized, it is evident that neither of the two penological justifications for the death penalty—retribution and deterrence of capital crimes by prospective offenders . . . provides adequate justification for imposing that penalty on juveniles."). The ability to distinguish right from wrong is part of the test for "insanity" as a defense, which provides a basis for mitigating punishment, but it is not part of the test for competence, which determines whether prosecution may occur at all. *Cf.* Daniel M'Naghten's Case, (1843) 8 Eng. Rep. 718 (H.L.) 719, 722–23 (setting forth the standard for being found "insane" at the time of the offense); *cf.* Drope v. Missouri, 420 U.S. 162, 171 (1975) (setting forth the standard for competence to stand trial). In *Atkins*, the Supreme Court recognized that the "diminished capacities" of mentally retarded individuals justify exemption from the death penalty even if they are able to tell right from wrong under the *M'Naghten* standard. *Atkins*, 536 U.S. at 318.

60. *Cf.* Dusky v. United States, 362 U.S. 402 (1960) (per curium) (establishing the right not to be subjected to trial if incompetent); *cf.* Pate v. Robinson, 383 U.S. 375, 384–85 (1966) (recognizing a procedural right to a competency hearing in state prosecutions based on the due process clause of the Fourteenth Amendment); *see also* Walker v. Att'y Gen., 167 F.3d 1339, 1343 (10th Cir. 1999) ("[C]ompetency claims can raise issues of both substantive and procedural due process.").

61. *See Pate*, 383 U.S. at 385–86 ("Where the evidence raises a 'bona fide doubt' as to a defendant's competence to stand trial, the judge on his own motion must impanel a jury and conduct a sanity hearing pursuant to [the Illinois competency statute at issue]."); *see also* Porter v. McKaskle, 466 U.S. 984, 985–86 (1984) (Marshall, J., dissenting) ("It is settled that, if evidence available to a trial judge raises a bona fide doubt regarding a defendant's ability to understand and participate in the proceedings against him, the judge has an obligation to order an examination to assess his competency, even if the defendant does not request such an exam.").

62. *Drope*, 420 U.S. at 180.

63. *Id.* Federal appeals courts have reversed lower courts for failing to conduct competency hearings in various situations, such as where: (1) the defendant could not communicate intelligently, had sustained a serious head injury, and had a family history of mental disturbance; (2) the defendant

evaluation is normally ordered by the court before a hearing on competence to stand trial. Each state has a mechanism for criminal courts to obtain a competency evaluation for a defendant.[64] The defendant has the burden of proving incompetence by a preponderance of the evidence.[65] Once a defendant is found to be incompetent, substantive due process requires freedom from criminal prosecution.[66]

The Supreme Court defined the standard for competence to stand trial decades ago.[67] Much more recently, the Court recognized that a higher standard of competence may be required for self-representation. These two standards are discussed separately below since both are highly relevant to the removal context, followed by an explanation of the consequences of an incompetence finding.

1. Competence to Stand Trial

In 1960, the Supreme Court issued its seminal decision in *Dusky v. United States*, which held that the standard for competence to stand trial "must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."[68] In *Drope v. Missouri*, the Supreme Court expounded on this standard, stating that "a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."[69] *Drope* built on *Dusky* by specifically mentioning the ability to assist in preparation of the defense.[70] These cases remain the guideposts for evaluating competency to stand trial. Scholars such as Richard Bonnie have expounded on the Court's terse competence standard by identifying in more detail the abilities needed to assist counsel, such as the ability to appreciate the seriousness of the situation and "recognize and relate relevant information

displayed strange, self-defeating behavior in court and believed his lawyer and the judge were part of a conspiracy; and (3) the defendant had been hospitalized for multiple mental disorders, had likely undergone treatment with antipsychotic medication, and his attorney had repeatedly requested assistance from mental health professionals. *See, e.g.*, United States v. Nichelson, 550 F.2d 502 (8th Cir. 1977); Torres v. Prunty, 233 F.3d 1103 (9th Cir. 2000); Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991).

64. William H. Fisher et al., *From Case Management To Court Clinic: Examining Forensic System Involvement of Persons With Severe Mental Illness*, 2 MENTAL HEALTH SERVICES RES. 41 (2000).

65. Cooper v. Oklahoma, 517 U.S. 348, 361 (1996) (rejecting Oklahoma's "clear and convincing" standard for establishing incompetency as offensive to "a principle of justice that is deeply 'rooted in the traditions and conscience of our people'").

66. *See* Dusky v. United States, 362 U.S. 402, 403 (1960) (per curiam).

67. *Id.*; *Drope*, 420 U.S. at 171.

68. *Dusky*, 362 U.S. at 402 (internal quotation marks omitted).

69. *Drope*, 420 U.S. at 171.

70. Requiring competence to assist counsel protects both the dignity of the process and the reliability of the adjudication. *See* Bonnie, *supra* note 58, at 554–55.

to the attorney."[71] Bonnie and others have also emphasized the defendant's decisionmaking capacity, focusing on the "capacity for reasoned choices."[72]

2. *Heightened Competence for Self-Representation*

Separate from the issue of competence to stand trial is the question of what level of competence a defendant must have to conduct her own defense.[73] The Supreme Court only recently addressed this issue in *Indiana v. Edwards*.[74] After the trial court found Edwards competent to stand trial but incompetent to represent himself, Edwards argued on appeal that his right to self-representation had been violated.[75] The Supreme Court rejected this argument, holding that "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves."[76] In reaching the conclusion that states may create a heightened standard of competency for self-representation, the Court emphasized both the accuracy of the adjudication and the importance of safeguarding dignity.[77] The Court recognized that the lack of mental capacity "threatens an improper

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71. *Id.* at 562–63.

72. *See id.* at 579; *see also* Terry A. Moroney, *Emotional Competence, "Rational Understanding," and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375, 1376 (2006) ("A robust conception of adjudicative competence that gives meaning to the Dusky standard must ask whether a criminal defendant has the capacity to participate meaningfully in the host of decisions potentially required of her, and a sound assessment of such capacity requires careful attention to both the cognitive and emotional influences on rational decision-making."); *see generally* Joanmarie Ilaria Dasvoli, *Physically Present, Yet Mentally Absent*, 48 U. LOUISVILLE L. REV. 313 (2009).

73. This question is particularly relevant when considering the appropriate competency standard for removal proceedings where counsel is a "privilege" rather than a right; persons in removal proceedings may hire attorneys at their own expense, but will not be provided attorneys. Consequently, sixty percent of the respondents in removal proceedings before the immigration courts are pro se, with significantly higher rates of pro se respondents in certain geographical areas and among detained populations.

74. Indiana v. Edwards, 554 U.S. 164, 178 (2008). Long before *Edwards*, and even before *Dusky*, however, the Court addressed the relationship between mental competency and representation by counsel in *Massey v. Moore*, 348 U.S. 105, 108 (1954), which powerfully stated 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."

75. In making this argument, Edwards cited the Supreme Court's decision in *Faretta v. California*, which recognized that a criminal defendant has a "constitutional right to proceed *without* counsel when" he "voluntarily and intelligently elects to do so." Faretta v. California, 422 U.S. 806, 807 (1975) (emphasis added). Because the defendant in that case was "literate, competent, and understanding," the decision never addressed the impact of mental competency on the right to self-representation. *Id.* at 834–35 n.46. Yet *Faretta* did indicate that the right to self-representation is not absolute, noting that a pro se defendant had no right "to abuse the dignity of the courtroom" or to "engag[e] in serious and obstructionist misconduct." *Id.*

76. *Edwards*, 554 U.S. at 178.

77. *Id.* at 176–77.

conviction or sentence" and therefore "undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial."[78] In addition, the Court expressed concern about the humiliating "spectacle that could well result from [a defendant's] self-representation at trial,"[79] stressing that the "proceedings must not only be fair, they must appear fair to all who observe them."[80]

While *Edwards* stopped short of defining the heightened standard of competence, it did mention some conditions that could obstruct self-representation, such as "[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illness."[81] Some scholars have criticized *Edwards* for its vagueness and deference to judicial discretion, while others have attempted to identify the abilities necessary for self-representation more concretely.[82] Despite its shortcomings, *Edwards* remains highly relevant to considering the appropriate competence standard for removal proceedings where counsel is a privilege rather than a right. Persons in removal proceedings may hire attorneys at their own expense but are not appointed attorneys by the government.[83] Consequently, about half of the respondents in removal proceedings are pro se, with significantly higher rates of pro se respondents in certain geographical areas and among detained populations.[84] *Edwards* indicates

78. *Id.*

79. *Id.* at 176.

80. *Id.* at 177 (internal quotation marks omitted) (citing Wheat v. United States, 486 U.S. 153, 160 (1988)).

81. *Id.* at 176 (quoting Brief for the Am. Psychiatric Ass'n et al. as Amici Curiae in Support of Neither Party, at 26, *Edwards*, 554 U.S. 164 (No. 07-208), 2008 WL 405546, at *26) (internal quotation marks omitted). The Court in *Edwards* declined to adopt Indiana's proposed standard, which would have "den[ied] a criminal defendant the right to represent himself at trial where the defendant cannot communicate coherently with the court or a jury." *Id.* at 178 (citing Brief for Petitioner at 20, *Edwards*, 554 U.S. 164 (No. 07-208), 2008 WL 33606, at *20).

82. For critiques of *Edwards*, see, e.g., Conor P. Cleary, Note, *Flouting Faretta: The Supreme Court's Failure to Adopt a Coherent Communication Standard of Competency and the Threat to Self-Representation After* Indiana v. Edwards, 63 OKLA. L. REV. 145 (2010); Alexander B. Feinberg, *Casenote: Constitutional Law—Competency and Self-representation—Constitution Permits States to Limit a Defendant's Self-representation Right by Insisting Upon Representation by Counsel for Defendant Lacking Mental Competency*, 39 CUMB. L. REV. 567, 579 (2009). For scholarship that proposes standards for competence to engage in self-representation, see E. Lea Johnston, *Representational Competence: Defining the Limits of the Right to Self-Representation at Trial*, 86 NOTRE DAME L. REV. 523, 571 (2011) (drawing on problem-solving theory to identify the abilities necessary for self-representation).

83. 8 U.S.C. § 1229a(b)(4)(A) (2012) ("[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings.").

84. *See* OFFICE OF PLANNING, ANALYSIS & TECH., EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2012 STATISTICAL YEAR BOOK at G1 (2013) (stating that the percentage of represented aliens increased from 45% in fiscal year ("FY") 2008 to 56% in FY 2012); Peter L. Markowitz et al., *Study Group on Immigration Representation, Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 364 (2011) (finding that detainees were represented 40% of the time in New York City, 19% of the time in other parts of New

that it would be appropriate to require a higher standard of mental competency for these pro se individuals. As discussed in Part III, the only published decision on mental competence by the Board of Immigration Appeals ("BIA") has the opposite effect of imposing a lower standard of competence for unrepresented respondents.[85]

3. Consequences of a Finding of Incompetence

Prior to the Supreme Court's 1972 decision in *Jackson v. Indiana*, an incompetent defendant could be detained indefinitely until competency was restored. In *Jackson*, the Court held that an incompetent "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 competency in the foreseeable future."[86] Under the current federal statute, once an incompetent defendant has been committed for four months, a determination must be made about whether there is a "substantial probability" that the defendant can be restored to competence.[87] Absent that showing, the state must either initiate civil commitment proceedings or release the defendant.[88] In some situations, involuntary administration of antipsychotic medication is allowed to help restore competence.[89] As a practical matter, *Jackson* has led to more "marginally competent" defendants being declared restored and pushed into the courtroom.[90] The increase in "marginally competent" defendants underscores the importance of recognizing a higher standard of competence for self-representation. In the criminal context, where most defendants are represented, this may not be a pressing concern, but in

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York, and 22% of the time in Newark, New Jersey); *see generally* Ingrid V. Eagly, Gideon's *Migration*, 122 YALE L.J. 2282 (2013) (exploring how a future immigration defense system should be designed).

85. The BIA does not require unrepresented individuals to have the ability to assist counsel with their defense, dropping a key part of the *Dusky/Drope* standard. *In re* M-A-M-, 25 I. & N. Dec. 474, 479 (B.I.A. 2011) (finding the proper test for competence in removal proceedings to be whether the respondent "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." (emphasis added)).

86. Jackson v. Indiana, 406 U.S. 715, 738 (1972).

87. 18 U.S.C. § 4241(d) (2012).

88. *Id.* § 4246.

89. *See, e.g.*, Riggins v. Nevada, 504 U.S. 127 (1992); Washington v. Harper, 494 U.S. 210 (1990); Sell v. United States, 539 U.S. 166 (2003). The Supreme Court has held that "the Constitution permits the Government to involuntarily administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial and, taking account of less intrusive alternatives, is significantly necessary to further important governmental trial-related interests." *Id.* at 179.

90. J. Amy Dillard, *Madness Alone Punishes the Madman: The Search for Moral Dignity in the Court's Competency Doctrine As Applied in Capital Cases*, 79 TENN. L. REV. 461, 482–84 (2012) (arguing that courts and hospitals pushed more marginally competent defendants into court in response to *Jackson*).

the removal context, it becomes urgent to address the situation of marginally competent, unrepresented individuals.

B. Competence in Civil Proceedings

The Supreme Court has never recognized a substantive due process right to competence in civil proceedings, but courts must still provide procedural due process, which guarantees "the opportunity to be heard at a meaningful time and in a meaningful manner."[91] The precise contours of procedural due process depend on the particular circumstances of the case and require consideration of the three factors set forth by the Supreme Court in *Mathews v. Eldridge*: "(1) the nature of the private interest that will be affected, (2) the comparative risk of an erroneous deprivation of that interest with and without additional or substitute procedural safeguards, and (3) the nature and magnitude of any countervailing interest in not providing additional or substitute procedural requirements."[92] Where the "individual interests at stake . . . are both 'particularly important' and 'more substantial than mere loss of money,'" due process places a heightened burden of proof on the government.[93] Courts applying the *Mathews* test in different contexts have, not surprisingly, reached different conclusions about the procedures that should be provided to deal with questions regarding a litigant's competency.

The flexible, fact-specific balancing test in *Mathews* is consistent with Federal Rule of Civil Procedure 17(c), which gives judges broad discretion to decide how to protect the rights of an incompetent individual in civil

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91. Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)) (internal quotation marks omitted).

92. Turner v. Rogers, 131 S. Ct. 2507, 2517–18 (2011) (applying the *Mathews* factors in the context of determining whether a civil contempt proceeding requires appointment of counsel) (internal quotation marks omitted) (citing *Mathews*, 424 U.S. at 335). The *Mathews* balancing test was initially conceived to address due process claims in the context of administrative law in a case involving a challenge to the adequacy of procedures for terminating Social Security disability benefits. *Mathews*, 424 U.S. at 323–26. *Mathews* has since become a general approach for testing whether certain procedures comply with due process in a variety of contexts. *See* Medina v. California, 505 U.S. 437, 444 (1992). For example, the Supreme Court has applied the *Mathews* to determine the standard of proof for termination of parental rights and for civil commitment to a mental hospital. *See generally* Santosky v. Kramer, 455 U.S. 745 (1982); Addington v. Texas, 441 U.S. 418 (1979).

The U.S. Courts of Appeals have also applied the *Mathews* test to competency issues arising in the removal context. *See, e.g.*, Mohamed v. Gonzales, 477 F.3d 522, 526 (8th Cir. 2007) (citing the *Mathews* test in assessing whether a petitioner challenging her deportability had a right to a competency hearing).

93. *See, e.g.*, *Santosky*, 455 U.S. at 756 (citation omitted) (involving termination of parental rights); *Addington*, 441 U.S. at 424 (concerning involuntary civil commitment); Woodby v. INS, 385 U.S. 276, 285–86 (1966) (involving deportation); Chaunt v. United States, 364 U.S. 350, 353 (1960) (concerning denaturalization); Schneiderman v. United States, 320 U.S. 118, 125 (1943) (concerning denaturalization); Fadiga v. Att'y Gen., 488 F.3d 142, 157 n.23 (3d Cir. 2007) ("[W]e cannot treat immigration proceedings like everyday civil proceedings . . . because . . . the liberty of an individual is at stake in deportation proceedings." (internal quotation marks omitted)).

proceedings. This rule provides for the appointment of a guardian ad litem or issuance of another appropriate order "to protect... [an] incompetent person who is unrepresented in an action.'"[94] Both the *Mathews* test and Rule 17(c) implicitly recognize that the interests at stake in a civil proceeding may vary over a significant range. At one end of the spectrum, in the most ordinary type of case, mere money is in dispute. Other civil proceedings may threaten more basic human needs, such as eviction from housing or denial of public benefits. Then there are civil proceedings with outcomes that encroach upon punishment, such as termination of parental rights, civil commitment, incarceration for civil contempt, juvenile delinquency adjudications, habeas proceedings, and removal proceedings. Commentators have long discussed the erosion of the civil-criminal distinction and raised questions about what constitutional protections should apply in punitive civil cases.[95] Quasi-criminal proceedings raise particularly challenging questions about what procedures should be followed to assess competency and what to do if a party is found incompetent.

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94. Krain v. Smallwood, 880 F.2d 1119, 1121 (9th Cir. 1989) (citing FED. R. CIV. P. 17(c)) (holding that "if an incompetent person is unrepresented, the court should not enter a judgment which operates as a judgment on the merits without complying with Rule 17(c)"). In *Krain*, the court explained that when there is a substantial question about the mental competence of a party proceeding pro se, the court should conduct a hearing to determine competence and, if necessary, to appoint a guardian ad litem. *Id.* The Second Circuit has held that Rule 17(c) imposes no duty upon a district court to "inquire *sua sponte* into a pro se [litigant's] mental competence, even when the judge observes behavior that may suggest mental incapacity." Ferrelli v. River Manor Health Care Ctr., 323 F.3d 196, 201 (2d Cir. 2003), *cert. denied*, 540 U.S. 1195 (2004). However, a district court would likely abuse its discretion if it failed to consider Rule 17(c) when "presented with evidence from an appropriate court of record or a relevant public agency indicating that the party had been adjudicated incompetent, or if the court received verifiable evidence from a mental health professional demonstrating that the party is being or has been treated for mental illness of the type that would render him or her legally incompetent." *Id.* While the court was "mindful of the need to protect the rights of the mentally incompetent," it also expressed concern about "the volume of pro se filings" and the "potential burden on court administration associated with conducting frequent inquiries into pro se litigants' mental competency." *See id.*; *see also* Powell v. Symons, 680 F.3d 301, 307 (3d Cir. 2012) (approving of the *Ferrelli* standard).

95. *See, e.g.*, Mann, *supra* note 2, at 1797; John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875 (1991); Franklin E. Zimring, *Multiple Middlegrounds Between Civil and Criminal Law*, 101 YALE L.J. 1901 (1991); Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79 (2008) (examining procedural protections in criminal prosecutions and high-stakes civil cases against large corporations); Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L REV. 239, 241–42 (2009); Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 778–89 (1997); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991) (recommending greater procedural protections for punitive civil sanctions); Jonathan I. Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478 (1974); J. Morris Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976).

Given the complexity of these issues, it is not surprising that courts frequently disagree about what process is due even when considering the same type of high stakes case. For example, in termination of parental rights cases, which threaten a "unique kind of deprivation"[96] and bear "many of the indicia of a criminal trial,"[97] state courts are split about whether the *Mathews* test requires a competency hearing prior to terminating the parent's rights, which the Supreme Court has described as "a penalty as great, if not greater, than a criminal penalty."[98] The Connecticut Supreme Court has held that due process requires a competency hearing in this situation.[99] Yet courts in several other states have reached the opposite conclusion after weighing the *Mathews* factors.[100]

Similarly, state courts are split about whether due process requires a competency hearing during civil commitment proceedings for sexually violent predators.[101] Applying the *Mathews* test, the California and

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96. M.L.B. v. S.L.J., 519 U.S. 102, 127–28 (1996) (citing Lassiter v. Dep't of Soc. Servs. of Durham Cnty., 452 U.S. 18, 27 (1981)).

97. *Santosky*, 455 U.S. at 762.

98. *Lassiter*, 452 U.S. at 39 n.5.

99. The Connecticut Supreme Court held that due process requires a competency hearing prior to termination of parental rights "when (1) the parent's attorney requests such a hearing, or (2) in the absence of such a request, the conduct of the parent reasonably suggests to the court, in the exercise of its discretion, the desirability of ordering such a hearing *sua sponte*." *In re* Alexander V., 613 A.2d 780, 785 (Conn. 1992). The standard in both situations is "whether the record before the court contains specific factual allegations that, if true, would constitute substantial evidence of mental impairment." *Id.* (citations omitted) (internal quotation marks omitted); *see In re* Kaleb H., 48 A.3d 631, 636–39 (Conn. 2012) (applying the standard in *In re Alexander V.* and holding that a competency hearing was not required because the record did not contain specific factors that, if true, would constitute substantial evidence of a mental impairment that would impede the respondent's ability to understand the proceedings against her and assist counsel in her defense).

100. *See, e.g.*, *In re* R.M.T., 352 S.W.3d 12, 19–22 (Tex. App. 2011) (discussing each of the three factors in the *Mathews* test, emphasizing the best interests of the child as a "trump card," and concluding that due process did not require a competency hearing prior to terminating parental rights); *In re* N.S.E., 666 S.E.2d 587, 589 (Ga. Ct. App. 2008) ("We find no authority, and the father has cited none, requiring a Georgia court to order a competency hearing in a termination proceeding."); *In re* W.J.S.M., 231 S.W.3d 278, 283 (Mo. Ct. App. 2007) ("To require that a parent must be 'competent' before a court could terminate their parental rights ignores the rights of the child to permanency. The basis for terminating Mother's parental rights was substantially based on the fact that Mother suffers from a mental condition which is *permanent* and renders her unable to provide the child with the necessary care, custody and control."); People v. Wanda (*In re* Charles A.), 856 N.E.2d 569, 573 (Ill. App. Ct. 2006) (applying the *Mathews* factors and reasoning that termination of parental rights cases must be resolved expeditiously because postponing the case for a fitness hearing or for restoration of competency would adversely impact a child's interest in finding a permanent home, as well as impose an increased fiscal cost and administrative burden on the state).

101. *Compare* Moore v. Superior Court, 237 P.3d 530, 547 (Cal. 2010) ("[W]e conclude that due process does not require mental competence on the part of someone undergoing a commitment or recommitment trial under the [SVP Act]."), *and* Commonwealth v. Nieves, 846 N.E.2d 379, 385 (Mass. 2006) ("We see no reason why the public interest in committing sexually dangerous persons to the care of the treatment center must be thwarted by the fact that one who is sexually dangerous also happens

Massachusetts Supreme Courts found no due process right to a competency determination in such proceedings.[102] These courts gave substantial weight to the government's interest in public safety and reasoned that the right to appointed counsel in this type of proceeding is sufficient to protect the respondent's interest.[103] A Florida appellate court, on the other hand, found that the person must be competent in order to exercise her due process right to challenge the factual assertions contained in documents, including expert opinions.[104] Otherwise, the court reasoned, "the due process right is simply illusory," because "it is an incompetent respondent's inability to assist counsel in challenging the facts contained in those hearsay statements that violates due process."[105] The reasoning of the Florida court highlights the interdependence of rights, especially the relationship between competency and the right to counsel, which we shall see again in the discussion of juvenile adjudications below.

This Subpart examines the rights of incompetent individuals in two types of quasi-criminal civil proceedings as relevant background for the discussion of removal proceedings that follows. First, juvenile adjudications provide a clear example of a civil proceeding where the right to competence has been widely recognized. Exploring the reasoning of state courts helps clarify in which other contexts this right should also apply. Juvenile adjudications are then contrasted with capital habeas proceedings, which have none of the trappings of a criminal trial and require far less, if any, participation by the petitioner. These critical differences in the nature of the two proceedings help explain why the Supreme Court recently concluded that there is no right to competence in capital habeas proceedings.[106] As will be shown in Part III, removal proceedings resemble juvenile adjudications, rather than habeas proceedings.

1. Mental Competence in Juvenile Delinquency Adjudications

Juvenile delinquency adjudications are technically civil but so closely approximate criminal trials that juveniles benefit from many of the same rights as criminal defendants. The U.S. Supreme Court has held, for example, that juveniles are entitled to appointed counsel, formal notice, confrontation and cross-examination of witnesses, and the

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to be incompetent."), *with* Branch v. State (*In re* Commitment of Branch), 890 So. 2d 322, 323 (Fla. Dist. Ct. App. 2004) (recognizing a limited right to a competency determination).

102. *See Moore*, 237 P.3d at 547; *Nieves*, 846 N.E.2d at 385.

103. *See Nieves*, 846 N.E.2d at 385; *see also* John L. Schwab, *Due Process and "The Worst of the Worst": Mental Competence in Sexually Violent Predator Civil Commitment Proceedings*, 112 COLUM. L. REV. 912, 945 (2012).

104. *In re Commitment of Branch*, 890 So. 2d at 327.

105. *Id.*

106. Ryan v. Gonzales, 133 S. Ct. 696, 700 (2013).

privilege against self-incrimination.[107] Moreover, each element in a juvenile adjudication must be proven beyond a reasonable doubt—the same standard used for a criminal conviction.[108] Yet some important differences remain between juvenile adjudications and criminal trials: juveniles do not have the right to a trial by jury, the right to bail, or the right to a public trial.[109]

Although the Supreme Court has not yet addressed whether a juvenile must be competent to be adjudicated, the majority of states have now addressed this issue. At least thirty-four states and the District of Columbia have recognized a right to competence in juvenile adjudications, twenty-six of them by statute and nine through case law.[110] Three main lines of reasoning can be derived from these state court decisions: (1) a substantive right to competence emerges because no amount of procedure is sufficient to ensure a fair and accurate proceeding; (2) a right to competence is a precondition for exercising other established rights; and (3) juvenile adjudications have many of the trappings of a criminal trial, so

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107. *In re* Gault, 387 U.S. 1, 31–57 (1967).

108. *In re* Winship, 397 U.S. 358, 368 (1970).

109. *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528, 545–551 (1971) (holding that the right to jury trial is inapplicable to juvenile proceedings); United States v. Edward J., 224 F.3d 1216, 1223 (10th Cir. 2000) ("We have not extended the 'public trial' right to juvenile defendants. In *McKeiver*, the Supreme Court seemed to express disdain for the idea."); State *ex rel.* P.M.P., 975 A.2d 441, 446 (N.J. 2009) ("[E]xcept for the right to indictment, the right to a jury trial, and the right to bail, [a]ll rights guaranteed to criminal defendants by the Constitution of the United States and the Constitution of this State ... [are] applicable to cases arising under [the juvenile code]" (internal quotation marks omitted)).

110. Richard E. Redding & Lynda E. Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL'Y & L. 353, 372, 379 (2001). Among the states that rely on statutes, some have a single statutory scheme that applies to both juvenile adjudications and criminal trials for adults, while others have separate statutes that specifically address juvenile competency. *See* Sue Burrell, et al., *Incompetent Youth in California Juvenile Justice*, 19 STAN. L. & POL'Y REV. 198, 213 (2008). State courts that have found a constitutional right to competence in juvenile proceedings include Arizona, Georgia, Illinois, Louisiana, Michigan, Minnesota, Ohio, Vermont, Washington, D.C. *See In re* Welfare of S.W.T., 277 N.W.2d 507, 511 (Minn. 1979) (finding the right not to be tried or convicted while incompetent to be a "fundamental right," even in the context of a juvenile delinquency adjudicatory proceeding); State *ex rel.* Causey, 363 So. 2d 472, 476 (La. 1978) (finding a "fundamental due process right" to competence in juvenile adjudications); *In re* W.A.F., 573 A.2d 1264, 1267 (D.C. 1990) ("The right not to be tried or convicted while incompetent is a fundamental right of a juvenile in juvenile delinquency proceedings"); State *ex rel.* Dandoy v. Superior Court, 619 P.2d 12 (Ariz. 1980) (en banc); People v. Carey (*In re* Carey), 615 N.W.2d 742, 746–47 (Mich. Ct. App. 2000) (concluding that "the right not to be tried while incompetent is as fundamental in juvenile proceedings as it is in the criminal context"); *In re* S.H., 469 S.E.2d 810, 811 (Ga. Ct. App. 1996) ("Principles of fundamental fairness require that this right [not to be subjected to a trial while incompetent] be afforded in juvenile proceedings."); People v. T.D.W. (*In* re T.D.W.), 441 N.E.2d 155 (Ill. App. Ct. 1982), *overruled on other grounds by* People v. Gentry, 815 N.E.2d 27 (Ill. App. Ct. 2004); *In re* Williams, 687 N.E.2d 507, 510 (Ohio Ct. App. 1997) (holding that "'the right not to be tried while incompetent' is as fundamental in juvenile proceedings as it is in criminal trials of adults"); *In re* J.M., 769 A.2d 656, 662 (Vt. 2001) ("Although juveniles are not necessarily entitled to every procedural protection afforded criminal defendants ... an incompetent juvenile cannot be found delinquent without violating our basic concepts of due process of law.").

proceeding with an incompetent juvenile would threaten the dignity of the legal process.[111] These arguments overlap substantially with the rationales behind prohibiting the trial of incompetent defendants.

The first line of reasoning indicates that a substantive due process right to competence emerges when no amount of process can ensure a fair and accurate proceeding. The most explicit example of this reasoning is a decision by the District of Columbia Court of Appeals, which observed that the "first function served by the adult competency requirement and the *Dusky* standard is to assure that the person charged with violating the law is able to prepare a defense, in order to increase the accuracy of the factual and guilt determinations."[112] The court then found that this function "*cannot be fulfilled by procedures other than a* Dusky *type standard in juvenile delinquency proceedings.*"[113] In other words, a substantive right to competence emerges because no amount of procedure can ensure the fair adjudication of an incompetent individual. Other courts likewise connect a right to competence in juvenile proceedings to fundamental fairness, but do so without explicitly explaining the move from procedural to substantive due process.[114]

The notion that procedural rights can give birth to a substantive right is neither radical nor new. As Justice John. M. Harlan observed in his concurrence in *In re Gault*, "[p]rocedure at once reflects and creates substantive rights, and every effort of courts since the beginnings of the common law to separate the two has proved essentially futile."[115] In a dissenting opinion in *Albright v. Oliver*, Justice Stevens, in a dissenting opinion joined by Justice Blackmun, similarly stressed that "[t]he Fourteenth Amendment contains only one Due Process Clause," and "[t]hough it is sometimes helpful, as a matter of doctrine, to distinguish between substantive and procedural due process, the two concepts are not mutually exclusive, and their protections often overlap."[116] Federal appellate courts have also recognized that "sometimes there is overlap"

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111. *See infra* notes 127–142 and accompanying text.

112. *In re W.A.F.*, 573 A.2d at 1267.

113. *Id.* at 1267 n.7 (emphasis added).

114. *See, e.g.*, *In re S.H.*, 469 S.E.2d at 811 ("Principles of fundamental fairness require that this right [not to be subjected to a trial] be afforded in juvenile proceedings."); *State ex rel. Causey*, 363 So. 2d at 476 (blurring the line between substantive and procedural due process by finding that "the right not to be tried while incompetent is a due process-fundamental fairness right" that should be "applicable to juvenile proceedings").

115. *See In re* Gault, 387 U.S. 1, 70 (1967) (Harlan, J., concurring in part and dissenting in part); *see also* Albright v. Oliver, 510 U.S. 266, 301 (1994) (Stevens, J., dissenting) ("The Fourteenth Amendment contains only one Due Process Clause. Though it is sometimes helpful, as a matter of doctrine, to distinguish between substantive and procedural due process . . . the two concepts are not mutually exclusive, and their protections often overlap."); Barnett v. Hargett, 174 F.3d 1128, 1133 (10th Cir. 1999) ("Competency claims are based either upon substantive due process or procedural due process, although sometimes there is overlap.").

116. *Albright*, 510 U.S. at 301 (Stevens, J. dissenting) (citations omitted).

between substantive and procedural due process in the context of competency claims.[117] Thus, it may be helpful to think of a substantive right to competence as the end point on a spectrum of procedural protections when nothing short of such protections will suffice.

The second line of reasoning regarding competence as a precondition for exercising other rights is exemplified by the decision of a Georgia appellate court, which found that a twelve-year-old boy with the mental age of a six-year-old and an IQ of forty was incompetent to stand delinquency proceedings for aggravated sodomy.[118] Noting that *In re Gault* confirmed the rights of juveniles to adequate notice of the charges, appointment of counsel, the privilege against self-incrimination, and the right to confront opposing witnesses, the court reasoned that "the cornerstone of these substantive rights is competence to understand the nature of the charges and assist in a defense."[119] In other words, a "want of competence renders the other rights meaningless."[120] This view of the right to competence as a precondition for the exercise of other rights echoes Justice Anthony Kennedy's concurrence in *Riggins v. Nevada*, which explained:

> Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.[121]

While the Georgia decision considered the *collective* body of rights recognized by the Supreme Court in juvenile proceedings, some other states have placed special emphasis on the right to counsel. For instance, in reviewing a case involving two juveniles who had committed delinquent acts, the Supreme Court of Nevada held that as "a matter of constitutional law, the trial court could go no further with the proceedings" where "neither minor could competently assist legal counsel in preparing defenses to the delinquency charges."[122] The court reasoned, "the right to counsel is meaningless unless that right is interpreted to mean effective counsel and counsel cannot be effective, particularly with reference to the merits of a case, without the competent cooperation of his client."[123]

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117. *Barnett*, 174 F.3d at 1133 ("Competency claims are based either upon substantive due process or procedural due process, although sometimes there is overlap.").

118. *In re S.H.*, 469 S.E.2d at 812.

119. *Id.* at 812 (citing *In re Gault*, 387 U.S. at 13).

120. *Id.* (citation omitted).

121. *See* Riggins v. Nevada, 504 U.S. 127, 139–40 (1992) (Kennedy, J., concurring) (citation omitted); *see also* People v. Carey (*In re* Carey), 615 N.W.2d 742, 746 (Mich. Ct. App. 2000) (quoting *Riggins*, 504 U.S. at 139–40 (Kennedy, J., concurring)); *In re* Williams, 687 N.E.2d 507, 510 (Ohio Ct. App. 1997) ("Competency is an underlying predicate to due process.") (quoting Lagway v. Dallman, 806 F. Supp. 1322, 1333 (N.D. Ohio 1992)).

122. *In re* Two Minor Children, 592 P.2d 166, 169 (Nev. 1979).

123. *Id.* (citation omitted).

Similarly, the Supreme Court of Arizona has held that "the right to assistance of counsel would be meaningless if the juvenile, through mental illness, was unable to understand the charges or assist in her own defense."[124]

Finally, the third line of reasoning emphasizes the nature of the proceedings in extending the right to competence from criminal trials to juvenile adjudications. The implicit rationale is that if the proceedings have the trappings of a criminal trial, then the legal dignity of the process is threatened if the court proceeds with an incompetent individual. As the Michigan Court of Appeals explained:

> Even though . . . juvenile proceedings are not considered adversarial, they have many of the trappings of criminal proceedings; the petition is filed by the prosecutor, notice is required, there must be a preliminary hearing, which resembles an arraignment in criminal proceedings, and the functions of the prosecutor and court are the equivalent to their functions in a criminal proceeding.[125]

By looking beyond the technical label of "civil" to the actual nature of the proceedings, the Michigan court followed *In re Gault*, which turned on the "reality" of juvenile proceedings.[126] In fact, the Michigan court's decision reflects the view expressed by some U.S. Supreme Court Justices that the proper inquiry is whether, "by our prior cases and by common sense," a particular substantive due process claim is "*close enough* to the interests that we already have protected to be deemed an aspect of 'liberty' as well."[127]

Only one state—Oklahoma—has explicitly rejected a right to competence for juveniles.[128] The Court of Criminal Appeals of Oklahoma reasoned that "the nature of juvenile proceedings themselves, being specifically not criminal proceedings and being directed towards rehabilitation of a juvenile, indicates . . . the intent of the legislature to

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124. *See* State *ex rel.* Dandoy v. Superior Court, 619 P.2d 12, 15 (Ariz. 1980) (en banc) (recognizing that "[i]n the context of a juvenile delinquency adjudicatory proceeding, the right not to be tried or convicted while incompetent has been held to be a fundamental right"); *see also In re Carey*, 615 N.W.2d at 746 (stressing that the right to counsel "means little if the juvenile is unaware of the proceedings or unable to communicate with counsel because of a psychological or developmental disability").

125. *Id.* at 746.

126. *In re* Gault, 387 U.S. 1, 28 (1967) (powerfully describing the reality of what is at stake in a juvenile proceeding).

127. *See* Michael H. v. Gerald D., 491 U.S. 110, 142 (1989) (Brennan, J., dissenting) (emphasis added); *see also* Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (stating that substantive due process is about underlying values, rather than "blind imitation of the past"); Lawrence v. Texas, 539 U.S. 558, 572, 573 (2003) (Kennedy, J., concurring) (observing that "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry" and arguing that courts may adopt a more expansive view of substantive due process based on an "emerging awareness" of modern practices) (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring) (internal quotation marks omitted).

128. Redding & Frost, *supra* note 110, at 368.

deal with juveniles regardless of mental state."[129] As one article points out, this decision was made in 1989, before juvenile justice systems had fully transitioned from being rehabilitative to truly penal in nature.[130] The Oklahoma Supreme Court may therefore reach a different conclusion if it were asked to address this issue today.[131]

This brief review shows widespread consensus that juveniles have a right to competence in civil delinquency adjudications. Although states remain divided on other important aspects of the competency determination for juveniles, including the definition of competence[132] and the result of an incompetency finding,[133] the core right to competence is well established through statutes and case law. The three strands of reasoning in the decisions discussed above clearly resonate with the core rationale underlying the prohibition against trial of incompetent individuals and provide a roadmap for asserting a substantive due process right to competence in removal proceedings, as discussed further in Part IV.

C. Mental Competence in Capital Habeas Proceedings

Habeas proceedings, like juvenile adjudications, are quasi-criminal in nature, although for different reasons. A juvenile adjudication resembles a criminal trial, whereas a habeas proceeding is "[r]ealistically . . . a stage in the criminal process."[134] As one federal appellate court observed, "to the extent that a habeas proceeding reviews a criminal punishment with the potential of overturning it, the habeas proceeding necessarily assumes part of the underlying case's criminal nature."[135] The backward-looking nature of habeas proceedings was central to the Supreme Court's unanimous opinion in the consolidated cases of *Ryan v. Gonzales* and

129. G.J.I. v. State, 778 P.2d 485, 487 (Okla. Crim. App. 1989).

130. Redding & Frost, *supra* note 110, at 373.

131. *Id.*

132. Some states apply the definition of competence set forth in *Dusky* and *Drope*, while others impose a more restrictive standard for juveniles. *Id.* at 369–70. Wyoming, for example, requires not only the presence of mental illness or mental retardation, but also that the juvenile satisfy the criteria for involuntary civil commitment, which requires the individual to be unable to present a danger to others or be unable to care for herself. *Id.* at 370 (citing Wyo. St. Ann. § 14-6-218(c) (2001)).

133. Some statutes provide for dismissal of the charges, while others call for civil commitment of the juvenile or list a range of options that may include "dismissal, probation, commitment, or filing a child in needs of services petition." *Id.* at 371 (citation omitted). Other differences pertain to the number of competency evaluations and who may perform them, as well as to the provisions, if any, addressing restoration to competence. *Id.* at 370–74.

134. *See* Holmes v. Buss, 506 F.3d 576, 578 (7th Cir. 2007); *see also* Fay v. Noia, 372 U.S. 391, 423–24 (1963) (clarifying that a habeas proceeding is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature), *overruled in part by* Wainright v. Sykes, 433 U.S. 72 (1977).

135. *See* O'Brien v. Moore, 395 F.3d 499, 505 (4th Cir. 2005); *see also* Jones v. Cain, 600 F.3d 527, 542 (5th Cir. 2010) ("In rare circumstances, a habeas court can end a state criminal proceeding as part of the habeas remedy.").

Tibbals v. Carter, issued in January 2013, which held that the incompetence of a state prisoner on death row does not require suspension of his federal habeas proceeding.[136]

In *Ryan*, which reversed a Ninth Circuit decision deriving a right to competence from a statute providing a right to counsel in capital habeas proceedings, the Court explained that "[g]iven the backward-looking, record-based nature of most federal habeas proceedings, counsel can generally provide effective representation to a habeas petitioner regardless of the petitioner's competence."[137] The Court found that attorneys "are quite capable of reviewing the state-court record, identifying legal errors, and marshaling relevant arguments, even without their clients' assistance."[138] *Ryan* is therefore not applicable to other contexts that are closer to trials, such as juvenile adjudications or removal proceedings, where the incompetent individual would need to play a much more active role in developing the facts and communicating with counsel. Indeed, the Court explicitly acknowledged in *Ryan* "that the benefits flowing from the right to counsel *at trial* could be affected if an incompetent defendant is unable to communicate with his attorney."[139] As an example, the Court observed that an incompetent individual "would be unable to assist counsel in identifying witnesses and deciding on a trial strategy."[140]

The Court's description of habeas proceedings in *Ryan* shows that the reasons behind the prohibition against trying incompetent defendants

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136. Ryan v. Gonzales, 133 S. Ct. 696, 700, 707 (2013) (holding that the Ninth Circuit erred in deriving a right to competence from the statutory right to counsel in capital habeas proceedings in 18 U.S.C. § 3599(a)(2) (2013) and that the Sixth Circuit erred in basing a right to competence on 18 U.S.C. § 4241(a) because that statute applies only to *federal* defendants, not state prisoners, and is limited to proceedings prior to sentencing and after probation, which do not encompass habeas proceedings). As a practical matter, the issue of competence usually only arises in habeas proceedings when the death penalty is involved because a habeas petitioner in a non-capital case has no incentive to delay or halt the proceedings with a finding of incompetence. *See, e.g.*, Holmes, 506 F.3d at 578–79 (explaining that a habeas petitioner in a non-capital case "usually has little to gain by claiming that he is incompetent to conduct the postconviction proceeding or, if he has the assistance of a lawyer, to assist in the lawyer's conduct of the proceeding," because a finding of incompetence would simply halt the proceeding and result in the petitioner "languish[ing] in prison"). If the petitioner is facing the death penalty, however, he "may prefer to languish in prison than to see his claims for postconviction relief denied, opening the way to his execution." *Id.*

137. *Ryan*, 133 S. Ct. at 704. The Ninth Circuit reached its conclusion in *Ryan* based on two prior precedents. In *Rohan*, the court had held that a federal statute guaranteeing state capital prisoners a right to counsel in federal habeas proceedings could not "be faithfully enforced unless courts ensure that a petitioner is competent." Rohan *ex rel.* Gates v. Woodford, 334 F.3d 803, 813 (9th Cir. 2003), *abrogated by Ryan*, 133 S. Ct. 696. The Ninth Circuit then extended the right to competence to record-based appeals, explaining that even in this situation, a petitioner is not "relegated to a nonexistent role," as "[m]eaningful assistance of appellate counsel may require rational communication between counsel and a habeas petitioner." Nash v. Ryan, 581 F.3d 1048, 1050 (9th Cir. 2009), *abrogated by Ryan*, 133 S. Ct. 696.

138. *Ryan*, 133 S. Ct. at 705.

139. *Id.* at 703.

140. *Id.*

do not apply to the habeas context. Not only does the backward-looking nature of habeas result in the petitioner playing a different role with counsel, but it also means that many of the other rights that require competence are simply not applicable to habeas. For example, the rights to confront and cross-examine witnesses and to testify on one's own behalf have no relevance to habeas proceedings. Consequently, proceeding with an incompetent petitioner does not give rise to the same concerns about jeopardizing the fairness and accuracy of the proceedings or compromising other constitutional rights. Furthermore, since most habeas writs are decided without any court hearing at all, moving forward with an incompetent petitioner cannot be analogized to an in absentia trial.

Finally, the incompetence of a habeas petitioner does not pose the same threat to the moral dignity of the legal process as the incompetence of a criminal defendant or juvenile because no "prosecution" is taking place that requires meaningful moral understanding of wrongdoing and punishment. Habeas is an action brought by the petitioner against the warden of the state prison, not a proceeding against the petitioner.[141] A habeas petitioner collaterally attacks a conviction that occurred at an earlier state trial; she does not mount a defense.[142] The state court has already entered "a presumptively valid judgment," and the petitioner must have been competent at that time to be convicted.[143] Thus, the phase for concern about moral understanding of wrongdoing has passed.

In short, the Supreme Court's reasoning in *Ryan* leaves completely open the question of whether a right to competence might exist in a different type of quasi-criminal context that more closely resembles a trial. Removal proceedings, where trial attorneys engage in active prosecution and testimony plays a crucial role, have no resemblance to habeas proceedings and require a very different analysis.

III. MENTAL COMPETENCE IN QUASI-CRIMINAL REMOVAL PROCEEDINGS

Removal proceedings, like juvenile adjudications, are technically civil but courts and commentators alike have recognized their quasi-criminal nature.[144] The Supreme Court acknowledged over half a century

141. *Id.* at 707.

142. *Id.*

143. *Id.* at 709.

144. *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356 (2010); Markowitz, *Straddling the Civil-Criminal Divide*, *supra* note 3, at 290–91 (distinguishing exclusion from expulsion, and arguing that "the determination of whether to expel a noncitizen whom the government has previously invited into the national community as a lawful permanent resident is a criminal proceeding, in which the defendant is entitled to the full panoply of criminal procedural protections guaranteed by the Constitution"); Markowitz, *Deportation is Different*, *supra* note 3 (arguing that the Supreme Court's decision in *Padilla* represents an important departure from precedents that treat deportation proceedings as purely civil); Eagly, *supra* note 9 (describing how immigration enforcement and criminal processes are intertwined).

ago that deportation can be a more severe penalty than criminal punishment because it "may result in poverty, persecution and even death"[145] or "of all that makes life worth living."[146] More recently, in *Padilla v. Kentucky*, the Court acknowledged "the seriousness of deportation as a consequence of a criminal plea," and held that an attorney's failure to advise defendants about the immigration consequences of criminal convictions may constitute ineffective assistance of counsel and violate the Sixth Amendment.[147]

Almost every aspect of removal proceedings more closely resembles a criminal proceeding than a civil one. ICE normally initiates the process by issuing a warrant for the noncitizen's arrest and filing a charging document called the "Notice to Appear" with the immigration court.[148] At the first hearing, the respondent usually admits or denies the charges, which is similar to an arraignment.[149] A trial attorney with DHS plays the role of "prosecutor" and has the burden of establishing removability by "clear and convincing" evidence, a standard that is higher than the "preponderance of the evidence" standard used in most civil cases.[150]

Once removability is established, the immigrant has the right to file various applications for relief from removal and carries the burden of establishing eligibility for those forms of relief, similar to presenting affirmative defenses in a criminal case.[151] The Immigration Judge schedules a "merits" hearing that resembles a mini-trial on these applications.[152] Unlike criminal trials, however, the immigrant is often unrepresented, normally testifies, and is subject to vigorous cross-examination by the trial attorney.[153] Lay and expert witnesses may also be called and cross-examined.[154] At the end of the merits hearing, the judge decides whether to grant relief or issue an order of removal.[155] The judge's decision may be appealed to the BIA, and the BIA's decision may be appealed to the federal appellate court with jurisdiction over the state where the immigration court proceeding occurred.[156]

During these removal proceedings, ICE may decide to detain the noncitizen.[157] In fact, immigration detainees—even those with no criminal

145. Bridges v. Wixon, 326 U.S. 136, 164 (1945).
146. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).
147. *Padilla*, 559 U.S. at 374.
148. 8 U.S.C. § 1229(a) (2014).
149. *Id.* § 1240.10(c).
150. *Id.* § 1240.8(a).
151. *Id.* § 1240.8(d).
152. *Id.* §§ 1240.7, 1240.9, 1240.10.
153. 8 U.S.C. § 1229a(b)(1); 8 C.F.R. §§ 1240.3, 1240.9.
154. 8 U.S.C. § 1229a(b)(1).
155. 8 C.F.R. § 1240.12.
156. *Id.* § 1240.15.
157. 8 U.S.C. § 1226 (a), (c)(1).

record—and inmates serving criminal sentences are frequently held together in the same facility.[158] Detained noncitizens may request a bond hearing before the immigration judge, which is very similar to a bail hearing.[159] However, large categories of immigrants are not eligible for release on bond and therefore remain detained for years while their cases are pending in immigration court or on appeal.[160]

This description shows that removal proceedings, like juvenile adjudications, have many of the trappings of criminal trials. Yet incompetent respondents facing deportation receive minimal protections.

A. Statutory and Regulatory Provisions Pertaining to Mental Incompetence

The INA and its regulations provide little guidance on how to treat incompetent individuals in removal proceedings. The sole statutory provision that addresses incompetency vaguely provides: "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."[161] As discussed further below, any immigrant who lacks competence is arguably not "present" in the proceedings, but the usefulness of this provision is limited because the Attorney General has thus far failed to prescribe any safeguards.

The regulations likewise fail to protect the interests of incompetent noncitizens. Regarding service of process, the regulations actually make it easier to deport incompetent individuals who are confined to an institution or hospital by disposing of the requirement that they be served personally and permitting service on the person in charge of the facility to suffice.[162] For incompetent individuals who are not confined,

158. In FY 2013, nearly seventy percent of detained immigrants were held in one of 244 state and county jails contracted to house immigrant detainees on behalf of ICE. *See* Dep't of Homeland Security, U.S. Immigration & Customs Enforcement, Salaries and Expenses, Fiscal Years 2012–2014 Congressional Budget Justification 44 (2014), *available at* http://www.dhs.gov/sites/default/files/publications/MGMT/DHS-%20Annual%20Performance%20Report%20and%20Congressional-Budget-Justification-FY2014.pdf.

159. 8 U.S.C. § 1226 (a)–(b); 8 C.F.R. §§ 1003.19, 1236.1.

160. Several categories of noncitizens are not eligible for bond hearings in immigration court, including: those subject to mandatory detention under the INA: "arriving aliens" (those who showed up at a point of entry and asked for admission to the United States, including asylum-seekers); and immigrants placed in "asylum only" proceedings. *See* INA § 236(c), 8 U.S.C. § 1226(c) (concerning mandatory detention of certain criminal aliens); INA § 235, 8 U.S.C. § 1225 (concerning arriving aliens).

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

162. *See* 8 C.F.R. § 103.8(c)(2)(ii). The BIA recently held that when there are indicia of a respondent's mental incompetency, DHS should serve the notice to appear 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 someone in a position of demonstrated authority in the institution or his or her

the regulation allows service on *any person with whom an incompetent person resides*, without consideration of whether that person is competent herself or has the best interests of the respondent at heart.[163]

Moreover, far from requiring appointment of counsel, or even a guardian ad litem for an incompetent respondent, the regulation provides that any "guardian, near relative, or friend" may appear on behalf of a respondent when it is "impracticable for the respondent to be present at the hearing because of mental incompetency."[164] Thus, an incompetent respondent facing deportation receives less protection than civil litigants receive in federal court because the federal rule provides that the "court *must appoint a guardian ad litem—or issue another appropriate order*—to protect a minor or incompetent person who is unrepresented in an action."[165] The immigration regulation merely states that a guardian, near relative, or friend *"shall be permitted to appear on behalf of the respondent,"* which allows the immigration court to play a much more passive role.[166]

The regulations also provide no criteria for evaluating whether a given person is appropriate for the role of appearing on behalf of the incompetent respondent, such as whether the person is free of conflicts of interest, will represent the best interests of the respondent, or has any knowledge of the immigration system.[167] During interviews with Human Rights Watch, some advocates reported encountering legal guardians in immigration cases who "could not identify the interests or will of the client."[168] Even worse, the regulations specify that if a guardian, relative, or friend cannot be found or fails to appear, the immigration court may actually request *"the custodian of the respondent"* to appear on the respondent's behalf.[169] This means that if ICE has detained the respondent, the very agency seeking to deport the respondent may appear

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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. *See In re* E-S-I-, 26 I. & N. Dec. 136, 136 (B.I.A. 2013). Thus, while the BIA encouraged service on the respondent, it did not hold that this is always required.

163. 8 C.F.R. § 103.8(c)(2)(ii).

164. *Id.* § 1240.4.

165. FED. R. CIV. P. 17(c) (emphasis added).

166. *Cf. id.* (emphasis added); 8 C.F.R. § 1240.4.

167. *See* 8 C.F.R. § 1240.4. In litigation challenging these regulations, the American Civil Liberties Union ("ACLU") stressed that the regulations "allow a system to exist with lower standards for the representation of an incompetent individual, allowing untrained representatives with potential and unexamined conflicts of interest to waive non-citizens' fundamental rights without their consent or even comprehension." *See* First Amended Class-Action Complaint for Declaratory and Injunctive Relieve and Petition for Writ of Habeas Corpus at 30 ¶ 92, Franco-Gonzalez v. Holder, No. 10-02211 (C.D. Cal. Aug. 2, 2010), *available at* https://www.aclu.org/files/assets/2010-8-2-GonzalezvHolder-AmendedComplaint.pdf.

168. DEPORTATION BY DEFAULT, *supra* note 7, at 72 n.252.

169. 8 C.F.R. § 1240.4 (emphasis added).

on her behalf. Despite the clear conflict of interest that this provision creates, courts have permitted detention center employees to represent respondents in removal proceedings.[170] In order to be appointed a guardian ad litem, on the other hand, a person must, at a minimum, demonstrate independence and competence.[171]

In addition, the regulations explicitly allow an immigration judge to accept an admission of removability from an incompetent individual who lacks counsel as long as that individual is accompanied by a "near relative, legal guardian, or friend."[172] The question of whether or not someone is removable from the United States can be extremely complicated, both legally and factually. Allowing an unrepresented, incompetent individual to admit to removability simply because he or she appears in court with a "friend," who may have absolutely no knowledge of the legal issues or the facts of the case, fails to safeguard the respondent's interests. Since 2011, recent developments have attempted to increase procedural due process protections for incompetent individuals facing deportation, but the idea of a substantive due process right to competence has neither been asserted nor addressed.

B. Recent Developments Regarding Mental Incompetence

1. *Introduction of "Safeguards" Under In re M-A-M-*

In 2011, the BIA finally provided some framework for addressing questions of competency in removal proceedings.[173] *In re M-A-M-* addressed when an immigration judge should make a competency determination, what factors a judge should consider and what procedures to follow to reach that determination, and the types of "safeguards" that may be prescribed when the respondent is found incompetent.[174] First, the BIA found that "an alien is presumed to be competent to participate in removal proceedings," so "[a]bsent indicia of mental incompetency, an Immigration Judge is under no obligation to analyze an alien's competency."[175] This finding is consistent with the law regarding competency in criminal cases.[176] The BIA noted that indicia of

170. Tex. Appleseed, Justice for Immigration's Hidden Population 51 (2010).

171. *See, e.g.*, Gaddis v. United States, 381 F.3d 444, 454 (5th Cir. 2004) (explaining that the Federal Rule of Civil Procedure 17(c) gives the district court the power to "effectuate its appointment of a competent, independent guardian *ad litem*").

172. 8 C.F.R. § 1240.10(c).

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

174. *Id.* at 476.

175. *Id.* at 477.

176. *See, e.g.*, Porter v. McKaskle, 466 U.S. 984, 985 (1984) ("It is settled that, if evidence available to a trial judge raises a bona fide doubt regarding a defendant's ability to understand and participate in the proceedings against him, the judge has an obligation to order an examination to assess his competency, even if the defendant does not request such an exam.").

incompetency could include "the inability to understand and respond to questions, the inability to stay on topic, or a high level of distraction," as well as documentary evidence, such as assessments of the respondent's mental health, testimony from professionals, and school records.[177]

Significantly, the BIA acknowledged that DHS is often in possession of relevant documents, especially when the respondent is detained, and found that "DHS has an obligation to provide the court with relevant materials in its possession that would inform the court about the respondent's mental competency."[178] This part of the holding is important because trial attorneys have not always submitted evidence of incompetence to the immigration court. Human Rights Watch has documented cases in which trial attorneys failed to inform the court that the respondent had a mental disability, as well as cases where they refused or neglected to supply information to the court, even when specifically ordered to do so.[179] Interviews conducted with immigration judges and attorneys indicated that ICE trial attorneys often "resisted efforts . . . to accommodate non-citizens with mental disabilities by providing mental health evaluations, sharing medical records with the court or attorneys, or agreeing to terminate cases where the person in proceedings cannot participate or protect his or her rights."[180]

In re M-A-M- does *not* require a competency hearing once questions of competency come to light. In fact, the decision does not even require a professional mental competency evaluation, much less one paid for by the government. Rather, the decision vaguely instructs immigration judges to "take measures to determine whether a respondent is competent to participate in proceedings."[181] Such measures may include simply asking questions to the respondent, granting continuances to allow the parties

177. *In re M-A-M-*, 25 I. & N. Dec. at 479–80. Other evidence could include reports from teachers, counselors, or social workers; participation in programs for persons with mental illness; applications for disability benefits; and affidavits or testimony from friends or family members. *Id.*

178. *Id.* at 480. ICE attorneys are usually in the best position to obtain medical records in a prompt manner, as FOIA requests for a detainee's medical records can take several months to process, making it difficult for an attorney to present timely evidence of incompetence. Moreover, detainees are frequently transferred between detention centers without their medical records. *See* JUSTICE FOR IMMIGRATION'S HIDDEN POPULATION, *supra* note 170, at 41 ("[E]ven when records exist and can be found, immigrants and their lawyers have difficulty accessing those records.").

179. DEPORTATION BY DEFAULT, *supra* note 7, at 34, 48. For example, in one case before the Boston Immigration Court, the ICE attorney revealed that the respondent had been previously found incompetent in criminal court only after the judge remarked that the respondent appeared to have a mental disability. *Id.* at 34 (quoting Telephone Interview by Human Rights Watch with John Pollock, Nat'l Lawyers Guild (Dec. 7, 2009)) (discussing observations of immigration court proceedings in Boston, including a case witnessed on November 2003). In another case, an ICE attorney who repeatedly failed to produce the competency evaluation requested by the immigration judge told the court "there aren't sufficient resources for us to do the evaluation." *Id.* at 48 (quoting Telephone Interview, *supra*).

180. *Id.* at 49.

181. *In re M-A-M-*, 25 I. & N. Dec. at 480.

time to submit evidence regarding the respondent's mental health, changing venue to allow a respondent to be closer to family or treatment programs, or requesting a mental competency evaluation.[182] Judges are supposed to "weigh" the results from these measures to determine if the respondent is competent.[183] Thus, *In re M-A-M-* permits the procedure for determining competency to be completely ad hoc.

The test for competency to participate in immigration proceedings is also deficient because the standard is whether the respondent "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."[184] Under this test, a significant part of the *Dusky/Drope* standard simply drops out of the analysis for respondents who are pro se, making it easier for them to be deemed competent than respondents with representation.[185] This paradoxical result conflicts with *Edwards*, which recognized the appropriateness of applying a *higher* standard of competence for self-representation.[186] Federal courts should reject the BIA's definition of competence under the doctrine of constitutional avoidance because it raises serious constitutional concerns under the due process clause.[187] However, even if the BIA's definition were treated as a statutory or regulatory interpretation that deserves deferential review, courts should reject it as unreasonable or plainly erroneous because it requires a lower standard of competence for pro se respondents than for those with counsel.[188]

If a respondent is found incompetent under the test in *In re M-A-M-*, then the result is not termination of the removal proceedings, but simply

182. *Id.* at 480–81.

183. *Id.* at 481.

184. *Id.* at 479 (emphasis added).

185. *See supra* note 84.

186. In *Edwards*, the Court explained that the standards in *Drope* and *Dusky* "assume representation by counsel and emphasize the importance of counsel." Indiana v. Edwards, 554 U.S. 164, 174 (2008). These standards "thus suggest (though do not hold) that an instance in which a defendant who would choose to forgo counsel at trial presents a very different set of circumstances, which in our view, calls for a different standard." *Id.* at 174–75.

187. Agencies' constitutional interpretations are not entitled to judicial deference. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 703–05 (1974); CBS v. Democratic Nat'l Comm., 412 U.S. 94, 103 (1973). Indeed, "[i]t is ... a 'permanent and indispensable feature of our constitutional system' that 'the federal judiciary is supreme in the exposition of the law of the Constitution.'" United States v. Morrison, 529 U.S. 598, 616–17 n.7 (2000) (quoting Miller v. Johnson, 515 U.S. 900, 922–23 (1995)).

188. An agency's interpretation of its statute is normally reviewed under *Chevron*, which requires courts to defer to any reasonable interpretation of an ambiguous term. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984). An agency's interpretation of its own regulation is reviewed under *Seminole Rock*, which requires deference unless the agency's interpretation is "plainly erroneous or inconsistent with the regulation." Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

that the judge should employ so-called "safeguards."[189] The decision gives judges total discretion to decide what kind of safeguards would be appropriate.[190] While the BIA gives some examples of safeguards, appointment of counsel is notably absent from that list.[191] In fact, instead of requiring appointed counsel, the BIA suggests that the participation of a family member, friend, or guardian somehow serves as a safeguard.[192] The BIA also entrusts the judge to take on certain roles traditionally performed by counsel, such as "actively aiding in the development of the record, including the examination and cross-examination of witnesses" and "reserving appeal rights for the respondent."[193] *In re M-A-M-* therefore takes a very different approach than the recommendations set forth in this Article, which maintain that appointment of counsel is necessary for all individuals in removal proceedings who do not meet the heightened standard of competence necessary for self-representation.

Moreover, the BIA does not explain how the safeguards that it mentions would actually help provide a full and fair hearing to an incompetent individual. For example, continuances may be helpful in the short-term but are of little use if the respondent cannot afford counsel or additional medical treatment.[194] Other supposed safeguards noted in the decision, such as "closing the hearing to the public" and "waiving the respondent's appearance," may actually undermine rather than promote a fair hearing.[195] Thus, while *In re M-A-M-* made important strides in requiring immigration judges to grapple with questions of competence, it set an unreasonably low standard of competence for unrepresented individuals and did not require competency hearings or appointed counsel, leaving much to the discretion of immigration judges.

2. *The* Franco-Gonzalez *Litigation*

In 2010, before the *In re M-A-M-* decision, a coalition of legal organizations filed a class action lawsuit in a Los Angeles federal district court on behalf of immigrant detainees in California, Arizona, and

189. *In re M-A-M-*, 25 I. & N. Dec. at 477–82.

190. *Id.* at 482–83.

191. *Id.* at 483.

192. *Id.*; *cf.* 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, 1 (2013) (arguing for concurrent appointment of both guardians ad litem *and* counsel for mentally ill individuals).

193. *In re M-A-M-*, 25 I. & N. Dec. at 483.

194. *See id.* at 483 (stating that safeguards may include "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," as well as "continuance of the case for good cause shown").

195. *Id.*

Washington with severe mental disabilities.[196] The named plaintiffs had been diagnosed with mental disabilities ranging from schizophrenia to mental retardation, and several had been found incompetent to stand trial in other court proceedings.[197] The lead plaintiff, Jose Antonio Franco-Gonzales, did not know his own age or birthday and could not tell time or dial phone numbers.[198] An immigration judge had found him incompetent and administratively closed his case in 2005, but he continued to languish in immigration detention for almost five more years without a bond hearing.[199] The lawsuit alleged violations under the INA, the Due Process Clause of the Fifth Amendment, and section 504 of the Rehabilitation Act.[200] The complaint alleged that mentally incompetent immigrant detainees should be appointed competent representation and that they should have a right to a bond hearing.[201]

After the class was certified, plaintiffs filed a motion for partial summary judgment and a permanent injunction.[202] The district court's order, issued in April 2013, broke new ground by embracing a disability rights framework for analyzing mentally incompetent individuals' right to appointed counsel, relying on a theory of reasonable accommodation. The court held that appointment of counsel is required under section 504 of the Rehabilitation Act, which forbids federally funded agencies from excluding or denying individuals with disabilities an equal opportunity to access program benefits and services.[203] The court reasoned that appointing counsel is the only reasonable accommodation through which

196. The lawsuit was litigated by the 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 Immigrant Rights Project. First Amended Complaint, *supra* note 167.

197. *Id.* at 4–6.

198. Press Release, ACLU, Immigrants with Mental Disabilities Lost in Detention for Years, (Mar. 25, 2010), *available at* http://www.aclu.org/immigrants-rights-prisoners-rights/immigrants-mental-disabilities-lost-detention-years.

199. First Amended Complaint, *supra* note 167, at 4.

200. *Id.* at 35–40.

201. *See* Order re Plaintiffs' Motion for Partial Summary Judgment and Plaintiffs' Motion for Preliminary Injunction on Behalf of Seven Class Members at 12, Franco-Gonzalez v. Holder, (No. 10-02211), 2013 WL 3674492, at *16 (C.D. Cal. Apr. 23, 2013).

202. The certified class was defined as "[a]ll individuals who are or will be in DHS custody for removal proceedings in California, Arizona, and Washington who have been identified by or to medical personnel, DHS, or an Immigration Judge, as having a serious mental disorder or defect that may render the incompetent to represent themselves in detention or removal proceedings, and who presently lack counsel in their removal proceedings." *Id.* at 2. This class included two subclasses: (1) individuals who had a serious mental disorder or defect that rendered them incompetent to represent themselves in detention or removal proceedings; and (2) individuals who had been detained for more than six months. *Id.*

203. 29 U.S.C. § 794 (2013). Establishing a prima facie case under section 504 of the Rehabilitation Act requires showing, among other things, that a recipience of federal funding denied someone a benefit solely because of a disability. *Id.* § 794(a). In this case, the benefit denied to the plaintiffs was full participation in their removal proceedings. *See* Order re Plaintiffs' Motion, *supra* note 201, at 3.

mentally incompetent detainees in removal proceedings can meaningfully exercise certain statutory "benefits," namely "a reasonable opportunity to examine the evidence against [them], to present evidence on [their] own behalf, and to cross-examine witnesses presented by the Government."[204] In reaching this conclusion, the court explicitly rejected the argument that *In re M-A-M-* provides sufficient safeguards.[205] In addition, the court held that mentally incompetent detainees are entitled to a bond hearing within 180 days.[206]

While the decision in *Franco-Gonzales* represents a huge step forward, it has limitations. First, it focuses only on appointment of counsel as a procedural due process protection and does not address the issue of whether incompetent individuals may be subjected to removal proceedings in the first place. Furthermore, it does not question the definition of competence set forth in *In re M-A-M-* or recognize that a heightened standard of competence is necessary for self-representation. Thus, the category of individuals who would be appointed counsel under *Franco-Gonzales* is smaller than the category of individuals who would be appointed counsel under the framework proposed in this Article.

3. *DHS Announces New Nationwide Policy in April 2013*

At the same time that the federal district court announced *Franco-Gonzalez*, the Department of Justice ("DOJ") and DHS announced a new nationwide policy for immigration detainees with serious mental disabilities.[207] The government indicated that this policy would take effect nationally by the end of 2013, but a year later, as this Article goes to print, the implementation is just getting started.[208] The policy addresses screening for mental conditions, competency hearings, appointment of counsel, and bond hearings. To begin with, the policy provides that detainees in a facility staffed by ICE Health Service Corps will be screened for serious mental disorders and conditions when taken into custody.[209] DHS states that it will also work with non-ICE Health Service Corps staffed detention facilities to identify detainees with serious mental disorders or conditions, although the policy fails to provide any specifics.[210]

204. Order re Plaintiffs' Motion, *supra* note 201, at 6; 8 U.S.C. § 1229a(b)(4)(B) (2014).

205. The court pointed out that it was undisputed that *In re M-A-M-* did not suggest any authority to appoint a "Qualified Representative" to incompetent individuals. The court also noted that the majority of safeguards in *In re M-A-M-* were left to the immigration judge's discretion and therefore did not guarantee that an incompetent individual would be able to participate as fully in her removal proceeding as a competent person. *Id.* at 6–7.

206. *Id.* at 8.

207. Press Release, Dep't of Justice, *supra* note 5.

208. *Id.*

209. *Id.*

210. *Id.*

In addition, the policy instructs immigration judges to convene a competency hearing if the court learns of any indication of mental incompetency.[211] An immigration judge who feels unable to make a competency determination based on the evidence presented at that hearing is authorized to order an independent exam and psychiatric or psychological report.[212] The competency exams will be administered through program run by the Executive Office for Immigration Review ("EOIR") and performed by independent medical professionals.[213] As of yet, the EOIR has not provided any details regarding the operation of this program or how the medical professionals will be selected or paid.

The policy further provides that "EOIR will make available a qualified representative to detainees who are deemed mentally incompetent to represent themselves."[214] To date, no details have been provided regarding who will be considered a "qualified representative," how representatives will be selected and assigned to individual cases, and whether or how the representatives will be paid. The policy also does not specify whether qualified representatives will be made available only at the immigration court level or for appeals as well. Lastly, consistent with *Franco-Gonzalez*, the new policy states that detainees identified as having a serious mental disorder have a right to a bond hearing once they have been detained for six months.

If this policy is implemented, it will represent an enormous step forward in protecting the procedural due process rights of noncitizens with mental disabilities. One major limitation of the policy, however, is that it applies only to *detainees*. Non-detained individuals with serious mental disabilities in removal proceedings should also have a right to a competency hearing and appointed counsel. Another limitation of the policy is that it does not discuss termination of cases in which the respondent is incompetent. Termination would be consistent with recognizing a right to competence in removal proceedings, which either courts or Congress should do for the reasons set forth below.

IV. Reasons to Recognize a Right to Competence in Removal Proceedings

Providing appointed counsel and competency hearings would significantly increase the procedural protections for individuals with mental disabilities facing removal. Several commentators have already argued quite persuasively that appointed counsel is critical for this

211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*

population.[215] This Article goes further, however, arguing that the presence of counsel is not sufficient to protect the fairness and accuracy of the hearing, especially when the definition of incompetence indicates that the respondent is unable to assist counsel. Recognizing a substantive due process right to competence—or creating the right by statute—is the only way to ensure that incompetent individuals are not deported in error. Taking this step by no means eliminates the need for robust procedural protections. Procedural due process is necessary, at a minimum, to identify those who are truly incompetent.[216] However, once an individual's incompetence is established, a right to competence would serve as a backstop that prevents deportation. The reasons underlying the prohibition against the trial of incompetent individuals provide a roadmap for showing why such a right should also be recognized in removal proceedings.

In addition, this Article contends that counsel must be appointed for those who do not meet the higher standard of competence required for self-representation. If counsel cannot be appointed to such individuals, then their cases also must be terminated. Defining the higher standard of competence is a challenging task that is beyond the scope of this Article.[217] Indeed, it is not clear whether the standard should be precisely defined.[218] This Article simply seeks to explain why courts should adopt a higher competence standard for self-representation in removal proceedings. This explanation draws on the same reasons underlying the prohibition against trial of incompetent individuals. As the Supreme Court stressed in *Edwards*, protecting the accuracy and dignity of the

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215. *See generally* Alice Clapman, *Hearing difficult Voices: The Due Process Rights of Mentally Disabled Individuals in Removal Proceedings*, 45 NEW ENG. L. REV. 373 (2011) (arguing that mentally disabled individuals should have a right to counsel in removal proceedings); Aliza B. Kaplan, *Disabled and Disserved: The Right to Counsel for Mentally Disabled Aliens in Removal Proceedings*, 26 GEO. IMMIGR. L.J. 523 (2012) (same); Wilson & Prokop, *supra* note 192; *see also Representation in Removal Proceedings*, 126 HARV. L. REV. 1658, 1659 (2013) (proposing "a right to appointed counsel for three classes of noncitizens—lawful permanent residents, the mentally ill, and juveniles").

216. Several individuals with serious mental conditions who took "voluntary deportations" turned out to be U.S. citizens. *See* DEPORTATION BY DEFAULT, *supra* note 7, at 4.

217. For discussions of the standard for representational competence, see generally E. Lea Johnston, *Representational Competence Defining the Limits of the Right to Self-Representation at Trial*, 86 NOTRE DAME L. REV. 523 (2011); E. Lea Johnston, *Setting the Standard: A Critique of Bonnie's Competency Standard and the Potential for Problem-Solving Theory for Self-Representation at Trial*, 43 U.C. DAVIS L. REV. 1605 (2010); Jason R. Marks, *State Competence Standards for Self-Representation in a Criminal Trial: Opportunity and Danger for State Courts After* Indiana v. Edwards, 44 U.S.F. L. REV. 825 (2010); *see also* Erica J. Hashimoto, *Defending the Right to Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 447–50 (2007) (finding that twenty-six percent of pro se defendants received felony convictions, compared with sixty-three percent of their represented counterparts).

218. *See, e.g.*, Jacob J. Stender, *Protect Me From Myself: Determining Competency to Waive the Right to Counsel During Civil Commitment Proceedings in Washington State*, 35 SEATTLE U. L. REV. 973, 980–82 (arguing that "a heightened but unarticulated standard" for competency to represent oneself provides the discretion needed to make accurate and fair decisions based on the particular facts of the case).

proceedings becomes an especially critical concern when the defendant is unrepresented.[219] Likewise, in the removal context, the absence of a lawyer intensifies concerns about reaching the correct decision, protecting constitutional and statutory rights, and safeguarding the dignity of the process.

Recognizing that competence falls along a spectrum rather than being a binary trait is especially important in the immigration context because of the high rates of pro se respondents.[220] In the criminal context, where lawyers are generally appointed, the focus is understandably on competence to stand trial, but in the immigration context, the court should focus equally on competence for self-representation. While the relative sizes of these two groups may be different in the criminal and immigration contexts, it is still possible—and advisable—to consistently define the groups and their due process rights. The various reasons underlying the prohibition against trial of incompetent individuals, which also support a higher competence standard for self-representation, are addressed in detail below.

A. Protecting the Fairness and Accuracy of Removal Proceedings

Neither the "safeguards" mentioned in *In re M-A-M-* nor appointment of counsel is always sufficient to protect the fairness and accuracy of a removal proceeding. In criminal cases, counsel is almost always provided, yet concerns regarding fairness and accuracy still justify the prohibition against trial of incompetent individuals.[221] These concerns are even greater in removal proceedings because the respondent generally plays a more active role than a defendant facing criminal trial. In removal proceedings, there is no prohibition against drawing an adverse inference if a respondent chooses not to testify.[222] Indeed, the

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219. Indiana v. Edwards, 554 U.S. 164, 176–77 (2008).

220. *See supra* note 84 and accompanying text.

221. *See* U.S. Const. amend. VI (guaranteeing that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence"); Gideon v. Wainwright, 372 U.S. 335, 343 (1963) (holding, in a case involving a felony, that the Fourteenth Amendment incorporates the Sixth, so that "one charged with a crime" has a right to counsel); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (extending *Gideon* to misdemeanors that carry jail sentences); Scott v. Illinois, 440 U.S. 367, 373 (1979) (holding that a defendant who faced only a fine, rather than incarceration, was not entitled to counsel); *see also* Alice Clapman, *Petty Offenses, Drastic Consequences: Towards a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 Cardozo L. Rev. 585, 585 (2011) (explaining the limits of the Sixth Amendment and how criminal offenses that do not trigger the right to counsel can still expose a noncitizen to deportation).

222. *See* Baxter v. Palmigiano, 425 U.S. 309, 318 (1976) (recognizing that "the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them"); Gutierrez v. Holder, 662 F.3d 1083, 1091 (9th Cir. 2011). *But see* Griffin v. California, 380 U.S. 609, 614 (1965) (holding that, in a criminal case, the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt").

norm is for the respondent to testify in order to provide crucial evidence, establish her credibility, and merit a favorable exercise of discretion.[223] In cases where the respondent has legal status and is challenging deportability rather than applying for some form of relief, the legal issues may still turn on certain facts and require testimony by the respondent. If the respondent cannot communicate these facts, then appointment of counsel will not ensure a fair proceeding. This Subpart addresses both credibility determinations and citizenship determinations as two examples of important issues where the presence of an attorney may not overcome the challenges posed by incompetency.

1. Credibility Determinations

Establishing the noncitizen's credibility is critical for virtually all applications for relief from removal. Credibility is especially important, however, in cases involving applications for asylum, withholding of removal, and protection under the Convention Against Torture.[224] In such cases, an adverse credibility finding may result in someone being removed to a country where her life or safety is in danger. Applicants for asylum and related forms of relief are also particularly likely to suffer from mental illnesses, such as post-traumatic stress disorder, related to past experiences of persecution that can affect the quality of their testimony.[225] In evaluating an applicant's testimony, an immigration judge must "determine whether or not the testimony is credible, is persuasive,

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223. *See* INA § 240(c)(4)(A)(i)–(ii), 8 U.S.C. § 1229a (2014).

224. *See, e.g.*, Michael Kagan, *Refugee Credibility Assessment and the "Religious Imposter" Problem: A Case Study of Eritrean Pentecostal Claims in Egypt*, 43 VAND. J. TRANSNAT'L L. 1179, 1185 (2010) (noting that "[e]ven vague and incoherent testimony may not definitively indicate fraud, because cultural barriers, language and interpretation problems, mental health issues, and the general limitations of human memory and communication can produce honest testimony that nevertheless appears superficially incredible"); Stuart L. Lustig, *Symptoms of Trauma Among Political Asylum Applicants: Don't Be Fooled*, 31 HASTINGS INT'L & COMP. L. REV. 725, 729 (2008) (discussing how psychological trauma can lead to inconsistencies that may be misinterpreted during an asylum hearing as showing a lack of credibility); Carol M. Suzuki, *Unpacking Pandora's Box: Innovative Techniques for Effectively Counseling Asylum Applicants Suffering from Post-Traumatic Stress Disorder*, 4 HASTINGS RACE & POVERTY L.J. 235, 241, 253–64 (2007) (addressing "how PTSD alters an asylum applicant's detail and consistency of memory, thus affecting the applicant's credibility and chance of being granted asylum"). *See generally* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), U.N. Doc. A/RES/39/46 (Dec. 10, 1984).

225. *See, e.g.*, Juliet Cohen, *Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers*. 13 INT'L J. REFUGEE L. 293, 308 (2001) (urging "great caution" in denying asylum based on credibility and noting that "a general impairment of recall is to be expected as a result of their traumatic experiences and physical and mental state"); Brianna M. Mooty, *Solving the Medical Crisis for Immigration Detainees: Is the Proposed Detainee Basic Medical Care Act of 2008 the Answer?*, 28 LAW. & INEQ. 223, 251 (2010) (explaining that "[t]he same experiences that are often the bedrock of asylum claims put these asylum-seekers at a significant risk of suffering post-traumatic stress and other mental health issues"); Suzuki, *supra* note 224 (explaining that post-traumatic stress disorder affects an asylum applicant's memory, impacting the detail and consistency of the testimony); DEPORTATION BY DEFAULT, *supra* note 7, at 36–37.

and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof."[226] The INA further provides that a credibility determination should be based on the totality of the circumstances, including demeanor, responsiveness, plausibility, consistency, and any inaccuracies or falsehoods, regardless of whether or not they go to the heart of the claim.[227]

An individual with severe mental disabilities is likely to have great difficulty in providing testimony that satisfies all of the above criteria. Someone with paranoid schizophrenia may conflate real and imagined forms of persecution. If called upon to testify, this individual might easily lapse from an accurate account of her past and the harm that she fears into a delusional narrative. There is nothing an attorney could do to prevent this result. While the attorney could introduce evidence about the client's mental illness and objective country reports about the harm that the individual would face if deported, the trial attorney and judge may still take the position that the person is not credible. In fact, Human Rights Watch has documented cases in which the mere presence of a mental illness has led to adverse credibility findings.[228] In such situations, where the respondent's own testimony plays a crucial role in deciding whether she should be allowed to remain in the country, no amount of procedure can ensure that an incompetent individual will receive a fair and accurate hearing. Only a right to competence would protect against erroneous deportations.

2. *Citizenship Determinations*

In some cases, critical facts might support a challenge to removability, but an attorney might have no way of accessing those facts if the client is incompetent. Multiple accounts of U.S. citizens with serious mental disabilities being erroneously deported to foreign countries show that DHS is often unaware of crucial facts when it decides to pursue deportation.[229] In some cases, a mentally incompetent respondent might

226. INA § 240(c)(4)(B), 8 U.S.C. § 1229a(c)(4)(B).

227. INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii).

228. For example, Michael A. suffered from psychosis and was denied asylum because the asylum officer found that his delusions rendered his testimony inherently implausible, reasoning that his psychosis "calls into question the entire credibility of his claim." DEPORTATION BY DEFAULT, *supra* note 7, at 29. Likewise, the government argued that Edwin B., who had fled Liberia, was not a credible witness because of his mental disability and should be denied relief. *Id.* at 38.

229. In 2000, for example, immigration authorities deported Sharon McKnight, a U.S. citizen with cognitive disabilities who was returning from a trip to visit her family in Jamaica. DEPORTATION BY DEFAULT, *supra* note 7, at 4. In 2007, ICE wrongfully deported Pedro Guzman, a U.S. citizen with development disabilities, who was lost in Mexico for almost three months before being located and returned to in California. *Id.* In 2008, ICE deported a U.S. citizen named Mark Lyttle, who had been diagnosed with bipolar disorder and development disabilities because, according to ICE, he had signed a statement saying that he was a Mexican national. *Id.*

not know where she was born or may be unable to intelligibly communicate this information. In other cases, determinations of citizenship can be very complex, requiring detailed information about the respondent's parents or even grandparents. In *Dent v. Holder*, for example, the Ninth Circuit remanded a case where the petitioner's claim to citizenship turned on an adoptive mother's birth in the United States.[230] If Dent had been incompetent, he may never have been able to raise the issue of his citizenship, and a lawyer, even if he had one, might have no way of knowing about his adoptive mother.

According to Jacqueline Stevens, an estimated 4000 U.S. citizens were erroneously detained or deported as aliens in 2010, and the number has exceeded 20,000 since 2003.[231] A "disproportionate" number of these individuals suffer from mental illness.[232] In some cases, mental illness has led citizens to assert false claims of alienage.[233] For example, when "Anna," who suffers from paranoid schizophrenia, was arrested for prostitution in Phoenix in October 2007, she told police that she was born in Paris; earlier, in 1991, when applying for a U.S. passport, she had stated that she was born in Tehran.[234] She had also reported at various points that "JFK is her father and the Pope is her father."[235] The Arizona Superior Court dismissed the criminal charges against her, finding her incompetent to stand trial.[236] Yet, based solely on her claim that she was born in Paris, ICE detained Anna and placed her in removal proceedings.[237] Despite having Anna's psychiatric records, the immigration judge ordered her deported to France.[238] France, of course, refused to issue travel documents because she was not a French citizen, but Anna remained detained for several months.[239] In this situation, where an immigration judge is inclined to believe statements made by a person

230. Dent v. Holder, 627 F.3d 365, 369–73 (9th Cir. 2010).

231. *See* Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens As Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 608 (2011); *see also* Lisa DiVirgilio, *Report: Hundreds of U.S. Citizens Wrongfully Deported Every Year*, SYRACUSE (July 26, 2010, 9:52 AM), http://www.syracuse.com/news/index.ssf/2010/07/report_hundreds_of_us_citizens.html (describing how Francis's story is part of a potentially larger trend of deportations of U.S. citizens).

232. Stevens, *supra* note 231, at 612.

233. *See id.* at 628; *see also Problems with ICE Interrogation, Detention, and Removal Procedures: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int'l Law, H. Comm. on the Judiciary*, 110th Cong. 8 (2008) (statement of Rachel Rosenbloom, Human Rights Fellow & Supervising Att'y, Ctr. for Human Rights & Int'l Justice at Boston Coll.) ("It is not uncommon for someone who is mentally ill and suffering from delusions to state that he or she was born abroad.").

234. Jacqueline Stevens, *Thin ICE*, THE NATION (June 5, 2008), http://www.thenation.com/article/thin-ice.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

known to suffer from delusions, even the involvement of an attorney may not have helped.

In other cases, U.S. citizens have been deported based on conflicting statements about their place of birth. For example, Mark Lyttle, a U.S. citizen with bipolar disorder and a learning disability, had sworn to immigration agents on two occasions that he was Mexican, but he had also sworn that he was born in North Carolina.[240] He endured a horrific ordeal after ICE deemed him an undocumented immigrant from Mexico.[241] Although ICE had substantial evidence of Lyttle's citizenship, including criminal record checks that indicated he was a citizen, ICE detained him for fifty-one days and placed him in removal proceedings, where he was forced to represent himself and ultimately ordered deported.[242] He spent four months wandering through Mexico and Central America homeless, and was even briefly jailed in Honduras, before he finally found a U.S. consular officer in Guatemala who contacted his family, realized that he was a U.S. citizen, and helped him return to the United States.[243] But what if Lyttle could not communicate that he was born in North Carolina and adopted? What if he did not have family members who could confirm his citizenship? Even if he had been appointed a lawyer during his removal proceeding, that lawyer might not have discovered that he is actually a U.S. citizen.

Another example is Gustavo S., a native English speaker with schizophrenia who was charged with illegal entry based solely on his statement that he was born in Honduras.[244] Gustavo, like Lyttle, gave inconsistent accounts of his place of birth to ICE as well as to his attorney.[245] Although the immigration judge disregarded Guastavo's statement as unreliable in light of his mental disabilities, ICE nevertheless detained him for nineteen months based solely on his statement regarding his place of birth and ultimately deported him to Honduras after acquiring a travel document from the General Consul of Honduras using the information provided by DHS.[246] Here, even the presence of an attorney did not prevent the erroneous deportation. These cases highlight situations in which the respondent's incompetence undermines accurate decisions about deportability. An attorney who cannot access crucial

240. Kristin Collins, *N.C. Native Wrongly Deported To Mexico*, CHARLOTTE OBSERVER (Aug. 30, 2009), http://www.charlotteobserver.com/2009/08/30/917007/nc-native-wrongly-deported-to.html.

241. *See id.*; *see also* Esha Bhandari, *Yes, the U.S. Wrongfully Deports Its Own Citizens*, ACLU (Apr. 25, 2013, 11:48 AM), http://www.aclu.org/blog/immigrants-rights/yes-us-wrongfully-deports-its-own-citizens; William Finnegan, *The Deportation Machine: Annals of Immigration*, NEW YORKER, Apr. 29, 2013, at 24.

242. Collins, *supra* note 240.

243. Bhandari, *supra* note 241.

244. DEPORTATION BY DEFAULT, *supra* note 7, at 45.

245. *Id.*

246. *Id.* at 46.

facts because of the client's incompetence can do little to help protect the fairness and accuracy of the proceedings.

B. Safeguarding Statutory and Constitutional Rights

In addition to protecting the accuracy and reliability of the proceedings, a right to competence would safeguard other rights established by statute or required by procedural due process. As in criminal cases, where the Sixth Amendment provides that "*the accused* shall enjoy the right . . . to be informed of the nature and cause of the accusation" and "to be confronted with the witnesses against him,"[247] the INA gives certain rights directly to the noncitizen facing deportation. The INA guarantees that "*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."[248] In both cases, these rights are given directly to the individual whose liberty is at stake, but incompetence undermines the ability to exercise these rights.

The emerging right to appointed counsel for incompetent detainees would add to the bundle of rights mentioned above. By definition, however, an incompetent individual does not have the ability to assist counsel and therefore cannot effectively exercise the right to counsel. Nor can counsel handle the case without the respondent's participation. As discussed above, respondents play an active role in removal proceedings. Their input and cooperation is necessary in obtaining relevant facts, identifying witnesses, and providing testimony. Thus, the nature of the proceeding is nothing like habeas, where the attorney can carry the case alone.[249] An incompetent immigrant who lacks the ability to communicate relevant information to either counsel or the court simply cannot exercise the rights guaranteed by the INA and Fifth Amendment Due Process Clause.

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247. U.S. Const. amend. VI (emphasis added).

248. *See* INA § 240(b)(4)(B), 8 U.S.C. § 1229a (2014) (emphasis added); *see also* Saidane v. INS, 129 F.3d 1063, 1065 (9th Cir. 1997) ("[T]he government must . . . afford *the alien* a reasonable opportunity to confront the witnesses against him or her." (emphasis added)). As Justice Frankfurter explained in discussing the common law right of allocution, even the "modern innovation[]" of a right to counsel in criminal proceedings does not "lessen[] the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation," because "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." Green v. United States, 365 U.S. 301, 304 (1961) (plurality opinion).

249. *See* Ryan v. Gonzales, 133 S. Ct. 696, 705 (2013).

C. Upholding the Prohibition Against Proceeding in Absentia

Deporting incompetent respondents also conflicts with the general prohibition against conducting removal proceedings in absentia.[250] As the Supreme Court recognized in *Drope*, "the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself."[251] Likewise, an incompetent respondent may be physically present but is absent from the hearing for all practical purposes. The INA provides that a hearing may take place "in the absence of the alien" only "when agreed to by the parties."[252] Moreover, the INA gives the respondent the right to "cross-examine witnesses," much like the Sixth Amendment Confrontation Clause, which is the primary basis for the prohibition against in absentia trials of criminal defendants.[253] The statutory requirements to proper notice of the time and place of the hearing, as well as the requirement to give notice of the consequences for failure to appear, all underscore the right to be present.[254] In fact, the BIA has repeatedly held that an immigration judge "has no authority to order an alien's removal from the United States in absentia unless the alien has received (or can be properly charged with receiving), at his last provided address, the . . . warnings and advisals contained in the Notice to Appear."[255]

If the respondent receives proper notice and nevertheless fails to appear, she may be ordered deported in absentia because the absence is considered consensual in this situation, but the same is true in many

250. This prohibition stems not only from the INA, see *infra* notes 252–254, 256, but also from basic principles of due process. The Supreme Court has held that the right to appear attaches in various civil contexts where a liberty interest is at stake. *See, e.g.*, Califano v. Yamasaki, 442 U.S. 682 (1979) (extending the right to an oral hearing to social security overpayment recoupment proceedings); Morrisey v. Brewer, 408 U.S. 471 (1972) (applying a right to be present in a parole revocation hearing); Specht v. Patterson, 386 U.S. 605 (1967) (holding that the right to be present exists in civil commitment proceedings).

251. *See* Drope v. Missouri, 420 U.S. 162, 171 (1975) (quoting Foote, *supra* note 54); *see also* McGregor v. Gibson, 248 F.3d 946, 951–52 (10th Cir. 2001) (quoting *Drope* and Foote, *supra* note 54); Watts v. Singletary, 87 F.3d 1282, 1292 (11th Cir. 1996) (quoting *Drope*, 420 U.S. at 171); Eddmonds v. Peters, 93 F.3d 1307, 1314 (7th Cir. 1996) (quoting *Drope*, 420 U.S. at 172; Foote, *supra* note 54, at 834); Stone v. United States, 358 F.2d 503, 507 n.5 (9th Cir. 1966) (quoting Foote, *supra* note 54, at 834).

252. The INA provides that the proceeding may take place: "(i) in person, (ii)where agreed to by the parties, in the absence of the alien, (iii) through video conference, or (iv) subject to subparagraph (B), through telephone conference." 8 U.S.C. § 1229a(b)(2)(A) (2014). For the proceeding to take place by telephone, the alien must have been advised of the right to proceed in person or through video conference and must consent to the telephone conference. *Id.* § 1229a(b)(2)(B).

253. *See* INA § 240(b)(4)(B), 8 U.S.C. § 1229a(b)(4)(B).

254. *See* INA § 240(a)(1), 8 U.S.C. § 1229a(a)(1).

255. *In re* Jorge Anyelo, 25 I. & N. Dec. 337, 339 (B.I.A. 2010); *see In re* G-Y-R-, 23 I. & N. Dec. 181, 187 (B.I.A. 2001).

criminal proceedings.[256] State criminal courts routinely construe the failure to show up for trial as a knowing and voluntary waiver of the right to be present and conduct the trial in the defendant's absence.[257] Federal courts are more constrained in this matter, as they must abide by Federal Rule of Criminal Procedure 43(c), which permits an in absentia trial only if the defendant was present at trial initially or had pleaded guilty or nolo contendere.[258] The Supreme Court confirmed in *Crosby v. United States* that a defendant's initial presence is required for an in absentia trial under Rule 43.[259] The Sixth Amendment, however, does not require this initial presence. In other words, as the Second Circuit has explained, "nothing in the Constitution prohibits a trial from being commenced in the defendant's absence so long as the defendant knowingly and voluntarily waives his right to be present."[260] Accordingly, state courts are free to proceed with a trial if the defendant was properly notified and never showed up, as long as "the requisite knowledge can be conclusively found" based on the record.[261] The constitutional prohibition against in absentia trials is therefore no more absolute than the INA provision: both permit a waiver of the right to be present. Mentally incompetent individuals, however, do not have the capacity to waive the right to be present in a criminal case or to "consent" to an in absentia removal hearing under the INA.[262]

The following statutory provision adds a layer of complexity to this analysis: "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."[263]

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256. *See* INA § 240(b)(5), 8 U.S.C. § 1229a(b)(5) (stating that an alien who fails to appear after receiving proper notice may be ordered removed in absentia if DHS "establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable").

257. Pennsylvania, for example, allows fugitive defendants to be tried in absentia, and some judges do this "routinely." *See* WALTER M. PHILLIPS, JR., REPORT OF SUBCOMMITTEE ON TRYING FUGITIVE DEFENDANTS IN ABSENTIA 10 (discussing the practices in Pennsylvania). Some states, but not all, require an on-the-record colloquy prior to finding waiver of the right to be present, which is similar to the oral warnings given by immigration judges (unless waived by the respondent's attorney) and set forth in writing on the Notice to Appear. *See id.* at 10; *see also* FLA. R. CRIM. P. 3.180 (allowing an in absentia trial if the defendant is voluntarily absent, even in capital cases); Peede v. State, 474 So.2d 808 (Fla. 1985) (upholding the in absentia trial of a defendant accused of murder).

258. *See* FED. R. CRIM. P. 43(c).

259. Crosby v. United States, 506 U.S. 255, 261 (1993). Some federal courts have since found that technical violations of Rule 43 resulted only in "harmless errors." *See, e.g.*, United States v. Benabe, 654 F.3d 753, 761 (7th Cir. 2011) (holding that the court's error in barring the defendants from trial on the day before trial, rather than on the first morning of trial, in violation of Rule 43, was "harmless").

260. Smith v. Mann, 173 F.3d 73, 76 (2d Cir. 1999), *cert. denied* 528 U.S. 884 (1999).

261. *Id.* at 76. Smith claimed that he missed the trial because he overslept, but the Second Circuit noted that he made no attempt to contact the court and thereafter remained a fugitive. *Id.* at 77. By declining certiorari in *Smith*, the Supreme Court implicitly agreed with the Second Circuit's analysis.

262. Waiver of a constitutional right must also be "competent" and "intelligent" under Supreme Court precedents. *See infra* note 303.

263. INA § 240(b)(3), 8 U.S.C. § 1229a(b)(3) (2014).

While this statutory provision does not explicitly prohibit removal proceedings if the respondent is incompetent, it indicates that Congress was aware of a potential problem related to in absentia hearings for mentally incompetent respondents. Since no safeguards have been prescribed, the provision is of limited practical use, and the best approach is to read it together with the other statutory provisions cited above. The INA's prohibition against proceeding "in the absence of the alien," unless the respondent gives consent, does not include any exceptions, so that prohibition should be interpreted as applying to mentally incompetent individuals as well.[264] Relying on that prohibition, courts could conclude that it is not possible to pursue removal when the respondent is incompetent.

D. Protecting the Dignity of the Individual and the Legal Process

Courts and commentators alike have identified the preservation of dignity as one of the reasons underlying the prohibition against subjecting an incompetent defendant to trial. This concept of dignity has different aspects. First, the defendant herself may be stripped of dignity by being transformed into a "spectacle," especially if she is attempting to conduct her own defense.[265] Second, the legal proceeding in which such a spectacle occurs appears undignified and unfair.[266] Third, the legal process loses dignity by becoming unhinged from the purposes of punishment, such as deterrence, retribution, and rehabilitation. Criminal prosecution does not serve these purposes when a defendant cannot comprehend the alleged wrongdoing, understand the nature of the proceedings, or grasp why she is being punished.[267]

Although deportation is not technically "punishment," the Supreme Court has repeatedly recognized that it is a very severe penalty that is closely related to criminal punishment.[268] In fact, the Court has acknowledged that it is often "the most important part . . . of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[269] Many noncitizens would prefer a temporary jail

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264. INA § 240(b)(2)(B), 8 U.S.C. § 1229a(b)(2)(B).

265. *See* Indiana v. Edwards, 554 U.S. 164, 176 (2008).

266. *See id.* (stating that criminal "proceedings must not only be fair, they must 'appear fair to all who observe them'" (citations omitted)); Hall v. United States, 410 F.2d 653, 658, 658 n.2 (4th Cir. 1969) ("[T]he idea of sentencing an insane person to prison remains offensive and is incompatible with the dignity of the judicial process.") (citing Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 831 (1968)).

267. *See, e.g.*, Dillard, *supra* note 90, at 470–71; Albert A. Ehrenzweig, *A Psychoanalysis of the Insanity Plea—Clues To the Problems of Criminal Responsibility and Insanity in the Death Cell*, 73 YALE L.J. 425, 433–41 (1964); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 404–06 (1958).

268. *See supra* note 3.

269. Padilla v. Kentucky, 599 U.S. 356, 364 (2010).

sentence to permanent exile. Subjecting incompetent individuals to deportation when they may not understand the meaning of legal status or comprehend why they are being separated from their families and forced to leave the country raises the same moral questions and poses the same threat to dignity as punishing incompetent defendants.

Moreover the same threat to the *appearance* of fairness exists in the deportation context because removal proceedings are intensely adversarial and have many of the trappings of criminal trials.[270] Among other aspects, the government files the charging document, formal notice must be given to the respondent, the functions of the trial attorney and immigration judge are equivalent to the functions of the prosecutor and judge in a criminal proceeding, and the respondent may be detained during the proceedings.[271] Differences do exist between removal proceedings and criminal proceedings, of course, but these differences reflect the greater protections that criminal defendants receive. Their absence from removal proceedings therefore only amplifies the appearance of unfairness. For example, the fact that the Fifth Amendment privilege against self-incrimination does not apply in removal proceedings makes it even more likely that the removal proceeding against an incompetent respondent will appear undignified and unfair, and the lower burden of proof, which facilitates deportation, only highlights the imbalance of power between the parties.[272] Recognizing a substantive right to competence in removal proceedings would therefore help preserve the moral dignity of the removal process and the appearance of fairness.

E. Removal as an Extension of the Criminal Process

Not only do removal proceedings have the same trappings as criminal trials, but immigration enforcement has become inextricably intertwined with criminal enforcement.[273] As Ingrid V. Eagly explains, this comingling of criminal and immigration enforcement begins at the early, investigatory stages of the criminal process and extends to decisions made during

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270. *See* Torres de la Cruz v. Maurer, 483 F.3d 1013, 1024 (10th Cir. 2007) (stating that removal proceedings closely resemble a trial and "are adversarial and employ many of the same procedures used in Article III courts"); Frango v. Gonzales, 437 F.3d 726, 728 (8th Cir. 2006) (same); Etchu-Njang v. Gonzales, 403 F.3d 577, 583 (8th Cir. 2005) (contrasting "adversarial" removal proceedings with "inquisitorial" Social Security benefit proceedings); Detroit Free Press v. Ashcroft, 303 F.3d 681, 699 (6th Cir. 2002) ("It is clear that removal proceedings are decidedly adversarial.").

271. 8 U.S.C. § 1229(a) (service of Notice to Appear); *id.* § 1229a (role of immigration judge and conduct of removal proceedings); *id.* § 1226 (detention).

272. The Supreme Court has also noted that removal proceedings "look[] prospectively to the respondent's right to remain in this country," whereas criminal proceedings seek to punish past acts; the government must show only identity and alienage, and the burden then shifts to respondent to prove time, place, and manner of entry; Miranda warnings are not required; the Ex Post Facto Clause does not apply; and the Eighth Amendment does not require bail to be granted in certain cases. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

273. *See, e.g.*, Eagly, *supra* note 9, at 1143–56.

booking, pretrial release, plea-bargaining and sentencing.[274] State and local officials involved in the criminal process are attuned to defendants' immigration status and the conviction-driven system of immigration enforcement, while, at the same time, federal immigration agents are embedded in local law enforcement systems.[275] Eagly observes that "the growing centrality of criminality to immigration enforcement is one of the most significant historical shifts in the federal immigration system."[276]

The integrated nature of immigration and criminal enforcement calls for a consistent approach to questions of competence during these processes. In the criminal context, the law is clear that a defendant must be competent at *all stages* of the prosecution.[277] The right to competence therefore extends all the way to sentencing. Competence during the penalty phase is particularly important because it represents the moment "when society authoritatively proceeds to decide and announce whether it will deprive . . . [someone] of liberty."[278] Pronouncing the sentence when the defendant is incompetent is akin to sentencing someone in absentia and "shows a lack of fundamental respect for the dignity" of the defendant.[279] Ensuring the defendant's presence and competence at sentencing simply "enhances the legitimacy and acceptability of both sentence and conviction."[280] In this respect, the right to competence has an especially long reach; other rights, such as the right to a jury trial and the right to be confronted with witnesses, do not extend to the sentencing phase.[281]

The question then becomes, precisely when does the right to competence end? Since there is no dispute that it extends to the penalty

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274. *Id.* at 1147–56.

275. *Id.* at 1134.

276. *Id.* at 1129.

277. *See* Drope v. Missouri, 420 U.S. 162, 181 (1975) ("Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial."); United States v. Rickert, 685 F.3d 760, 765 (8th Cir. 2012) ("[A] defendant must be competent at all stages of the prosecution, including sentencing."); United States v. Rahim, 431 F.3d 753, 759 (11th Cir. 2005) ("Whether the defendant is competent is an ongoing inquiry; the defendant must be competent at all stages of trial."); United States v. Collins, 949 F.2d 921, 924 (7th Cir. 1991) ("[U]nquestionably, 'the need for competency extends beyond the trial to the sentencing phase of a proceeding.'") (quoting United States v. Garrett, 903 F.2d 1105, 1115 (7th Cir.), *cert. denied*, 498 U.S. 905 (1990)); United States v. Pellerito, 878 F.2d 1535, 1544 (1st Cir. 1989) ("The need for competency survives trial and extends through the sentencing phase of a criminal proceeding."); Hall v. United States, 410 F.2d 653, 658, 658 n.2 (4th Cir.) (finding that an incompetent defendant may not be "effectively present" at sentencing and that passing sentence under such conditions might violate due process), *cert. denied* 396 U.S. 970 (1969); *see* FED. R. CRIM. P. 32(a)(1)(A), (C).

278. Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 831 (1968).

279. *Id.*

280. *Id.*

281. Spaziano v. Florida, 468 U.S. 447, 462–63 (1984) (holding that the right to jury trial does not apply at sentencing); Williams v. New York, 337 U.S. 241, 252 (1949) (holding that the sentencing judge may consider reports of probation officers and psychiatrists without affording any cross-examination).

phase, the issue may be reframed as whether deportation is also part of that penalty phase. The Supreme Court's decision in *Padilla* suggests that it is. In addition to describing deportation as "an integral part . . . of the penalty" that results from a conviction, *Padilla* went on to explain:[282]

> Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context. . . .
>
> Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence.[283]

In concluding that deportation is "not categorically removed from the ambit of the Sixth Amendment right to counsel,"[284] the Court recognized that there is no bright line between the criminal sentence and the deportation that routinely follows. The erosion of the boundary between these two penalty phases creates room for courts to find that the right to competence should span both proceedings. Even in cases in which the criminal process does not reach the penalty phase, however, the interlocking nature of criminal and immigration enforcement supports extending the right to competence to removal proceedings.

V. POTENTIAL CONCERNS WITH A RIGHT TO COMPETENCE IN REMOVAL PROCEEDINGS

While a substantive right to competence could prevent many forms of injustice, it also has some potential drawbacks. First, it may open the door to indefinite civil commitment. As criminal defense lawyers are well aware, a finding of incompetence may result in a long period of civil commitment when a guilty plea would have led to a much shorter jail sentence.[285] Second, recognizing a right to competence in removal proceedings may mean that an incompetent individual would be forced to forfeit a chance at being granted legal status by the immigration judge. There is no analog for this concern in the criminal context because defendants cannot gain any benefits through the criminal system; at best they can preserve the status quo. This Part explores both of these issues and suggests that these concerns may not be as significant as they initially appear.

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282. Padilla v. Kentucky, 599 U.S. 356, 364 (2010).

283. *Id.* at 365–66 (citations omitted).

284. *Id.* at 366.

285. *See generally* Jackson v. Indiana, 406 U.S. 715 (1972).

A. The Risk of Indefinite Civil Commitment

As noted above, if a criminal defendant is not competent and will not become competent in the foreseeable future, the state must either initiate civil commitment proceedings or release the defendant and dismiss the charges.[286] Defense attorneys would often prefer to avoid the risk of civil commitment by opting not to raise the issue of competency and accepting a conviction that will result in a relatively short sentence or perhaps just a fine.[287] Various scholars have debated whether defense attorneys may legally and ethically make these types of strategic decisions about whether to raise competency.[288] Some have argued that defense attorneys should be able to "waive" the right to competence, although the waiver of a constitutional right must normally be made "competently and intelligently."[289] These debates reflect the gravity of the threat of civil commitment in the criminal context. In the immigration context, however, the threat may not be as significant. There are at least two reasons why this would be true. First, many noncitizens in removal proceedings would not meet the standard for civil commitment, which requires a finding of dangerousness. Second, neither immigration judges nor DHS are currently

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286. *Id.*

287. *See, e.g.*, Dillard, *supra* note 90, at 465–66.

288. The American Bar Association ("ABA") standard provides that defense attorneys must raise the issue of incompetence whenever they have a "good faith doubt" that the defendant is competent to stand trial, but scholars have argued that attorneys may legally and ethically act more strategically in deciding whether to raise the issue. *See, e.g.*, Albert J. Diaz et al., ABA Criminal Justice Mental Health Standards 7-4.2(c) ("Defense counsel should move for evaluation of the defendant's competence to stand trial whenever the defense counsel has a good faith doubt as to the defendant's competence."). *But see* Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 Wis. L. Rev. 65, 67 (proposing that defense attorneys make case-by-case determinations regarding whether to raise competency concerns); Bonnie, *supra* note 58, at 564–65 (arguing that "*procedural* due process does not always require the defense attorney to bring her doubts about a defendant's competence to judicial attention"); John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 Am. U. L. Rev. 207, 235 (2008) (arguing that the ABA standard is "outrageous" and "not justified by history, necessity, or logic and undermines the integrity of the attorney-client relationship and, therefore, the integrity of the criminal justice system"); Dillard, *supra* note 90, at 465–66 (explaining that the category of "marginally competent defendants" creates room to confront the determinate criminal justice system rather than face indefinite civil commitment).

289. *See* Johnson v. Zerbst, 304 U.S. 458, 468 (1938) (holding that a criminal defendant may not waive right to counsel or plead guilty unless he does so "competently and intelligently"); Pate v. Robinson, 383 U.S. 375, 384 (1966) ("[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial."); Godinez v. Moran, 509 U.S. 389, 400 (1993) ("A finding that a defendant is competent to stand trial . . . is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel. In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary."). *But see* Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. Rev. 921, 959 (1985) (arguing that the defendant or defense counsel should be able to waive competency). Richard Bonnies criticized Winick's waiver argument as inconsistent with the Constitution and the interests of society. *See* Bonnie, *supra* note 58, at 542–48.

authorized to initiate civil commitment proceedings. This Subpart discusses each of these reasons in detail.

1. *The Assessment of Dangerousness*

The standard for civil commitment in most states requires showing, by clear and convincing evidence, that the individual poses a danger to self or others and that the danger is in the near future.[290] While the Supreme Court has never held that a finding of dangerousness is constitutionally required for civil commitment, it has explained that the mere presence of mental illness is not enough.[291] In the case of an incompetent defendant, the criminal charges that led to the initiation of civil commitment proceedings impact the assessment of dangerousness, even though the defendant was never convicted. Empirical research confirms that perceived criminal status affects how hospitals assess and treat patients.[292] Therefore, immigration lawyers representing mentally incompetent individuals with criminal records have good reason to be concerned about the risk of civil commitment. Currently, about half of the individuals subject to an ICE detainer have a criminal conviction, and fourteen percent are identified as posing a serious threat to public safety or national security.[293] If one removes from the analysis traffic violations and marijuana possession, which are likely to be viewed as non-dangerous crimes, two-thirds of detainers involve individuals with no criminal record.[294] Thus, many noncitizens, but far from all, will have a criminal record that clouds any assessment of dangerousness.

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290. Dora W. Klein, *When Coercion Lacks Care: Competency To Make Medical Treatment Decisions and Parens Patriae Civil Commitments*, 45 U. MICH. J.L. REFORM 561, 567 (2012) (tracing the history of the dangerousness requirement for civil commitment); Addington v. Texas, 441 U.S. 418, 425 (1979) (holding that the burden of proof for civil commitment is "clear and convincing evidence," which is an intermediate standard between "beyond a reasonable doubt" and "a preponderance of the evidence").

291. O'Connor v. Donaldson, 422 U.S. 563, 575 (1975) ("[T]here is . . . no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom."). The court did not decide "whether the State may compulsorily confine a nondangerous, mentally ill individual for the purpose of treatment." *Id.* at 573.

292. One study found that "forensic patients" (those who have been accused of crimes) spend four times as long in the hospital as "civil patients" and that the length of the hospitalization corresponds to the seriousness of the alleged crime. Robert D. Miller et al., *Judicial Oversight of Release of Patients Committed After Being Found Not Competent To Stand Trial or Not Guilty by Reason of Insanity in Violent Crimes*, 28 J. FORENSIC SCI. 839, 842 (1983). Another study found that individuals whose criminal charges had been dismissed based on a finding that they were not competent and not restorable to competency were treated differently for purposes of civil commitment than other members of the community whose conditions had simply deteriorated to the point of being committed. Gwen A. Levitt et al., *Civil Commitment Outcomes of Incompetent Defendants*, 38 J. AM. ACAD. PSYCHIATRY & L. 349, 357 (2010).

293. *Few ICE Detainers Target Serious Criminals*, TRAC (Sept. 17, 2013), http://trac.syr.edu/immigration/reports/330 (reporting on data from ICE for FY 2012 and the first four months of FY 2013).

294. *Id.* TRAC further reports that in Fiscal Year 2013, about fourteen percent of deportation filings were based on alleged criminal activity, but the fact that ICE did not charge a criminal ground

Of course, even those without a criminal record may be perceived as dangerous simply because of their mental illness. Numerous studies have shown that mentally ill individuals are stigmatized as dangerous, with factors such as the individual's race, age, and education affecting people's perceptions of danger.[295] The evidence regarding whether the mentally ill are actually more violent than members of the general population is mixed, but the consensus seems to be that there is a modest but statistically significant relationship between severe mental illness and violence.[296] Some studies have found that the relationship between mental illness and violence disappears when one takes into account substance abuse as a compounding factor, while other studies indicate that substance abuse only makes the relationship between severe mental illness and violence stronger.[297] Factors such as a history of violent victimization and exposure

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in other cases does not mean the respondents in those cases had no criminal history; ICE does not need to charge a criminal ground if the person is otherwise removable. *See U.S. Deportation Proceedings in Immigration Courts*, TRAC, http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php (last visited Apr. 24, 2014) (search "Fiscal Year" "2013" and "2014").

295. Nava R. Silton et al., *Stigma in America: Has Anything Changed?: Impact of Perceptions of Mental Illness and Dangerousness on the Desire for Social Distance: 1996 and 2006*, 199 J. NERVOUS & MENTAL DISEASE 361, 365 (2011) (finding, inter alia, that race, education, age, and religious practices affect perceptions of dangerousness). *See* Bruce G. Link et al., *Public Conceptions of Mental Illness: Labels, Causes, Dangerousness and Social Distance*, 89 AM. J. PUB. HEALTH 1328, 1330–31 (1999); Bernice A. Pescosolido et al., *The Public's View of the Competence, Dangerousness, and Need for Legal Coercion of Persons with Mental Health Problems*, 89 AM. J. PUB. HEALTH 1339, 1342 (1999); Richard A. Van Dorn et al., *A Comparison of Stigmatizing Attitudes Towards Persons with Schizophrenia in Four Stakeholder Groups: Perceived Likelihood of Violence and Desire for Social Distance*, 68 PSYCHIATRY: INTERPERSONAL & BIOLOGICAL PROCESSES 152, 154 (2005); M.C. Angermeyer et al., *Mental Disorder and Violence: Results of Epidemiological Studies in the Era of De-institutionalization*, 33 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY S1, S4 (1998). *See generally* J.C. Phelan & B.G. Link, *The Growing Belief that People with Mental Illness Are Violent: The Role of the Dangerousness Criterion for Civil Commitment*, 33 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY S7 (1998) (discussing the possibility that the adoption of the dangerousness criterion for civil commitment may have had the unintended consequence of increasing the stigma of mental illness in the United States).

296. *See, e.g.*, Richard Van Dorn et al., *Mental Disorder and Violence: Is There a Relationship Beyond Substance Use?*, 47 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 487, 487 (2011) (stating that the consensus indicates "a modest, yet statistically significant relationship between severe mental illness . . . and violence"); Arthur J. Lurigio & Andrew J. Harris, *Mental Illness, Violence, and Risk Assessment: An Evidence-Based Review*, 4 VICTIMS & OFFENDERS 341, 344 (2009) (finding that the best designed and most statistically sophisticated studies show a modest relationship between severe mental illness and violence).

297. *See* Eric B. Elbogen & Sally C. Johnson, *The Intricate Link Between Violence and Mental Disorder: Results from the National Epidemiologoical Survey on Alcohol and Related Conditions*, 66 ARCHIVES GEN. PSYCHIATRY 152, 155 (2009) (finding that serious mental illness was statistically unrelated to community violence unless comorbid substance abuse or dependence was involved); Jeffrey W. Swanson et al., *The Social-Environmental Context of Violent Behavior in Persons Treated for Severe Mental Illness*, 92 AM. J. PUB. HEALTH 1523, 1529 (2002) (finding that people with mental illness who had no other risk factors for violence, such as substance use, were no more likely to engage in assaultive acts than members of the general population). *But see* Van Dorn et al., *supra* note 296, at 501 (finding that substance abuse makes the relationship between severe mental illness and violence even stronger).

to community violence have also been found to affect propensity for violence among the mentally ill.[298] There is no dispute, however, that "most people with mental illness are not violent, [and] that most violent acts are committed by people who are not mentally ill."[299]

The research mentioned above provides several important lessons for immigration lawyers concerned about the possibility of civil commitment. First, if the respondent has been charged or convicted of a crime, especially a violent crime, the immigration lawyer should think carefully about how to approach questions of competency—much like a criminal defense lawyer. The risk of a dangerousness finding is likely reduced when the respondent has no criminal history. The lawyer must still consider, however, whether the client is likely to be considered a danger to self or others based on the client's particular mental disability and any compounding factors that may be present. The importance of these specific, contextualizing factors should not be underestimated. In some cases, the client may struggle with a mental illness or cognitive deficiencies that create no risk of dangerous behavior, while other cases will call for much more caution.

2. *The Limited Powers of Immigration Judges*

In addition, civil commitment is a more remote possibility in the removal context than the criminal context because the statutory powers of immigration judges differ from the powers of state court judges. Many state statutes *require* the court, district attorney, or medical institution to initiate involuntary commitment proceedings if the defendant is found incompetent and cannot be restored to competency within a reasonable period of time.[300] In fact, state statues often authorize the same judge who found the defendant incompetent to determine whether that defendant poses a danger to self or others for purposes of civil commitment.[301]

Immigration judges, on the other hand, have no such power. Immigration judges only have the authority delegated to them by the

298. Swanson et al., *supra* note 297, at 1528–29.

299. Van Dorn et al., *supra* note 296, at 487.

300. *See, e.g.*, KY. REV. STAT. ANN. § 504.110 (LexisNexis 2008) (providing that if a defendant is found incompetent to stand trial, the court "shall conduct an involuntary hospitalization proceeding" and, if there is a substantial probability that the defendant will gain competency in the foreseeable future, the court "shall commit" the defendant to a treatment facility for sixty days); W. VA. CODE ANN. § 27-6A-3(a) (1999) ("The court shall commit such defendant to a mental health facility under the jurisdiction of the department of health"); IND. CODE § 35-36-3-3(b) (2013) ("If a substantial probability [of restoring competency] does not exist, the state institution ... or the third party contractor shall initiate regular commitment proceedings."). Some states require initiation of civil proceedings only for certain enumerated crimes. *See, e.g.*, N.M. STAT. ANN. § 31-9-1.6(C) (1978) (dealing with commitment due to mental retardation); *see also* PAUL S. APPELBAUM & THOMAS G. GUTHEIL, CLINICAL HANDBOOK OF PSYCHIATRY AND THE LAW 137 (4th ed. 2007) (reviewing state commitment statutes).

301. *See* APPELBAUM & GUTHEIL, *supra* note 300.

Attorney General.[302] The limited matters over which they have jurisdiction are carefully delineated in the regulations.[303] These regulations provide that an immigration judge may determine removability, adjudicate certain applications for relief from removal, and, where appropriate, order withholding of removal under the INA or the Convention Against Torture.[304] Insofar as the regulations state that an immigration judge may also "take any other action consistent with applicable law and regulations as may be appropriate," the judge is still limited to matters over which she has been granted jurisdiction by the statute or regulations.[305] Thus, nothing in the regulations currently gives an immigration judge the authority to order an agency to initiate civil commitment proceedings.

The BIA has narrowly construed an immigration judge's regulatory grant of powers, finding, for example, that an immigration judge does not have authority to order discovery,[306] cannot adjudicate a type of application not specifically named in the regulations,[307] and cannot review DHS's decision to commence removal proceedings against a given individual.[308] Given that the INA and regulations make no mention of any authority to initiate a totally separate type of proceeding, such as civil commitment proceedings, that action would lie far outside the scope of an immigration judge's delegated powers.

Similarly, nothing in the statute or regulations gives DHS the authority to initiate civil commitment proceedings. The regulations give DHS only the power to "present on behalf of the government evidence material to the issues of deportability or inadmissibility and any other

302. *In re* Fede, 20 I. & N. Dec. 35, 35–36 (B.I.A. 1989) ("The Board and immigration judges . . . only have such authority as is created and delegated by the Attorney General.").

303. *See* Proceedings to Determine Removability of Aliens in the United States Rule, 8 C.F.R. § 1240.1(a)(1) (2013) (describing the matters over which an immigration judge has jurisdiction); Executive Office for Immigration Review Rule, 8 C.F.R. § 1003.1(b) (2013) (describing the matters over which the BIA has appellate jurisdiction); *see also In re* Hernandez-Puente, 20 I. & N. Dec. 335, 339 (B.I.A. 1991) (stating that immigration judges "have no jurisdiction unless it is affirmatively granted by the regulations"); *In re* Sano, 19 I. & N. Dec. 299, 300–01 (B.I.A. 1985); *In re* Zaidan, 19 I. & N. Dec. 297, 298 (B.I.A. 1985).

304. Executive Office for Immigration Review Rule, 8 C.F.R. § 1003.10(a)(1); *In re Hernandez-Puente*, 20 I. & N. Dec. at 339.

305. *See* Proceedings to Determine Removability of Aliens in the United States Rule, 8 C.F.R. § 1240.1(a)(1)(iv). An immigration judge could not, therefore, take action based on another source of law outside the INA and its regulations. *See, e.g.*, Padilla-Padilla v. Gonzales, 463 F.3d 972, 977 (9th Cir. 2006) (finding that an immigration judge did not have jurisdiction over questions of customary international law).

306. *In re* Henriquez Rivera, 25 I. & N. Dec. 575, 579 (B.I.A. 2011) (holding that the immigration judge erred in ordering DHS to provide the Immigration Court with an applicant's complete administrative record from United States Citizenship and Immigration Services ("USCIS")).

307. *In re Hernandez-Puente*, 20 I. & N. Dec. at 339.

308. DHS is given sole authority to determine whether to commence proceedings under the INA. *See In re* Lujan-Quintana, 25 I. & N. Dec. 53, 56 (B.I.A. 2009); *In re* G-N-C-, 22 I. & N. Dec. 281, 284 (B.I.A. 1998) ("[T]he decision to institute deportation proceedings involves the exercise of prosecutorial discretion and is not a decision which the Immigration Judge or the Board may review.").

issues that may require disposition by the immigration judge."[309] DHS, like any other administrative agency, is limited to enforcement of its statute. Agency action outside statutory limits is considered ultra vires and invalid.[310] Initiating civil commitment proceedings has nothing to do with enforcement of the INA and bears no relevance to issues of deportability and inadmissibility. As a practical matter, DHS also has limited financial resources. Because DHS does not even have the resources to pursue removal proceedings against everyone who lacks legal status, initiating an entirely different type of proceeding unrelated to immigration seems out of the question.[311] For all of these reasons, civil commitment poses less of a threat in the removal context than the criminal context.[312]

Although mentally incompetent individuals could be subject to regular immigration detention while their competence is being evaluated or while attempts are made to restore competence, the new DHS policy discussed above purports to prevent prolonged detention of these individuals by giving them the right to a bond hearing after six months.[313] Moreover, at least one federal appellate court—the Ninth Circuit—has curtailed the risk of prolonged detention by taking the more sweeping step of holding that detainees subject to mandatory detention and those classified as arriving aliens, over whom immigration courts traditionally had no bond jurisdiction, must be given a bond hearing after six months of detention.[314]

B. Forfeiting the Chance to Gain Legal Status

In a subset of cases, immigration lawyers may *want* to proceed despite a client's incompetence because they believe that the client is eligible for some form of relief and has a strong chance of being granted

309. Proceedings to Determine Removability of Aliens in the United States Rule, 8 C.F.R. § 1240.2(a).

310. Civil Aeronautics Bd. v. Delta Air Lines, Inc., 367 U.S. 316, 322 (1961) ("[T]he determinative question is not what the [agency] thinks it should do but what Congress has said it can do."); *id.* at 328 (finding that a federal agency cannot "do indirectly what it cannot do directly"); Gibas v. Saginaw Mining Co., 748 F.2d 1112, 1117 (6th Cir. 1984) ("[A]dministrative agencies are vested only with the authority given to them by Congress.").

311. The cost of civil commitment often exceeds the cost of criminal incarceration due to the need for higher numbers of staff and more medical care. For example, a study showed that the cost of civil commitment in Minnesota is $120,000 per year for a sex offender, which is three times the cost of criminal incarceration. Office of the Legislative Auditor, State of Minn., Civil Commitment of Sex Offenders x (2011), *available at* http://www.auditor.leg.state.mn.us/ped/pedrep/ccso.pdf. The annual cost of civil commitment programs in other states with secure facilities range from around $36,000 to $180,000 per year. *Id.*

312. It is, of course, possible that Congress could amend the INA to grant immigration judges or DHS the power to initiate civil commitment proceedings. Given how thinly resources are stretched within these agencies, however, it seems unlikely that Congress would be able to add this task, which is unrelated to immigration enforcement, to their workload.

313. Press Release, Dep't of Justice, *supra* note 5.

314. Rodriguez v. Robbins, 715 F.3d 1127, 1138 (9th Cir. 2013).

legal status. There are certain applications for relief that can only be granted in removal proceedings, such as various forms of cancellation of removal, which lead to lawful permanent residence.[315] Moreover, if the United States Citizenship and Immigration Services ("USCIS") has decided not to grant an affirmative asylum application, the immigration court obtains jurisdiction over the application.[316] If the judge grants asylum, the respondent becomes eligible to apply for lawful permanent residence one year later.[317] Applications for withholding of removal and protection under the Convention Against Torture may be adjudicated only by the immigration court.[318] While these forms of relief do not lead to lawful permanent residence, they do allow people to live and work legally in the United States.[319]

Attorneys who believe a case is so strong that they can win it despite the client's incompetence may not want the case to be terminated. Perhaps the country conditions are so horrific, the corroborating evidence so overwhelming, and the expert testimonies so persuasive that the lawyer feels confident that the respondent will prevail even if she does not testify or testifies poorly. Such cases may be rare but are certainly conceivable. For example, a survivor of genocide might prevail with little testimony, even if she is mentally incompetent. Recognizing a substantive right to competence need not, however, result in forfeiting relief. The unique nature of immigration proceedings, which expose the respondent to deportation yet also provide an opportunity to obtain legal status, requires a contextualized understanding of the right to competence. This contextualized understanding calls for bifurcating the issue of deportation from applications for relief or, at a minimum, paying close attention to the level of participation actually needed in a particular case,

315. *See* Proceedings to Determine Removability of Aliens in the United States Rule, 8 C.F.R. § 1240.1(a)(ii) (2013) (providing that the immigration judge shall have authority to determine applications under sections 240A(a) and (b) of the INA, codified as amended at 8 U.S.C. §§ 1229a(a)–(b), which pertain to cancellation of removal). The statutory language in section 1229(b)(a) and (b) provides that the "Attorney General may cancel removal" for certain individuals. 8 U.S.C. §§ 1229b(a)–(b) (2012). Congress delegated primary authority to administer the INA to the Attorney General, who, in turn, delegated that authority to various agencies within the Department of Justice, including the EOIR. The EOIR is composed of the Immigration Courts and the BIA. *See* STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 3 (5th ed. 2009).

316. *See* 8 C.F.R. § 1240.1(a)(ii); Procedures for Asylum and Withholding of Removal Rule, 8 C.F.R. § 1208.4(b) (2013); *see also Obtaining Asylum in the United States*, USCIS (Mar. 10, 2011), http://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states (describing the affirmative and defensive application processes).

317. Adjustment of Status of refugees and Aliens Granted Asylum Rule, 8 C.F.R. § 1209.2(a) (2013).

318. Proceedings to Determine Removability of Aliens in the United States Rule, 8 C.F.R. § 1240.1(a)(iii); Procedures for Asylum and Withholding of Removal Rule, 8 C.F.R. §§ 1208.16(a), 1208.17 (2013).

319. Control of Employment of Aliens Rule, 8 C.F.R. §§ 1274a.12(a)(10), (c)(8), (c)(18) (2009).

as well as the attorney's judgment about the client's ability to assist, when making competency determinations.

1. *Bifurcating Deportation from Applications for Relief*

The basic purpose of recognizing a substantive due process right to competence is to prevent an incompetent individual from being deported erroneously and unfairly, while also preserving the dignity of the removal process.[320] These reasons support a substantive right *not to be deported* while incompetent, but should not rule out being able to apply for legal status. The process of pursuing an application such as asylum or cancellation of removal does not raise questions about the respondent's moral understanding of wrongdoing and penalization. Moreover, the risk associated with an error is minimal because entry of a deportation order would still be prohibited if the application were denied. In other words, a denial would simply maintain the status quo.

Permitting an incompetent individual to pursue an application in immigration court does not really differ from allowing an incompetent individual to be a litigant in an ordinary civil case. Once deportation is off the table, the case loses its quasi-criminal component. Just as an incompetent individual can pursue a civil claim with an attorney, next friend, or guardian ad litem under Federal Rule of Civil Procedure 17(c), an incompetent individual should be permitted to pursue an application in immigration court with similar procedural due process protections. This type of bifurcated analysis should apply where the application can only be granted by the immigration court and not by UCSIS if the removal proceeding is terminated. As noted above, cancellation of removal, asylum (if USCIS has already made a determination), withholding of removal, and protection under the Convention Against Torture exemplify these types of applications.[321] Applications such as adjustment of status (the process of becoming a permanent resident), which could be filed with USCIS after the removal proceeding is terminated, would not require a bifurcated hearing.[322] The removal proceeding would simply be terminated based on mental incompetency and the adjustment application would then be filed with USCIS.

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320. *See Incompetency to Stand Trial*, *supra* note 8, at 458; Bonnie, *supra* note 58, at 543.

321. *See supra* notes 317–318 and accompanying text; *see also* 8 C.F.R. § 208.16(a) (stating that, with one exception, asylum officers shall not consider applications for withholding of removal, which must be decided by an immigration judge); *id.* § 208.16(b) (stating that individuals in removal proceedings may seek protection under the Convention Against Torture).

322. The immigration court has jurisdiction over an adjustment application when the applicant is in removal proceedings. 8 C.F.R.§ 1245.2(a) (2014). Otherwise, USCIS has jurisdiction over the application. *Id.* § 245.2 ("USCIS has jurisdiction to adjudicate an application for adjustment of status filed by any alien, unless the immigration judge has jurisdiction.").

The different burdens of proof for deportability and eligibility for relief support a bifurcated approach. The government bears the burden of establishing deportability by clear and convincing evidence.[323] With applications for relief, on the other hand, the respondent bears the full burden of showing eligibility for the relief sought.[324] The differences in these standards underscore how the deportability determination resembles a criminal proceeding, where the government brings the charge and bears the burden of proof. Applications for relief, on the other hand, remain purely in the hands of the respondent, as when a civil litigant seeks a remedy from the court. In short, immigration courts serve multiple purposes and make different types of decisions. Recognizing a right not to be deported while incompetent need not result in depriving noncitizens of the ability to pursue legal status in immigration court.

2. *Context-Specific Competency Evaluations*

While a bifurcated approach to competency would be the easiest way to handle concerns about applications for relief, another approach is to ensure that the competency determination takes into consideration "the actual need for client participation in a particular case" and gives special weight to the attorney's judgment regarding the respondent's ability to assist.[325] A context-specific assessment of competency is consistent with the standard in criminal cases, where competency evaluations should consider "whether the accused's ability to understand [and assist with] the process is proportional to the relative complexity and severity of the case."[326]

For example, a client who cannot give coherent testimony in a complicated asylum case may be deemed unable to assist and incompetent, but that same client may be found competent in a different type of case that relies primarily on documentary evidence and does not require much client participation.[327] This interpretation is consistent with *Indiana v. Edwards*, which instructs "judges to take realistic account of the particular defendant's mental capacities" in order to make a competency

323. INA § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A) (2014); Proceedings to Determine Removability of Aliens in the United States Rule, 8 C.F.R. § 1240.8(a).

324. *See, e.g.*, *In re* S-Y-G-, 24 I. & N. Dec. 247, 251–52 (B.I.A. 2007); *In re* Jean, 23 I. & N. Dec. 373, 386 (B.I.A. 2002).

325. Bonnie, *supra* note 58, at 564 (recommending approaches that "would substitute the attorney's informed judgment about the client's competence (in relation to the actual need for client participation in the particular case) for the formal evaluation and, possibly, adjudication, which are now thought to be required").

326. King, *supra* note 288, at 232 (citing ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-4.1, 7-5.1, 7-5.2, 7-5.4, *supra* note 288).

327. In the criminal context, "the same person at the same mental stage might be competent to proceed to trial in a drug possession case but be incompetent to stand trial in a complex conspiracy case." King, *supra* note 288, at 232.

determination that is "more fine-tuned" and "tailored to the individualized circumstances of a particular defendant."[328]

A competency determination should also recognize that the respondent's attorney is often in the best position to judge whether the respondent is able to assist given the specific nature of the case and the level of participation needed.[329] Attorneys usually spend far more time with their clients than outside evaluators, and the unique nature of their conversations with clients provides the most relevant experience for assessing the client's ability to assist in the manner that a given case requires. As the Supreme Court has acknowledged, "defense counsel will often have the best-informed view of the defendant's ability to participate in his defense."[330] Giving special weight to the attorney's judgment of the client's ability to assist also shows respect for the attorney-client relationship and the attorney's ethical duty of zealous representation. Construing competency in this way should create space for attorneys to proceed with a case when they believe that they can prevail despite the client's mental disabilities.

VI. ALTERNATIVES TO A RIGHT TO COMPETENCE

Those who remain wary of recognizing a right to competence because they think it goes too far, exposes clients to even greater dangers than deportation, or does not permit enough strategic flexibility may be interested in alternative ways to protect the interests of clients with serious mental disabilities. This Part sets forth three alternatives and explains the potential problems with each approach.

A. DISCRETIONARY TERMINATION BY IMMIGRATION JUDGES

One alternative is for immigration judges to decide on a case-by-case basis whether to terminate a case based on the respondent's incompetence.[331] Termination is superior to administrative closure, which simply involves taking a case off of the court's calendar temporarily

328. Indiana v. Edwards, 554 U.S. 164, 177–78 (2008). John King has argued that *Dusky* anticipates this interpretation of competency by "suggesting that the standard for competency could vary based upon the nature of the proceedings the defendant faces." King, *supra* note 288, at 232 (citing Dusky v. United States, 362 U.S. 402, 402–03 (1960) (per curiam)).

329. *See* Bonnie, *supra* note 58, at 546 (arguing that the attorney is in the best position to decide whether the defendant's competency should be evaluated and noting that this is not the same as saying that the attorney can "waive" a defendant's right not to be convicted while incompetent).

330. Medina v. California, 505 U.S. 437, 450–51 (1992) (holding that allocating the burden of proof to the defendant to show incompetence does not offend due process).

331. *See* Molly Bowen, Note, *Avoiding an "Unavoidably Imperfect Situation": Searching for Strategies to Divert Mentally Ill People Out of Immigration Removal Proceedings*, 90 WASH. U. L. REV. 473, 489–502 (2012) (proposing termination by immigration judges and prosecutorial discretion as two ways to avoid subjecting mentally ill people to removal proceedings).

because it would ensure that detained respondents are released.[332] Some of the plaintiffs in the *Franco-Gonzalez* litigation, for example, languished in detention for years even after having their cases administratively closed. While DHS's new policy should give all incompetent detainees the right to a bond hearing after 180 days, that does not mean that the bond will be granted.[333] A judge may still find that the respondent is a danger to the community and refuse to set a bond. In other cases, the judge may set a high bond and the respondent may not have the means to post it. Termination is the only way to ensure that prolonged detention does not occur. Termination also opens the door to applying for certain types of legal status that cannot be obtained while in removal proceedings.

The initial problem with this proposal for discretionary termination is that it remains unclear whether an immigration judge even has the authority to terminate a case unless DHS agrees.[334] *In re M-A-M-* mentions only administrative closure as a safeguard.[335] Moreover, although the BIA recently held that an immigration judge has the authority to administratively close a case over the opposition of DHS, it has never reversed its longstanding position that an immigration judge lacks the power to *terminate* over DHS's opposition.[336] As the Ninth Circuit

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332. For example, naturalization applications cannot be adjudicated while in removal proceedings. *See* Initiation of Removal Proceedings Rule, 8 C.F.R. § 1239.2(f) (2013); *In re* Hidalgo, 24 I. & N. Dec. 103, 107 (B.I.A. 2007).

333. *See* INA § 236(a) (Stating that an immigration judge may decide to continue to detain the noncitizen or set a bond of at least $1500); 8 C.F.R. § 1003.19 (providing that, in order to be released on bond, a criminal noncitizen must demonstrate that she is not a threat to national security, that she does not pose a danger to others, and that she is not a flight risk); *id.* § 1236.1(c)(8) (same); *see also In re* D-J-, 23 I. & N. Dec. 572, 576 (B.I.A. 2003) (finding that neither the INA nor the applicable regulations confer on the alien the right to release on bond).

334. The *Immigration Judge Benchbook* states that it remains an open question whether or not an immigration judge may terminate removal proceedings to assure fundamental fairness consistent with the Due Process Clause. *The Immigration Judge Benchbook: Mental Health Issues*, EXEC. OFF. FOR IMMIGR. REV., DEP'T OF JUSTICE (Apr. 2010), http://www.justice.gov/eoir/vll/benchbook.

335. *In re* M-A-M-, 25 I. & N. Dec. 474, 483 (B.I.A. 2011).

336. *See In re* Wong, 13 I. & N. Dec. 701, 703 (B.I.A. 1971) ("If enforcement officials of the Immigration and Naturalization Service choose to initiate proceedings against a deportable alien and prosecute those proceedings to a conclusion, the special inquiry officer under 8 CFR 242.8 has no discretionary authority to terminate."); *In re* Geronimo, 13 I. & N. Dec. 680, 681 (B.I.A. 1971) ("Where [deportation] proceedings have been begun, it is not the province of the special inquiry officer (or of this Board on appeal) to review the wisdom of the District Director's action in starting the proceedings, but to determine whether the deportation charge is sustained by the requisite evidence."); *In re* Vizcarra-Delgadillo, 13 I. & N. Dec. 51, 55 (B.I.A. 1968) (holding that the special inquiry officer had authority to terminate proceedings as "improvidently begun" in a case where termination was reasonable and both parties agreed to the motion to dismiss); *In re* Quintero, 18 I. & N. Dec. 348, 349–50 (B.I.A. 1982) (noting that termination is not a proper means to delay an alien's deportation); *In re* Singh, 21 I. & N. Dec. 427, 435 (B.I.A. 1996) ("As long as the [government] chooses to prosecute the applicant's proceedings to a conclusion, the Immigration Judges and this Board must order the applicant excluded and deported if the evidence supports such a finding."); *In re* Sanchez-Herbert, 26 I. & N. Dec. 43, 45 (B.I.A. 2012) ("[A]n Immigration Judge may terminate

explained decades ago, an "immigration judge is not empowered to review the wisdom of the INS in instituting the proceedings."[337] Rather, "[the judge's] powers are sharply limited, usually to the determination of whether grounds for deportation charges are sustained by the requisite evidence or whether there has been abuse by the INS in its exercise of particular discretionary powers."[338] The current regulation regarding termination of proceedings by an immigration judge mentions only termination "to permit the alien to proceed to a final hearing on a pending application or petition for naturalization."[339] Consequently, although some immigration judges have taken the initiative to terminate where the respondent is incompetent, many will not do so unless DHS agrees.[340]

Federal courts that disagree with the BIA's position on termination may look to a line of cases in the Second Circuit holding that removal proceedings should be terminated whenever regulatory violations occurred during the hearing that affect fundamental rights derived from the Constitution or federal statutes.[341] In reaching this conclusion, the

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proceedings when the DHS cannot sustain the charges or in other specific circumstances consistent with the law and applicable regulations").

337. Lopez-Telles v. INS, 564 F.2d 1302, 1304 (9th Cir. 1977) (finding that the BIA's decisions "plainly hold that the immigration judge is without discretionary authority to terminate deportation proceedings so long as enforcement officials of the INS choose to initiate proceedings against a deportable alien and prosecute those proceedings to a conclusion").

338. *See id.*; *see also* Yao v. INS, 2 F.3d 317, 319 (9th Cir. 1993) ("As the BIA points out, the IJ was not empowered to terminate or suspend proceedings once initiated.").

339. Initiation of Removal Proceedings Rule, 8 C.F.R. § 1239.2(f) (2013). This part of the regulation resembles former 8 CFR § 242.7, which provided a special inquiry officer the discretion to terminate a deportation proceeding only to permit a noncitizen "to proceed to a final hearing on a pending application or petition for naturalization," as long as the noncitizen established "prima facie eligibility for naturalization" and the case must involve "exceptionally appealing or humanitarian factors." *See In re* Wong, 13 I. & N. Dec. 701, 703 (B.I.A. 1971); *see also In re* Hidalgo, 24 I. & N. Dec. 103, 106 (B.I.A. 2007) (discussing when termination is appropriate based on a pending naturalization application). DHS, on the other hand, is empowered to cancel a notice to appear in a broad range of situations, including where the notice was "improvidently issued" or where "[c]ircumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interest of the government." *See* Initiation of Removal Proceedings Rule, 8 C.F.R. § 239.2(a)(6)–(7); *see also id.* § 1239.2(c); *In re* W-C-B-, 24 I. & N. Dec. 118, 122 (B.I.A. 2007) (stating that once jurisdiction vests with an immigration judge, a notice to appear cannot be cancelled by the DHS, which must instead move for dismissal of the matter on the basis of a ground set forth in the regulations).

340. For example, an immigration judge *sua sponte* terminated removal proceedings in the case of Ever Francisco Martinez-Rivas, a lawful permanent resident from El Salvador who was one of the plaintiffs in the *Franco-Gonzalez* litigation, after finding that his schizophrenia rendered him incompetent and made it impossible to go forward with the proceeding. *See* Franco-Gonzalez v. Holder, 767 F. Supp. 2d 1034, 1042, 1048 (C.D. Cal. 2010). Federal District Court Judge Dolly M. Gee indicated that the immigration judge had correctly terminated the proceedings. *Id.* at 1048 ("To her credit, the Immigration Judge terminated the removal proceedings after recognizing that she could not go forward with the proceeding given Martinez's mental condition.").

341. *See* Montilla v. INS, 926 F.2d 162, 166–70 (2d Cir. 1991) (applying the *Accardi* Doctrine, named after a Supreme Court decision that vacated a deportation order because the procedure did not conform to the regulations); Waldron v. INS, 17 F.3d 511, 518 (2d Cir. 1993) ("[W]hen a regulation is promulgated to protect a fundamental right derived from the Constitution or a federal statute, and the

Second Circuit reasoned that the "notion of fair play animating [the Fifth Amendment due process clause] precludes an agency from promulgating a regulation affecting individual liberty or interest, which the rule-maker may then with impunity ignore or disregard as it sees fit."[342] Applying similar logic, courts could find that removal proceedings should be terminated if the respondent is deprived of the statutory right to "a reasonable opportunity to examine the evidence against [her], to present evidence on [her] own behalf, and to cross-examine witnesses presented by the Government."[343] Because incompetent respondents cannot exercise these rights, their cases could then be terminated.

Another option would be for Congress to amend the INA—or for DOJ to amend the regulations—to specifically give immigration judges the authority to terminate based on incompetency or, more generally, to terminate over DHS's opposition. Once immigration judges have this authority, attorneys could seek termination for incompetent clients on a case-by-case basis. While this would allow attorneys to make strategic decisions about whether to pursue relief or request termination, it would also give judges enormous discretionary power. Some judges may be sympathetic and agree to termination, but others may refuse. Empirical research has documented huge variations in how often judges grant asylum cases, so it would not be surprising to find similar variations in other types of discretionary decisions.[344] Numerous judges have not hesitated to issue deportation orders against respondents with obvious and severe mental disabilities. Their perspective and practice may not change simply because they are now given the authority to terminate.

B. Prosecutorial Discretion by the Department of Homeland Security

Another alternative is for DHS to exercise prosecutorial discretion with individuals who have serious mental disabilities.[345] DHS could do this at several different points: ICE officials could decide not to issue a Notice to Appear when someone shows signs of incompetence; ICE could decide not to detain that individual; a trial attorney could decide to retract the Notice to Appear after realizing, perhaps in court, that the respondent may be incompetent;[346] or the trial attorney could agree to

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INS fails to adhere to it, the challenged deportation proceeding is invalid and a remand to the agency is required."); *see also* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954).

342. *Montilla*, 926 F.2d at 164.

343. INA § 240(b)(4)(B), 8 U.S.C. § 1229a(b)(4)(B) (2014).

344. *See generally* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295 (2007).

345. *See* Bowen, *supra* note 331, at 494–502 (discussing prosecutorial discretion as a way to divert mentally ill individuals from removal proceedings).

346. *See* Initiation of Removal Proceedings Rule, 8 C.F.R. § 239.2(a)(6)–(7) (2014) (allowing DHS to cancel a notice to appear after jurisdiction has vested with the immigration court where the notice

termination of the case by the immigration judge. A stronger version of this proposal is for DHS to establish a presumption that prosecutorial discretion should be exercised in favor of termination in cases in which the respondent is incompetent. The presumption would act as a policy that would guide all trial attorneys, instead of leaving it to each individual's discretion.

Exercising prosecutorial discretion in this way would be consistent with the immigration enforcement priorities set forth in the 2011 Morton Memos, which require ICE to prioritize who should be deported due to the agency's limited resources. These memos require ICE to consider "whether the person . . . suffers from severe mental or physical illness" and specifically mentions "individuals who suffer from a serious mental or physical disability" among the classes of people who "warrant particular care."[347] Exercising prosecutorial discretion would also conserve tremendous government resources. Under the new DHS/DOJ policy, pursuing the deportation of individuals with serious mental disabilities will become much more costly, requiring professional competency evaluations, competency hearings, and appointed representatives at the government's expense. Terminating these cases early on as soon as indicia of incompetence become apparent—or not filing charges in the first place if the person is known to have a serious mental disability—would conserve resources at a time when DHS and DOJ are both experiencing significant budget cuts.[348]

DHS may be reluctant to exercise prosecutorial discretion, however, if some of the negative factors mentioned in the Morton Memos are also present, such as cases involving "serious felons, repeat offenders, or individuals with a lengthy criminal history of any kind," or "individuals with an egregious record of immigration violations."[349] Individuals who

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was "improvidently issued" or where "[c]ircumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interest of the government"); *id.* § 239.2 (setting forth grounds on which the DHS may cancel a notice to appear prior to jurisdiction vesting with the immigration judge).

347. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge, and All Chief Counsel, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 4–5 (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

348. *Doing Business with the U.S. Marshals Service: Notice to Vendors Regarding Sequestration*, U.S. MARSHALS SERV., http://www.justice.gov/marshals/business (last visited Apr. 24, 2014) ("Within the Department of Justice, sequestration will result in a reduction of over $1.6 billion from the Fiscal Year 2013 funding level."); *Written Testimony for a House Committee on Homeland Security, Subcommittee on Oversight and Management Efficiency Hearing Titled "The Impact of Sequestration on Homeland Security: Scare Tactics or Possible Threat?"*, DHS MGMT. DIRECTORATE, U.S. CUSTOMS & BORDER PROT., & U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Apr. 12, 2013), http://www.dhs.gov/news/2013/04/12/written-testimony-dhs-mgmt-cbp-ice-and-tsa-house-homeland-security-subcommittee (mentioning $3.2 billion in budget reductions).

349. Memorandum from John Morton, *supra* note 347, at 5.

entered recently or have any criminal record might also be disfavored.[350] In cases where such negative factors are present, DHS could take the position that discretion is not warranted. So far, DHS has generally been reluctant to exercise discretion. After reviewing almost 300,000 cases from November 2011 to May 2012, DHS found only seven percent of the cases eligible for administrative closure, although the numbers could be greater going forward.[351] Relying on prosecutorial discretion is therefore likely to protect some but not all mentally incompetent individuals. The power to agree to termination or administrative closure in any given case would remain entirely in the hands of DHS. Recognizing a constitutional right to competence, on the other hand, would provide protection across the board.

C. A Reasonable Accommodation Approach

The reasonable accommodation theory that prevailed in *Franco-Gonzales* was an original and creative argument. While that argument has not yet been reviewed by the Ninth Circuit or raised in other federal courts, it prompts interesting questions about the relationships between reasonable accommodations and substantive due process. On the one hand, a reasonable accommodation approach seems to conflict with some of the arguments set forth above for why individuals in removal proceedings should have a right to competence. It suggests, for example, that the appointment of an attorney "level[s] the playing field," placing an incompetent individual on equal footing with competent individuals.[352] As discussed above, however, an attorney often cannot overcome the obstacles presented by incompetency. The reasonable accommodation approach is also limiting insofar as it suggests that only incompetent individuals in removal proceedings need attorneys to actualize their due process rights. This Article has explained why those who fail to meet a heightened standard of competence necessary for self-representation should be appointed attorneys. Moreover, some commentators have argued that due process requires *everyone* facing deportation to be

350. *Id.* at 4 (stating that length of presence in the United States is a relevant factor).

351. *See Prosecutorial Discretion: A Statistical Assessment*, Immigration Policy Ctr. (June 11, 2012), http://www.immigrationpolicy.org/just-facts/prosecutorial-discretion-statistical-analysis; *see also Prosecutorial Discretion Closed 1 in 4 Cases in Seattle, San Diego, Charlotte Immigration Courts*, TRAC (Aug. 12, 2013), http://trac.syr.edu/whatsnew/email.130812.html. While the national figure is seven percent, the percentage is much higher in certain immigration courts. *Id.*

352. In rejecting the defendants' argument that appointment of counsel would place mentally incompetent detainees in a significantly better position than competent noncitizens in removal proceedings, the court explained that providing a representative "is merely the *means* by which Plaintiffs may exercise the same benefits as other non-disabled individuals, and not the benefit itself." Franco-Gonzalez v. Holder, 2013 WL 3674492, at *7 (C.D. Cal. 2013). In other words, appointing the representative "serves only to level the playing field by allowing [mentally incompetent detainees] to meaningfully access the hearing process." *Id.* at *8.

appointed counsel, given the complexities of immigration law and the extraordinary difficulty that even the most competent individuals face when forced to navigate this system pro se.[353]

On the other hand, there are also ways that a reasonable accommodation approach may support the types of arguments articulated above. One of the Supreme Court's most important disability rights cases, *Tennessee v. Lane*, suggests that a substantive right can emerge from a conglomeration of procedural rights. *Lane* involved two paraplegic plaintiffs who could not access Tennessee courtrooms because the buildings lacked wheelchair access. One of the plaintiffs, George Lane, crawled up two flights of stairs to attend his first criminal hearing. When he refused to crawl or be carried up the stairs for the next hearing, he was jailed for failure to appear. The plaintiffs filed suit under Title II of the Americans with Disabilities Act, which closely resembles section 504 of the Rehabilitation Act, providing that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity."[354] The issue before the Supreme Court was whether Title II was invalid legislation because it abrogated states' sovereign immunity under the Eleventh Amendment.[355]

In finding no Eleventh Amendment violation, the Court reasoned that Title II sought to enforce not only the equal protection right against irrational discrimination, but also certain rights protected by the Due Process Clause, which are subject to more searching judicial review.[356] Specifically, the Court upheld Title II "as it applies to the class of cases implicating the fundamental right of access to the courts."[357] The Court extracted this fundamental right of access to courts from a conglomeration of rights, including: (1) the right of a criminal defendant to be present at all critical stages of a trial;[358] (2) the right of civil litigants to have a

353. *See, e.g.*, Beth J. Werlin, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393, 425 (2000). For a thorough review of the literature on appointment of counsel for noncitizens in removal proceedings, see Eagly, *supra* note 9.

354. Americans with Disabilities Act § 202, 28 U.S.C. § 12132 (2014). By comparison, section 504 of the Rehabilitation Act similarly provides: "No otherwise qualified individual with a disability in the United States, as defined in section 705 (20) of this title, shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." 29 U.S.C. § 794(a) (2012).

355. Tennessee v. Lane, 541 U.S. 509, 514–15 (2004)

356. *See id.* at 522–23.

357. *Id.* at 533–34.

358. *See id.* at 523 (quoting Faretta v. California, 422 U.S. 806, 819 n.15 (1975)); *see also* Snyder v. Massachusetts, 291 U.S. 97, 137–38 (1934) (holding that procedural due process protects a defendant's right to be present during the view of the scene of the crime, which is part of the trial).

"meaningful opportunity to be heard";[359] (3) the right of criminal defendants to a jury composed of a fair cross section of the community;[360] and (4) the right of members of the public to access criminal proceedings.[361] These four rights all implicate procedural due process, yet the court viewed them in their totality and derived a substantive right of access to courts. After identifying the fundamental right at stake, the Court concluded that Title II's abrogation of state sovereign immunity was justified.[362]

The decision in *Lane* indicates that constitutional due process concerns may underlie the duty to provide reasonable accommodations or, conversely, that the duty to accommodate helps preserve the due process right to a meaningful opportunity to be heard. Thus, a disability rights approach to mental incompetency is not completely distinct from a substantive due process approach.[363] While *Lane* involved physical barriers that deprived people of their fundamental right of access to

359. *See Lane*, 541 U.S. at 523 (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)); *see also Boddie*, 401 U.S. at 374 (holding that procedural due process "prohibit[s] a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages"); M.L.B. v. S.L.J., 519 U.S. 102, 107 (1996) (holding that Mississippi statutes requiring a mother to pay $2,352.36 in record preparation fees to pursue her appeal challenging termination of her parental rights violated due process and equal protection).

360. *Lane*, 541 U.S. at 523 (citing Taylor v. Louisiana, 419 U.S. 522, 530 (1975)) (holding that women as a class may not be excluded from jury service or given automatic exemptions based solely on sex if the consequence is that criminal juries are male). In finding that the fair cross section requirement is an essential component of the Sixth Amendment right to a jury trial, the court drew on cases involving due process and equal protection challenges to jury-selection systems. *Taylor* effectively overruled *Hoyt v. Florida*, 368 U.S. 57, 68–69 (1961), which had rejected the contention that a system like Louisiana's deprived a defendant of due process and equal protection. *See* Payne v. Tennessee, 501 U.S. 808, 828, 828 n.1 (1991) (recognizing that *Taylor* effectively overruled *Hoyt*); *see also* Peters v. Kiff, 407 U.S. 493, 502 (1972) ("These principles compel the conclusion that a State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States."); Berghuis v. Smith, 130 S. Ct. 1382, 1396 (2010) (Thomas J., concurring) (quoting Duren v. Missouri, 439 U.S. 357, 372 (Rehnquist, J., dissenting)) (opining that *Taylor* rests less on the Sixth Amendment than on an "amalgamation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment").

361. *Lane*, 541 U.S. at 523 (citing Press-Enter. Co. v. Sup. Ct. of Cal., Riverside, 478 U.S. 1, 7 (1986)). While *Press-Enterprise* held that the First Amendment protects the public's right to access criminal proceedings, due process concerns were also implied. The Court observed, "one of the important means of assuring a fair trial is that the process be open to neutral observers." *Press-Enter. Co.*, 478 U.S. at 7. The Court also characterized the right to an open public trial as "a shared right of the accused and the public, the common concern being the assurance of fairness." *Id.*

362. The Court found that Title II's requirement of program accessibility was congruent and proportional to its object of enforcing the right of access to the courts. In other words, Congress had the authority under section 5 of the Fourteenth Amendment to abrogate state sovereign immunity in order to enforce that Amendment's substantive guarantees. *Lane*, 541 U.S. at 533–34.

363. Jessica L. Roberts, *An Area of Refuge: Due Process Analysis and Emergency Evacuation for People with Disabilities*, 13 VA. J. SOC. POL'Y & L. 127, 147 (2005) (arguing that a substantive due process model will come closer than an equal protection model to achieving the equality of treatment for disabled persons intended by Congress in enacting the Americans with Disabilities Act).

court, substantive due process could also be invoked to support a finding that mental barriers—such as incompetency—deprive individuals of their right to a reasonably fair removal proceeding. In short, thinking about the rights of mentally incompetent respondents through the lens of disability rights might have certain limitations, but it might also open the door to novel ways of understanding the relationship between procedural and substantive due process. This approach therefore merits further thought and exploration.

CONCLUSION

Until now, discussions about the rights of noncitizens with serious mental disabilities have been limited to procedural due process concerns, mainly emphasizing the need for appointed counsel. This Article hopes to add an important new dimension to the debate by arguing for a substantive due process right to competence in removal proceedings. If federal courts are not willing to recognize this constitutional right, then Congress could create an analogous statutory right. The bottom line is that the same reasons that underlie the prohibition against trial of criminal defendants provide strong support for prohibiting the deportation of incompetent individuals. Courts should not turn a blind eye to these compelling reasons simply because removal proceedings are technically labeled civil. Rather, they should consider the reality of what is at stake, as many states have done in the context of juvenile adjudications.

Recognizing a right to competence in removal proceedings would impact only a small fraction of cases. Thus, the DHS need not fear that recognizing this right would obstruct immigration enforcement. For many individuals with mental disabilities, procedural due process protections will suffice. These procedural protections can be tailored based on the nature and severity of a given individual's disabilities. At least two groups, however, require special attention in order to preserve the fairness, accuracy, and dignity of the proceedings. First, those who are legally incompetent under the *Dusky/Drope* standard should never be subjected to removal proceedings. Second, those who fail to meet a higher standard of competence necessary for self-representation should not be subjected to removal proceedings unless they are appointed counsel. While discretionary termination and prosecutorial discretion are alternatives, they fail to provide across-the-board protections for mentally incompetent individuals. Moreover, a disability rights framework imparts new inspiration and invites further exploration but does not recognize that simply providing representation to a respondent who cannot assist fails to resolve concerns about the fairness and accuracy of the proceedings. In short, only a two-tiered right to competence will protect the most vulnerable subset of individuals from potentially errant deportations.