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Articles

ACCOMMODATING INCOMPETENCY IN IMMIGRATION COURT

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ABSTRACT—In criminal law, an individual must be deemed competent to stand trial, yet our immigration courts routinely order the deportation of incompetent noncitizens. A removal proceeding against a noncitizen—where an outcome of deportation often risks life-threatening harm—continues apace even if the noncitizen has been deemed incompetent by the immigration judge. In place of halting proceedings, the immigration judge imposes "safeguards" pursuant to a provision of the immigration code that neither defines nor explains the term. In practice, judges' application of the term "safeguards" is often absurd. The implications of continuing a proceeding against a noncitizen with a disability affecting competency are significant. Unlike criminal defendants, noncitizens facing removal carry the burden for much of the proceeding, so their participation and understanding is critical to having a fair shot. Yet noncitizens are routinely ordered deported even though they do not understand or meaningfully participate in removal proceedings.

By unifying a small but rich body of literature from immigration, disability, and criminal competency scholarship and cases, this Article closes a gap in understanding how the machinations of the immigration legal system result in the removal of noncitizens whose disabilities render them incompetent. It takes stock of the immigration agency's failure to answer foundational questions about how its competency framework should work. This shortcoming results in what I call "safeguards theater," in which the immigration courts push proceedings forward despite clear indications the noncitizen did not understand.

In place of the current practice, this Article instead argues for the application of disability law. Federal disability law guarantees a person with a disability meaningful access to immigration court, so a removal proceeding after a competency determination must be accessible to the noncitizen. This Article's proposal would curtail the immigration courts' reliance on safeguards theater and allow noncitizens meaningful judicial review of competency issues. Finally, the Article questions whether a person with a disability affecting competency should undergo removal proceedings at all.

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INTRODUCTION

Everod Reid, a legal permanent resident—a so-called "green card" holder[1]—in the United States for more than thirty-five years, was detained by U.S. Immigration & Customs Enforcement (ICE). He was placed in removal proceedings, where an immigration judge would decide whether he could stay in the United States. He was one of the lucky few noncitizens in removal proceedings who had a lawyer; however, his long history of untreated schizophrenia caused him to be so paranoid of his counsel he refused to talk to her. Despite this breakdown, and the holes it left in the lawyer's understanding of her client's life, the immigration judge decided that the best course of action was to literally remove their robe—perhaps in an attempt to appear less intimidating—and proceed with the case despite knowing he was likely incompetent, a decision a reviewing federal judge apparently found baffling. The judge ordered Mr. Reid removed.[2] But what if he had been entitled to reasonable accommodations? Indeed he was, but this entitlement did not factor into the judge's analysis.

Reid's story highlights a fundamental tension in the American legal system. While American criminal law has for centuries been clear that a

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[1] *See* IRENE GIBSON, U.S. DEP'T OF HOMELAND SEC., U.S. LAWFUL PERMANENT RESIDENTS: 2021 (Apr. 2021), https://ohss.dhs.gov/sites/default/files/2023-12/2022_0405_plcy_lawful_permanent_residents_fy2021v2.pdf [https://perma.cc/4Q35-7XKZ]. Despite the name, nothing about lawful permanent residence (or "LPR status") is in fact permanent, as the cases discussed at length in this Article demonstrate. Immigration law subjects people admitted to lawful status, such as LPR status, to "deportability" primarily based on criminal convictions at any time after their admission, including decades later. *See* Immigration and Nationality Act (INA), Pub. L. No. 117-360, § 237(a)(2), 66 Stat. 163 (codified as amended at 8 U.S.C. § 1227(a)(2)). Several scholars have persuasively argued that the deportability grounds and their disregard for a noncitizen's length of time in the United States are a form of post hoc social control. *See, e.g.*, Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1084 (2021) (describing "post-entry social control" as a goal of deportation). *See generally* Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171 (2018) (describing the inclusion of certain criminal grounds of deportability based on their association with certain racial or cultural communities). A note about citations to the statute: Immigration practitioners, immigration judges, and the Board of Immigration Appeals (BIA) all generally cite to the INA and its numbering of the provisions of the statute. Federal courts reviewing agency determinations (both by immigration judges and the BIA) generally cite to the codification of the INA in the U.S. Code at Title 8. This Article will primarily cite to the INA but where appropriate, or where citing federal court decisions, will use the U.S. Code citation.

[2] These are the facts of *Reid v. Garland*, as gathered from oral argument. Oral Argument at 20:41, Reid v. Garland, No. 20-3324, 2024 WL 4674317 (2d Cir. Nov. 5, 2024), https://ww3.ca2.uscourts.gov/decisions/isysquery/fb5e04b8-15bd-496f-86e0-c1358556cafd/571-580/list/ [https://perma.cc/S2SN-3MDW]. There is some indication in the record that Mr. Reid's attorney may have requested the judge remove their robe as a safeguard. However, immigration judges have complete discretion to implement whatever safeguards they see fit. *See In re* M-A-M-, 25 I. & N. Dec. 474, 481–82 (B.I.A. 2011). The *Reid* decision came down only a few days before the publication of this Article and thus is not fully described herein. *See Reid*, 2024 WL 4674317, at *1.

defendant must be competent to stand trial,[3] American immigration law has long been muddled on whether—and what degree of—competency is required for deportation proceedings in immigration court.[4] This is true even when the consequences of deportation are as serious as great risk of physical harm or death. Immigration law presumes that everyone is able-bodied, healthy, and mentally well,[5] but it is easiest to define competency in terms of a disability that affects it: most people are not competent to participate in a legal process if they have a disability that adversely impacts their ability to understand the proceeding or to carry out certain functions within it, such as consulting with counsel or presenting evidence.[6]

Immigration courts' jumbled conception of competency stems from a few overlapping sources: the ableism running through American immigration law[7] and American legal processes;[8] the civil, as opposed to criminal, nature of immigration proceedings;[9] and the immigration agencies'

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[3] Fatma E. Marouf, *Incompetent but Deportable: The Case for a Right to Mental Competence in Removal Proceedings*, 65 HASTINGS L.J. 929, 940 (2014) ("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.'" (quoting 97 F. 937, 941 (6th Cir. 1899))).

[4] *See* Mimi E. Tsankov, *Incompetent Respondents in Removal Proceedings*, IMMIGR. L. ADVISOR (Exec. Off for Immigr. Rev., Washington, D.C.), Apr. 2009, at 2, https://www.justice.gov/sites/default/files/eoir/legacy/2009/07/24/vol3no4.pdf [https://perma.cc/B7CV-K7LM] (laying out case law from 2009 and earlier on competency in immigration court). Although the court processes which produce a deportation determination are formally known as "removal proceedings," this Article will refer to them interchangeably as removal proceedings and deportation proceedings, both because the functional outcome is deportation and because historically they were also known as deportation proceedings. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009–546.

[5] I use the term "ableism" to embody these presumptions and preferences in immigration law. *See* Ashley Eisenmenger, *Ableism 101*, ACCESS LIVING (Dec. 12, 2019), https://www.accessliving.org/newsroom/blog/ableism-101/ [https://perma.cc/VKR4-YLYL].

[6] Marouf, *supra* note 3, at 940–41. Most disabilities affecting competency are mental health or cognitive disabilities, including intellectual disability. Note that not every mental health or cognitive disability will rise to the level of incompetency in a legal setting, because the standard lays out that incompetency can be context- or task-specific. *Id*. at 989–90.

[7] Nermeen Arastu & Qudsiya Naqui, *Standing on Our Own Two Feet: Disability Justice as a Frame for Reimagining Our Ableist Immigration System*, 71 UCLA L. Rev. 236, 240–42 (2024).

[8] *Supreme Court Upholds Applicability of Title II to States:* Tennessee v. Lane, ANDREWS DISABILITY LITIG. REP., June 3, 2004, at 2, 1 No. 8 ANDISLR (West) 2 ("Justice Stevens noted the history of discrimination against those with disabilities Title II was attempting to remedy, including the refusal to allow certain individuals to vote and/or marry, the institutionalization of some individuals for no reason, and the refusal to allow some to participate as jurors."); Tennessee v. Lane, 541 U.S. 509, 513–15 (2004) (finding a courtroom that was physically inaccessible to a person with a mobility disability to be unlawfully discriminatory).

[9] *See In re* M-A-M-, 25 I. & N. Dec. 474, 478 (B.I.A. 2011) ("[I]mmigration proceedings are civil in nature . . . .").

presumption of competency for noncitizen respondents[10] are all likely culprits. Moreover, scholars and other commentators have aptly characterized the immigration legal process as a deportation machine.[11] Immigration courts favor form over substance in service of ruling against most immigrants who appear before it.[12] Continuing with proceedings against respondents deemed incompetent allows the machine to keep humming along.[13]

In *In re M-A-M-*, however, the Board of Immigration Appeals (BIA)[14] recognized the need for an immigration judge to confirm that a respondent in immigration court is competent to proceed and, if they are not, to take certain steps in the form of "safeguards."[15]

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[10] *Id*. at 477. There has been significant scholarly critique of the process for rebutting this presumption, particularly the sources of information immigration judges do—or do not—use for competency determination. *See, e.g.*, Sarah Sherman-Stokes, *Sufficiently Safeguarded?: Competency Evaluations of Mentally Ill Respondents in Removal Proceedings*, 67 HASTINGS L.J. 1023, 1057–63 (2016) (critiquing immigration courts' failure to provide competency evaluations by medical professionals). The noncitizen hauled into court in a removal proceeding is called the "respondent." 8 C.F.R. § 1001.1(r) (2023).

[11] ADAM GOODMAN, THE DEPORTATION MACHINE: AMERICA'S LONG HISTORY OF EXPELLING IMMIGRANTS 3, 6 (Karen Carter, Eric Crahan & Thalia Leaf eds., 2020).

[12] *See* Sherman-Stokes, *supra* note 10, at 1029 ("Feeding this deportation machine has been the rise of extended border control, increased expedited removal, and expanded mandatory detention."); Cházaro, supra note 1, at 1074–75; GOODMAN, *supra* note 11, at 6. Recently, the Ninth Circuit commented that the immigration judge and the BIA's behavior in the instant case was in service of the principle "deport people at any cost." Ontiveros Lozano v. Garland, No. 22-1468, 2023 WL 8368876, at *2 (9th Cir. Dec. 4, 2023).

[13] This is especially the case for noncitizen respondents with criminal records, for whom immigration consequences are particularly harsh. *See, e.g.*, AM. IMMIGR. COUNCIL, AGGRAVATED FELONIES: AN OVERVIEW (Mar. 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/aggravated_felonies_an_overview_0.pdf [https://perma.cc/2MQQ-2X7M] (describing the results of an aggravated felony conviction, including deportation without a removal hearing and ineligibility for asylum). The BIA has insinuated that these respondents should not benefit from the processes designed to vindicate the rights of noncitizens with disabilities affecting their competency. *See infra* notes 261–264 and accompanying text.

[14] The BIA is the appellate body that hears appeals of right from immigration judge decisions. *See Board of Immigration Appeals*, EXEC. OFF. FOR IMMIGR. REV. (May 14, 2024), https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/3H5R-REDW]. This Article uses "immigration court" to describe the trial-level process happening in any given courtroom before any given immigration judge. Together, immigration courts and the BIA constitute the immigration court system as a whole housed in the Executive Office of Immigration Review (EOIR), a subagency of the U.S. Department of Justice (DOJ). *See About the Office*, EXEC. OFF. FOR IMMIGR. REV. (last updated June 17, 2024), https://www.justice.gov/eoir/about-office [https://perma.cc/4RCU-2VYG].

[15] *In re* M-A-M-, 25 I. & N. Dec. 474, 479 (B.I.A. 2011) ("In cases involving [noncitizens] with issues of mental competency, Immigration Judges will need to consider whether there is good cause to believe that the [noncitizen] lacks sufficient competency to proceed without safeguards."). This Article will use the term noncitizen instead of "alien," even where that term appears in the statute. The term "alien" is dehumanizing.

The term "safeguard" appears in the Immigration and Nationality Act (INA), the governing immigration statute, and was included in its original drafting in 1952.[16] But the legislative history on its inclusion is paltry; the term's inclusion merited only one comment from one senator, who broadly alluded to notions of protection for the noncitizen.[17] Congress's repeated revisions of the immigration law have not included any definitional clarification or illumination of its intent to include the term in the statute.[18] So the meaning of a safeguard in the immigration court context[19] has never been satisfactorily spelled out—not in the statute, accompanying regulations, nor in agency or federal case law. The role it is supposed to play for a noncitizen respondent lacking competency also has never been laid out.[20]

The consequences of failing to contend with what a "safeguard" is have been predictably dire for noncitizens in removal proceedings. Often, in removal cases where immigration judges made a finding of incompetency and imposed "safeguards," such judges engage in what this Article will call "safeguards theater." Safeguards theater occurs when the immigration judge disregards the individual circumstances of a disabled respondent in their

[16] Immigration and Nationality Act, Pub. L. No. 414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

[17] 82 CONG. REC. 5418 (1952) (statement of Sen. Paul Douglas).

[18] Congress amended the INA several times between 1965 and the early 2000s. *See, e.g.*, Immigration and Nationality Act Amendments of 1976, Pub L. No. 94-571, 90 Stat. 2703; Immigration and Nationality Act Amendments of 1978, Pub. L. No. 95-417, 92 Stat. 917; Refugee Act of 1980, Pub L. No. 96-212, 94 Stat. 102; Immigration Reform and Control Act of 1986, Pub L. No. 99-603, 100 Stat. 3359; Immigration Act of 1990, Pub L. No. 101-649, 104 Stat. 4978; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub L. No. 104-208, 110 Stat. 3009; REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302. A close look at the legislative record for each of those reforms reveals no discussion of competency or safeguards. Intriguingly, there was a push to amend the immigration statute to provide for competency evaluations in the early 2000s, but that push did not succeed. *See* Tsankov, supra note 4, at 2 (discussing 155 CONG. REC. H1762 (daily ed. Feb. 23, 2009)).

[19] Safeguards are widely understood in American legal discourse generally—they appear in everything from financial antifraud legislation to medical privacy rules. *See, e.g.*, *FTC Safeguards Rule: What Your Business Needs to Know*, FED. TRADE COMM'N (May 2022), https://www.ftc.gov/business-guidance/resources/ftc-safeguards-rule-what-your-business-needs-know [https://perma.cc/QV53-WMGR] (requiring financial institutions to take steps to safeguard customer information); OFF. FOR C.R., U.S. DEP'T OF HEALTH & HUM. SERVS., SAFEGUARDS, https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/special/healthit/safeguards.pdf [https://perma.cc/YQB3-99QP] (requiring entities subject to the Health Insurance Portability and Accountability Act (HIPAA) to implement safeguards for protected health information). And it is widely understood to be rooted in the long-standing legal concern with sufficient process. In these contexts, unsurprisingly, safeguards are extremely process-oriented and often quite rote.

[20] Notably, the concept of safeguards is largely absent from many areas of law that center people with disabilities. An exception to this is the IDEA Act, which governs special education, and which provides rote, process-oriented safeguards to the *parents* of the student with a disability to ensure that the parents are informed and can protect their child's interests. *See* Individuals with Disabilities Education Act, 20 U.S.C. § 1414. This is fundamentally different from a safeguard offered directly to a disabled person, as seen in immigration court.

courtroom in favor of implementing safeguards potentially unrelated to the nature of the respondent's disability in order to move the proceeding forward. In other words, the proceedings take on attributes of a charade.

Safeguards theater has led both to bizarre results, such as an immigration judge removing her robe for a respondent whose paranoid schizophrenia rendered them incapable of communicating with counsel,[21] and to unremarkable ones, such as an immigration judge committing to comply with the law by reading the respondent's filings in court, despite critical information gaps in that file due to an inability to communicate with counsel.[22] The immigration courts' engagement in safeguards theater generally does not redound to the disabled respondent's favor—in those examples, the judges ordered longtime U.S. residents removed, subjecting them to permanent exile to countries where they may be unable to access care and may be harmed. Moreover, the reviewing court upheld the theater on appeal, as often happens for respondents with these profiles.[23]

A small but cogent body of prior scholarship has rightly focused on the shortcomings of immigration judges' approach to assessing competency pursuant to *In re M-A-M-*,[24] the problematic and anomalous fact that an immigration court proceeds even when a respondent before it is deemed incompetent,[25] and the programs that appoint legal counsel as a safeguard to those deemed incompetent in immigration court.[26] However, prior research has yet to hone in on a critical aspect of the competency framework set out in *In re M-A-M-*: the steps an immigration judge must take to implement "safeguards" before moving forward against a noncitizen determined not to be sufficiently competent.

This Article thus offers two primary contributions. First, it fills a gap in the literature by investigating the animating principle behind the foundational statutory "safeguards" language and the definitions subsequently given to the term by the BIA. The lack of clarity about the term is the seed from which grows the entire tangled thicket of how to address a noncitizen's disability affecting their competency in immigration court.

Second, it advances an argument for using a disability lens to clarify the meaning of the term and empower noncitizen respondents with competency-

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[21] Reid v. Garland, No. 20-3324, 2024 WL 4674317, at *12 (2d Cir. Nov. 5, 2024).

[22] *See* Benedicto v. Garland, 12 F.4th 1049, 1058–59, 1061 (9th Cir. 2021).

[23] *Id.* at 1053.

[24] For example, Professor Sarah Sherman-Stokes notes the lack of evaluations by mental health professionals in immigration court, in contrast to the competency evaluation processes available in criminal court systems. Sherman-Stokes, *supra* note 10, at 1043–47.

[25] Marouf, *supra* note 3, at 963–64.

[26] Amelia Wilson, Franco *I Loved: Reconciling the Two Halves of the Nation's Only Government-Funded Public Defender Program for Immigrants*, 97 WASH. L. REV. ONLINE 21, 42–50 (2022).

affecting disabilities to remain in the driver's seat in their cases. Little in scholarly literature or immigration case law evinces recognition that the competency inquiry in immigration court is, at its core, a disability inquiry.[27] The immigration courts and the BIA are subject to federal disability law, yet the requirements of that law are missing from any discussions of competency—or the subsequent safeguards put forth—by the immigration courts, the BIA, or reviewing federal courts.[28] This omission is problematic—it opens the door to incoherence, enabling safeguards theater by the immigration courts and the BIA.

Accordingly, this Article proceeds in four Parts. Part I begins by briefly outlining the competency framework in criminal court before explaining how immigration proceedings function, particularly for a noncitizen respondent who has a disability affecting competency. Part II focuses on the origin of the term "safeguard" in the modern immigration statute, subsequently discussing how immigration courts and the BIA and federal courts reviewing its decision-making have employed the term. The cases reveal at least three different roles for a safeguard conceptualized by the BIA and a striking lack of consensus around which role should be given primacy. It is, in a word, incoherent. Part III then applies a disability lens to these various conceptualizations of safeguards, and, concluding that only one comports with immigration courts and the BIA's disability law obligations, recommends steps they can take to strengthen its commitment to disability rights and cease engaging in safeguards theater. Finally, Part IV challenges assumptions underlying the competency framework, contributing to the scholarly discourse on (1) whether noncitizens with disabilities affecting competency should ever undergo deportation at all and (2) the ableism at the intersection of criminal and immigration law resulting in a double punishment of noncitizens with disabilities affecting their competence.

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[27] Marouf, *supra* note 3, at 998. Professor Fatma Marouf's article briefly discusses a disability analysis before inviting someone to take it up. Some criminal law scholars have explored disability and the ableism at play in competency determinations in the criminal legal system but have not focused on the intersection of disability law and criminal law in that context, as this Article does. *See, e.g.*, Michael L. Perlin, *On "Sanism*,*"* 46 SMU L. REV. 373, 400–01 (1992) (arguing that disability biases and stereotypes impact competency determinations); Jamelia N. Morgan, *Why Disability Studies in Criminal Law and Procedure?*, 71 J. LEGAL EDUC. 124, 125–26 (2021) (arguing that disability studies provide a crucial lens with which to analyze criminal law and criminal procedure).

[28] *See* RUBY RITCHIN, HUM. RTS. FIRST, "YOU SUFFER A LOT": IMMIGRANTS WITH DISABILITIES FACE BARRIERS IN IMMIGRATION COURT 3 (July 19, 2023), https://humanrightsfirst.org/library/you-suffer-a-lot-immigrants-with-disabilities-face-barriers-in-immigration-court [https://perma.cc/X5KF-H7EL].

I. OVERVIEW OF COMPETENCY IN IMMIGRATION PROCEEDINGS AND CRIMINAL PROCEEDINGS

To understand the way in which the term "safeguard" fits into the established competency framework in immigration court, it is helpful to first understand the removal process itself and the operation of the *M-A-M-* competency framework within it. Similarly, as a point of comparison, it is helpful to understand how competency issues are addressed in criminal proceedings. This Part will lay those foundations for understanding. Section I.A will discuss competency in immigration court, while Section I.B will discuss the analogous determination in criminal court. Section I.C will compare the two.

A. Competency in Immigration Court

This Section provides the necessary detailed foundation for understanding how competency is adjudicated in immigration court. First, it provides an overview of a removal proceeding. Then, it provides a historical accounting of how the modern competency framework developed, along with a high-level overview of that framework. Finally, it briefly explains the appeals process for a noncitizen respondent before describing an innovative federal case that systematically scrutinized the competency and safeguards framework. These Subsections collectively provide the context in which the safeguards case law has developed.

1. Fundamentals of Removal Proceedings

In modern American immigration law, legal proceedings[29] determine whether a noncitizen who is present in the United States—with or without

[29] The same 1952 legislation that injected the word "safeguards" into immigration law also created "special inquiry officers," the predecessors of immigration judges, and including a hearing clause. Immigration and Nationality Act, 8 U.S.C. § 1252(b); *see also* Note, *The Special Inquiry Officer in Deportation Proceedings*, 42 VA. L. REV. 803 (1956). For decades, exclusion, admission, and deportation decisions were made by immigration inspectors located at ports of entry such as Angel Island in California. *See, e.g.*, Yamataya v. Fisher, 189 U.S. 86, 87 (1903). In *Yamataya*, the judiciary scrutinized an inspector's decision through Ms. Yamataya's filing of a habeas corpus petition, and ultimately upheld it in an early instance of the immigration system's privileging of form over substance. *Id.* at 87–88, 102. *See also* Pooja R. Dadhania, *Language Access and Due Process in Asylum Interviews*, 97 DENVER L. REV. 707, 708–09 (2020).

LPR status[30]—will be deported from the United States.[31] Known at various times as removal proceedings, deportation proceedings, or exclusion proceedings, these proceedings have long been considered civil and administrative in nature—the immigration judges determining whether someone can remain in the United States are administrative adjudicators employed by the Department of Justice (DOJ).[32] Because these legal proceedings are civil, noncitizens subject to them are not entitled to lawyers;[33] nationally, there are more than 3.6 million pending removal proceedings on both "detained" and "non-detained" dockets.[34] A 2016 study found that 37% of noncitizens had counsel for their removal proceedings nationally; for

[30] There is a common misconception among the general public that only immigrants without status are placed in immigration proceedings. *See, e.g.*, Dexter Filkins, *Biden's Dilemma at the Border*, NEW YORKER (June 12, 2023), https://www.newyorker.com/magazine/2023/06/19/bidens-dilemma-at-the-border [https://perma.cc/X9K8-C3BA] (discussing removal proceedings extensively but only for asylum seekers who have recently arrived at the border). As discussed *supra* in note 1 and as demonstrated throughout this Article by the facts of the cases analyzed, immigration law contemplates the removal of people with status as well, and such proceedings are routine within the system. *About the Data – ICE Detention*, TRAC IMMIG., https://trac.syr.edu/phptools/immigration/detention/about_data.html [https://perma.cc/BEG7-E3RY].

[31] Although, as Professor Angélica Cházaro notes, the vast majority of deportations happen through summary proceedings at the border known as expedited removal—in other words, most people who are issued a removal order never see the inside of a courtroom. Cházaro, *supra* note 1, at 1044.

[32] The IIRIRA renamed deportation proceedings as removal proceedings. *See* Michael Kagan, *Mass Surrender in Immigration Court*, 14 U.C. IRVINE L. REV. 163, 167 (2024) (using deportation and removal proceedings interchangeably); *Yamataya*, 189 U.S. at 87; Sherman-Stokes, *supra* note 10, at 1028, 1041 n.106. 48 Fed. Reg. 8038–39 (Feb. 25, 1983) (codified at 8 C.F.R. pts. 1, 3, 100) established the Executive Office of Immigration Review (EOIR) in the DOJ. This was an internal reorganization moving the BIA and the immigration adjudication functions of the Immigration and Naturalization Service (INS) (the precursor to the Department of Homeland Security). *See also About the Office*, *supra* note 14.

[33] As elaborated on in this Section, there is one significant exception to this rule: detained noncitizens deemed incompetent are appointed counsel pursuant to the *Franco* litigation in the Ninth Circuit and the corresponding National Qualified Representative Program, which now operates at every detained immigration courtroom in the country. *See generally* Wilson, *supra* note 26. Legal attempts to secure the right to counsel for unaccompanied immigrant children have been unsuccessful. *See Right to Appointed Counsel for Children in Immigration Proceedings*, AM. IMMIGR. COUNCIL, http://exchange.americanimmigrationcouncil.org/litigation/right-appointed-counsel-children-immigration-proceedings [https://perma.cc/A8WQ-89H5]. There has been a significant advocacy push for universal representation in immigration courts in recent years, as well as critique offered for such programs. *See Universal Representation Project*, ROCKY MOUNTAIN IMMIGRANT ADVOCACY NETWORK, https://www.rmian.org/universal-representation-project# [https://perma.cc/DK6E-L68T]; Cházaro, *supra* note 1, at 1113; *see also Universal Representation for Detained Immigrants Facing Deportation in New York State*, VERA INST., https://www.vera.org/ending-mass-incarceration/reducing-incarceration/detention-of-immigrants/new-york-immigrant-family-unity-project [https://perma.cc/6BDQ-P3AH].

[34] *See Immigration Court Backlog*, TRAC IMMIG. (Sept. 2024), https://trac.syr.edu/phptools/immigration/backlog/ [https://perma.cc/E88Q-R3Z9].

detained immigrants, that rate was closer to 15%.[35] Recent data out of Colorado, where my students and I practice, place the representation rate for noncitizens in removal proceedings in this state at a meager 14%.[36] The stakes and severity of removal proceedings and a removal order are increasingly recognized popularly and legally, where courts and scholars have begun to characterize immigration proceedings as quasi-criminal.[37]

2. Competency in Removal Proceedings

In contrast to criminal law's longstanding requirement that a criminal defendant must be competent to stand trial, immigration law only recently began to reflect any similar consideration of a noncitizen's competency to stand in a proceeding that would result in deportation.[38]

In 1952, Congress passed the McCarran–Walter Act, the original version of the Immigration and Nationality Act (INA), which remains the governing immigration statute today.[39] In section 240(b)(3) of the INA, Congress required the Attorney General to establish "safeguards" if any noncitizen respondent could not be present in immigration court on account of a disability affecting their competency.[40] Within a few years,[41] the BIA issued regulations addressing some aspects of the removal process for noncitizens with disabilities affecting competency: primarily (1) acceptable forms of service of the charging document;[42] (2) who may stand in to represent them if they cannot appear (which this Article will call "the stand-in regulation");[43] and (3) a prohibition on accepting an admission of

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[35] Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL (Sept. 2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court [https://perma.cc/9BL9-BQYY].

[36] *Too Few Immigration Attorneys: Average Representation Rates Fall from 65% to 30%*, TRAC IMMIGR. (Jan. 24, 2024), https://trac.syr.edu/reports/736/ [https://perma.cc/39JM-44SP].

[37] Lee v. United States, 582 U.S. 357, 370 (2017) (reiterating that "[d]eportation is always 'a particularly severe penalty,'" which may be of greater concern to a convicted noncitizen "than any potential jail sentence" (quoting Padilla v. Kentucky, 559 U.S. 356, 365, 368 (2010))).

[38] *See, e.g.*, Drope v. Missouri, 420 U.S. 162, 171 (1975) (noting that the "common-law prohibition" on trying incompetent criminal defendants "has long been accepted").

[39] ALICIA J. CAMPI, AM. IMMIG. L. FOUND., THE MCCARRAN-WALTER ACT: A CONTRADICTORY LEGACY ON RACE, QUOTAS, AND IDEOLOGY (June 1, 2004), https://www.americanimmigrationcouncil.org/sites/default/files/research/Brief21%20-%20McCarran-Walter.pdf [https://perma.cc/CC8J-PEC9].

[40] 8 U.S.C. § 1229a(b)(3).

[41] Some of these regulations, however, were promulgated as recently as 2010. *United States: Immigration and Nationality Act (Last Amended March 2010)*, UNHCR: REFWORLD (Mar. 4, 2010), https://www.refworld.org/legal/legislation/natlegbod/2010/en/103608?prevDestination=search&prevPath=/search?keywords=United+States%3A+Immigration+and+Nationality+Act+%28last+amended+March+2010%29&sort=score&order=desc&result=result-103608-en [https://perma.cc/8HR7-PY7Z].

[42] 8 C.F.R. § 103.8 (2024).

[43] *Id.* § 1240.4.

removability—essentially, a guilty plea—from a respondent who is not competent and not counseled.[44]

Between 1952 and 2011, nearly sixty years after enactment of the INA provision providing for safeguards, the BIA issued only one precedential case addressing competency and safeguards, and that case merely confirmed that the regulations discussed above applied to both exclusion and deportation proceedings.[45] It contained no discussion of a standard of competency or a definition of safeguards.

That changed in 2011, when the BIA issued *In re M-A-M-*, which set out a competency framework and three-part process for immigration judges to follow whenever there were indications that a respondent appearing in immigration court had a disability or condition affecting their competency. The *M-A-M-* decision sets out a test for competency that borrows from the criminal law discussed above: "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."[46]

Should the immigration judge determine a respondent is not sufficiently competent, step three of *M-A-M-* requires the imposition of safeguards that would allow the removal process to move forward.[47] This is a point of significant departure from the process in criminal courts. The goals of the safeguards are fairness in the proceeding and protecting the respondent's rights and privileges under the INA.[48] Some safeguards are concretely procedural.[49] Others are left to the discretion of the immigration judge, with very little guidance from the opinion to channel that discretion.[50] All of these steps are closely analyzed below.

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[44] *Id.* § 1240.10(c).

[45] *In re* Stoytcheff, 11 I. & N. Dec. 329 (1965).

[46] *See In re* M-A-M-, 25 I. & N. Dec. 474, 478–79 (B.I.A. 2011). Professor Marouf has critiqued this competency standard because it essentially renders the ability-to-consult-with-an-attorney prong optional. Marouf, *supra* note 3, at 963.

[47] *M-A-M-*, 25 I. & N. Dec. at 481.

[48] *Id.* at 476 (describing step three's goal in prescribing safeguards as "to ensure that proceedings are sufficiently fair"); *Id.* at 481 (describing the goal of prescribing safeguards as "to protect the rights and privileges of the" respondent).

[49] *Id*. at 482 (citing various regulations).

[50] *Id.* at 481–82. The *M-A-M-* decision lists examples of safeguards that an immigration judge may consider. In the opinion, the list was illustrative. In practice, many immigration judges limit themselves to the listed safeguards.

A suite of BIA decisions has given additional contour to the *M-A-M-* decision over the last decade.[51] These cases set out a variety of roles that safeguards can play when there is an issue of competency but fail to recognize that the term is not doing the same work across the cases and is at times contradictory. All of this agency case law applies when a respondent's competency is at issue and safeguards are considered for implementation.

3. Appealing Competency and Safeguards Determinations

A noncitizen respondent who receives a removal order from an immigration judge may appeal that order.[52] The first appeal goes to the BIA, which "is the highest administrative body for interpreting and applying immigration laws."[53] If a noncitizen respondent loses before the BIA, they can appeal again by filing a petition for review to the federal court of appeals for the judicial circuit in which the immigration judge completed the removal proceedings.[54] On appeal, both the BIA and the federal courts can review a finding of incompetency, the failure of the immigration judge to make such a finding, and the safeguards the immigration judge imposed.

Appeals of competency-related issues often focus on whether the noncitizen respondent received sufficient process and whether the proceeding comported with the due process notions of fundamental fairness that run through immigration law.[55]

4. Franco-Gonzalez v. Holder *and Appointed Counsel*

Shortly before *In re M-A-M-* was decided, a group of noncitizens with disabilities affecting their competency detained by ICE in Southern California filed suit against the Attorney General.[56] This case was styled

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[51] *In re* E-S-I-, 26 I. & N. Dec. 136, 144 (B.I.A. 2013); *In re* J-R-R-A-, 26 I. & N. Dec. 609, 611 (B.I.A. 2015); *In re* J-S-S-, 26 I. & N. Dec. 679, 682 (B.I.A. 2015); *In re* M-J-K-, 26 I. & N. Dec. 773, 778 (B.I.A. 2016).

[52] DHS can also appeal an outcome that is adverse to its interests. 8 C.F.R. § 1003.1(b) (2024) (detailing the noncitizen respondent's ability to appeal to the BIA); 8 U.S.C. § 1252(a)(1) (detailing the noncitizen respondent's ability to appeal to the federal courts).

[53] *Board of Immigration Appeals*, EXEC. OFF. FOR IMMIGR. REV. (May 14, 2024), https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/EM82-86EV]; 8 C.F.R. § 1003.1(d)(1). A creature of regulation, the BIA as currently constituted was created by the Attorney General in 1940 when its predecessor, the Immigration and Naturalization Service, was moved to the DOJ. It has undergone several rounds of reform by rulemaking since then. *EOIR's Organizational Overview: A Historical Lens of EOIR*, EXEC. OFF. FOR IMMIGR. REV., https://www.justice.gov/eoir/strategic-plan/organizational-overview/historical-lens [https://perma.cc/8F9Y-MZDK].

[54] *See* 8 U.S.C. § 1252(b)(1)–(2).

[55] *See infra* Section II.B.2.

[56] First Amended Complaint at ¶¶ 2, 17, Franco-Gonzalez v. Holder, No. CV 10-02211 DMG (DTBx) (C.D. Cal. Aug. 2, 2010), 2013 WL 3674492. The lead plaintiff in this case, Jose Antonio Franco-Gonzalez, had an intellectual and cognitive disability and was detained by ICE for more than five years

Franco-Gonzalez v. Holder and is known colloquially as *Franco*. The plaintiffs alleged that the immigration agencies failed to create adequate procedures for people with mental disabilities in detention and in removal proceedings, in violation of the Due Process Clause, the INA, and federal disability law.[57] Judge Dolly Gee, after issuing orders explaining why the safeguards in *In re M-A-M-* are insufficient,[58] issued a permanent injunction in April 2013 guaranteeing appointed counsel to noncitizens with disabilities that affect their competency who are detained by ICE in the Ninth Circuit. The judge ordered appointed counsel as a reasonable accommodation under federal disability law.[59] This was a landmark litigation for many reasons. Among them was the innovative use of section 504 of the Rehabilitation Act, a disability civil rights statute governing the conduct of federal agencies such as ICE and the Executive Office for Immigration Review (EOIR).[60] Additionally, the remedy of appointed counsel in a system where counsel is not guaranteed was radical at the time and has proven game-changing since.[61]

In an attempt to stave off the *Franco* decision, EOIR and the Department of Homeland Security (DHS) announced nationwide policies to provide appointed counsel to detained noncitizens who are deemed incompetent in early 2013 and operationalized this program by the end of that year.[62] This program, known as the National Qualified Representative Program (NQRP) and funded by EOIR through a nonprofit administrator, provides counsel pursuant to *Franco* within the Ninth Circuit and pursuant to the EOIR policy outside it.[63] Through this program, EOIR has created a limited number of documents and trainings for immigration judges on issues

after an immigration judge administratively closed his removal proceedings because of his incompetency. *Id*. at ¶ 11.

[57] *Id.* at ¶ 6.

[58] Franco-Gonzalez v. Holder, 2013 WL 3674492, at *9, *19–20 ("The Court has discussed at length the reasons why the 'safeguards' set forth in *M-A-M-* are insufficient in its prior orders.").

[59] *Id.* at *9.

[60] *Id.* at *3, *6.

[61] *See* Wilson, *supra* note 26, at 27–28.

[62] *See* Press Release, ACLU of S. Cal., Class Action Lawsuit Forces Policy Change to Protect Detained Immigrants with Serious Mental Disabilities (Apr. 22, 2013), https://www.aclusocal.org/en/press-releases/class-action-lawsuit-forces-policy-change-protect-detained-immigrants-serious-mental [https://perma.cc/HUZ9-DNFY]; *National Qualified Representative Program (NQRP)*, EXEC. OFF. FOR IMMIGR. REV., https://www.justice.gov/eoir/national-qualified-representative-program-nqrp [https://perma.cc/77KQ-4NA2].

[63] *The National Qualified Representative Program (NQRP)*, ACACIA CTR. FOR JUST., https://acaciajustice.org/what-we-do/#our-programs [https://perma.cc/FAW8-T693].

of competency. None of them provide a definition of the term "safeguards" or spend much time discussing it.[64]

As Professor Amelia Wilson has recently documented, more than 2,000 immigrants have been appointed counsel in detained courtrooms across the country.[65] Professor Wilson has frankly assessed the shortcomings of this program after a decade of implementation.[66] However, for purposes of this Article, the program's significance in providing counsel for thousands of people deemed incompetent under the *In re M-A-M-* framework to "invoke those rights" guaranteed in immigration court and accessible to respondents who do not have disabilities cannot be understated.[67] It also throws into sharp relief the critical need for safeguards to be properly defined and commonly understood because appointed counsel is often litigating their application.[68]

In summary, the process for conducting removal proceedings against a noncitizen, detained or not, whose disability affects competency is as follows: although competency is presumed, an immigration judge should be alert for any indicia of incompetency when a noncitizen appears in court for their removal proceedings. If the judge detects such indicia, the judge must

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[64] In 2013, EOIR announced a nationwide plan to provide "enhanced procedural protections to unrepresented detained respondents" with serious mental disorders or conditions. EXEC. OFF. FOR IMMIGR. REV., PHASE I OF PLAN TO PROVIDE ENHANCED PROCEDURAL PROTECTIONS TO UNREPRESENTED DETAINED RESPONDENTS WITH MENTAL DISORDERS (December 31, 2013), https://immigrationreports.wordpress.com/wp-content/uploads/2014/01/eoir-phase-i-guidance.pdf [https://perma.cc/QPM6-UKG4]. Known as the "Phase I Plan" and primarily directed at immigration judges, the policy has a few major takeaways. First, and perhaps most significantly, it creates the program by which a qualified legal representative is made available in removal and related proceedings for someone deemed incompetent. Second, less relevant to this Article, the Phase I Plan lays out details on the provision of mental health evaluations as part of the competency inquiry, including, for example, the qualifications of the evaluator and the contents of the evaluation report. Notably, the Phase I Plan only spends a few paragraphs on procedural protections and safeguards. First, it reiterates the immigration judge's obligation to "prescribe appropriate safeguards and protections to ensure the fundamental fairness" of the proceeding. *Id.* at 15. The rest of this section focuses entirely on legal counsel, reiterating its commitment to providing a qualified representative and instructing immigration judges to "consider the examining mental health professional's assessment of the respondent's ability to consult with and assist counsel when deciding whether provision of a qualified representative is an effective safeguard and protection in a case." *Id.* It then indicates that a respondent does not have the right to waive the presence of their appointed counsel because their provision is a safeguard, and notes that a respondent's noncooperation with their appointed counsel does not negate the government's efforts to provide a safeguard. The plan contains no other no discussion of other safeguards. It also fails to discuss disability law or reasonable accommodations at all.

[65] Wilson, *supra* note 26, at 24.

[66] For example, she notes that being deemed a *Franco* class member can result in prolonged detention while the competency process plays out. *See id.* at 23, 46.

[67] Franco-Gonzalez v. Holder, No. CV 10–02211 DMG (DTBx), 2013 WL 3674492, at *5 (C.D. Cal. Apr. 23, 2013).

[68] For cases demonstrating the insufficiency of counsel as a safeguard without other safeguards, *see infra* Section II.B.2 (discussing the Ninth Circuit case *Benedicto v. Garland* and the Second Circuit case *Reid v. Garland*).

determine whether the respondent is sufficiently competent to proceed pro se and without safeguards. If the respondent is not sufficiently competent, the judge should impose "safeguards" before the removal proceeding moves forward. Those determinations can be reviewed on appeal, both by the BIA and subsequently by a federal circuit court.

B. Competency in Criminal Court

The process for assessing the competency of an accused person is a well-worn path in criminal courts across the country at both the federal and state level.[69] Federal law allows either party to raise competency upon a bona fide doubt, which the judge must grant if they have reason to believe the defendant lacks competency to understand the nature and consequences of the proceedings against them or to assist properly in their defense.[70]

In federal criminal proceedings, if a defendant is deemed incompetent, a statute authorizes the Attorney General to hospitalize them for treatment for a reasonable period of time.[71] Only if the treating facility certifies that the defendant has "recovered" does the court reassess their competency, and only if the court is satisfied will it set their case for trial.[72] Otherwise, the court will dismiss the charges and either release or civilly commit the defendant.[73]

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[69] Studies have estimated that between 50,000 and 60,000 accused people are evaluated for competency every year, approximately 15,000 of whom are deemed incompetent. *See, e.g.*, Douglas R. Morris & Nathaniel J. DeYoung, *Psycholegal Abilities and Restoration of Competence to Stand Trial*, 30 BEHAV. SCIS. &. L. 710, 710 (2012) (citing various studies). This is not to say that this system is functional or even necessarily compliant with disability law. *See generally* Perlin, *supra* note 27, at 376 (analyzing the legal system's bias against the mentally disabled). Moreover, the literature rarely views competency in the criminal legal system through the lens of disability, with some notable exceptions in the scholarship of Professor Jamelia N. Morgan and others. Morgan, *supra* note 27, at 125 (noting that "disability is hiding in plain sight" in much of the criminal legal system and its case law).

[70] Pate v. Robinson, 383 U.S. 375, 385 (1966); 18 U.S.C. § 4241(a) (codifying the standard for competency to stand trial set out in the Supreme Court's decisions in *Dusky v. United States*, 362 U.S. 402 (1960), and *Drope v. Missouri*, 420 U.S. 162 (1975)). As discussed in this Article, *In re M-A-M-* borrows the *Drope* standard for application in removal proceedings. *See supra* Section I.A.2.

[71] 18 U.S.C. § 4241(d)(1).

[72] *Id.* § 4241(e).

[73] *Id.* § 4246; *see also* 21 AM. JUR. 2D *Criminal Law* § 103 (2024) (describing the purposes and limits of state confinement of those deemed incompetent). Dismissal may not always follow in practice, particularly in state criminal systems. *See, e.g.*, Zachary D. Torry & Kenneth J. Weiss, *Dismissal of Charges Against an Incompetent Defendant*, 39 J. AM. ACAD. PSYCH. & L. 258 (2011) (discussing a case in which a Maryland trial court denied defendant's motion to dismiss, even though Maryland law mandated dismissal for incompetent defendants after a certain number of years); J. Thomas Sullivan, *Not Fit to Be Tried: Due Process and Mentally-Incompetent Criminal Defendants*, 39 U. ARK. AT LITTLE ROCK L. REV. 155 (2017) (discussing the Arkansas Supreme Court's reversal of an order to dismiss criminal charges against a defendant with mental impairment who could not be restored to fitness to stand trial).

A recent case from Colorado provides a snapshot of one state criminal system's competency process.[74] On March 22, 2021, Ahmad Al Aliwi Alissa allegedly fatally shot ten people at a King Soopers supermarket in Boulder, wounding several others.[75] He was arrested and criminally charged.[76] In September 2021, the court suspended his proceedings and ordered an evaluation.[77] In December 2021, the court ruled he was not competent based on evaluations by medical professionals, who diagnosed him with schizophrenia.[78] However, the evaluators determined that he was likely to be restored to competency, and in August 2023 it was announced that Mr. Alissa's competency had been restored through court-ordered, involuntary medication and that his criminal proceedings would move forward.[79] At the request of the prosecution, he was detained at the state mental health hospital pending trial, as the county jail was ill-equipped to provide the level of care he needs.[80]

C. Distinguishing Competency Processes in Immigration Proceedings from Criminal Proceedings

The question of competency, and the corollary inquiry into safeguards available to a noncitizen respondent who is deemed incompetent, loom large in any removal proceeding. In a critical distinction from criminal law, immigration proceedings generally are not halted when a noncitizen

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[74] I have selected Colorado because that is where my students and I practice. This Article by no means sanctions or condones the Colorado criminal legal system's competency system, which is rife with backlogs and other issues. *See, e.g.*, Allison Sherry, *Jailed Coloradans Waiting Longer and Longer for Competency Services, with Sometimes Tragic Consequences*, CPR NEWS (Oct. 15, 2021, 4:00 AM), https://www.cpr.org/2021/10/15/jailed-coloradans-mental-illness-waiting-longer-competency-services-restoration-sometimes-tragic-consequences/ [https://perma.cc/9GJ9-CMDL].

[75] Allyson Waller, *Suspect Charged with 10 Counts of Murder in Boulder, Colo., Shooting*, N.Y. TIMES (Mar. 23, 2021), https://www.nytimes.com/live/2021/03/23/us/boulder-colorado-shooting [https://perma.cc/95LH-XTX2].

[76] Notice of Raising Competency at 1, People v. Ahmad Al Aliwi Alissa, No. 21CR497 (Colo. Dist. Ct. Sept. 1, 2021).

[77] Order Re: The People's Request for Clarification and the Defendant's Notice of Raising Competency and Motion to Vacate Preliminary Hearing and Suspend the Proceedings at 4, People v. Ahmad Al Aliwi Alissa, No. 21CR497 (Colo. Dist. Ct. Sept. 2, 2021).

[78] Elise Schmelzer, *Boulder King Soopers Shooting Suspect Ruled Incompetent to Stand Trial*, DENVER POST (Dec. 3, 2021, 5:18 PM), https://www.denverpost.com/2021/12/03/boulder-king-soopers-shooting-incompetent/ [https://perma.cc/8YFN-D2V4]; Steve Gorman, *Suspect in Colorado Supermarket Shooting Declared Mentally Fit for Trial*, REUTERS (Oct. 6, 2023, 8:16 PM), https://www.reuters.com/legal/suspect-colorado-supermarket-shooting-declared-mentally-fit-trial-2023-10-06/ [https://perma.cc/G84P-629G].

[79] Gorman, *supra* note 78.

[80] *Id.*; *see* Allison Sherry, *Accused Boulder King Soopers Shooter Found Mentally Competent for Trial*, CPR NEWS (Aug. 23, 2023, 2:30 PM), https://www.cpr.org/2023/08/23/accused-boulder-king-soopers-shooter-found-mentally-competent-for-trial/ [https://perma.cc/TR48-RHEB].

respondent is not competent to proceed. Indeed, the BIA has repeatedly expressed its preference for the continuation of proceedings against respondents determined to be incompetent[81] and its confidence that such continuation is both required by the statute and appropriate[82] given the nature of the proceedings.[83]

Most importantly, and also distinct from criminal law, the noncitizen carries the burden of proof for much of the removal proceeding.[84] The government must initially demonstrate a respondent's noncitizen status[85] and removability.[86] If the government does so, the burden shifts to the noncitizen respondent to prove that they are eligible for the form or forms of relief that they are pursuing[87] and, if that form of relief is discretionary, that they merit a favorable exercise of discretion by the immigration judge.[88] Thus, a noncitizen who has been deemed incompetent is required to continuously participate in their removal proceeding and must carry out critical and high-stakes tasks such as correctly filling out and filing a relief application[89] and marshaling documentary and testimonial evidence.[90] The criminal-law equivalent would be requiring a defendant deemed incompetent to both defend against the prosecution's charge and mount an affirmative defense. Because a noncitizen respondent's disability affecting competency may

[81] *See, e.g.*, *In re* M-J-K-, 26 I. & N. Dec. 773, 773 (B.I.A. 2016) (reversing an immigration judge's termination of removal proceedings against a respondent deemed incompetent despite the immigration judge's determination that no safeguard was adequate).

[82] *Id.* at 776 ("As we have previously emphasized, the 'Act's invocation of safeguards presumes that proceedings can go forward, even where the [noncitizen] is incompetent, provided the proceeding is conducted fairly.'" (quoting *In re* M-A-M-, 25 I. & N. Dec. 474, 477 (B.I.A. 2011))).

[83] *M-A-M-*, 25 I. & N. Dec. at 478–79.

[84] *See generally* 8 C.F.R. § 1240.8 (2024) (detailing the burdens of proof involved in a removal proceeding).

[85] *Id.* § 1240.8(c). The statute terms this "alienage."

[86] *Id.* § 1240.10(c)–(d). Removability is defined in the INA at § 240(e)(2). Immigration and Nationality Act, Pub. L. No. 117-360, § 240(e)(2), 66 Stat. 163. However, it should be noted that noncitizen respondents routinely admit the factual allegations and charges against them, alleviating the government's need to carry this burden. This practice has been roundly critiqued by Professor Michael Kagan. Kagan, *supra* note 32, at 164.

[87] 8 C.F.R. § 1240.8(c)–(d).

[88] Immigration and Nationality Act § 240(c)(4).

[89] *See, e.g.*, *I-589, Application for Asylum and for Withholding of Removal*, USCIS (Apr. 9, 2024), https://www.uscis.gov/i-589 [https://perma.cc/RU9G-WG45].

[90] A noncitizen respondent has the statutory right to present evidence. Immigration and Nationality Act § 240(b)(4)(B). After the passage of the REAL ID Act of 2005, respondents seeking fear-based relief from removal, such as asylum, are more likely to carry their burden if they present evidence that corroborates their testimony. *Id.* § 208(b)(1)(B).

impact their ability to carry out those tasks, the question of supports or accommodations needed—i.e., safeguards—is critical.[91]

Thus, because safeguards are the mechanism by which a noncitizen respondent ostensibly receives the support needed to carry out the high-stakes tasks described above in their removal proceeding, the following Part explores the use of "safeguards" terminology developed in immigration law.

II. SAFEGUARDS IN IMMIGRATION LAW

The appearance of the single word "safeguard" in one provision of the original 1952 INA has been the hook on which the entire competency framework in immigration court has hung. Because of this clause, and as the discussion of that framework's operation above underscores, the term plays an outsized role in immigration court proceedings where competency is at issue. Understanding the meaning of "safeguards" is thus critically important to understanding how it should be functioning in immigration court. Accordingly, Section II.A takes a close look at the use of the term "safeguards" in the immigration statute and its implementing regulations. Section II.B synthesizes BIA decisions. Section II.C conducts the same inquiry as Section II.B but with federal cases that review BIA competency and safeguard determinations on appeal. These Sections collectively surface and analyze a variety of conceptualizations of "safeguards" in immigration court decisions, capturing the incoherence of the BIA's competency law.

A. Safeguards in the Immigration and Nationality Act and Implementing Regulations

The term "safeguard" only appears one time in the INA—in the provision that governs all aspects of the removal proceeding, including the form of the proceeding, the rights of the noncitizen in the proceeding, the consequences for failing to appear, the distribution of the burdens of proof, and the process for appeals and reopening of cases.[92] Specifically, INA section 240(b)(3) states:

> If it is impracticable by reason of a [noncitizen's] mental incompetency for the [noncitizen] to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the [noncitizen].[93]

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[91] Consequently, I also argue that the correct inquiry regarding competency in immigration court is not "competent to proceed," as it is often shorthanded in the cases, but rather "competent to proceed without safeguards *and pro se*." Indeed, *In re M-J-K-* explicitly notes that the inquiry does not end when it is determined that a respondent lacks competency. 26 I. & N. Dec. 773, 776 (B.I.A. 2016).

[92] *See generally* 8 U.S.C. § 1229a (discussing removal proceedings).

[93] *Id.* § 1229a(b)(3).

The INA does not offer any definition of a safeguard, nor does it define "rights and privileges" defined or lay out a standard for "mental incompetency." Additionally, the fact that, in most cases, the noncitizen is present in court is not accounted for in this clause. Further, there is no explanation in the statute of how the safeguards will ensure the rights and privileges of the noncitizen who is deemed incompetent. In other words, the statute offers no link between the safeguard and the incompetency. As experience has shown, they often remain unlinked.

Moreover, the statute contemplates a situation in which a noncitizen is not present in court for some reason due to their incompetency; the subsequent framework the BIA has set out, by contrast, applies to noncitizen respondents who are present but unable to meet the competency legal standard. This shift has not been accounted for.

The legislative history sheds very little light on Congress's choice to include the term "safeguards" in this provision. The INA's original enactment preceded the liberalization of American immigration law in 1965.[94] Legislative history indicates that Congress included this provision in the original version. The pre-enactment congressional record reveals almost no discussion of this particular provision. Indeed, only one senator commented on it. Senator Paul Howard Douglas of Illinois made brief mention of this provision in his comprehensive remarks from the floor, noting that it was one of "two clauses which are designed to protect the [noncitizen]."[95] He further noted that no senator had lodged an objection to this provision.[96] There was no further discussion. As one scholar has commented, the language of the statute with regards to safeguards is "passing . . . , seemingly empty."[97]

Congress has revised and amended the INA several times since its adoption.[98] Yet a thorough scouring of the legislative history and

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[94] ANDREW M. BAXTER & ALEX NOWRASTEH, CATO INST., A BRIEF HISTORY OF U.S. IMMIGRATION POLICY FROM THE COLONIAL PERIOD TO THE PRESENT DAY 15 (Aug. 3, 2021), https://www.cato.org/sites/cato.org/files/2021-07/policy-analysis-919-revised.pdf [https://perma.cc/K9QQ-5SBU] (describing the Immigration and Nationality Act of 1965 as the beginning of the "[r]eopening [of] [t]he [i]mmigration [s]ystem" after World War II); Sherman-Stokes, *supra* note 10, at 1053 n.171 (describing modern immigration law as "a maze of hyper-technical statutes and regulations").

[95] 82 CONG. REC. 5418 (1952) (statement of Sen. Paul Douglas). Notably, Sen. Douglas was speaking against the bill in part because he was concerned it was not sufficiently rights-oriented for people going through the deportation process. *See id.* at 5410.

[96] *Id.* at 5418.

[97] Sherman-Stokes, *supra* note 10, at 1047.

[98] *See, e.g.*, H.R. REP. NO. 94-1553, at 8 (1976) (discussing amendment H.R. 14535, which established a per-country ceiling on immigrant visas); H.R. REP. NO. 95-1206, at 2 (1978) (discussing amendment H.R. 12443, which established a single worldwide ceiling on immigrant visas); H.R. REP.

congressional record gives no indication Congress has ever revisited INA section 240(b)(3) or provided any additional context or meaning to the term "safeguards" or its conceptual role in assuring the rights of noncitizens with disabilities affecting competency.[99]

In short, nowhere in this statute nor in prior reforms of the statute itself has Congress taken on the important work of developing competency standards or fleshed out the existing safeguards framework.

The immigration regulatory bodies have promulgated several orders and regulations addressing noncitizens with disabilities, although they are not designated as "safeguards" in the regulations per se. For example, one widely cited regulatory "safeguard" governs the proper service of the charging document.[100] 8 C.F.R. § 103.8, titled "service of decisions and other notices," requires personal service in certain circumstances, such as when the noncitizen is confined, a minor, or a person deemed to be incompetent.[101] Moreover, in the case of a person deemed incompetent, service should be made on the person they reside with, and all efforts should be made to serve a "near relative, guardian, committee, or friend."[102] The regulation does not mention the word "safeguard."

The second regulation, 8 C.F.R. § 1240.4, provides for an attorney, legal representative, guardian, near relative, or friend—the person who

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NO. 96-781, at 1 (1980) (Conf. Rep.) (discussing the "Refugee Act of 1980," which amended the INA "to establish a more uniform basis for the provision of assistance to refugees"); H.R. REP. NO. 99-1000, at 1 (1986) (Conf. Rep.) (discussing the "Immigration Reform and Control Act of 1986," which amended the INA "to effectively control unauthorized immigration to the United States"); H.R. REP. NO. 101-955, at 1 (1990) (Conf. Rep.) (discussing the "Immigration Act of 1990," which changed the preference system for immigrant admission and provided for administrative naturalization); H.R. REP. NO. 104-828, at 1 (1996) (Conf. Rep.) (discussing the "Illegal Immigration Reform and Immigrant Responsibility Act of 1996," which increased border patrol, increased penalties for immigrant smuggling and document fraud, and reformed deportation law and procedures); REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (establishing regulations for state driver's licenses and implementing security standards for identification documents).

[99] The closest Congress has come to issuing further guidance on the issue was in the appropriations bill of 2009, where the House of Representatives issued a statement encouraging EOIR to work with "experts and interested parties in developing standards and materials for immigration judges to use in conducting competency evaluations." 155 CONG. REC. H1762 (daily ed. Feb. 23, 2009) (statement of Rep. David Obey) (discussing the Omnibus Appropriations Act, H.R. 1105, 111th Cong. (2009)). The result of this encouragement, presumably, was the agency's creation of the NQRP program in 2013.

[100] *See, e.g.*, *In re* E-S-I-, 26 I. & N. Dec. 136, 144–45 (B.I.A. 2013); *In re* M-J-K-, 26 I. & N. Dec. 773, 775 (B.I.A. 2016).

[101] The regulation uses the dehumanizing formulation "the incompetent." 8 C.F.R. § 103.8(c)(2)(ii) (2024). This Article uses person-centered language throughout instead and has adapted the description of this regulation. For more on person-centered language, see Kathryn Hyams, Natalie Prater, Julie Rohovit & Piper Meyer-Kalos, *Person-Centered Language*, CTR. FOR PRAC. TRANSFORMATION (Apr. 2018), https://practicetransformation.umn.edu/practice-tools/person-centered-language/ [http://perma.cc/89KG-4CQY].

[102] 8 C.F.R. § 103.8(c)(2)(ii).

received the charging document pursuant to the first regulation—to appear for an incompetent respondent "[w]hen it is impracticable" for them to be present.[103] The regulation does not define impracticability or identify itself as a safeguard.

Finally, 8 C.F.R. § 1240.10(c) prohibits an immigration judge from accepting an admission of removability—the immigration law equivalent of a guilty plea—from a respondent deemed incompetent who lacks representation.[104]

In a precedential decision on competency, the BIA commented on the dearth of meaning provided in the statute and regulations. In *In re M-J-K-*, the BIA wrote:

> Although the Act does not provide further guidance on the implementation of safeguards, the regulations do address discrete situations . . . . The regulations do not otherwise identify specific safeguards to be applied. Nor do they limit the alternatives available to ensure the procedural fairness of the hearing.[105]

B. Safeguards in the Case Law

In its cases, the BIA and reviewing federal courts have endeavored to fill in the gaps left by the statute and regulations. This Section identifies and analyzes that effort.

1. Safeguards in Agency Case Law

More than a decade after its issuance, *In re M-A-M-* remains the BIA's definitive case on competency and safeguards. This Subsection takes a close look at the decision, with a particular emphasis on its discussion of "safeguards," before reviewing subsequent precedential agency case law that also addresses competency and the imposition of safeguards. This close study reveals a critical analytical failure: the cases manifest obvious confusion about the role a safeguard is supposed to play in immigration court after a competency determination has been made. Indeed, the cases formulate three distinct roles "safeguards" can play in immigration court, but these roles are inconsistent, if not outright contradictory, and the case law does not

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[103] *Id.* § 1240.4. The regulation at 8 C.F.R. § 1240.43 applies to noncitizens placed into deportation proceedings prior to Apr. 1, 1997 who are deemed incompetent. It uses nearly identical language to 8 C.F.R. § 1240.4. This Article treats these as a single regulation.

[104] *Id.* § 1240.10(c). On several occasions, the BIA has pointed to other regulations for other supposed "safeguards" for respondents who are deemed incompetent. *See, e.g.*, *In re* M-A-M-, 25 I. & N. Dec. 474, 482 (B.I.A. 2011) (citing the regulation requiring an immigration judge to develop the record); *M-J-K-*, 26 I. & N. Dec. at 777 (citing to the regulation on good cause continuances). However, these are generally applicable regulations for every removal proceeding and make no modification or accommodation specifically for respondents deemed incompetent, as the three regulations discussed in this Section do. Their weight as safeguards, then, is arguably little.

[105] *M-J-K-*, 26 I. & N. Dec. at 775.

present a unifying theory of how these roles should interact or which one takes primacy. This confusion has led to charade-like results—the safeguard imposed often has little to do with the nature of the respondent's disability affecting competency; rather, it allows the proceeding to move forward even when the respondent cannot participate.

a. In re M-A-M-

The analysis in *M-A-M-* begins with reaffirmation of the long-held notion that a noncitizen in removal proceedings is presumed competent should nothing indicate otherwise.[106] It then locates its authority to create a competency framework in the statute through section 240(b)(3)'s "acknowledge[ment]" that noncitizens who have disabilities affecting competency may be placed in removal proceedings and assertion that the "invocation of safeguards presumes that proceedings can go forward, even where the [noncitizen] is incompetent, provided the proceeding is conducted fairly."[107]

After laying these foundations, the opinion turns to the first two steps of its three-step framework: indicia of incompetency and measures immigration judges should use to assess competency. Professor Sarah Sherman-Stokes has thoroughly evaluated and critiqued these initial steps, so this Article will not discuss them beyond noting two significant ideas the BIA proposes in these sections of the opinion.[108] First, the BIA posits that the indicia of incompetency are supposed to impel the immigration judge to "consider whether there is good cause to believe that the [noncitizen] lacks sufficient competency to proceed without safeguards."[109] In other words, the crux of the analysis the BIA instructs an immigration judge to carry out pursuant to this framework is the determination of the "sufficiency" of competency such that a determination on the necessity of safeguards is warranted.

Second, and perhaps most critically for this Article, these sections introduce the concept of the respondent's "meaningful participation" as an objective of the competency–safeguards process. This notion is a substantial gloss on the nature of competency not previously found in the statute or regulations, which merely focused on the noncitizen's presence in the courtroom. For example, the BIA notes that certain mental disabilities "would not prevent a respondent from meaningfully participating" in

[106] *M-A-M-*, 25 I. & N. Dec. at 477.

[107] *Id.*

[108] Sherman-Stokes, *supra* note 10, at 1043–44 (noting "this initial inquiry is extremely problematic" and "the next question is how an immigration judge—often with little mental health training—is to assess competency in the courtroom").

[109] *M-A-M-*, 25 I. & N. Dec. at 479.

proceedings, thereby not affecting competency.[110] Relatedly, it notes that the task of the immigration judge upon recognizing indicia of incompetency is to "determine whether a respondent is competent to participate in proceedings."[111] It also characterizes the regulations on incompetency as designed to "provide guidance regarding safeguards to protect [noncitizens] who otherwise lack sufficient competency to meaningfully participate in proceedings."[112]

The BIA's discussion of the third step in the framework and the concept of safeguards begins by offering immigration judges unfettered "discretion to determine which safeguards are appropriate" based on the circumstances of the case.[113] In support, the BIA cites the process-oriented regulations discussed earlier in this Article.[114] Critically, nowhere in this "safeguards" discussion is "safeguard" defined.

The opinion then offers an illustrative list of examples of appropriate safeguards.[115] This list substantially mirrors the safeguards laid out in the regulations, such as refusing to accept an admission of removability, allowing a family member or close friend to aid in the case, and fulfilling the general duties of the immigration judge, such as developing the record.[116] It also includes ideas for case management, such as facilitating legal representation or medical treatment, continuing the case, closing the hearing to the public, and reserving the respondent's right to appeal on their behalf.[117] While the opinion requires the immigration judge to articulate their reasoning for their decision on which safeguards to implement, there is no instruction to the immigration judge to ensure that the safeguard actually ensures meaningful participation by the respondent noncitizen.[118] Finally, the BIA recognizes circumstances where no safeguard may be sufficient, suggesting administrative closure in such cases.[119] It does not explain why

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[110] *Id.* at 480.

[111] *Id.*

[112] *Id.* at 482.

[113] *Id.* at 481–82.

[114] *See supra* Section II.A.

[115] *M-A-M-*, 25 I. & N. Dec. at 483.

[116] Indeed, District Court Judge Dolly Gee said as much in the *Franco* litigation class certification order issued shortly after the *M-A-M-* decision. In certifying the class, Judge Gee pointed out that the safeguards discussed in *In re M-A-M-* are no different "from those already prescribed by existing statutes and regulations." Franco-Gonzales v. Napolitano, No. CV 10-02211 DMG (DTBx), 2011 WL 11705815, at *11 (C.D. Cal. Nov. 21, 2011); *M-A-M-*, 25 I. & N. Dec. at 483.

[117] *M-A-M-*, 25 I. & N. Dec. at 483.

[118] *Id.*

[119] *Id.*

any safeguard may be insufficient, only vaguely referring to "concerns [that] remain" after their implementation.[120]

The opinion's imprecise language makes it somewhat challenging to summarize or analyze.[121] Nonetheless, it is possible to glean a conceptual role for "safeguards" from the BIA's analysis. *In re M-A-M-* indicates that safeguards are supposed to ensure a respondent who has been deemed incompetent can still meaningfully participate in the removal proceeding. In other words, when a noncitizen respondent is not sufficiently competent to participate without rendering the process unfair, judges should put a safeguard in place to facilitate the respondent's meaningful participation and level the playing field.[122]

b. Other BIA competency case law

After *In re M-A-M-*, the BIA has revisited competency in immigration court in four precedential decisions. Several of them specifically focus on safeguards, although the discussion of safeguards throughout these four opinions is scattershot. And even in cases where the entire issue on appeal was a safeguard, the BIA never offered a satisfactory definition of the term or a consistent conceptual role for safeguards to play.

Decided in 2013, *In re E-S-I-* countenanced the proper mechanism for serving a charging document on someone who had a known mental health disability.[123] The question for the BIA was which of the regulations governing service of documents, including the ones that directly addressed serving a noncitizen who was incompetent, should have governed the service of the respondent in that case.[124] There, the respondent had been transferred to ICE detention directly from a psychiatric hospital, and the charging document had been served on both ICE's own Supervisory Deportation

[120] *Id.*

[121] For example, although this Article has noted the use of the terms "meaningfully participate" and "sufficient competency" above, the opinion toggles back and forth between "meaningfully participate" and "participation" as well as "sufficient competency" and "competent" without acknowledgement or consistency. *See supra* text accompanying notes 107 and 110.

[122] "Meaningfully participate" is a more accurate description of a safeguard's objective than "participation." Although the BIA toggles back and forth between the phrases throughout the opinion, its use of "meaningfully participate" in the specific context of discussing regulations that serve as safeguards adds weight to the idea that the participation must be meaningful and that the safeguard's role is to ensure as much. *See supra* note 110 and accompanying text.

[123] *In re* E-S-I-, 26 I. & N. Dec. 136, 137 (B.I.A. 2013). This respondent was a green card holder for more than 20 years before being placed in removal proceedings. The opinion does not provide any specifics about their mental health, including whether the respondent is disabled, besides noting they had "mental health issues." *Id.* at 137. Given the respondent's confinement in a psychiatric hospital prior to DHS custody, it seems safe to assume that, like so many other respondents where competency becomes an issue, they had a mental health disability.

[124] *Id.* at 137–38.

Officer and the respondent's purported cousin.[125] The BIA held that in cases where the incompetency is obvious, proper service requires serving the person responsible for the institution where the respondent is confined, including the immigration detention center.[126] The BIA only characterized this regulation as a safeguard in passing, noting that, should competency surface as an issue after a charging document has been served and removal proceedings have commenced, the immigration judge should consider requiring the charging document to be re-served as a safeguard.[127] There was no discussion of the intended objective of taking such a step.

In 2015, the BIA issued *In re J-S-S-* and *In re J-R-R-A-*. *In re J-S-S-* addressed the burden and standard of proof for a competency determination, finding that neither party bears the burden and the immigration judge should make a finding by the preponderance of the evidence.[128] It further held that the standard of appellate review for a competency finding is clear error.[129] The opinion briefly notes that the point of safeguards is to "ensure that the respondent's rights and privileges under the [INA] are protected" and "protect his or her due process rights."[130] As part of its rationale for not allocating to any party the burden of proof, the BIA underscored the role of the immigration judge in identifying which safeguards are "appropriate," which the BIA reasoned would be furthered by the immigration judge's independent competency determination.[131]

In re J-R-R-A- addresses competency and safeguards, but on both fronts the BIA added significant confusion.[132] In immigration court, the respondent had difficulty answering basic questions and gave disjointed and

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[125] *Id.*

[126] *See* 8 U.S.C. § 1229 (bearing the title of "Initiation of Removal Proceedings" and discussing service of a charging document (known as the Notice to Appear, or NTA) as part of the initiation of the proceedings); *see also* Pereira v. Sessions, 585 U.S. 198, 202 (2018) (characterizing the NTA as the start of removal proceedings); Niz-Chavez v. Garland, 141 S. Ct. 1474, 1478 (2021) ("[The immigration statute] requires the government to serve 'a notice to appear' on individuals it wishes to remove from this country.").

[127] *E-S-I-*, 26 I. & N. Dec. at 144–45.

[128] *In re* J-S-S-, 26 I. & N. Dec. 679 (B.I.A. 2015). The respondent in this case was a longtime permanent resident who had lived in the United States for nearly two decades before removal proceedings began. *Id.* at 680. He had a long and well-documented history of mental health disabilities, which had been a central point of focus during his contact with the criminal legal system (he had been referred for three different competency evaluations during his criminal cases). *Id.* Nonetheless, the immigration judge determined that he was competent to proceed. *Id.* at 680, 683 (detailing the holdings on burden and standard of proof).

[129] *Id.* at 684.

[130] *Id.* at 681.

[131] *Id.* at 683–84.

[132] *In re* J-R-R-A-, 26 I. & N. Dec. 609 (B.I.A. 2015). Again, the record clearly identified the respondent as a person with a disability.

confusing testimony.[133] His counsel noted that he had a cognitive disability and expressed concern that the disability affected his ability to testify.[134] Yet neither counsel nor the immigration judge initiated the competency determination process under *In re M-A-M-*.[135]

Despite the lack of a *M-A-M-* hearing or competency finding, the BIA's opinion proceeds to step three of the *M-A-M-* framework to discuss safeguards that should be imposed when an asylum applicant's testimony may be impacted by their mental condition.[136] Notably, the BIA did not limit its discussion to mental disabilities that affect competency—so this decision's holding is not limited to proceedings where a respondent's competency is at issue.[137]

Rather, credibility takes center stage. In the asylum hearing below, the immigration judge determined that the respondent was not credible and denied him relief, dismissing the respondent's cognitive disabilities as "not a license to give incredible testimony."[138] The BIA's analysis centers this interweaving of competency and credibility, noting that while credibility concerns are generally oriented towards ferreting out fabrication, the holding in *In re J-R-R-A-* is intended to address "the complicating issue of assessing an asylum claim where an individual has a mental health condition that may result in delusions or an otherwise unreliable account of events, but where there may be no deliberate fabrication involved."[139]

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[133] *Id.* at 609.

[134] *Id.*

[135] *Id.* at 609–10.

[136] *Id.* at 610. In fact, the case was remanded for a competency determination by the immigration judge in the first instance.

[137] This has been leveraged by practitioners before the immigration courts to request safeguards for clients without a competency determination. *See, e.g.*, LAURA LUNN, MOLLY LAUTERBACK & SARAH GILLMAN, ACACIA CTR. FOR JUST., NQRP PRACTICE ADVISORY: PROCEDURAL SAFEGUARDS AND SECTION 504 OF THE REHABILITATION ACT (May 3, 2023), https://static1.squarespace.com/static/57f6bd842e69cf55d8158641/t/64b0622e9299b230afc46ff7/1689281075577/NQRP+Practice+Advisory+-+Safeguards+and+Section+504+of+the+Rehabilitation+Act+-+2023-05-03+%5BFINAL%5D+%281%29.pdf [https://perma.cc/U4XP-ZKYP].

[138] *J-R-R-A-*, 26 I. & N. Dec. at 610. Psychiatric disabilities that may or may not impact competency also frequently affect immigration judges' perceptions of credibility, a threshold determination they must make for most forms of immigration relief required by INA § 208(b). *See* Lillian Novak, A Theory of Disability Discrimination in Immigration Court: Using the Rehabilitation Act to Advocate for People with Trauma-Based Psychiatric Disabilities in Removal Proceedings 18–25 (2023) (unpublished manuscript) (on file with author); Julia Simon-Kerr, *Law's Credibility Problem*, 98 WASH. L. REV. 179 (2023) (discussing credibility assessments in immigration proceedings); *see also J-R-R-A-*, 26 I. & N. Dec at 611 (discussing the heightened need for an asylum seeker to be found credible because, to win asylum, they must demonstrate they have a subjective fear of persecution that is objectively reasonable).

[139] *J-R-R-A-*, 26 I. & N. Dec. at 611. In one of its more perceptive moments, the BIA notes that factors potentially perceived as dishonest may in fact reflect a disability. I applaud the BIA for

The BIA then issued guidance for these situations—both where a respondent has been deemed incompetent and where there has been no such finding—through identifying a specific safeguard an immigration judge should impose. On an individualized basis, "where a mental health concern may be affecting the reliability of the applicant's testimony, the Immigration Judge should . . . generally accept that the applicant believes what he has presented, even though his account may not be believable to others or otherwise sufficient to support the claim."[140] The BIA justified this safeguard on due process grounds: it increases the fundamental "fairness of the proceedings by foreclosing the possibility that a claim is denied solely on testimony that is unreliable on account of the applicant's competency issues, rather than any deliberate fabrication."[141]

Even though *In re J-R-R-A-* ultimately centers a safeguard, it never defines the term. Worse, the BIA's discussion of the purpose of a safeguard in the removal proceeding is truncated and muddled. First, it never acknowledges or engages with *In re M-A-M-*'s concern with a respondent's ability to meaningfully participate in immigration proceedings. The opinion in fact discounts a respondent's ability to meaningfully participate by vitiating their testimony of any meaning.[142] It seems that the term "safeguard" in this case is intended to be quasi-procedural: in the process of determining whether an asylum applicant has a subjective fear that is objectively reasonable, an immigration judge should simply assume the existence of a subjective fear for an applicant with a disability affecting competency or reliability. But this is not entirely procedural because the nature of fear is substantive in asylum: an applicant must demonstrate a genuinely held fear of persecution that is objectively reasonable.[143] This is not a procedural safeguard in the same way that, for example, the regulation governing service of the charging document is. Moreover, because the *J-R-R-A-* safeguard is not merely applicable to respondents who have been deemed incompetent, it is arguably imposed in service of a different objective from that of a safeguard imposed pursuant to *In re M-A-M-*'s competency framework.

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recognizing this. However, this quote also demonstrates the BIA's lack of familiarity with cognitive disabilities, which are distinct disabilities from "mental health condition[s]." *Id.*

[140] *Id.* at 612.

[141] *Id.*

[142] Novak, *supra* note 138, at 31–32.

[143] *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 450 (1987) (Blackmun, J., concurring) ("[T]he very language of the term 'well-founded fear' demands a particular type of analysis—an examination of the subjective feelings of an applicant for asylum coupled with an inquiry into the objective nature of the articulated reasons for the fear.").

The BIA's most recent safeguards-related precedential opinion is *In re M-J-K-*, decided in 2016.[144] There, the respondent's mental health disability manifested with increasing severity over the course of several appearances on the detained docket in Aurora, Colorado and San Diego, California, where he had been transferred by ICE to appear on a special mental health docket.[145] In San Diego, the immigration judge ordered a psychological evaluation; the evaluator opined that the respondent could not consult with counsel and was unlikely to be restored to competency.[146] The immigration judge thus found that the respondent was not competent. Further, surveying the steps already taken in the case—the provision of a psychological evaluation, transfer of the case to a specialized docket, and granting continuances—and determining that appointment of counsel and administrative closure were not options, given the medical expert's findings, the immigration judge terminated the case on the grounds that there would be no safeguard available to ensure the fairness of the proceedings.[147] DHS appealed.[148]

The holding of *In re M-J-K-* is that the standard of review for the adequacy of safeguards imposed is de novo. Startlingly, the BIA applied that holding to the facts of this case to find that unexplored safeguards—in the form of legal representation, re-serving the charging document on someone "with knowledge of the respondent's background," and continuances for counsel to investigate the facts, and administrative closure—"may allow the proceedings to go forward."[149] The BIA reached this conclusion despite acknowledging the immigration judge's review of all of these supposedly "unexplored" safeguards and subsequent determination that they were ineffective in the circumstances of this case.[150]

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[144] 26 I. & N. Dec. 773 (B.I.A. 2016). As in all of the other cases to come before the BIA discussed in this Section, this case involves a respondent placed in removal proceedings after more than 30 years in the United States as a permanent resident. *Id.* While the nature of the respondent's disability affecting competency is not clear from the opinion, it is not apparently in dispute that he was a person with such a disability. *Id.* at 774 (noting the finding of the immigration judge that he was not competent based in part on a medical expert's opinion).

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.* at 773.

[149] *Id.* at 773, 778. This is despite the immigration judge's finding in this case that counsel would be unable to gather information from her client. *Id.* at 777–78.

[150] *Id.* at 773, 777. This seems to be a case of the BIA contorting its legal analysis in support of a desired outcome. The opinion gives away the game in a footnote, noting that the respondent's criminal conviction should have caused the immigration judge to "be particularly reluctant" to terminate proceedings in this case, which would have resulted in the respondent's release from detention. *Id.* at 777 n.4.

In re M-J-K- substantially contributes to the ongoing lack of clarity as to the purpose and meaning of the term "safeguards" in immigration court. The BIA offers a novel description of the role of a safeguard:

> As we have previously emphasized, the "Act's invocation of safeguards presumes that proceedings can go forward, even where the [noncitizen] is incompetent, provided the proceeding is conducted fairly." *Matter of M-A-M-*, 25 I&N Dec. at 477. In other words, even though a respondent lacks competency, the inquiry does not end there. Rather, when the respondent cannot participate in the proceedings because of a lack of competency, the question becomes whether sufficient relevant information can otherwise be obtained to allow challenges to removability and claims for relief to be presented in the absence of reliable testimony from the respondent.[151]

In other words, for the first time, the BIA offered up the idea that a safeguard constitutes any avenue, besides the respondent, for obtaining relevant information to make available to the immigration court.[152] This conceptualization of the role of a safeguard is directly at odds with the role envisioned in *In re M-A-M-*, where the role of a safeguard is to ensure the respondent's meaningful participation. Indeed, the role of safeguards described in *M-J-K-* essentially ensures that a respondent need not participate and that, in situations where a lawyer is present (or appointed) and cannot communicate with the respondent, the lawyer nonetheless can serve the problematic role of standing in for the respondent as participant.[153] This conceptualization of the role of safeguards is also not merely procedural. It is, in fact, quite substantive and may have outcome-determinative effects on a respondent's case depending on the quality of the information available through other avenues besides the respondent.

Through the shifting role of safeguards described in this decision, this case illustrates, perhaps most clearly of any BIA decisions, the sort of "safeguards theater" that the competency framework in immigration court licenses. This is because, even though a respondent's identification of relevant information through a viable attorney–client relationship is a critical—if not the most critical—component in a case, so long as an

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[151] *Id.* at 776.

[152] This section of the opinion is light on legal support, underscoring its novelty. The BIA cites only to *J-R-R-A-*, which, as discussed above, instructed an immigration judge to focus on the record evidence rather than a respondent's unreliable testimony. *Id.* at 776. *J-R-R-A-*, of course, does not stand for the proposition that the respondent should simply not participate and that other avenues for information are instead the safeguard to be implemented.

[153] To elaborate on the point, if a lawyer could make the arguments that the client would want them to, this role would not necessarily pose a problem. However, the issue here is that the client is unable to communicate their objectives and interests to the attorney or otherwise participate meaningfully in assisting the attorney with their defense.

immigration judge takes some action to safeguard the respondent, the safeguards may be deemed sufficient and upheld on review without any participation by the respondent whatsoever. The safeguard thus serves the immigration judge, and the removal system, at the expense of the respondent.

In sum, the BIA's case law on safeguards after a finding of incompetency describes three inconsistent roles that a safeguard plays in such circumstances. The first, encapsulated in *In re M-A-M-*, is to ensure the meaningful participation of the respondent who has been deemed incompetent. The second, captured most succinctly in *In re E-S-I-* and given additional, if hazy, meaning in *In re J-R-R-A-*, is a purely procedural protection. And the third, conceptualized in *In re M-J-K-* and building on *In re J-R-R-A-*, is the facilitation of alternative sources of potential information and evidence for the court in place of the respondent. These are strikingly different—if not antithetical—concepts, and the cases that set them out do not present a coherent understanding of the objective a safeguard is intended to fulfill.

2. Federal Court Review

The BIA is the first stop for an appeal of a removal order.[154] Once the BIA decides an appeal, its order is considered final.[155] Should a party decide to pursue further appeals, the immigration statute mandates filing a petition for review in a circuit court.[156] Because of this process, there is substantial federal court case law reviewing agency determinations on competency and imposition of safeguards. This Subsection surveys the law to determine what role the federal courts conceptualize safeguards as playing in removal proceedings for a respondent deemed incompetent.

Federal courts have considered competency questions on review of removal orders even before the BIA issued its competency framework in *In re M-A-M-*. Indeed, *In re M-A-M-* itself summarizes the relevant federal case law in existence at the time of the decision. In particular, it discusses two cases that provide some insight on safeguards. First, it cites a 1977 Ninth Circuit case holding due process was not violated where a noncitizen with mental illness was represented by counsel and accompanied by a state court-

[154] 8 C.F.R. § 1240.15 (2024). Similarly, DHS is entitled to appeal a grant of relief by an immigration judge, and both parties may appeal a bond determination. *Immigration Court Practice Manual* § 9.3(f), U.S. DEP'T OF JUST.: EXEC. OFF. FOR IMMIG. REV., https://www.justice.gov/eoir/reference-materials/ic/chapter-9/3 [https://perma.cc/BE25-JZ73]. For purposes of this Part, the appellate process described focuses on appeal of denial of relief and issuance of a removal order by an immigration judge because that is the procedural posture in which a competency determination and safeguards imposition is most frequently appealed.

[155] 8 U.S.C. § 1252(a)(1).

[156] *Id.* § 1252(b)(2).

appointed conservator who testified on his behalf.[157] Second, it cites a 2006 Tenth Circuit decision holding that "procedural safeguards were in place and the [noncitizen] had an opportunity to be heard at a meaningful time and in a meaningful manner" where he was represented and able to answer questions and provide "his version of the facts."[158]

The cases cited by *In re M-A-M-* exemplify much of the federal case law developed in this area, even after the BIA fleshed out the competency framework in 2011. In the 1977 Ninth Circuit case *Nee Hao Wong v. INS*, the court determined that procedural due process did not require proceedings to be suspended until such time as the respondent could "participate intelligently" in them.[159] The court reasoned that where the respondent's state-appointed conservator had testified on his behalf pursuant to the stand-in regulations discussed throughout Section II.A and he had been represented by counsel, his proceedings were fundamentally fair and his rights had been protected.[160]

And in *Brue v. Gonzales* in 2006, the Tenth Circuit held the respondent, who had a long and significant history of documented mental health disabilities, was given the process he was due because he was represented.[161] The court also flirted with the idea that the statutory provision and stand-in regulation required no additional safeguards when a respondent who was incompetent was present in court and endeavored to emphasize how "minimal" the procedural protections are in immigration court.[162] Finally, the court rejected the petitioner's argument that his mental health disabilities affected his ability to provide information to his counsel that would have affected his claims.[163] The court reasoned that "[a]lthough his testimony occasionally drifted off," he was able to provide his version of the facts.[164] Accordingly, he was meaningfully heard.[165]

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[157] *In re* M-A-M-, 25 I. & N. Dec. 474, 482 (B.I.A. 2011) (citing Nee Hao Wong v. INS, 550 F.2d 521, 523 (9th Cir. 1977)).

[158] *M-A-M-*, 25 I. & N. Dec. at 482–83 (citing Brue v. Gonzales, 464 F.3d 1227, 1232–34 (10th Cir. 2006)). The BIA also cites cases from the Eighth and First Circuits that stand for the proposition that competency is presumed. *M-A-M-*, 25 I. & N. Dec. at 483.

[159] *Nee Hao Wong*, 550 F.2d at 523.

[160] *Id.* In general, this decision expresses a lot of ableism, if not outright animus, towards people with mental health disabilities. *See, e.g.*, *id.* at 523–24 (using such terms as "mental incompetents" and "mental problems" and upholding the lower court's decision, citing concern about the costs of the respondent's care to the public).

[161] 464 F.3d at 1233.

[162] *Id.*

[163] *Id.* at 1234.

[164] *Id.*

[165] *Id.*

Since *In re M-A-M-*'s issuance, federal courts have cited to it over 100 times, a striking fact that further hints at the prevalence of mental health disabilities among noncitizens appearing in immigration court and the impact that the murky competency rules have on removal proceeding outcomes.[166] This fact is thrown into sharper relief when considered against the backdrop that the vast majority of removal orders are not appealed all the way to the federal circuits.[167] Thus, because competency arises with some frequency on appeal, the remainder of this Subection does not endeavor to review all of the cases in which it is raised. Rather, it attempts to identify trends in federal court treatment of the term "safeguard" by reviewing a sampling of decisions from circuits that have closely considered the question.

Across the circuits, there is limited support for the notion that a safeguard facilitates the respondent's meaningful participation. The Fourth Circuit appears to have endorsed *In re M-A-M-*'s "meaningful[] participat[ion]" conceptualization.[168] The Second Circuit also appears to favor that conceptualization, discussed below. However, the Fourth Circuit has described safeguards as a means for protecting a respondent's rights, but without inquiry into whether the noncitizen respondent is able to meaningfully participate with the safeguards in place.[169] In that opinion, the Fourth Circuit also referred to safeguards as "procedural safeguards."[170]

The Fourth Circuit's focus on process and protection of rights in *Cardenas-Martinez* reflects the overall approach of the federal courts toward reviewing safeguards imposed in removal proceedings. Indeed, courts use

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[166] WESTLAW, https://westlaw.com [https://perma.cc/7B2L-N2RZ] (search "Matter of M-A-M-" with filter "Federal Courts of Appeals").

[167] As of fiscal year 2022, the BIA completed 31,764 cases; compare this figure to the approximately 4,955 cases appealed to the U.S. Courts of Appeals. *Compare Adjudication Statistics: All Appeals Filed, Completed, and Pending*, EXEC. OFF. FOR IMMIGR. REV. (Apr. 19, 2024), https://www.justice.gov/eoir/media/1344986/dl?inline [https://perma.cc/6L44-LNH3]; *with Federal Judicial Caseload Statistics 2022*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2022 [https://perma.cc/M832-264W].

[168] Hernandez Mucia v. Garland, No. 21-1670, 2022 WL 17269002, at *2 (4th Cir. Nov. 29, 2022) (quoting Diop v. Lynch, 807 F.3d 70, 76 (4th Cir. 2015)). However, the Fourth Circuit tends to confuse the "meaningful participation" conceptualization for the standard for competency, not the goal of any safeguards imposed, finding that because the respondents had been able to meaningfully participate, the finding of competency was correct. The BIA first blurred these lines in upholding the immigration judge's finding that Mr. Hernandez Mucia, who had received a post-traumatic stress disorder diagnosis and sometimes heard voices, was competent because he had meaningfully participated in the proceeding.

[169] Cardenas-Martinez v. Garland, No. 19-2327, 2021 WL 3138593, at *4 (4th Cir. July 26, 2021). Mr. Cardenas-Martinez, who had come to the United States at the age of fifteen as an unaccompanied minor, had "been diagnosed with ADHD, anxiety, and 'major neurocognitive defects,'" and an autism diagnosis had not been ruled out by his medical care team. *Id.* at *1.

[170] *Id.* at *5.

"procedural safeguards" and "safeguards" interchangeably, reflecting an understanding that if sufficient process is provided, the safeguard is appropriate or sufficient.[171] While expressing some frustration with the lack of clarity from immigration courts and the BIA on competency and "how to proceed if an individual is incompetent," the Ninth Circuit has variously held that the safeguards' role is to protect the respondent's rights, to safeguard the respondent's due process rights, and to ensure the respondent receives the process they are due.[172] Similarly, the Eleventh Circuit has stated that a removal proceeding can continue "so long as safeguards are in place to ensure that the respondent's rights and privileges under the INA are protected."[173]

The Ninth Circuit's discussion in *Benedicto v. Garland* is the circuit's most recent answer to a challenge to safeguards on appeal and its limitations. Mr. Benedicto was a legal permanent resident for more than thirty years when his removal proceedings began.[174] The record is replete with references to his "mental illness" and obvious manifestations of paranoia and other symptoms of a disability. While the Ninth Circuit's decision in his case does not specifically document his disabilities, it appears undisputed he has "mental illness" and the immigration judge's determination of his incompetency to proceed pro se was not challenged.[175] Mr. Benedicto distrusted his appointed counsel, at one point punching counsel in the face, who made multiple motions to terminate on the grounds that they could not consult. In denying these motions, the federal court specifically held that

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[171] *See, e.g.*, Salvador v. Garland, No. 20-60517, 2022 WL 1055572, at *1 (5th Cir. Apr. 8, 2022) (noting that "appropriate procedural safeguards were provided" to the respondent, such as the immigration judge accepting her subjectively held beliefs pursuant to *J-R-R-A-*).

[172] Calderon-Rodriguez v. Sessions, 878 F.3d 1179, 1182 (9th Cir. 2018); Benedicto v. Garland, 12 F.4th 1049, 1058 (9th Cir. 2021) (holding that the safeguards' role is to protect the respondent's rights); Bartolo v. Holder, 495 F. App'x 825, 827 (9th Cir. 2012) (holding that the safeguards' role is to protect the respondent's due process rights). In this case, Mr. Bartolo suffered from undisputed "serious mental illness." *Id.* at 826. The short opinion does not describe Mr. Bartolo's immigration history. This case represents one of the few reversals on appeal—the Ninth Circuit held that the immigration judge's decision to exclude Mr. Bartolo from the courtroom "out of concern that he might disrupt the proceedings or cause an 'incident' due to his illness," as an unarticulated safeguard, violated due process. *Id.* at 826–27; *cf.* Chavarin v. Sessions, 690 F. App'x 924, 927 (9th Cir. 2017) (holding that the safeguards' role is to ensure the respondents receive the process they are due). Mr. Chavarin "lived for many years in the United States as a legal resident" and had been diagnosed with schizophrenia. *Id.* at 925. The immigration judge imposed as safeguards frequent breaks for Mr. Chavarin to take his medication, the presence of three attorneys, and the involvement of his family members at the hearing. The appellate court states without explanation that this constituted the process he was due. *Id.* at 927.

[173] Coto v. U.S. Att'y Gen., No. 20-13369, 2021 WL 3627592, at *1 (11th Cir. Aug. 17, 2021).

[174] *Benedicto*, 12 F.4th at 1053, 1058. Mr. Benedicto evinced multiple symptoms of mental disabilities, apparent from the opinion, which seem to have significantly adversely impacted his relationship with his appointed counsel. *Id.* at 1054.

[175] *Id.* at 1055.

Mr. Benedicto had the opportunity to consult with an attorney as part of its finding that his proceedings comported with due process.[176] Mr. Benedicto's proceedings moved forward with six safeguards in place, and he was ordered removed. On appeal, the federal court upheld his removal order by counting the number of safeguards the immigration judge imposed and determining without further explanation that these safeguards were the process he was due.[177] It was irrelevant to the court that the safeguards included such unremarkable—and legally required—tasks as the immigration judge accepting counsel's filing of applications for relief and reviewing the entire record.[178] The court also evinced no regard for Mr. Benedicto's inability to participate in the proceedings.[179]

In its analysis, the court leaned heavily on the number of safeguards provided by the immigration judge to the respondent and his appointed counsel, finding that they "sufficed to provide Benedicto with due process."[180] Indeed, after listing out the six implemented "procedural safeguards"—appointing counsel, granting continuances, compelling documents from the government, ensuring that appointed counsel could file written pleadings and application for relief, personally questioning the respondent, and reviewing evidence submitted into the record—the court held that these safeguards permitted the respondent and his appointed counsel "to present 'sufficient relevant information' supporting his claims for relief and challenge his removability."[181]

The Ninth Circuit appears to subscribe to the *In re M-J-K-* conceptualization of safeguards, applauding the efforts made by the appointed counsel and immigration judge to put evidence into the record without Mr. Benedicto's cooperation or participation, even where those efforts were as minimal and routine as reading the file. The court then cloaks these efforts in the language of due process, even though the record seems to indicate that several significant areas of investigation into potential avenues for relief from removal remained unexplored at the conclusion of the

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[176] *Id.* at 1054, 1060.

[177] *Id.* at 1058.

[178] *See generally* 8 C.F.R. 1003.10(b) (2024) (describing the powers and duties of an immigration judge).

[179] *Benedicto*, 12 F.4th at 1555 (noting the immigration judge implemented "appropriate" safeguards in Mr. Benedicto's proceedings, including: appointment of a qualified representative, granting "all continuance requests" from Mr. Benedicto's qualified representative, providing "two explanations of Benedicto's rights and the charges in the Notice to Appear," allowing the qualified representative to appear telephonically, and independently questioning Mr. Benedicto herself during the merits hearing).

[180] *Id.* at 1058.

[181] *Id.* (citing *In re* M-J-K-, 26 I. & N. Dec. 773, 776 (B.I.A. 2016)).

removal proceedings.[182] Of greater concern, the Ninth Circuit did not explain how the safeguards were at all responsive to the respondent's disability or how they overcame the breakdown of his relationship with his counsel.

Reid v. Garland, freshly decided in the Second Circuit,[183] could chart a different path for federal court review of safeguards used for noncitizen respondents deemed incompetent in immigration court. There, according to the facts discussed at oral argument, a longtime permanent resident with unrebutted evidence of severe schizophrenia distinctly and adversely impacting his ability to consult with counsel was ordered removed by the immigration judge, partially due to his inability to provide key pieces of information to his counsel.[184] His counsel's motion to terminate proceedings was denied.[185] The immigration judge, aware that the respondent was unable to consult with counsel, never made a competency finding but nonetheless imposed safeguards—chief among them, taking off the judicial robe.[186]

At oral argument, Judge Myrna Pérez expressed incredulity, asking the government lawyer, "but if you didn't make a formal finding as to competency, how could you make sure that the safeguards at issue are actually fixing the problem that the person in front of them is having?"[187] After the government lawyer defended the immigration judge by stating that "[the immigration judge] put the safeguards in place, and we think that is enough,"[188] Judge Pérez rephrased the question, "if you don't know what is the person's issue, how can you be sure that the safeguards that you have are actually married to addressing that issue?"[189]

The government lawyer took the position that the respondent in this case received due process, framing the inquiry as, "did [the noncitizen respondent] have notice and opportunity to respond? Did he have a fundamentally fair chance to put forth all the evidence necessary for those two [forms of relief he was pursuing]?"[190] The government lawyer argued that all of the evidence necessary for relief was presented to the immigration judge and this demonstrates that the respondent got the process he was due, framing the inquiry again as, "is there anything else that he could have, that

[182] For example, the court did not explore Mr. Benedicto's fear-based claims for relief with corroborating witnesses such as family members. *Id.* at 1058.

[183] Reid v. Garland, No. 20-3324, 2024 WL 4674317 (2d Cir. Nov. 5, 2024).

[184] Oral Argument, *supra* note 2, at 0:00–1:41.

[185] *Id.*

[186] *Id.*

[187] *Id.* at 13:06.

[188] *Id.* at 13:41.

[189] *Id.* at 13:44.

[190] *Id.* at 14:11.

additional safeguards could have provided, that would have enabled him to put forth more evidence that could have tipped the scales [on relief]?"[191]

Judge Pérez repeatedly noted the profound disconnect between the difficulty that the respondent's disability affecting competency posed—namely, that he could not communicate or consult with his counsel—and the safeguard the immigration judge decided to implement: taking off their judicial robe. At one point, she pointedly asked the government attorney: "[S]o how about you tell me, how is not wearing a robe going to address not being able to connect with your lawyer?"[192]

Although the questions are phrased somewhat unartfully, Judge Pérez's point is clear: safeguards, in her conceptualization, should be tied to the respondent's disability affecting competency and should build a bridge to their meaningful participation in their proceedings. This is consistent with *In re M-A-M-* and that opinion's purported role of safeguards. However, Judge Pérez also articulated an additional step beyond what *In re M-A-M-* currently requires—a check to ensure that someone can in fact meaningfully participate after any particular safeguard is imposed. Or, as she alluded to, that the implemented safeguard is "actually . . . addressing that issue."[193] As the Second Circuit seems to have issued a rule in this case along the lines that Judge Pérez discussed at oral argument,[194] it may mark a strong turn in the federal courts toward embracing the *In re M-A-M-* articulation of safeguards as a means to meaningful participation over the less robust, less coherent articulations found in other agency case law discussed above. Moreover, as spelled out more fully below, Judge Pérez's concern for an individualized and responsive safeguard is consistent with disability law requirements for noncitizen respondents with disabilities affecting competency.

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[191] *Id.* at 17:41.

[192] *Id.* at 20:41.

[193] *Id.* at 13:50.

[194] *See generally* Reid v. Garland, No. 20-3324, 2024 WL 4674317, at *1 (2d Cir. Nov. 5, 2024) ("[W]e hold that to protect the rights and privileges of noncitizens who may be incompetent, an IJ must: (1) make a finding as to whether the noncitizen is incompetent; and, if so, (2) generate a record of sufficient findings regarding the character, scope, and severity of the noncitizen's incompetency; (3) implement safeguards that address the character, scope, and severity of the noncitizen's incompetency; and (4) articulate how and why the safeguards adequately and appropriately protect the noncitizen's rights and privileges under the INA and the Due Process Clause."). As noted in the Introduction, *Reid* was decided days before this Article's publication. As a result, this Article does not parse the opinion itself thoroughly, although it appears consistent with Judge Pérez's reasoning at oral argument. *Id.*

III. SAFEGUARDS AS REASONABLE ACCOMMODATIONS: APPLYING A DISABILITY LENS

This Article makes it clear that questions of competency in immigration court are, ultimately, a disability inquiry. All of the respondents at the center of agency case law on competency and safeguards were people with mental disabilities that affected their competency.[195] Their disabilities, in turn, affected their ability to continue to defend their removal case, as the law requires them to do. Thus, as a normative matter, disability law should apply in these cases. Disability law readily presents frameworks for conducting removal proceedings more fairly.

Before turning to the specific legal frameworks applicable to noncitizens with disabilities who are placed in removal proceedings, it is necessary to consider the context in which those frameworks operate: namely, the rank ableism of the American immigration legal system. The long history of hostility toward immigrants with disabilities codified in immigration statutes has been thoroughly documented.[196] For decades, American immigration law has been preoccupied with keeping people with all kinds of health conditions and disabilities—including mental disabilities—out of the country.[197] Even today, medical conditions are grounds for inadmissibility,[198] and people applying for many types of

[195] *See supra* note 106 and accompanying text (discussing a respondent who had "difficulty answering basic questions, such as his name and date of birth" and had been diagnosed with schizophrenia); *supra* note 123 and accompanying text (discussing a respondent who was "transferred into DHS custody from a psychiatric hospital" and had a known history of mental illness); *supra* note 128 and accompanying text (discussing a respondent who had a well-documented history of mental health disabilities); *supra* note 132 and accompanying text (discussing a respondent who had a "cognitive disability that affected his ability to testify"); *supra* note 144 and accompanying text (discussing a respondent deemed incompetent by the immigration judge based on psychiatric evaluation).

[196] *See generally* Medha D. Makhlouf, *Destigmatizing Disability in the Law of Immigration Admissions*, *in* DISABILITY, HEALTH, LAW, AND BIOETHICS 187 (I. Glenn Cohen, Carmel Shachar, Anita Silvers & Michael Ashley Stein eds., 2020) (discussing the codification of immigration statutes that are especially hostile towards immigrants with disabilities).

[197] *Id.* ("Federal laws excluding noncitizens on the basis of vague, health-related criteria have existed since 1882."). Early-twentieth-century policy from the U.S. Public Health Service called for medical inspectors to look for evidence of various conditions, including hysteria and "psychoses of various kinds." *Id.*

[198] 8 U.S.C. § 1182(a)(1)(A)(iii)(II) ("Any [noncitizen] . . . who is determined . . . to have had a physical or *mental disorder* and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the [noncitizen] or others and which behavior is likely to recur or to lead to other harmful behavior . . . is inadmissible." (emphasis added)); *Chapter 7: Physical or Mental Disorder with Associated Harmful Behavior*, in *Policy Manual*, U.S. CITIZENSHIP & IMMIG. SERVS. (last updated July 12, 2024), https://www.uscis.gov/policy-manual/volume-8-part-b-chapter-7 [https://perma.cc/G9TE-WCVE].

immigration status must submit to a medical examination as part of their application.[199]

Immigration is by no means the only area of American society or the law that discriminates on the basis of disability. As Justice John Paul Stevens wrote in *Tennessee v. Lane*, the Americans with Disabilities Act (ADA) "was passed by large majorities in both Houses of Congress after decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons with disabilities."[200] Moreover, the ADA, enacted in 1990, is complementary legislation to the Rehabilitation Act of 1973,[201] known as the "Rehab Act." The Rehab Act primarily provided federal funding for vocational support for people with disabilities, but it included a groundbreaking anti-discrimination provision at section 504 of the statute.[202] Section 504 prohibits discrimination on the basis of disability by federal agencies, as well as any entity that receives federal financial assistance.[203] As Justice William Brennan noted in *School Board v. Arline*, the Rehab Act's passage—and its expansive definition of disability—"reflected Congress' concern with protecting the [disabled] against discrimination stemming not only from simple prejudice, but also from 'archaic attitudes and laws' and from 'the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with [disabilities].'"[204] In short, the legal frameworks discussed below came into existence in response to a long history of—and as part of a

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[199] *Chapter 3: Applicability of Medical Examination and Vaccination Requirement*, in *Policy Manual*, U.S. CITIZENSHIP & IMMIG. SERVS. (last updated July 12, 2024), https://www.uscis.gov/policy-manual/volume-8-part-b-chapter-3 [https://perma.cc/JE3B-2GKQ]. Similarly, the "public charge" rule in immigration law expressly allows for immigration courts to consider whether someone will require access to public benefits, such as Medicaid, in adjudicating their applications for admission or immigration benefits. This discriminates against people with disabilities and was the source of significant litigation and public outcry during the Trump administration. Public Charge Ground of Inadmissibility, 8 C.F.R. pts. 212, 245 (2024) (proposing rule by DHS prescribing determination of whether a noncitizen is inadmissible to the United States); Cook County v. Texas, 37 F.4th 1335, 1337 (7th Cir. 2022) (affirming district court's denial of motions for relief from judgment under Rule 60(b) after district court vacated the Rule under the APA); Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 8 C.F.R. pts. 103, 106, 212–214, 245, 248 (2024) (issuing final rule by DHS removing the 2019 Rule from the C.F.R.); Public Charge Ground of Inadmissibility, *id.* pts. 103, 212–213, 245 (issuing final rule by DHS on public charge promulgated as final in December 2022, reinforcing the longstanding policies on public charge that ensures families can access benefits without fear which remains in effect to date).

[200] 541 U.S. 509, 516 (2004). This decision barred Tennessee from maintaining courthouses with physical barriers for people with mobility disabilities that resulted in a paraplegic man with business before a Tennessee court having to pull himself up the courthouse steps. *Id.* at 513–15.

[201] 28 C.F.R. §§ 35.101–35.103 (2024).

[202] *See* Sch. Bd. v. Arline, 480 U.S. 273, 277–79 (1987) (discussing the legislative history of the Rehab Act). Section 504 is codified at 29 U.S.C. § 794.

[203] 29 U.S.C. § 794.

[204] *Arline*, 480 U.S. at 279 (quoting S. REP. NO. 93-1297, at 50 (1974)).

congressional attempt to combat—disability discrimination in the United States.

Section 504 governs federal programs conducted directly by a federal agency that provides federal services or benefits, such as DHS and DOJ, as well as a program conducted by any entity that receives federal financial assistance.[205] Under section 504, entities that conduct such programs must provide meaningful access to the program for a person with a disability who seeks to participate in it, often by provision of a reasonable accommodation or a policy modification.[206]

Thus, in Section III.A, I discuss the applicability of disability law in immigration court, demonstrating that section 504 of the Rehabilitation Act covers these proceedings and highlighting key cases that support this application. In Section III.B, I explore how disability law applies to noncitizens with disabilities affecting competency in removal proceedings, detailing the process for determining qualifying disabilities and ensuring meaningful access. Next, in Section III.C, I evaluate existing competency law in immigration court through a disability lens, focusing on the role and effectiveness of safeguards. Finally, in Section III.D, I discuss the importance of incorporating disability arguments into competency and safeguards claims, advocating for the integration of disability law into immigration court practices and outlining potential benefits and strategies for practitioners.

A. Disability Law Applies in Immigration Court

As co-authors and I have written elsewhere, there is no question that section 504 applies to programs conducted within the immigration system.[207] Indeed, the immigration courts, the BIA, and federal courts agree. According

[205] MEGAN H. MACK, U.S. DEPT. OF HOMELAND SEC., OFF. FOR C.R. & C.L., GUIDE 065-01-001-01, COMPONENT SELF-EVALUATION AND PLANNING REFERENCE GUIDE 6 (June 6, 2016), https://www.dhs.gov/sites/default/files/publications/disability-guide-component-self-evaluation.pdf [https://perma.cc/P2VU-QAGT].

[206] Alexander v. Choate, 469 U.S. 287, 301 (1985) (setting out the meaningful-access standard); *Reasonable Accommodations and Modifications*, U.S. DEP'T HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/reasonable_accommodations_and_modifications [https://perma.cc/KT2S-LYXT] ("Under Section 504, the requirement to make reasonable accommodations applies to any changes that may be necessary to provide equal opportunity to participate in any federally-assisted program or activity.").

[207] Margo Schlanger, Elizabeth Jordan & Roxana Moussavian, *Ending the Discriminatory Pretrial Incarceration of People with Disabilities: Liability Under the Americans with Disabilities Act and the Rehabilitation Act*, 17 HARV. L. & POL'Y REV. 231, 251 (2022) ("There is no question that the ADA and Rehabilitation Act protect individuals with disabilities from discrimination in a variety of contexts—including in programs within both immigration and criminal systems. The statutory texts are extremely broad: the Rehabilitation Act, as already quoted, covers federally conducted or assisted 'program[s] or activit[ies],' and the ADA covers 'services, programs, or activities of a public entity.'").

to DHS's own internal section 504 compliance documents, the provision applies to, among other things, immigration benefits, enforcement of immigration laws, and operation of immigration detention.[208] Similarly, the DOJ has promulgated regulations to implement section 504 in its own activities.[209]

Every federal court that has considered the applicability of section 504 to removal proceedings has determined that those proceedings must comply with disability law. For example, in *Franco*, Judge Gee repeatedly found that the plaintiffs had stated a claim for a section 504 violation by not being provided with appointed counsel.[210] Similarly, in *Fraihat v. ICE*, Central District of California Judge Jesus Bernal found that, with regards to noncitizens detained by ICE whose disability placed them at serious risk of harm or death by COVID-19, section 504 guaranteed them meaningful access to their removal proceedings.[211] The government did not contest the applicability of section 504 in these cases.[212]

Whether individual immigration judges understand their obligations to comply with section 504 in any given removal proceeding is a murkier question. Indeed, I have gathered several orders by immigration judges that indicate an unwillingness to apply section 504 in an individual respondent's removal proceedings. A recent advocacy report by Human Rights First finds that, based on a review of publicly available EOIR documents, immigration judges appear to have received no training on their disability law obligations or how to interact with respondents who appear before them

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[208] MACK, *supra* note 205.

[209] 29 U.S.C. § 794(a); 28 C.F.R. § 39.130 (2024) (applying the Rehabilitation Act to the DOJ); Memorandum from John M. Gore, Acting Assistant Att'y Gen., Dep't of Just., to the Fed. Agency C.R. Dirs. & Gen. Couns. (Apr. 24, 2018), https://www.justice.gov/crt/page/file/1060321/download [https://perma.cc/C3EX-BHTA].

[210] *See, e.g.*, Amended Order for a Preliminary Injunction, No. 107, at 26–27, Franco-Gonzalez v. Holder, No. CV 10–02211 DMG (DTBx), 2013 WL 3674492, at *3 (C.D. Cal. Apr. 23, 2013).

[211] *See* 445 F. Supp. 3d 709, 747–48 (C.D. Cal. 2020) (finding that section 504 covered immigration proceedings, with no counterargument from ICE, and finding that plaintiffs were likely to succeed on their section 504 claim, which requires a plaintiff to show that: "(1) he is an individual with a disability; (2) he is otherwise qualified to receive the benefit; (3) he was denied the benefits of the program solely by reason of his disability; and (4) the program receives federal financial assistance" (citing Updike v. Multnomah Cnty., 870 F.3d 939, 949 (9th Cir. 2017))). Plaintiffs established that persons with health conditions who are put at risk of severe illness and death if exposed to COVID-19 qualify as persons with disabilities under section 504. Furthermore, "[d]efendants [did] not argue otherwise." *Id.* at 747; *see also* Fraihat v. ICE, 16 F.4th 613, 650 (9th Cir. 2021) (reversing on other grounds based on assessment of evidence, not disagreement with the liability theory); Schlanger, Jordan & Moussavian, *supra* note 207, at 241 (collecting cases and commenting on this theory of coverage). In *P.L. v. ICE*, the court held that it could not reach the putative class's Rehabilitation Act claim because of the jurisdiction-stripping provisions of the INA. No. 1:19-CV-01336 (ALC), 2019 WL 2568648, at *3 (S.D.N.Y. June 21, 2019).

[212] *Franco-Gonzalez*, 2013 WL 3674492, at *5; *Fraihat*, 445 F. Supp. 3d at 748; Moran v. U.S. Dep't of Homeland Sec., No. ED CV 20-00696-DOC-JDE, 2020 WL 6083445, at *5 (C.D. Cal. Aug. 21, 2020).

with disabilities.[213] The report documents several concerning instances of immigration judges exhibiting bias and stigma toward noncitizen respondents with disabilities appearing before them, including disabilities affecting competency.[214] Training for immigration judges specific to issues of competency and noncitizen respondents with disabilities affecting competency, required primarily as part of *Franco*, has been deemed inadequate by scholars.[215] It does not appear that immigration judges who have been trained on issues of competency have been given any training on locating competency issues within a larger disability framework.

Despite immigration courts and the BIA's apparent lack of familiarity with its disability law obligations, disability law frameworks offer a clear roadmap for how to address a noncitizen respondent's disability affecting competency. Moreover, they provide a measuring stick by which to judge the current competency frameworks in immigration court, with a particular emphasis on the safeguards provided.

B. Applying Disability Law for a Noncitizen in Removal Proceedings with a Disability Affecting Competency

The section 504 analysis for a noncitizen with a disability affecting competency who is placed in removal proceedings would unfold like this: first, they would need to be determined to have a qualifying disability under the law.[216] This is a capacious definition and fact-driven inquiry. Mental and cognitive disabilities—including those that would affect competency—are

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[213] RITCHIN, *supra* note 28, at 32. Human Rights First takes the position that section 504 clearly applies to removal proceedings conducted by EOIR. *Id.* at 18. EOIR training materials developed in 2021 and produced in response to a FOIA request by immigration attorney Matthew Hoppock discuss competency at length with no citation to disability law. James F. McCarthy III & Christina Baptista, EOIR, Determining Mental Competence and Safeguards and Protections (Apr. 2021) (unpublished slide deck) (on file with author).

[214] RITCHIN, *supra* note 28, at 6.

[215] Professor Amelia Wilson's article looking back on ten years of the *Franco* litigation and the related NQRP program indicates immigration judges sitting outside of the *Franco* court's jurisdiction receive "less robust" and "less frequent" training than their *Franco* counterparts. Wilson, *supra* note 27, at 39–40; *see also* Sherman-Stokes, *supra* note 10, at 1050 ("[I]mmigration judges . . . have received little, if any, training on mental illness and mental incompetence."). The 2021 training slides produced to Matthew Hoppock pursuant to a FOIA, *supra* note 213, were disconcertingly rudimentary, except for a presentation made by Immigration Judge Jack Weil. It is my understanding that Judge Weil's more detailed presentation was made to a subset of immigration judges.

[216] Under both the ADA and the Rehabilitation Act, a person has a disability if: (i) "a physical or mental impairment that substantially limits one or more [of his or her] major life activities"; (ii) he or she has "a record of such an impairment"; or (iii) he or she is "regarded as having such an impairment." 42 U.S.C. §§ 12102(1)–(2); 29 U.S.C. § 705(20)(B).

expressly included if they substantially limit a major life activity, thereby qualifying under the law.[217]

The second step of the section 504 analysis is to determine whether the person with a disability can meaningfully access the federally administered or assisted program—in this case the removal proceedings.[218] The "meaningful access" standard, first announced by the Supreme Court in *Alexander v. Choate*, protects equal opportunity: a person with a disability that qualifies under the statutory definition must be granted a reasonable accommodation so that their access to the program in question looks equal to the access of a person without that disability.[219] The meaningful access standard does not guarantee equal results, but it means more than some or minimal access.[220]

Often, section 504 analysis turns on the reasonableness of the change to the program that the person with the disability is seeking because that accommodation or modification is the mechanism by which meaningful access may be achieved. The person with the disability generally bears responsibility to request such a change and, in litigation, carries the burden of demonstrating its reasonableness.[221] People with disabilities request reasonable accommodations or modifications to the policies, practices, and procedures that make up a program in order to gain meaningful access.[222]

The program can raise a defense that any given accommodation or modification poses an undue burden or fundamentally alters the program.[223] However, section 504 generally imposes affirmative obligations for federally funded or assisted programs to be accessible for people with disabilities.[224]

Moreover, for programs in a custodial setting such as immigration detention, case law heightens those programs' obligations even further. These heightened obligations have been applied to ICE detention and

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[217] 29 U.S.C. § 705(20)(B); 42 U.S.C. §§ 12102(1)–(3). Major life activities recognized in disability law that could affect competency to carry out tasks in a courtroom setting might include concentrating, communicating, and working. *See* 42 U.S.C. § 12101.

[218] *See supra* discussion in Section III.A (explaining the cases that have found immigration proceedings to be programs or benefits covered by section 504).

[219] 469 U.S. 287, 301–02 (1985); *see id.* at 305.

[220] Schlanger, Jordan & Moussavian, *supra* note 207, at 255.

[221] *Id.* at 258 & n.119 (collecting cases).

[222] 28 C.F.R. § 35.130(b)(7) (2024); *id.* § 35.108(e)(3). When, as in removal proceedings, a program run by a covered entity such as a federal agency is challenged, the terms are used fairly interchangeably.

[223] *See, e.g.*, PGA Tour, Inc. v. Martin, 532 U.S. 661, 682 (2001) (articulating a fundamental alteration standard).

[224] *See, e.g.*, Updike v. Multnomah Cnty., 870 F.3d 939, 949 (9th Cir. 2017) (stating that Title II and section 504 include an affirmative obligation for public entities to be accessible for people with disabilities).

meaningful access to removal proceedings.[225] Under these heightened standards, the program must take affirmative steps to identify people with disabilities seeking access and provide them with reasonable accommodations.[226] Whether an accommodation is reasonable in any given circumstance is "a fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question."[227] Put plainly, the accommodation must actually address the disability and what the person with a disability actually needs to equally access the program in question.

Applying these rules to the typical facts of a removal proceeding where a finding of incompetency has been made and the immigration judge is considering what safeguards to implement, safeguards should track reasonable accommodations. First, as the facts of the respondents in the cases described above demonstrate, they are people with disabilities likely covered by section 504.[228] Noncitizen respondents with indicia of incompetency that rise to the level of a finding of incompetency to proceed pro se and without safeguards almost certainly have a disability that qualifies under section 504.

Second, because the removal proceeding continues even after a finding of incompetency, a noncitizen respondent with a disability affecting competency must participate in that proceeding. Accordingly, they need meaningful access to that proceeding that affords them an equal opportunity to respondents without qualifying disabilities to defend themselves from removal and present applications for relief from removal. Under section 504, the noncitizen respondent with a disability affecting competency would be entitled to individualized reasonable accommodations to guarantee their meaningful access to their proceedings, such that they had an equal opportunity to adduce evidence and testimony, consult with their counsel, and otherwise meaningfully participate in their removal proceedings.

C. Evaluating Safeguards Through a Disability Lens

Having laid out the disability law frameworks that apply in immigration court, this Section will turn to assessing competency law in immigration court, focusing on safeguards. In particular, it answers the question: which

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[225] *See* Fraihat v. U.S. Immig. & Customs Enf't, 445 F. Supp. 3d 709, 747–48 (C.D. Cal. 2020) (first citing *Updike*, 870 F.3d at 949; and then citing Armstrong v. Brown, 732 F.3d 955, 962 (9th Cir. 2013)), *rev'd on other grounds*, 16 F.4th 613, 650 (9th Cir. 2021) (reversing based on assessment of evidence, not disagreement with the liability theory).

[226] *See Fraihat*, 445 F. Supp. 3d at 747.

[227] Celano v. Marriott Int'l, Inc., No. C 05-4004 PJH, 2008 WL 239306, at *3 (N.D. Cal. Jan. 28, 2008).

[228] I cannot state this conclusion more definitively without the additional facts of their disabilities and their impact on major life activities, as disability law requires fact-intensive analysis.

role envisioned for safeguards laid out in the cases, if any, is consistent with immigration courts and the BIA's disability law obligations? Put another way, do safeguards play the role of reasonable accommodations under disability law?

Before beginning that analysis, it is worth revisiting the strange note on which *In re M-A-M-* opens: that the issue of competency in immigration court is a "difficult area of the law" and that the opinion's objective is "ensur[ing] that proceedings are as fair as possible in an unavoidably imperfect situation."[229] Notably, what is not discussed is disability law. The *In re M-A-M-* decision—and all of the other case law discussed in this Article, for that matter—is devoid of any discussion of disability law, or any real engagement with the fact that a competency analysis is, at its heart, a disability analysis. In fact, while disability law requires some expertise and is certainly amenable to critique and improvement, it is by no means impossibly difficult. These table-setting statements by the BIA in this case read like an attempt to excuse itself for disability discrimination.

Despite this, *In re M-A-M-*'s conceptualization of "safeguards" as "meaningful participation" in removal proceedings hews most closely to the "meaningful access" disability law standard set out by the Supreme Court in *Choate*.[230] *In re M-A-M-* centers the noncitizen respondent with a disability affecting competency in its analysis. Specifically, per the opinion, any safeguard imposed by the immigration judge should facilitate the respondent's meaningful participation in the proceeding.[231] By requiring an incompetent respondent's meaningful participation, the BIA leaves the respondent in charge of their own case. Indeed, an equal opportunity to participate in a federally administered or assisted program embodies the idea of meaningful access that the Court laid out. Meaningful participation with safeguards is thus critical for meaningful access to the removal proceeding. The BIA's "meaningful participation" formulation of safeguards roughly equates safeguards with reasonable accommodations in immigration court.

That said, through a disability lens, *In re M-A-M-* falls short on two fronts. First, an individualized assessment of a noncitizen respondent's disability affecting competency so that they can be guaranteed meaningful participation (or meaningful access) is not a "safeguard" as that term is commonly used in the law. Instead, the inquiry would be more accurately

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[229] 25 I. & N. Dec. 474, 476 (B.I.A. 2011).

[230] Curiously, the *In re M-A-M-* opinion provides no citation for this "meaningful participation" formulation, although meaningful participation seems to be a variation on meaningful access.

[231] *M-A-M-*, 25 I. & N. Dec. at 482–83 (discussing Tenth Circuit case in which safeguards were deemed sufficient where "the [noncitizen] had an opportunity to be heard at a meaningful time and in a meaningful manner").

characterized as an assessment for a reasonable accommodation. The complete omission of a disability law framework and failure to instruct immigration judges to use such framework tolerates an unacceptable risk that individual respondents may not receive the accommodation they are entitled to under disability law, allowing immigration judges to get away with disability discrimination.

In re M-A-M-'s second shortcoming is that there is nothing in the opinion requiring any confirmation that the individual respondent can participate meaningfully (or has meaningful access). While the standard the opinion sets out theoretically squares with disability law, the opinion requires nothing to ensure that any safeguard an immigration judge imposes in fact facilitates meaningful participation. Accordingly, even under *In re M-A-M-*'s most favorable conceptualization of safeguards, from a disability vantage point, immigration courts and the BIA run the distinct risk of engaging in "safeguards theater," imposing safeguards that have no relation to a respondent's disability or the accommodations they need to meaningfully access or participate in the proceedings. This could constitute disability discrimination in violation of section 504.[232]

The role of safeguards as laid out in *In re M-J-K-* and *In re J-R-R-A-* is wholly incompatible with disability law. In those cases, the BIA instructs the immigration judge, as a safeguard, to dismiss or disregard the participation of the noncitizen respondent with a disability affecting competency. In addition to being paternalistic toward the person with the disability, this role of safeguards vitiates disability law's requirement of meaningful access to the removal proceedings; without the meaningful participation of the respondent—through, for example, testimony and consultation with counsel—the proceedings are not meaningfully accessed. They become a charade. The respondent is no longer in charge in their own case, which is at odds with disability law's empowerment of people with disabilities to have equal opportunities through meaningful access.

The process-oriented safeguards such as those set out in *In re E-S-I-* and reflected in the regulations are less amenable to disability law analysis. For example, ensuring the proper service of the charging document on a noncitizen with a known disability affecting competency, while important, merely notifies the respondent or someone affiliated with them that they are

[232] The only federal court to closely and systematically scrutinize the BIA's competency framework has reached a similar conclusion. In *Franco*, Judge Gee made the pointed observation that "[t]he majority of these 'safeguards,' however, are left to the Immigration Judge's discretion, and none guarantee that the incompetent [noncitizen] may participate in his proceedings as fully as an individual who is not disabled." Franco-Gonzalez v. Holder, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, at *8 (C.D. Cal. Apr. 23, 2013) (citing *M-A-M-*, 25 I. & N. Dec. at 482).

being called to court for removal proceedings. It has no bearing on what happens once those proceedings commence, including whether the respondent has meaningful access to them or can meaningfully participate. In other words, these safeguards largely open the door to the programs, but they do not ensure equal opportunity within them. For this reason, while these safeguards map most closely onto the term "safeguard" as it is understood in other areas of the law and in popular discourse, they should not be considered reasonable accommodations or program modifications as federal disability law requires. These safeguards are better understood to be additional process layered over the disability law inquiry.[233]

In summary, only one of the BIA's three conceptualizations of safeguards is compatible with disability law. One is, by contrast, antithetical to disability law. And one is neither here nor there—it is a more traditional, process-oriented safeguard, and is best understood as separate from a disability analysis. Because only *In re M-A-M-*'s meaningful participation formulation is consistent with section 504 requirements, the BIA should clarify that this is the sole role for safeguards to play. It should further issue additional clarification to strengthen the *In re M-A-M-* decision and address the shortcomings of that decision identified in this Section.[234] Finally, the BIA should overturn or clarify its prior decisions in *In re M-J-K-* and *In re J-R-R-A-* because they allow for safeguards that act in a case in ways that are inconsistent with federal disability law.

D. Incorporating Disability Arguments into Competency and Safeguards Claims

The immigration courts would do well to consider parallel arguments for safeguards and reasonable accommodations. In other words, respondents before immigration courts should ask the immigration judge to implement both, one grounded in the immigration statute and one grounded in federal disability law. Indeed, some practitioners have implemented just such a practice and leading practitioners, such as the network of appointed counsel for people deemed incompetent, have encouraged it.[235]

The benefit of requesting both safeguards and reasonable accommodations is threefold. First, it signals to the immigration judge that the post-competency-determination task before them must comport with disability law. It gives them a framework for ensuring that the safeguards

[233] This understanding is similar to that of the IDEA provision providing safeguards to parents of students with disabilities. *See* 20 U.S.C. § 1400.

[234] This argument assumes that some of the larger problems around competency frameworks in immigration court discussed in this Article remain static.

[235] LUNN ET AL., *supra* note 137.

imposed relate to the nature of the respondent's disability and guarantee the respondent an equal opportunity to present their case in court. In other words, by considering safeguards and reasonable-accommodations arguments as a pair, immigration judges would be disincentivized from engaging in safeguards theater.

Second, incorporating questions of compliance with section 504 into appeals on review to federal circuit courts further disincentivizes safeguards theater by the immigration courts.[236] This is because a denied request for a reasonable accommodation after a competency determination is actionable in federal court. Even with the immigration statute's jurisdiction-stripping provisions, questions of disability law compliance are questions of law reviewable in federal court.[237] Because federal court case law is well-developed on the disability law front, federal courts reviewing an appeal of a removal order where a respondent had safeguards implemented would have a clear road map for evaluating the respondent's claim: the question for the federal court would be whether they were discriminated against on the basis of their disability by not having meaningful access to their proceedings. This is a post hoc check that any safeguard imposed by an immigration judge was in fact tailored to the nature of the respondent's disability and was effective in providing the respondent meaningful access.

This second consideration is additionally important because, as the federal cases discussed above show, the federal courts currently uphold safeguards theater. For example, the *Benedicto* case is bizarre in the lengths it goes to defend unremarkable safeguards imposed by the immigration judge. The opinion is a clear endorsement of safeguards theater—because the judge took some action to impose safeguards, the safeguards are sufficient. That the safeguards imposed were merely consistent with the

[236] I should acknowledge that a limitation to this proposed benefit is the difficulty noncitizen respondents have accessing federal court review. This arises for several reasons. First, many immigration attorneys, particularly nonprofit service providers, do not fund federal court litigation. Second, a Petition for Review (PFR) must be filed 30 days after a BIA decision, but once the BIA decision is issued, the removal order is considered final. *See, e.g.*, FLORENCE IMMIGR. & REFUGEE PROJECT, HOW TO FILE A PETITION FOR REVIEW IN THE NINTH CIRCUIT COURT OF APPEALS 4, 9 (Feb. 2022), https://www.firrp.org/media/Ninth-Circuit-Guide-2013.pdf [https://perma.cc/3PCA-ZBR5]. A petitioner for review may seek a stay of removal, but review is not automatic, and removal orders are frequently executed while a PFR is pending, requiring the noncitizen respondent to prosecute the litigation from abroad. *Id.* at 8. As a result, it is unlikely that every noncitizen respondent who may have a meritorious claim of disability discrimination will be able to bring that claim in a petition for review before a federal court, allowing some safeguards theater to continue unchecked. *See id.*

[237] I have previously written about this extensively in the context of a detained noncitizen's access to habeas corpus to raise a Rehab Act claim. *See* Schlanger, Jordan & Moussavian, *supra* note 207, at 281. Here, the question is even easier: the jurisdiction-stripping provision of the INA expressly allows federal courts to review questions of law on a PFR. 8 U.S.C. § 1252(a)(2)(D). Whether a safeguard comported with disability law is a question of law.

judge's basic duties under the law is irrelevant to the federal court. So is the fact the safeguards in no way addressed the respondent's disability or ameliorated his inability to consult with his counsel.

The frustration the federal courts express with immigration courts and the BIA's lack of clarity, along with the failure to provide definitions in the federal case law on competency and safeguards, betray the federal judges' lacking understanding of what they are looking at when these issues are challenged on appeal. Giving federal courts an analytical tool through disability law would mitigate this systemic shortcoming.

Additionally, if the federal courts continue to rely on due process considerations in assessing competency determinations and safeguards implementation, an understanding of disability law would give that analysis more teeth. Because due process is flexible and circumstance-specific,[238] the federal courts can consider disability law in determining whether specific safeguards are fundamentally fair under the Fifth Amendment as due process requires.[239]

But, to be clear, a disability law remedy is preferable to maintaining the due process status quo. This is primarily because, as this Article amply demonstrates, due process—particularly in immigration, where merely the low bar of "fundamental fairness" must be cleared—can easily lose sight of the person at the center of the contested process. Process can be deemed sufficient even when the respondent with the disability manifestly does not comprehend. By contrast, the disability law inquiry requires that the respondent with the disability be front and center. The person-centeredness of ensuring equal access through reasonable accommodations or policy modifications means that, should a disability claim be brought, the federal court has no choice but to assess the proceeding that was conducted in direct

[238] This is a long-held notion. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 334 (1976) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands." (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972))); *see also* Henry M. Hart Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1394 (1953) ("[T]he requirements of due process must vary with the circumstances, . . . allowing [the Court] all the flexibility that can conceivably be claimed . . . .").

[239] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 24–25 (1981) ("Rather, the phrase [due process] expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake."). It is well-established that individuals in removal proceedings have a due process right to a full and fair hearing, see, for example, *Jacinto v. INS*, 208 F.3d 725, 727 (9th Cir. 2000), and a statutory right to a reasonable opportunity to present evidence on her behalf. *See* 8 U.S.C. § 1229a(b)(4). Nonetheless, scholars have characterized the immigration court system as undergoing a "due process crisis." Talia Peleg & Ruben Loyo, *Transforming Deportation Defense: Lessons Learned from the Nation's First Public Defender Program for Detained Immigrants*, 22 CUNY L. REV. 193, 200 (2018).

relation to the respondent and whether their needs were met. Because of this, disability law provides more robust protection, particularly from the vantage point of the respondent.

A brief example may further illustrate this point. As discussed above, in *Franco-Gonzalez v. Holder*, the district court judge found that, under federal disability law, appointed counsel at government expense was a reasonable accommodation for detained noncitizen respondents with disabilities affecting competency.[240] In other words, Judge Gee in *Franco* effectively created a right to counsel in immigration court where it was not expressly contemplated by statute. By contrast, in *C.J.L.G. v. Sessions*, the Ninth Circuit held that due process did not require the creation of a similar appointed-counsel-at-government-expense system for children appearing in immigration court.[241] Despite expressing sympathy for C.J., a child facing death at the hands of gang members should he be deported to Honduras, the panel declined to create a due process right to counsel for children in immigration court, focusing on the process C.J. was due at the hands of other actors in the system—namely, the immigration judge—and not on his ability to access his court proceeding.[242]

Third, disability law covers all kinds of disabilities, not just those that might affect a noncitizen's competency in court. Educating immigration judges on their obligations under disability law would potentially increase judges' amenability to provision of reasonable accommodations for any disability. In other words, by incorporating disability law into the post-competency determination analysis, the court may turn more readily to disability law for other kinds of analysis, such as the impact of trauma on testimony. This would be critical for other key components of removal proceedings, such as credibility determinations.

In some ways, the fuzziness of agency case law—*In re J-R-R-A-* in particular—on the idea that safeguards must correlate to competency has redounded to the benefit of respondents with disabilities who have not been deemed incompetent. Specifically, because *In re J-R-R-A-* opens the door to the provision of safeguards even where a finding of incompetency is not made, practitioners have requested safeguards for respondents who have not been deemed incompetent.[243] If *In re J-R-R-A-* is overruled or clarified by the

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[240] *See supra* Section I.A.4.

[241] 880 F.3d 1122, 1150–51 (9th Cir. 2018), *vacated on other grounds sub nom.*, C.J.L.G. v. Barr, 923 F.3d 622, 629 (9th Cir. 2019) (en banc) (granting the PFR). In a similar case, *J.E.F.M. v. Lynch*, a Ninth Circuit panel held there was no jurisdiction for a class-wide due process challenge on behalf of unrepresented children in immigration court. 837 F.3d 1026, 1038 (9th Cir. 2016).

[242] *C.J.L.G.*, 880 F.3d at 1129, 1150–51.

[243] *Cf.* LUNN ET AL., *supra* note 137, at 12.

BIA, as this Article contends it should be, then reasonable accommodations for these respondents could fill the void created by such a narrowing or reversal.

IV. REMOVAL OF PEOPLE WITH DISABILITIES IS IMMORAL AND CONFLICTS WITH DISABILITY LAW

It would be remiss to close this Article without challenging the premises on which the competency framework rests. This Part will address two of them: Section IV.A discusses the continuation of a removal proceeding despite a respondent being deemed incompetent, and Section IV.B looks at the overemphasis on a noncitizen with a mental health disability's contact with the criminal legal system.

A. Termination of Removal Proceedings Should Be Routine

First, it is profoundly troubling that, in a stark departure from the criminal law governing competency, immigration proceedings move forward when a noncitizen respondent is deemed incompetent. This is concerning for a few reasons. First, the safeguards imposed after such a finding may not be responsive to and effective for supporting the nature of their disability, resulting in a proceeding where they did not, as a matter of fact, understand the proceeding or have the ability to navigate it. In these circumstances, the immigration court is vulnerable to engaging in safeguards theater, imposing a few ineffective safeguards and allowing the deportation machine to move right along. The risk of wrongful removal under such circumstances is great.

Second, for noncitizen respondents who are not detained when they are deemed incompetent, they are not entitled to counsel under *Franco* or the NQRP. Thus, they may be forced to continue pro se even without being competent to understand and navigate the proceedings. In other words, in the non-detained setting, the person may not be able to meet the standard for competency because they will remain uncounseled, regardless of other safeguards.

This Article insists instead that termination of proceedings for noncitizen respondents who are determined to be incompetent should be routine. As the *Reid* and *Benedicto* cases demonstrate, practitioners representing noncitizen respondents deemed incompetent move for

termination with some regularity.[244] This argument currently takes several forms.

First, counsel in *Reid* and *Benedicto* made the argument on the basis that they were unable to consult with their clients. This argument sounds in the competency standard articulated in *In re M-A-M-* and borrowed from criminal law. The standard requires that, where counsel is present, the noncitizen respondent can consult with counsel.[245] Where the noncitizen respondent's disability affecting competency also affects the construction of the attorney–client relationship, such consultation may not be possible. For example, Mr. Reid and Mr. Benedicto both exhibited profound distrust of their counsel and critical information gaps could not be filled through the attorney–client relationship. Using the analogy of driving a car, even assuming those attorneys respected their client's position in the driver's seat, there could be no meaningful agreement between attorney and client on the direction in which they would drive, their strategy for getting to their destination safely, and the like. This inability to consult, in addition to causing the attorney–client relationship to potentially break down, rendered their clients so incompetent—despite the presence of counsel—that proceedings could not continue.[246]

A second argument conceptualizes termination as a last resort when all other safeguards or reasonable accommodations have been determined to be inadequate to ensure the noncitizen's meaningful access to and participation in their removal proceedings. Indeed, the 2016 EOIR Immigration Judge Benchbook—a sort of how-to manual for immigration judges—expressly contemplated termination where safeguards may not be adequate.[247] And in fact, even *In re M-A-M-* indicates that proceedings should only move forward if they can be rendered fair by the implementation of adequate safeguards,

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[244] *See id.* at 23 & n.19 (citing Sherman-Stokes, *supra* note 10, at 1057 n.191 (citing a 2015 interview with a New Jersey immigration practitioner who has "represented approximately fifteen respondents annually with competency evaluations each year for the last four years and had approximately ten to fifteen cases terminated on competency grounds")).

[245] *In re* M-A-M-, 25 I. & N. Dec. 474, 478 (B.I.A. 2011) (quoting Drope v. Missouri, 420 U.S. 162, 171 (1975)).

[246] As previously noted, Mr. Benedicto punched his appointed counsel, a clear indication the relationship had broken down. *See* text accompanying *supra* notes 174–182.

[247] *Mental Health Issues* at 15, Resource in *Immigration Judge Benchbook*, U.S. DEP'T OF JUST.: EXEC. OFF. FOR IMMIG. REV., https://www.justice.gov/eoir/archived-resources-0 [https://perma.cc/T6R6-92JU] (download "Immigration Judge Benchbook (Archived)," open "tools" folder, and select document labelled "MHIIndex_archive.pdf"). Similarly, presentation slides from an EOIR training for immigration judges conducted in 2021 indicate that judges received instructions to consider termination as a safeguard, although—curiously—not for detained cases. Daniel Cicchini & Renae Hansell, Juvenile Cases slide 66 (unpublished slidedeck), https://www.muckrock.com/foi/file/1027665/embed/ [https://perma.cc/Z2F9-HM5K].

implying that inadequate safeguards would be cause for termination. Indeed, quite recently, DHS proposed a regulation requiring termination where safeguards are not adequate, adding strength to this argument.[248]

To prevail, this argument requires a clear and shared understanding of safeguards, what work they do in a removal proceeding where competency is at issue, and how they are assessed for adequacy. *Benedicto* and *Reid* show the vulnerability of the argument—even where respondents' counsel (and, in the case of Mr. Reid, their mental health expert) mounted strong arguments that those respondents could not participate in their proceedings and termination was necessary as a last resort, their motions to terminate were denied. And the BIA held in both cases that the safeguards theater engaged in by the immigration judges instead—taking off their robe, reading the record, allowing counsel to make arguments, etc.—was sufficient.[249]

I posit an additional rationale for agency termination of proceedings where a noncitizen respondent has a disability affecting competency. As Professor Sherman-Stokes has noted, termination of proceedings because of a noncitizen's incompetency would be available under federal disability law.[250] This Section fleshes that argument out.

As discussed above, reasonable modifications to policies, practices, and procedures are commonly made under disability law. Here, the BIA and immigration courts' policy is to continue with the removal proceeding against all noncitizen respondents deemed incompetent to proceed pro se and without safeguards. Under disability law, respondents with such profiles should argue for a reasonable modification to that policy in the form of termination of their removal proceedings. Indeed, the government's own recent proposed rule requiring termination for incompetent respondents where safeguards are inadequate could be read as just such a policy modification. And indeed, immigration courts terminate proceedings against respondents for many different reasons, undermining any defense that the

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[248] Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 8 C.F.R. pts. 1001, 1003, 1239, 1240 (2024).

[249] The *Benedicto* and *Reid* cases also demonstrate the vulnerability of the argument that inability to consult with counsel should lead to termination. As Professor Marouf has argued, this is undoubtedly in part because the right to counsel in immigration court is optional, rendering that prong of the competency standard on shaky ground. Marouf, *supra* note 3, at 946 n.85. Additionally, the incoherence around the role of safeguards likely also contributes—at least in the *Benedicto* case—to the federal court's endorsement of safeguards as an alternative route to gathering information, which renders the attorney–client relationship less critical.

[250] Sarah Sherman-Stokes, *No Restoration, No Rehabilitation: Shadow Detention of Mentally Incompetent Noncitizens*, 62 VILL. L. REV. 787, 791 (2017) (arguing that termination of proceedings and release to mental health care may be the "only 'reasonable accommodations' available to this subset of incompetent respondents"). I argue instead for a reasonable program modification, not a reasonable accommodation, for the reasons laid out above.

policy modification sought by respondents with disabilities affecting competency fundamentally alters the program.[251]

Some commentators have argued that a lawyer seeking termination in a removal proceeding where the client has viable forms of relief faces an ethical conundrum.[252] This argument carries additional weight where the form of relief at issue is only available in removal proceedings, such as cancellation of removal. This argument goes: by seeking termination and taking these forms of relief off the table, the lawyer places the noncitizen client in immigration-status limbo. They may be returned to "square one" in the immigration process as an undocumented person. Additionally, they may lose access to benefits that stem from pending removal proceedings where an application for relief has been filed and is waiting adjudication, such as work authorization.[253]

However, these commentators rightly note that relief is not guaranteed in immigration court.[254] Cancellation of removal, for example, requires meeting the high burden of showing an "exceptional and extremely unusual hardship" to a qualifying relative with immigration status.[255] It also requires demonstrating so-called "good moral character."[256] Finally, it requires an immigration judge to determine that a noncitizen respondent merits an exercise of discretion through the grant of relief.[257] For noncitizens with disabilities affecting competency, meeting these burdens may prove extremely challenging, even when counseled. Rolling the dice by continuing

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[251] For example, under the Biden Administration, various leaders at ICE have instructed staff to move to dismiss proceedings against certain sympathetic respondents, motions which immigration judges routinely grant. *See, e.g.*, Memorandum from John D. Trasviña, Principal Legal Advisor, to All OPLA Att'ys 8–10 (May 27, 2021), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigrationenforcement_interim-guidance.pdf [https://perma.cc/2SE7-3NHE] (instructing the immigration courts to dismiss proceedings against vulnerable groups).

[252] Marouf, *supra* note 3, at 987; Cyrus Mehta & Kaitlyn Box, *Ethical Considerations when the Removal Case Is Dismissed*, INSIGHTFUL IMMIGR. BLOG (Apr. 30, 2023), https://blog.cyrusmehta.com/2023/04/ethical-considerations-when-the-removal-case-is-dismissed.html [https://perma.cc/52D3-ULB7].

[253] *My Immigration Court Case Was "Dismissed." What Will Happen Now?*, ASYLUM SEEKER ADVOC. PROJECT (July 25, 2024), https://help.asylumadvocacy.org/after-dismissal/ [https://perma.cc/P8C2-GEZ9]. While some noncitizens may apply for work authorization independent of removal proceedings, they must wait 150 days after submitting an application to be eligible; termination of removal proceedings would therefore restart the applicant's 150-day waiting period. *Work Permits*, ASYLUM SEEKER ADVOCACY PROJECT, https://help.asylumadvocacy.org/work-permits/#apply [https://perma.cc/AS6Y-EQ2G].

[254] Mehta & Box, *supra* note 252.

[255] 8 U.S.C. § 1229b(b)(1)(D).

[256] *Id.* § 1229b(b)(1)(B).

[257] IMMIGRANT LEGAL RES. CTR., NON-LPR CANCELLATION OF REMOVAL (June 2018), http://www.ilrc.org/sites/default/files/resources/non_lpr_cancel_remov-20180606.pdf [https://perma.cc/9XPX-4BWV].

forward with a removal proceeding accordingly carries significant risk. Moreover, the adverse impact of the proceeding, which is stressful for every respondent experiencing them and may be so stressful as to be disabling for a noncitizen with a disability affecting competency, should be taken into consideration as part of the attorney's ethical calculus.

In response, Professor Fatma Marouf has argued that removal proceedings for a noncitizen respondent deemed incompetent should be bifurcated such that the possibility of deportation is taken off the table, but the possibility of pursuing relief is not.[258] This nuanced approach presents a possible way forward. In the meantime, under the current system, practitioners should seek termination more vigorously.

B. Overemphasis on and Double Punishment Due to Criminal Contacts

The other assumption built into the current competency framework is the problematic and acontextual notion that certain criminal contacts by noncitizens with mental health disabilities affecting competency disentitle them to meaningful participation or favorable outcomes. For example, in *In re M-J-K-*, the BIA cautioned that termination was not appropriate for a noncitizen respondent who had "a history of serious criminal conduct" (the respondent there had been convicted of a crime of violence aggravated felony) and "may pose a danger to himself or others upon his release into the community."[259] In *Benedicto*, the Ninth Circuit also found that termination was not warranted for someone with Mr. Benedicto's criminal history, relying on *In re M-J-K-*.[260]

This line of thinking by the courts exhibits a complete lack of understanding of the criminalization of mental health in the United States

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[258] Marouf, *supra* note 3, at 987. Attorneys should request bifurcation, of course, with the consent of their clients pursuant to the ethical rules governing case-outcome decision-making authority and the client-centered analogy of keeping the client in the driver's seat.

[259] *In re* M-J-K-, 26 I. & N. Dec. 773, 777 n.4 (B.I.A. 2016). In making this assertion, the BIA cites to the proposition that a violent act due to mental illness does not reduce the danger the actor presents to others, found in *In re G-G-S-*, 26 I. & N. Dec. 339, 346 (B.I.A. 2014). But *G-G-S-* has since been overturned, precisely because it took no account of how mental health disabilities are accounted for in the criminal legal system. *In re* B-Z-R-, 28 I. & N. Dec. 563, 566 (Att'y Gen. 2022).

[260] Benedicto v. Garland, 12 F.4th 1049, 1061 (9th Cir. 2021). EOIR training materials for immigration judges developed in 2021 include a cryptic note that administrative closure, a sort of pause in a removal proceeding just short of termination, is a safeguard but should not be considered for detained respondents. Cicchini & Hansell, *supra* note 247. While this casts a weird pall over the notion of safeguards—what does detention status have to do with any of the roles the BIA has set out for safeguards?—it likely stems from the *Franco* litigation and the limbo Mr. Franco and other class members found themselves in after their cases had been administratively closed due to their disabilities, but they had not been released from detention.

among citizens and noncitizens alike. Moreover, it reflects the widespread, erroneous social stereotyping that conflates mental health disabilities and dangerousness.

First, people with mental health disabilities are far more likely to have contact with the criminal legal system than people without such disabilities, particularly people of color and those from marginalized and poor communities.[261] Moreover, once people with mental health disabilities are swept into the criminal legal system, they are more likely to be treated more harshly—for example, they may receive harsher punishments than similarly situated defendants without disabilities.[262] For noncitizens who are then moved into the immigration legal system, the length of punishment is relevant to whether or not they will be found removable and may also impact eligibility for certain forms of relief.[263] In short, that a noncitizen with a mental health disability affecting competency may also have a criminal record with multiple contacts with law enforcement and the criminal legal system is a reflection of that system's ableist treatment of mental health disabilities, not necessarily their moral failings as a person. The BIA's complete disregard for that context in discussing the respondent's criminal record in *In re M-J-K-* imports that ableist discrimination into immigration matters.

The BIA compounds the issue, however, by assuming that the respondent's past criminal record of this nature implies future dangerousness.[264] Here, also, the BIA engages in unacceptable, untrue, and ableist stereotyping. People with mental health disabilities are not more likely than people without to engage in violence solely because of their disability, with very few exceptions.[265] Rather, people's environmental

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[261] *See* Robert Bernstein & Tammy Seltzer, *Criminalization of People with Mental Illnesses: The Role of Mental Health Courts in System Reform*, 7 UDC/DCSL L. REV. 143, 145 (2003) (citing Linda A. Teplin, *Keeping the Peace: Police Discretion and Mentally Ill Persons*, NAT'L INST. OF JUST. J., July 2000, at 12) (finding people with mental health disabilities were twice as likely to be arrested for the same behavior as people without disabilities). For example, in 2017, more than half of Portland Police Bureau arrests involved houseless people. Rebecca Woolington & Melissa Lewis, *Portland Homeless Accounted for Majority of Police Arrests in 2017, Analysis Finds*, OREGONIAN (June 27, 2018, 8:37 PM), https://www.oregonlive.com/portland/2018/06/portland_homeless_accounted_fo.html [https://perma.cc/QWT7-MUX7].

[262] Bernstein & Seltzer, *supra* note 261, at 146.

[263] 8 U.S.C. §§ 1101(a)(43), 1158(b)(2)(A)(ii), 1227(a)(2)(A)(iii); 8 C.F.R. § 208.13(c) (2024).

[264] *See In re* M-J-K-, 26 I. & N. Dec. 773, 777 n.4 (B.I.A. 2016).

[265] *See, e.g.*, *The MacArthur Violence Risk Assessment Study*, UNIV. VA. SCH. L., http://www.law.virginia.edu/macarthur-violence-risk-assessment-study [https://perma.cc/5YBR-R5RP]. This study followed people with mental health disabilities and determined that only those with command hallucinations and those with symptoms of psychopathy—not generally considered a mental health disability—tended to engage in violent acts. *See* Tori DeAngelis, *Mental Illness and Violence: Debunking*

factors, such as living in a violent neighborhood or exposure to violence as a child, were more likely to contribute to violence than any particular mental health diagnosis.[266] Further, people with substance use disorder, or a dual diagnosis of substance use disorder and a mental health disability, tend more to violence.[267] It follows, then, that the substance use, not the mental health disability, is more likely to contribute to violence.[268] A more detailed analysis of the specific circumstances surrounding convictions, as well as any changes to those circumstances, such as the respondent's participation in treatment for substance use disorder while in detention, would allow the immigration system to more meaningfully grapple with dangerousness questions instead of engaging in stereotyping about people with disabilities.

Taking a further step back, it is deeply problematic that the BIA sanctions removal of people who may lack competency to understand the process that results in their removal because of their criminal record. Both the BIA in *In re M-J-K-* and the Ninth Circuit in *Benedicto* express tolerance for such a result despite obvious indications in both cases that the respondent could not understand the proceedings or meaningfully consult with counsel to mount a defense. These decisions appear to treat removal as an additional punishment for the kinds of lives and conduct that would lead to this sort of criminal record, facilitated by safeguards theater. But this sort of punishment is expressly at odds with the supposedly civil nature of immigration removal, even as the façade of a civil immigration system increasingly crumbles. And worse, this sort of punishment for an incompetent defendant simply would not be contemplated in a criminal adjudication, where it has been expressly held, even for the so-called "worst of the worst" offenders convicted of the most serious crimes, that someone must be aware of and understand the reason for imposition of punishment.[269]

Myths, Addressing Realities, MONITOR ON PSYCH., last updated July 11, 2022, https://www.apa.org/monitor/2021/04/ce-mental-illness [https://perma.cc/EC98-NAND].

[266] *See* DeAngelis, *supra* note 265 (citing *The MacArthur Violence Risk Assessment Study*, *supra* note 265).

[267] *Id.*

[268] *Id.* (finding that when people with serious mental illness commit violent or aggressive acts, other factors besides the illness itself are often at play, a big one being substance-use disorder).

[269] *See* Ford v. Wainwright, 477 U.S. 399, 422 (1986) (Powell, J., concurring). The Court has considered competency to be executed on three occasions and has not disturbed this formulation. *Id.*; Panetti v. Quarternman, 551 U.S. 930, 934 (2007); Dunn v. Madison, 583 U.S. 10, 13 (2017). While removal is not execution, it is potentially permanent exile, often to a place where the noncitizen has expressed a fear of harm, and a violent process unto itself. *See generally* Cházaro, *supra* note 1 (discussing the violence of deportation).

CONCLUSION

By proceeding against noncitizens whose disabilities render them incompetent in the ways that this Article has illuminated, the immigration courts and BIA are engaging in widespread disability discrimination. As the number of immigrants in detention rises again following the pandemic, and as increasing numbers of asylum seekers arrive at our borders seeking safety and security—often having survived disabling trauma—it is imperative that immigration courts and the BIA chart a new path immediately. At the same time, reviewing federal courts must end their tolerance of disability discrimination—in violation of federal law—in immigration court.

Any path forward that immigration courts and the BIA chart, or that the federal courts insist upon, must empower disabled noncitizen respondents to meaningfully participate in their removal proceedings or escape the threat of removal altogether. This Article has identified tools available to these entities—or advocates before them—to make these changes.