Beyond "Crimigration" and the Civil-Criminal Dichotomy — Applying Mathews v. Eldridge in the Immigration Context

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I. INTRODUCTION

Policies and regulations from the past decade underscore the need for strong constitutional safeguards in removal proceedings, which are administrative proceedings where an Immigration Judge adjudicates whether a noncitizen should be deported from the United States under the Immigration and Nationality Act (INA). Deportation has accelerated; the Obama Administration has removed nearly 400,000 noncitizens in each of the last three years.\(^1\) Congress and the Executive have limited appellate review of final orders of removal\(^2\) and sharply curtailed avenues of discretionary relief.\(^3\) Immigration detention has increased significantly; Immigration and Customs Enforcement (ICE) detained a record total of 384,000 noncitizens in 2009, and 363,000 noncitizens in 2010.\(^4\) Immigration law also has become

\(^1\) Julia Preston, *U.S. To Review Cases Seeking Deportations*, N.Y. TIMES, Nov. 17, 2011, at A1 ("The Obama administration has removed high numbers of illegal immigrants, nearly 400,000 in each of the last three years.").


\(^3\) See, e.g., *Padilla v. Ky.*, 130 S. Ct. 1473, 1480 (2010) ("However, the [Judicial Recommendation against Deportation (JRAD)] procedure is no longer part of our law. Congress first circumscribed the JRAD provision in the 1952 Immigration and Nationality Act (INA), and in 1990 Congress entirely eliminated it. In 1996, Congress also eliminated the Attorney General’s authority to grant discretionary relief from deportation, an authority that had been exercised to prevent the deportation of over 10,000 noncitizens during the 5-year period prior to 1996. Under contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of these amendments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses.” (internal citations omitted)).

more complex, with a maze of difficult regulations that govern the forms of relief available at different stages of the removal process. Recognizing recent changes in immigration enforcement and the severity of deportation, this Note suggests that some groups of noncitizens in removal proceedings ought to have heightened procedural safeguards as a matter of constitutional law.

In Padilla v. Kentucky, the Supreme Court recently drew attention to the constitutional safeguards for noncitizens facing removal. The Court held that the Sixth Amendment right to effective assistance of counsel requires criminal defense attorneys to advise noncitizen clients about the immigration consequences of a guilty plea or conviction. Over the past two years, this decision has led to a dramatic shift in criminal practice. It has prompted a series of advisories for defense attorneys who represent noncitizen clients; criminal defense offices have begun to create new positions staffed by immigration experts; and state bar associations and other organizations have sponsored training sessions to instruct defense attorneys on immigration law. Although Padilla focused on the rights of noncitizens in criminal proceedings, the Court also recognized the significant individual liberty interests for noncitizens facing removal, the decreasing avenues of immigration relief available for noncitizens, and the growing nexus between immigration law and criminal law, the latter of which grants strong constitutional protections to suspects and defendants.

Despite the recent changes to immigration law and language in Padilla recognizing the seriousness of deportation, noncitizens in removal proceedings continue to lack important procedural safeguards for a variety of reasons. Historically speaking, the Supreme Court considered deportation proceedings to be an intrinsic part of the U.S. government’s sovereignty; the Court held that the government therefore retained the power to limit the


5. See, e.g., Adam B. Cox & Cristina M. Rodriguez, The President and Immigration Law, 119 YALE L.J. 458, 461-62 (2009) ("Outside the courts, the relationship between the President and Congress has been defined by Congress’s dramatic expansion of federal immigration law over the course of the twentieth century through the creation of a complex, rule-bound legal code, which has given rise to a comprehensive regulatory system.").


7. Id. at 1483.


9. See, e.g., KATHERINE BRADY & ANGIE JUNCK, STEPS TO ADVISING A NONCITIZEN DEFENDANT UNDER PADILLA v. KENTUCKY (2010) (discussing the scope of defense counsel’s duty and the steps required of defense attorneys in terms of immigration advice).

10. See Padilla, 130 S. Ct. at 1478 ("While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation.").
procedural rights granted to noncitizens.\textsuperscript{11} The expansion of procedural rights would also entail a significant financial burden on the state; the approximate cost of providing counsel to indigent noncitizens could be as much as $110 million per year.\textsuperscript{12} Given the negative public perception towards those convicted of crimes, it is politically challenging to support greater procedural rights for noncitizens today; the Obama Administration has focused a significant part of its removal efforts on removing noncitizen criminals.\textsuperscript{13} Moreover, the relative lack of procedural rights for noncitizens allows the government to enforce criminal or anti-terrorism priorities within an administrative system that does not require that the government extend litigants the rigorous protections associated with the criminal process.\textsuperscript{14} The government, for example, can preventively detain a suspected terrorist for immigration violations and circumvent the pre-trial detention requirements from criminal law.\textsuperscript{15}

Accordingly, several notable procedural weaknesses persist in removal proceedings. First, indigent noncitizens do not have the right to court-appointed counsel,\textsuperscript{16} a right that can be outcome-determinative given the complexity of immigration law. One recent study found that non-detained noncitizens in removal proceedings with counsel obtained relief in 74\% of their cases, in contrast to the 13\% success rate for non-detained noncitizens who proceeded \textit{pro se}; detainees with counsel received relief in 18\% of their cases, compared to the 3\% success rate for detainees who proceeded \textit{pro se}.\textsuperscript{17} Secondly, noncitizens in removal proceedings also are not protected by the Fourth Amendment and the exclusionary rule.\textsuperscript{18} Under current Supreme

\textsuperscript{11} See Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).


\textsuperscript{13} See, e.g., Brian Bennett, U.S. Steps Up Deportation Efforts for Criminal Immigrants, L.A. TIMES, May 26, 2012 ("In an aggressive effort to boost deportations, U.S. Immigration and Customs Enforcement has begun to increase by nearly 25\% the number of agents tasked with finding and deporting illegal immigrants with criminal records, pulling 150 officers from desks and backroom jobs to add extra fugitive search teams around the country.").

\textsuperscript{14} See, e.g., Nora V. Demleitner, Immigration, Threats and Rewards: Effective Law Enforcement Tools in the "War on Terrorism"?, 51 EMORY L.J. 1059, 1061 (2002) (describing the expanded use of deportation to enforce anti-terrorism and criminal law priorities).


Court precedent, immigration enforcement officers are permitted to enter private residences without search warrants or consent, arrest or detain persons without warrants or probable cause, and use racial profiling in immigration enforcement operations. Thirdly, because there is no ex post facto protection in removal proceedings, noncitizens may be deported retroactively. If Congress alters the grounds of deportation—which Congress has the plenary power to do—the modified grounds are applicable to events that occurred prior to and subsequent to the congressional change. Finally, the Department of Homeland Security (DHS) can initiate removal proceedings in any immigration court in the nation, even if a noncitizen has lived in a particular state or region for her entire life.

Many scholars have recognized these procedural weaknesses and argued that the Constitution requires heightened procedure for all noncitizens in removal proceedings, including access to some or all of these four procedural rights. The most recent incarnation of this argument, "crimigration," generally proceeds in two steps. Scholars begin with the assumption that there are two types of constitutional procedure in the United States, civil procedure and criminal procedure, the latter of which grants strong constitutional safeguards to suspects and defendants. They then argue that noncitizens in removal proceedings ought to have heightened procedural safeguards as a matter of constitutional law because removal proceedings are not civil but are criminal in nature. This latter step can take

713, 722 (BIA 1988).


23. Peter L. Markowitz, Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings, 43 HARV. C.R.-C.L. L. REV. 289, 294 (2008) ("[E]ven if a defendant pled guilty years ago in reliance on then correct advice that she would suffer no immigration consequences, this would not protect her from removal today based on subsequent changes in the federal immigration laws.").


25. See, e.g., Austin T. Fragomen, The Uncivil Nature of Deportation: Fourth and Fifth Amendment Rights and the Exclusionary Rule, 45 BROOK. L. REV. 29, 34-35 (1978) ("This Article contends that deportation proceedings should be deemed 'criminal' or quasi-criminal in nature in order to do away with the argument that constitutional safeguards do not apply to a 'civil' proceeding."); Stephen H. Legomsky, The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms, 8 IMMIGR. & NAT'LITY L. REV. 679, 691 (2007) ("[I]mporting the criminal enforcement model into immigration law without the accompanying criminal adjudication model exposes the affected noncitizens to harsh consequences without the necessary procedural safeguards."); Markowitz, supra note 23 at 290-91 (arguing that expulsion proceedings, where the government seeks to deport a lawful permanent resident previously admitted into the United States, ought to be considered criminal proceedings); Teresa A. Miller, Blurring the Boundaries between Immigration and Crime Control after September 11th, 25 B.C. THIRD WORLD L.J. 81 (2005) (analyzing the criminalization of immigration law and arguing that immigration
many forms. Some scholars argue that deportation can be tantamount to a penalty, making removal proceedings a punitive criminal proceeding, rather than a corrective proceeding.²⁶ Others argue that immigration and criminal law require the same level of constitutional protections because the enforcement of immigration law is indistinguishable from criminal law; local police are increasingly collaborating with armed administrative immigration and customs officials to arrest and detain removable noncitizens.²⁷ A middle ground "crimigration" approach has gained some support since the Padilla decision. At least two scholars argue that because language in Padilla supports the principle that removal proceedings occupy a middle ground between the civil and the criminal, removal proceedings ought to afford noncitizens some (but not all) procedural features from the criminal process.²⁸

Since proponents of "crimigration" rely on the civil-criminal dichotomy
in constitutional procedure, they often do not take into account the large body of scholarship documenting the breakdown of this dichotomy in practice. Nominally civil proceedings can employ hybrid sanctioning that blends elements of the retributive (criminal) and restorative (civil) models. The means that the state employs to enforce and govern criminal and other areas of law have converged. Officers from administrative agencies may cooperate with local police to enforce "civil" regulations promulgated by the very same administrative agencies. Although one would ordinarily associate the loss of physical liberty with criminal proceedings, detention prior to, during, and after proceedings is common in both non-criminal and criminal proceedings. Despite the flaws in the civil-criminal model, few scholars have provided an alternative theory of constitutional procedure.

Like "crimigration," this Note suggests that some groups of noncitizens in removal proceedings ought to have heightened procedural safeguards as a matter of constitutional law, including the right to counsel, the right against unreasonable searches and seizures, the right against ex post facto application of immigration law, and the right to have removal proceedings in the district in which the noncitizen resides. However, this Note moves beyond "crimigration" by recognizing that the civil-criminal procedural model is flawed and by proposing an alternate non-bifurcated theory of constitutional procedure based on the Fifth and Fourteenth Amendments' Due Process Clauses as interpreted in Mathews v. Eldridge. Under this model, there are several specific procedural safeguards potentially available

30. See Mann, supra note 29 at 1804.
31. See Wishnie, supra note 27.
34. 424 U.S. 319 (1976). Mathews holds that the constitutionally-required procedure in a given proceeding should strike a balance between (1) the individual interest at stake in the proceeding, (2) the government interest, and (3) the risk of erroneous deprivation of the individual interest and the probable value of additional process.
in any proceeding, such as the right to counsel, the right to a jury trial, or the right against unreasonable searches and seizures. In a given proceeding, the Due Process Clauses of the Fifth and Fourteenth Amendments can require all, some, or none of these protections, depending on the balance between the three prongs of Mathews. This model, which already describes the procedural safeguards constitutionally required in many types of proceedings, suggests that all proceedings exist across a single continuum, with a variable level of specific procedural safeguards required, based on the constitutional right to due process.

This Note applies this theory of constitutional procedure to three groups of noncitizens: (1) those detained during and after removal proceedings, (2) those for whom removal may result in stigmatization and social exclusion in a country of origin, and (3) parents who have children in the United States. The balance of the Mathews factors for these three groups of noncitizens resembles the balance of the Mathews factors in other proceedings that grant litigants some or all of these safeguards. The first group experiences deprivation of the individual liberty to be free, like criminal suspects and defendants, parolees and probationers facing revocation, and juveniles in delinquency proceedings. The second group faces stigmatization and social exclusion in a country of origin because of their status as deportees, similar to the social stigmatization of those involuntarily committed by the state. And the third group resembles parents in termination hearings: deportees with children in the United States can have their relationship with their child effectively terminated by the state. Assuming that the Due Process Clause, as interpreted in Mathews, can serve as the foundation for constitutional procedure, these three groups of noncitizens likely have the right to some or all of the following safeguards: the right to counsel, the right against unreasonable searches and seizures, the right to ex post facto protection, and the right to have removal proceedings in the district in which the noncitizen resides.

II. The Due Process Clause and Mathews as a General Procedural Doctrine

As opposed to a bifurcated civil-criminal dichotomy in procedure, there

35. This Note treats the constitutional requirement of due process as identical between the Fifth and Fourteenth Amendments, with the former applying to the federal government and the latter to state governments. See Munn v. Illinois, 94 U.S. 113, 123-24 ("By the Fifth Amendment, [the right to due process of law] was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the Fourteenth, as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the States."); Leonard G. Ratner, The Function of the Due Process Clause, 116 U. Pa. L. Rev. 1048, 1048-1050 (1968) (arguing that the Due Process Clauses of the Fifth and Fourteenth Amendments encompass similar procedural rights).

36. Mathews, 424 U.S. at 335.
are arguably three types of proceedings in the United States—civil,\textsuperscript{37} criminal, and administrative—each with their own constitutional theory of procedure. The criminal process is highly constitutionalized;\textsuperscript{38} civil law is generally governed by non-constitutional procedural doctrine and rules;\textsuperscript{39} and in administrative adjudications, agencies must comply with \textit{Mathews v. Eldridge},\textsuperscript{40} which interprets the Fifth and Fourteenth Amendment Due Process Clauses in the federal and state administrative settings.

This Part argues that the Due Process Clause, as interpreted through the \textit{Mathews} administrative test,\textsuperscript{41} may serve as a non-bifurcated model of constitutional procedure in all proceedings. A survey of several types of proceedings suggests that, irrespective of a civil, criminal, or administrative label, the specific procedural safeguards granted to litigants strike a balance between: (1) the individual interest in the proceeding; (2) the risk of erroneous deprivation of that interest and the probable value of additional process; and (3) the government interest in the proceeding, including the financial costs of additional process.\textsuperscript{42}

Section I.A sets out the constitutional argument for why the Due Process Clause can be the foundation for constitutional procedure in all proceedings. Section I.B discusses how this Note primarily relies on Supreme Court precedent to conceptualize the three prongs of \textit{Mathews} in immigration removal proceedings and in the other types of proceedings analyzed below. Section I.C then reviews several types of civil, criminal, and administrative proceedings to suggest that \textit{Mathews} already works as a positive matter. The Supreme Court tends to require constitutional procedural protections on a continuum based on the Due Process Clause and the balance between the three \textit{Mathews} factors.

\textsuperscript{37} As used here, "civil" refers to proceedings that involve private civil litigants, in contrast to criminal proceedings, where the state prosecutes an individual or entity, and administrative proceedings, where an Executive agency adjudicates a dispute. \textit{See} John Leubsdorf, \textit{Constitutional Civil Procedure}, 43 Texas L. Rev. 579, 580 (1984) (discussing the constitutional requirements in state and federal proceedings involving private civil litigants).

\textsuperscript{38} \textit{See}, e.g., U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.") (emphasis added).

\textsuperscript{39} The Federal Rules of Civil Procedure are an important example in this regard. \textit{See also} Stuntz, \textit{supra} note 29, at 4 ("[T]he provision of counsel and counsel’s performance, discovery, settlements, the questioning of witnesses, the disposition of cases that don’t go to the jury—all issues that have been constitutionalized in criminal cases—are in civil cases governed by local rules of civil procedure, by statute, by nonconstitutional common law, or by local custom.").

\textsuperscript{40} 424 U.S. 319 (1976).

\textsuperscript{41} Dusenbery v. United States, 534 U.S. 161, 167 (2002) ("The \textit{Mathews} balancing test was first conceived in the context of a due process challenge to the adequacy of \textit{administrative procedures} used to terminate Social Security disability benefits.") (emphasis added).

\textsuperscript{42} \textit{Mathews}, 424 U.S. at 335.
A. The Due Process Clause and Constitutional Procedure

The Due Process Clause of either the Fifth or Fourteenth Amendment can require all, some, or none of the universe of specific procedural rights available in a proceeding. These procedural rights include: the right against unreasonable searches and seizures; the privilege against self-incrimination; the requirement that a prosecution occur in the district in which the charged crime allegedly took place; the right against ex post facto application of laws; the right to state-appointed counsel and the effective assistance of counsel; the right to trial by jury; the right to testify in one's favor and the right to not have opposing parties comment adversely on a defendant's failure to testify; the right to compel the production of witnesses and evidence in one's favor; the right to call expert witnesses; the right to be present at trial and to confront, or cross-examine, all of the opposing party's witnesses; the right against double jeopardy; and the right to be exonerated if the opposing party does not meet its burden of proof.43 The Due Process Clause ultimately expresses the individual's right to due process of law, which includes the rights to fundamental fairness, to be meaningfully heard in court, to have a fair hearing or trial,44 and the right against the arbitrary exercise of state power.45

The Constitution, however, appears to preclude a theory of constitutional procedure based on the Due Process Clause; the Bill of Rights distinguishes criminal proceedings from all others. Nevertheless, the criminal procedural rights in the Constitution may be seen as clarifications of what the Due Process Clause requires, the specific safeguards necessary to preserve the individual's free and fair hearing and to ensure that an individual is not subjected to arbitrary state coercion. Writing for the majority in Johnson v. Zerbst,46 Justice Hugo Black borrowed language directly from the Due Process Clause in conceptualizing the Sixth Amendment right to counsel:

44. See Mathews, 424 U.S. at 343 (1976) ("An additional factor to be considered here is the fairness and reliability of the existing pretermination procedures . . . ."); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring) (Due process "represent[s] a profound attitude of fairness between man and man, and more particularly between the individual and government.").
45. See Bank of Columbia v. Okely, 17 U.S. *235, *244 (1819) (holding that due process is "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice"). See also Bruce A. Ackerman, Social Justice in the Liberal State 7 (1981) ("[T]he reason advanced by a power wielder on one occasion must not be inconsistent with the reasons he advances to justify his other claims to power."); Jerry L. Mashaw, The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value, 44 U. Chi. L. Rev. 28, 53 (1976) (freedom from arbitrariness builds on the principle that "like cases receive like attention and like evidentiary development so that the influence of such arbitrary factors as location are limited.").
46. 304 U.S. 458 (1938).
[the right to counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment . . . embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.47

Subsequent Supreme Court jurisprudence continues to voice the principle that criminal procedural rights preserve the suspect and defendant’s rights to a free and fair trial and to be meaningfully heard in court, the bedrock principles of the constitutional right to due process.48 Incorporation doctrine in particular lends support to a reading of the Due Process Clause as encompassing specific procedural safeguards. The Due Process Clause of the Fourteenth Amendment covers many of the criminal protections from the Bill of Rights, making these protections applicable to suspects and defendants in state criminal prosecutions.49

The Supreme Court and several federal Circuit Courts also have read the Due Process Clause to require criminal procedural protections in non-criminal proceedings to protect the individual’s rights to fundamental fairness and against the arbitrary exercise of state power.50 In juvenile delinquency hearings—namely administrative or civil proceedings—the Supreme Court has required virtually all of the criminal procedural safeguards under the Due Process Clause of the Fifth or Fourteenth Amendments.51 Similarly, the Supreme Court has extended almost all of the

47. Id. at 462-63 (emphasis added).
48. See, e.g., Chambers v. Mississippi, 410 U.S. 284, 294 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.").
49. See generally Felix Frankfurter, Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, 78 HARV. L. REV. 746 (1965) (discussing Supreme Court cases that apply provisions of the Bill of Rights to the states).
50. See Peter Markowitz, Deportation is Different, 1 U. PA. J. CONST. L. 1299, 1351 (2011) ("[T]here is ample precedent for selective incorporation of criminal rights into non-criminal proceedings. Beyond the examples from the immigration realm already discussed, the Court has applied some rights commonly associated with criminal proceedings to non-criminal proceedings, including juvenile delinquency proceedings, civil commitment proceedings, some parole revocation proceedings, and court marital proceedings."); Stephen J. Schulhofer, Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws, 7 J. CONTEMP. LEG. ISSUES 69, 79 (1996) (arguing that even if certain Amendments of the Bill of Rights refer to criminal proceedings, the Due Process Clause of the Fifth or Fourteenth Amendments can mandate that the same safeguards apply to non-criminal proceedings).
51. In re Gault, 387 U.S. 1 (1967); see also B. J. George, Jr., Juvenile Delinquency Proceedings: The Due Process Model, 40 U. COLO. L. REV. 315 (1968) (noting that the Due Process Clause requires notice, the right to counsel, the right to confrontation, and the privilege against self-
procedural safeguards from the criminal process to parolees and probationers facing revocation of their release.\textsuperscript{52} In the immigration context—a nominally administrative adjudication—circuit courts have held that the Due Process Clause of the Fifth Amendment encompasses the right to effective assistance of counsel, a Sixth Amendment right.\textsuperscript{53}

The argument that the Due Process Clauses of the Fifth or Fourteenth Amendment can encompass specific procedural rights may be qualified to some extent by language from \textit{Medina v. California}.\textsuperscript{54} In that case, the Court observed in dicta that "[t]he Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order."\textsuperscript{55}

However, the reading of the Due Process Clause proposed in this Note is consistent with the language from \textit{Medina}. This Note does not make a normative claim that criminal proceedings ought to afford greater constitutional safeguards as a matter of due process, the argument that the Court appeared to be wary of in \textit{Medina}. Instead, it makes a positive claim about criminal proceedings: the constitutional right to due process, as interpreted in \textit{Mathews}, can explain why the Constitution affords suspects and defendants certain procedural rights. The constitutional right to due process also explains why certain proceedings considered non-criminal still extend litigants all the criminal procedural safeguards and why certain proceedings extend litigants weaker procedural safeguards.

B. The Applicability of \textit{Mathews}

This Note relies largely on Supreme Court precedent to conceptualize the individual interest, the government interest, and the risk of erroneous deprivation in removal proceedings and the other types of proceedings analyzed below. \textit{Mathews} and its progeny provide guidance on how to interpret the three prongs by illustrating the types of individual interests or government interests that are significant in conceptualizing procedural rights. The Court, for example, has underscored that the liberty from bodily restraint is among the most significant individual interests that can be at

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\item \textsuperscript{52} See Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).
\item \textsuperscript{53} See Nehad v. Mukasey, 535 F.3d 962, 967 (9th Cir. 2008) (recognizing that noncitizens in removal proceedings have the right to effective assistance of counsel under the Fifth Amendment); Osei v. INS, 305 F.3d 1205, 1208 (10th Cir. 2002) (same); Xu Yong Lu v. Ashcroft, 259 F.3d 127, 132 (3d Cir. 2001) (same); Hernandez v. Reno, 238 F.3d 50 (1st Cir. 2001) (same); Huicochea-Gomez v. INS, 237 F.3d 696 (6th Cir. 2001) (same); lavorski v. INS, 232 F.3d 124 (2d Cir. 2000) (same).
\item \textsuperscript{54} 505 U.S. 437 (1992).
\item \textsuperscript{55} Id. at 443.
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stake in any proceeding. Similarly, the Court has held consistently that the fiscal costs of the administrative process are important in understanding the government interest prong. Accordingly, the Mathews decision has been clarified and interpreted through the Court’s process of common law decision-making. Laurence Tribe and Michael Dorf emphasize the importance of judicial precedent in conceptualizing fundamental constitutional rights, such as the right to due process of law:

[T]he elaboration of constitutional values proceeds mostly from prior decisions. By focusing on precedent—intended here to include the rationales of prior cases as well as their holdings—we do not deny that other factors play a significant role in constitutional adjudication. We single out precedent-based arguments because such arguments generally take account of these other factors. The Court has nominally based even its boldest innovations in constitutional law upon precedent.56

Tribe and Dorf go on to discuss the Supreme Court’s institutional role in interpreting fundamental rights. Its jurisprudence can be the best guide as to the level of generality at which to cast constitutional rights because the Supreme Court is the political institution tasked with interpreting the Constitution and its own cases.57

Before surveying different types of proceedings to illustrate the extent to which their procedural requirements comport with the due process model, it is important to acknowledge two counterarguments to the use of Mathews to analyze the requirements of the constitutional right to due process in civil, criminal, and administrative proceedings. One challenge could come from those who continue to support the civil-criminal dichotomy in procedure; since Mathews may be limited to the civil or administrative contexts, one could argue that Mathews should not be used to analyze procedure in all proceedings. The Supreme Court, however, has already applied Mathews to adjudicate criminal procedural rights, including in determining if the state was constitutionally required to undertake a psychiatric evaluation of a defendant; the Court also has applied Mathews in several civil proceedings.58 This jurisprudence suggests that Mathews can be used as a general

57. Id. at 1065.
vehicle through which to interpret the constitutional requirements of the Due Process Clause.

Another recurring criticism of Mathews is that it may be susceptible to outcome-oriented analysis; it is unclear at what level of generality to cast the three prongs. To take the example addressed in the present Note, a noncitizen’s “individual interest” may be defined narrowly as the right to remain legally in the United States. Where a noncitizen contravenes the INA, the United States government’s plenary power over its borders, a power inherent to the country’s sovereignty, can allow the government to remove the noncitizen summarily with very limited procedural rights. On the other hand, a noncitizen’s “individual interest” can be cast generally as the family ties, property, and life that she has created in the United States over the course of a number of years; this broader conceptualization counsels in favor of relatively strong procedural rights.

In some ways, this criticism of Mathews illustrates the difference between rules and standards in the law. Unlike rules—bright-line commands that limit the discretion of an adjudicator—standards are deliberately open-ended, allowing an adjudicator to make a fact-specific determination. What procedural rights should be granted to a noncitizen based on her family ties to the United States? The three prongs of Mathews are not a rule but a flexible standard of constitutional due process that structures the discussion of procedural rights. To expect Mathews to provide a single comprehensive definition of its three prongs is difficult in light of the nature of due process, a right that is highly-context specific and that is “flexible and calls for such procedural protections as the particular situation demands.” Moreover, Mathews and subsequent Supreme Court articulations of that decision provide a roadmap through which to navigate the levels of generality and de-
cide between alternate formulations of the individual interest, the government interest, or the risk of erroneous deprivation. In the analysis that follows, this Note uses judicial precedent to interpret the three prongs of Mathews in removal proceedings.

C. Mathews, Due Process, and Continuum of Procedural Protections

The Due Process Clause of the Fifth or Fourteenth Amendments, as interpreted in Mathews, can provide a foundation for a single non-bifurcated constitutional theory of procedure because this model can explain procedure as a positive matter. The specific safeguards required by the Supreme Court in many legal proceedings already appear to strike a balance between: (1) the individual interest in the proceeding; (2) the risk of erroneous deprivation of that interest and the probable value of additional process; and (3) the government interest in the proceeding, including the financial costs of additional process.65 The subsections that follow apply the Mathews balancing test to criminal proceedings, juvenile delinquency proceedings, probation and parole revocation proceedings, involuntary commitment proceedings, parental termination hearings, and property actions.

1. Criminal Procedure

The criminal process extends defendants and suspects all of the rights listed in Section I.A.66 and can be situated at the far end of a procedural continuum that varies based on the balance between the Mathews factors. Under the third prong of Mathews, the government may have strong interests in ensuring societal safety, minimizing costs, and deterring future crimes.67 These government interests, however, do not outweigh the need to minimize the erroneous deprivation of significant individual interests: freedom from the coercive power of the state and freedom from bodily restraint.

In the criminal process, the authority of the state is directed against an individual.68 Many criminal constitutional protections equalize the playing field and protect the individual interest to be free of coercive state power, a fundamental democratic right. Moreover, criminal safeguards also seek to minimize the erroneous deprivation of a related individual interest: the freedom from bodily restraint by the state.69 As the Supreme Court noted in

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69. Colb, supra note 66, at 815.
Foucha v. Louisiana, this freedom is “at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” In Foucha, the Court went on to observe that “[w]e have always been careful not to minimize the importance and fundamental nature of the individual’s right to liberty.” The criminal procedural system is especially concerned with wrongly subjecting an innocent person to incarceration.

Criminal prosecutions that impose the death penalty involve a greater interest in life under the first prong of Mathews than criminal prosecutions that involve the right to be free from bodily restraint. The Due Process Clause thus requires heightened procedural safeguards in state and federal death penalty cases to minimize the risk of erroneously putting a person to death. In a line of cases beginning with Furman v. Georgia, the Supreme Court has held that the death penalty cannot be imposed in a procedural system that creates “a substantial risk that it [will] be inflicted in an arbitrary and capricious manner.” The Court has required that capital sentencing schemes meet twin procedural objectives: to be “at once consistent and principled but also humane and sensible to the uniqueness of the individual.” In death penalty cases, there is an independent review of the death sentence by either a sentencing judge or an appellate tribunal to determine if the penalty is being erroneously applied in a given case.

A potential objection to a constitutional theory of criminal procedure based on the Due Process Clause and Mathews could be based on the lack of variation in procedure between criminal prosecutions. Setting aside the heightened process required in death penalty cases, “[w]hy should a person accused of turnstile jumping, facing the prospect of a day in jail (or less), receive the same full panoply of rights as a person accused of rape, facing years in prison?” To phrase this objection in another way, the individual interest under Mathews for the person jumping the turnstile—one day in jail—appears to be significantly less than the person accused of rape. Nevertheless, the argument thus far suggests that the Supreme Court treats the two persons similarly for purposes of constitutional procedure.

However, the constitutional requirements of due process actually vary for these two persons based on the balance between the individual interest

71. Foucha, 504 U.S. at 80.
72. See id. (quoting United States v. Salerno, 481 U.S. 739 (1987)).
73. William Blackstone famously stated, “[b]etter that ten guilty persons escape than that one innocent suffer.” 4 William Blackstone, Commentaries *358.
74. 408 U.S. 238 (1972).
77. See Gregg, 428 U.S. at 195 (“As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.”).
78. Markowitz, supra note 50, at 1353.
at stake, the risk that the person is deprived of that interest, and the government’s interest. When a person is subject to the coercive power of the state and faces deprivation of the liberty to be free—as is the case with a defendant facing prosecution for rape—the Supreme Court has held in favor of the full panoply of criminal procedural rights.79 As the freedom from bodily restraint begins to fall away and a defendant faces only one day in jail, the Court has determined that there is less significant of an individual interest at stake; therefore, there is a weaker constitutional requirement to minimize the erroneous deprivation of that interest. For defendants facing only one day in jail or a lesser fine, the Court has required fewer safeguards.80

Additionally, there are probably criminal cases where the procedural safeguards provided by the state grant a higher level of process than is required constitutionally by the Supreme Court, despite the balance between a lesser individual interest such as a fine, the risk of erroneous deprivation, and the government interest. This can be explained in part by the fact that Mathews creates a constitutional floor; criminal proceedings that involve a fine or lesser punishment can afford a higher level of process than is required by the Due Process Clause. Mathews also does not necessarily explain procedure in every type of proceeding in the United States. Some criminal proceedings may fall outside of the model proposed in this Note. For example, as Part II will demonstrate, certain removal proceedings do not comply with the requirements of the Due Process Clause.

2. Other Proceedings and the Individual Liberty to be Free

The Supreme Court has held on various occasions that proceedings that adjudicate interests related to the individual liberty to be free from bodily restraint—the most significant of interests under the first prong of Mathews81—generally afford the litigants extremely strong procedural safeguards.

Juvenile delinquency proceedings, which are considered non-criminal, still extend the defendant child all of the procedural protections from Sec-

79. See Alabama v. Shelton, 535 U.S. 654 (2002) (upholding the right to counsel for a defendant facing a prison sentence, even if the sentence is suspended); Argersinger v. Hamlin, 407 U.S. 25 (1972) (holding that the accused in any criminal prosecution involving the deprivation of liberty is entitled to counsel).

80. See Scott v. Illinois, 440 U.S. 367, 373-74 (1979) (holding that there is no right to counsel where the defendant is only facing a fine and not a term of imprisonment); Duncan v. Louisiana, 391 U.S. 145, 158 (1968) (no constitutional right to a jury trial for “petty crimes”).

81. See Lassiter v. Dep’t of Soc. Servs., 452 U.S. 18, 25 (1981) (“The pre-eminent generalization that emerges from this Court’s precedents on an indigent’s right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation.”).
tion I.A.\textsuperscript{82} Under the third prong of \textit{Mathews}, the government may have a strong interest in ensuring societal safety, minimizing the costs of the process, and deterring future delinquents. This government interest, however, may be outweighed by the individual interest in juvenile proceedings, which is comparable to that in the criminal process. Criminal and juvenile delinquency proceedings both involve similar notions of state coercion and the state seeking to deprive an individual of her freedom. The Supreme Court has required strong safeguards under the Due Process Clause so that juveniles are not erroneously subjected to these significant costs.\textsuperscript{83}

Similarly, in probation and parole revocation proceedings, the Due Process Clause requires that litigants in revocation proceedings have almost all the protections from Section I.A, save for the right to trial by jury and the right to counsel, the latter of which is determined on a case-by-case basis.\textsuperscript{84} Under the third prong of \textit{Mathews}, the government's interest is identical to that in criminal and juvenile delinquency processes, including in ensuring societal safety. Parole and probation revocation may afford fewer procedural safeguards because these proceedings do not adjudicate as significant an individual interest under the first prong of \textit{Mathews} as the criminal and juvenile delinquency processes. The state seeks to re-incarcerate someone who has violated the law, who must report to a parole or probation officer, and who has a less significant claim to be free of coercive state power. As the Supreme Court noted in \textit{Morrissey v. Brewer}, "[r]evocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions."\textsuperscript{85} There also may be less risk of erroneous deprivation because the reasons for revoking parole or probation may be related to the original crime; the state has already afforded the parolee or probationer the rigorous protections of the criminal process in proving her guilt beyond a reasonable doubt.\textsuperscript{86}

\textsuperscript{82} See In re Winship, 397 U.S. 358, 365 (1970) (holding that the criminal "beyond a reasonable doubt" standard of proof must be applied in juvenile proceedings); In re Gault, 387 U.S. 1 (1967) (holding that juveniles accused of crimes in a delinquency proceeding must be afforded the same process rights as adult suspects and defendants).

\textsuperscript{83} Gault, 387 U.S. at 47 (discussing the need to provide criminal procedural safeguards to juveniles to "prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction).  

\textsuperscript{84} See Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) ("T]here will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees."); Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (holding that the state interests at stake in a parole revocation hearing—including the administrative convenience of being able to return the individual to imprisonment do not outweigh the individual interest: "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others.").

\textsuperscript{85} \textit{Morrissey}, 408 U.S. at 480.

\textsuperscript{86} Cf. \textit{id}. at 480 ("Parole arises after the end of the criminal prosecution, including imposi-
In involuntary commitment proceedings, the Supreme Court has required that those facing commitment receive many of the protections outlined in Section 1.A, including the right to counsel for indigent individuals; however, there are laxer evidentiary standards, and the state only has to prove that an individual ought to be committed by clear and convincing evidence, rather than beyond a reasonable doubt.87

This lower level of safeguards can be attributed to the fact that the individual interest under Mathews is less significant than in cases of incarceration. Although commitment proceedings are concerned partly with freedom from bodily restraint, they are also focused on the individual interest to be free from social stigmatization after release from commitment.88 The Supreme Court has noted that there are fewer restraints placed on liberty within a treatment facility when compared to incarceration after criminal, juvenile delinquency, or parole/probation revocation proceedings.89 The constitutional right to due process also requires fewer procedural safeguards in commitment proceedings because the individual has an interest in being treated. Although rehabilitation historically was a driving force behind the theory of criminal incarceration, the past forty years have seen a marked increase in a purely retributive rationale.90 The Court has emphasized that commitment, on the other hand, focuses on treatment of an individual for her own benefit.91
3. Parental Termination

In state and federal parental termination hearings, the Supreme Court has held that the Due Process Clause of the Fifth or Fourteenth Amendments requires less by way of the procedural protections mentioned in Section I.A, including no right to trial by jury, looser evidentiary rules, a lesser burden of proof, and a qualified right to counsel, which is determined on a case-by-case basis. Because parents still have the qualified right to counsel and the right to have termination proceedings in the district in which they reside, parental termination hearings have stronger constitutional procedure than the other proceedings analyzed infra.

The balance between the Mathews factors—and the weaker individual interest at stake in parental termination hearings—explains why parental termination hearings afford less process than criminal, juvenile delinquency, parole and probation revocation, and involuntary commitment proceedings. Termination proceedings still involve the coercive power of the state; the hearing considers whether the state can sever the legal bond between a parent and child. But the parent is not facing detention by the state. The parent is still free to attempt to build a relationship with the child, even after the legal parent-child relationship has ended. Because the Supreme Court has deemed the individual interest to be significant but weaker than in the proceedings discussed supra, it has determined that the constitutional right to due process requires less by way of procedural protection.


Under Mathews, interests less weighty than incarceration or termination of parental rights result in fewer procedural safeguards. Because the individual interest is less, the costs to the government of additional process become a more significant factor, and there may also be higher tolerance for the erroneous deprivation of these interests.

In cases of civil property disputes or administrative proceedings where the state seeks to deprive an individual of her property, the constitutional right to due process does not require that these proceedings take place before a judge; that the state does not need to provide participants with the right to counsel; and that the burden of proof is normally preponderance of dual functions of institutionalization continued to be recognized. While one of the goals of this movement was to provide medical treatment to those who could benefit from it, it was acknowledged that this could not be done in all cases and that there was a large range of mental illness for which no known ‘cure’ existed.”).

94. Id. at 25.
the evidence.95 These proceedings require a minimal set of procedural rights, including notice and the opportunity to be heard in writing.96

The same can be said of administrative proceedings for "new property,"97 and employment termination.98 The Court has affirmed the importance of welfare benefits and employment, but it has not held that procedural protections approaching the criminal process are required; welfare and employment termination extend litigants notice and a chance to be heard in writing.99

III. THE CONSTITUTIONALITY OF PROCEDURE IN REMOVAL PROCEEDINGS

Assuming that the Due Process Clause can serve as the foundation for a theory of constitutional procedure that creates a procedural continuum varying based on the three prongs of Mathews, removal proceedings currently require less procedural safeguards than criminal, parole and probation revocation, involuntary commitment proceedings, and parental termination hearings. Although the Supreme Court has required that termination hearings must be conducted in the jurisdiction in which the parent resides and that certain parents are afforded the right to counsel, noncitizens in removal proceedings can be subject to jurisdiction anywhere in the United States and only have a statutory right to counsel at the noncitizen's own expense.100 Noncitizens also lack the right against ex post facto application of immigration laws and the protections of the exclusionary rule for unreasonable searches and seizures by immigration enforcement officers.

This Part suggests that removal proceedings for three groups of noncitizens—(1) those detained during and after removal proceedings, (2) those for whom removal may result in stigmatization and social exclusion in a country of origin, and (3) parents who have children in the United States101—ought to be moved up the Mathews continuum. If a noncitizen in

95. See, e.g., 21 U.S.C. §§ 853(d), 853(j) (establishing the preponderance of the evidence burden of proof in civil property forfeiture proceedings); Fuentes v. Shevin, 407 U.S. 67, 80-93 (1972) (holding that prior to the seizure of property, the state must provide adequate due process, which only requires the opportunity for a pre-seizure hearing).
96. Fuentes, 407 U.S. at 80-93.
98. See Greene v. McElroy, 360 U.S. 474, 508 (1959) (finding that government hearing revoking security clearance without giving petitioner opportunity to confront or cross-examine "failed to comport with...traditional ideas of fair procedure").
101. Although this Part focuses on the due process rights of three particular groups—instead of arguing that the Constitution requires greater procedural safeguards for all noncitizens in removal proceedings—these three groups are significant to the question of the overall constitutionality of removal proceedings; they represent a large subset of the broader population in removal proceedings. See Sections II. A.1, II. B.1, and II. C.1, infra, for the numbers of
removal proceedings can prove that she is in one of these three groups, the Due Process Clause requires greater specific safeguards, including the right to counsel, Fourth Amendment rights and the exclusionary rule, the right against ex post facto application of immigration laws, and the right to have removal proceedings in the district in which the noncitizen reside. Some of the proceedings to which removal proceedings are compared, such as parental termination hearings, do not afford litigants all four of these safeguards. Nevertheless, the balance of Mathews factors for these three groups of noncitizens resembles the balance in other proceedings where the Supreme Court has required that litigants have access to many or all of these four safeguards.

As noted in Section I.B, supra, the Mathews test may be susceptible to outcome-oriented analysis, and decision-makers may be able to mold the three factors to support the outcome they want. To guard against this criticism, this Part relies on Supreme Court precedent that either explicitly or implicitly defines the individual interest, the government interest, and the risk of erroneous deprivation in removal proceedings and in the other proceedings to which removal proceedings are compared. This precedent includes decisions in which the Court does not expressly apply Mathews but nevertheless recognizes relevant features of particular groups of litigants. 102 This Part also draws on other legal sources— including statutes and international law—and social science research that may help conceptualize the three prongs of Mathews in the removal context.

A. Removal Proceedings and the Individual Liberty To Be Free

The INA requires the detention of certain groups of noncitizens during removal proceedings; some noncitizens have the possibility of being released on bond while others are detained mandatorily. 103 Immigration and Customs Enforcement (ICE) detained 363,000 foreign nationals in 2010, which means detainees form around 70% of noncitizens apprehended for removal. 104 The government does not detain the other 30% of noncitizens in removal proceedings but requires that these noncitizens report to their removal hearings in immigration court.

According to the Supreme Court's jurisprudence on comparable pro-

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102. For example, the Court did not cite and apply Mathews in Zadvydas v. Davis, 533 U.S. 678, 690 (2001). The Court held indefinite immigration detention after a final order of deportation invalid on statutory grounds. Nevertheless, the Court suggested that the freedom from bodily restraint is a significant individual interest for noncitizens in detention. Id.


ceedings, the Due Process Clause requires that detainees in removal proceedings have the right to counsel, the right to ex post facto protection, the exclusionary rule applied to unreasonable searches and seizures, and the right to have removal proceedings occur in the district in which they reside. Under the individual interest prong of Mathews, detainees are deprived of the individual liberty to be free, like litigants in criminal, juvenile delinquency, parole and probation revocation, and involuntary commitment proceedings. Although the loss of liberty in removal proceedings is arguably preventive and not punitive, the Court still requires almost all of these procedural safeguards in cases of preventive detention. Under the second prong of Mathews, the risk of erroneous removal is especially acute for detained noncitizens because they are often deprived of liberty in remote locations, far from avenues of legal representation. Under the third prong, the cost to the government of providing heightened safeguards to noncitizen detainees may be offset by the fact that such safeguards could lead to greater efficiency.

3. The Individual Interest: The Liberty to Be Free

On the one hand, the loss of liberty for detainees in immigration removal proceedings is preventive in nature. Immigration detention purportedly secures noncitizens for removal and ensures societal safety while proceedings are ongoing. However, the Supreme Court requires heightened procedural safeguards in cases of preventive detention as a constitutional due process matter. In United States v. Salerno, where the Court upheld preventive detention in criminal proceedings, it emphasized that this type of detention was only permitted with rigid constitutional safeguards, including the rights to counsel and to cross-examine witnesses, a clear and convincing evidence burden of proof for the government, and immediate appellate review of the preventive detention decision by an independent judge. Those committed by the state may be detained preventively, but the Court has required access to rigid constitutional safeguards as they await the determination of their status. In Zadvydas v. Davis, which

105. See Zadvydas, 533 U.S. at 690.
107. Id. at 751. See also David Cole, In Aid of Removal: Due Process Limits on Immigration Detention, 51 EMORY L.J. 1003, 1011 (2002) ("The Court [in Salerno] emphasized that the safeguards included the fact that the defendant has the rights to counsel, to testify, to proffer evidence, and to cross-examine witnesses; that the government must prove its case by clear and convincing evidence; and that an independent judge guided by statutorily enumerated factors must issue a written decision subject to immediate appellate review.") (internal citations and footnotes omitted).
108. See Fouche v. Louisiana, 504 U.S. 71, 82 (1992) (finding unconstitutional preventive detention in an involuntary commitment proceeding because there was no hearing to determine if the respondent was a danger to society).
considered detention in immigration removal proceedings, the Court cited Salerno to underscore the significance of the individual interest for anyone being deprived of their individual liberty to be free;\textsuperscript{110} Zadvydas, however, did not make a constitutional holding as to which procedural rights detained noncitizens ought to have in removal proceedings. Given the close similarities between the loss of individual liberty for immigrant detainees and other cases of detention, this Section supports such a constitutional principle. Even if immigration detention is purely preventive, detained noncitizens should at least have the right to counsel prior to being detained and throughout the removal process; the Court has extended this right to other litigants in cases of preventive detention.

Moreover, many scholars document the vindictive nature of immigration detention\textsuperscript{111}—detention can be an especially harsh penalty when a noncitizen’s only violation is entering the country without inspection by immigration authorities. In this sense, immigration detention, although preventive in name, serves the same functional purpose as incarceration in the criminal, juvenile delinquency, parole and probation revocation, and involuntary commitment processes. Specifically, detention during removal proceedings can deter violations or punish those who contravene immigration law. To the extent that immigration detention is not just preventive, the loss of liberty in removal proceedings for detainees is the same loss of liberty that the Supreme Court has recognized as the outcome of criminal, juvenile delinquency, parole and probation revocation, and involuntary commitment processes. This outcome in the latter proceedings justifies heightened constitutional process for litigants, including the right to counsel, the right to ex post facto protection, the exclusionary rule applied to unreasonable searches and seizures, and the right to have removal proceedings occur in the district in which they reside.

The fact that Immigration and Customs Enforcement (ICE) houses some noncitizens in jails alongside criminal offenders underscores the similarities between the deprivation of liberty in the immigration and criminal contexts.\textsuperscript{112} The loss of liberty may arguably be worse for noncitizen detainees:

\begin{quote}
[A] lawful permanent resident who is convicted of a misdemeanor
\end{quote}

\textsuperscript{110} Zadvydas, 533 U.S. at 690 ("And this Court has said that government detention violates that Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections, or, in certain special and ‘narrow’ nonpunitive ‘circumstances,’ where a special justification, such as harm-threatening mental illness, outweighs the ‘individual’s constitutionally protected interest in avoiding physical restraint.’") (internal citations omitted).

\textsuperscript{111} See Kanstroom, supra note 26, at 1890-93.

marijuana offense may be sentenced to only a few days in jail. However, once in removal proceedings, federal law requires that the same permanent resident be subject to mandatory detention for the months or years it takes to complete the subsequent immigration case.113

Parolees and probationers facing revocation also may be comparable to detained noncitizens in removal proceedings. Some scholars suggest that immigration status in the United States is like a contract between a noncitizen and the government. When the noncitizen abides by the terms of the contract, the United States extends her lawful status, but when the noncitizen fails to abide by the terms of the contract, by committing certain crimes, the government can revoke the contract, detain the noncitizen, and begin removal proceedings.114 In immigration removal proceedings for former lawful residents and in parole and probation revocation, the state’s withdrawal of a privilege given to a litigant, either immigration status in the United States or release under supervision, leads to detention and deprivation of individual liberty. For constitutional due process purposes, detained noncitizens should be treated with at least the same procedural protections as parolees and probationers; noncitizens can have a constitutional right to counsel, which an administrative immigration court can determine on a case-by-case basis.

The Court’s precedent thus suggests that noncitizen detainees should have, at the very least, all of the protections that those facing preventive detention have, including the right to counsel. The Court requires the right to counsel as a matter of constitutional due process in all proceedings that involve the freedom from bodily restraint.115 To the extent that immigration detention serves a more retributive purpose, the constitutional right to due process requires a greater panoply of rights, comparable to the criminal process, including the right to counsel, the right to ex post facto protection, the right against unreasonable searches and seizures, and the right to have removal proceedings in the district in which they reside.

2. The Risk of Erroneous Deprivation

Under the second prong of Mathews, detainees in removal proceedings are at a high risk of being erroneously removed, which further supports the argument that the Due Process Clause should require strong safeguards for detainees. Because many detention centers are located in remote locations,

113. Markowitz, supra note 22, at 295.
it may be difficult for attorneys, translators, immigrant rights organizations, and other civil society groups to travel to facilities to assist noncitizens in presenting claims for relief. Libraries at immigration detention facilities may consist of limited and outdated legal resources. Legal resources also are often only in English, which can pose an obstacle for many detainees who are not fluent in the language.

Detainees also may not be able to conduct the detailed fact-finding necessary to present defenses to removal. Noncitizens claiming asylum or relief under the Convention Against Torture (CAT) must present extensive evidence of political and social conditions in their countries of origin. This fact-finding is likely difficult when confined and is apt to be particularly challenging for indigent detainees who lack the assistance of counsel.

The current system thus risks sending detained noncitizens to persecution or torture simply because they are unable to research and present claims.

Finally, detention may exact a significant psychological toll on noncitizens, “creat[ing] an incentive for [them] to forego pursuing procedural rights or valid claims that may prolong the length of detention.” Appointing detainees counsel or giving them the right against being transferred to remote locations for their removal proceedings would improve the accuracy of the removal determination.

3. The Government Interest

Opponents of heightened constitutional safeguards in removal proceedings often invoke costs to the government. Appointing counsel for detainees—or for any of the categories of noncitizens discussed infra—would undoubtedly entail significant administrative costs. Recognizing the right against ex post facto application of immigration laws and the right to have removal proceedings occur in the district in which a noncitizen resides may result in litigation to challenge the conduct of removal proceedings that do not comply with these requirements. There are also broader societal costs of extending the Fourth Amendment exclusionary rule to noncitizen detainees. Because certain evidence may be barred from removal hearings, noncitizens that ought to be deported under the INA could be able to remain in

119. See AMNESTY INTERNATIONAL, supra note 116, at 31.
the United States.

However, these costs can be weighed against the government's shared interest with the noncitizen in not wrongfully removing her.121 Granting greater procedural rights can improve the accuracy of removal determinations, ensuring that noncitizens with the substantive right to remain in the United States are allowed to do so.122 This is especially significant in cases of noncitizen detainees petitioning for asylum or relief under the CAT. International human rights law enshrines the shared interest of the United States in ensuring that this group is not sent to persecution or torture.123

Similarly, having the right to counsel or the right to have removal proceedings in the district in which the detained noncitizen resides could lead to fewer administrative costs. By being close to home, noncitizen detainees can conduct the fact-finding necessary for their claims. By having counsel, "cases are better presented and argued, and briefs, motions, and in-court proceedings are more likely to conform to rules of procedure."124 A 2004 study conducted by the Board of Immigration Appeals concluded that noncitizens represented by counsel were able to clearly identify contested issues in well-written briefs; this potentially reduced the time needed to resolve issues.125 The constitutional right to counsel thus could lead to shorter detentions and decrease the annual cost of detention from $1.7 billion.126 Immigration judges also would not need to expend time and resources considering pro se filings; such filings currently lead to greater administrative costs because judges have to construe pro se claims broadly and independently consider all the evidence on the record.127

Ultimately, heightened procedure actually decreases costs to the government in some areas, and the administrative costs do not necessarily outweigh the government's shared interest in accurate adjudication of the detainees' immigration claims. The balance between the three prongs of Mathews suggests that the Due Process Clause requires heightened constitutional safeguards for noncitizen detainees, including the right to counsel,

121. Cf. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981) ("Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision.").
123. See, e.g., Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div., §2242, 112 Stat. 2681-764, 822 (announcing the policy of the United States "not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture").
124. Kaufman, supra note 120, at 145.
126. DETENTION WATCH, supra note 109.
127. See Ruiz-Martinez v. Mukasey, 516 F.3d 102, 120-21 (2d Cir. 2008) (finding that immigration judges and the BIA have a legal obligation to construe pro se briefs "as having sufficiently made the arguments relevant to the issues raised by his claims").
the right against unreasonable searches and seizures, the right against ex post facto application of immigration law, and the right to have removal proceedings in the district in which they reside. The Constitution requires all of these rights for litigants in the criminal, juvenile delinquency, parole and probation revocation, and involuntary commitment processes. Furthermore, the Constitution extends many of these rights to defendants facing preventive detention.

B. Removal Proceedings and Social Stigmatization

This Section applies the Mathews test to noncitizens that face stigmatization and social exclusion in a country of origin because of their status as deportees. As discussed infra in sub-section III.B.1, some social science research suggests that deportees to Central America, particularly El Salvador and Mexico, face significant stigmatization. In 2010, the Department of Homeland Security removed 8,315 criminal deportees to El Salvador and 127,728 to Mexico.128

If a litigant can show that she will experience stigmatization and social exclusion in a country of origin, the Due Process Clause requires that she have heightened safeguards comparable to the procedural safeguards granted by the Supreme Court in involuntary commitment proceedings, including the right to counsel and the right to have the proceeding in the district in which the noncitizen resides. Under the first prong of Mathews, the individual interest is comparable to involuntary commitment proceedings, which involve the individual liberty to be free from social stigmatization after commitment. Additionally, the second and third prongs of Mathews counsel in favor of higher procedural safeguards based on similar issues to those discussed supra in Sections II.A.2 and II.A.3.

1. The Individual Interest: Stigmatization and Social Exclusion

A person who has been committed by the state potentially faces a life of restricted economic choices and social exclusion, which can be traced to the state labeling the person as sick and deviant through the commitment proceeding.129 The Supreme Court has interpreted the Due Process Clause as


129. Note, Civil Commitment of the Mentally Ill, 87 HARV. L. REV. 1190, 1272 (1974) ("[T]he individual may be confined indefinitely, and, if he is released, the lingering stigma of mental illness may handicap him in maintaining personal relationships, in finding a job, and in gaining admission to school.").
requiring strong procedural safeguards for those being committed because of the significant psychological trauma caused by this post-release experience. Stigmatization of deportees, which operates at two levels, can be comparable to those who have been involuntary committed: (1) internal, first-person stigmatization, and (2) external, state and society stigmatization. The Due Process Clause thus requires similar levels of procedural safeguards in commitment and certain removal proceedings.

As to the former type of stigmatization, some deportees experience psychological trauma having been labeled by the United States government as outsiders, unqualified to be part of American society; this is similar to the experience of persons who feel abnormal or deviant because the government has forced them outside of society into a mental treatment facility. In the first chapter of Nations of Emigrants, sociologist Susan Coutin discusses the psychologically transformative effects of removal on “retornados,” deportees from the United States to El Salvador:

Through removal, people who have complex belongings to multiple communities are stripped of certain memberships. Retornados undergo a rite of passage in which they discover they are “owned,” in a sense by the legal constructs that document their existence. In fact, through detention and deportation, they actually become the physical beings that correspond to these legal constructs, and they are barred from the United States, the country with which they may most closely identify.

In addition to internal stigmatization, residents and the government in a country of origin may reject deportees and particularly criminal deportees. Deportees are often readily identifiable based on their individual characteristics, including clothing, language, American mannerisms, and government-issued identification indicating their deportee status. In Mexico and Central America, deportees often are physically harassed and abused or refused from jobs because they are perceived as causing gang vi-

132. See Note, supra note 129.
134. The Immigration and Nationality Act acknowledges some of the effects of this stigmatization. Consider the concept of “voluntary departure,” where a noncitizen concedes removability but can return to a country of origin on her own. A noncitizen that opts for voluntary departure can avoid being sent back with other deportees and being made to register with their home governments as official deportees. See 12 U.S.C. § 1229c (2006).
135. See, e.g., Brotherton & Barrios, supra note 131, at 44 (“[N]ative Dominicans can often spot a deportee from afar, their dress, their walk, their language, all give them away.”).
olerance and political instability. 136 Criminal deportees to Mexico may face especially acute social exclusion given the perception that they are responsible for growing drug violence, particularly in recent years. 137 In El Salvador, the government has actively equated deportees with gangsters, and officials have targeted deportees for random strip searches and imprisonment. 138 Other residents in Central America and Mexico may perceive deportees as those who abandoned a country and who now return, burdening a society that is already devoid of economic opportunity. 139 As Coutin notes:

[Retornados to El Salvador] are denied or stripped of legal status in the United States, made ineligible for visas to reenter the United States, and sent back to El Salvador not as heroic citizens whose remittances saved the country from financial ruin, but rather as failed émigrés likely to enter the ranks of the unemployed, the impoverished, and the criminal. They are considered by many to be a burden on their country of origin . . . 140

Ultimately, the individual interest in removal proceedings that involve issues of stigmatization and social exclusion is comparable to the individual interest at stake in involuntary commitment proceedings. If a noncitizen proves that she will experience such stigmatization after removal, the constitutional right to due process requires greater procedural safeguards. Removal proceedings for this group should be moved up the Mathews continuum and at least guarantee noncitizens the right to counsel, which is granted to litigants in involuntary commitment proceedings.

This conclusion may be limited by the difficulties in measuring and proving stigmatization. How does an immigration court or other legal body determine if a noncitizen deserves heightened procedural safeguards be-


139. See Dingeman & Rumbaut, supra note 138 at 395 (2010) ("Fearful that they would be perceived as failed émigrés, most initially attempted to control information about their deportation status, preferring that only close friends and relatives know the truth of their story.").

140. COUTIN, supra note 133, at 33.
cause she will experience stigmatization and psychological trauma resulting from social exclusion? The answer to this question is highly individual- and fact-specific, and is further complicated by the lack of social science literature studying the experience of deportees after removal.141

At the very least, the analysis presented in this Section suggests that there is a segment of deportees that deserve heightened constitutional process; courts ought to consider the individual experience of these deportees when determining the process required. More social science studying the experience of deportees after deportation can help develop this argument further by revealing which sets of individuals are especially at risk.

2. The Other Two Prongs of Mathews and Stigmatization

For those facing stigmatization and social exclusion, the risk of erroneous deprivation and the government interest are similar to those discussed supra, in Sections II.A.2 and II.A.3. Therefore, these two prongs support the conclusion that noncitizens facing stigmatization deserve the rights to counsel and to have removal proceedings in the district in which the noncitizen resides—two rights that the Court has required as a constitutional due process matter for those facing involuntary commitment. The risk of being removed erroneously may be especially high for this group of noncitizens because some of them claim immigration relief in removal proceedings as asylees or under the CAT; social stigmatization and exclusion can be grounds for substantive immigration relief.142 Presenting these types of claims can be difficult without counsel or other legal assistance because it requires an understanding of particular country conditions, the cultural circumstances that lead to social exclusion, and the ability to translate this factual material into legally cognizable language.143 Heightened procedure can help minimize the risk that this group of noncitizens is erroneously deported from the US.

As for the third prong of Mathews, the government still shares an interest in ensuring that deportees are not wrongfully sent back to a country where they are stigmatized, ostracized, and excluded. This government interest draws on international legal obligations.144 Granting heightened procedure

141. See supra notes 128-37 and accompanying text for examples of this social science scholarship.
143. See AMNESTY INTERNATIONAL, supra note 116 at 31.
144. See United Nations Convention on the Status of Refugees, Art. 1, July 28, 1951, 189 U.N.T.S. 152 (defining “refugees” as persons who have a “well-founded fear of being persecuted” in a country of origin, with persecution encompassing stigmatization and social exclusion); MATHEW PRICE, RETHINKING ASYLUM 135 (2009) (defining “persecution” to include claims based on social exclusion and mistreatment when perpetrated by government agents); Amy Shuman & Carol Bohmer, The Stigmatized Vernacular: Political Asylum and the Politics of Visibility/Recognition, 49 J. FOLKORE RESEARCH 199, 207 (identifying social stigmatization as a
to the group of noncitizens facing stigmatization or social exclusion can promote accurate adjudication and protect the government interest to not wrongfully deport a noncitizen.

C. Removal Proceedings and Termination of Parental Rights

This Section applies the Mathews balancing test to noncitizen parents who have children in the United States and who thus face the effective termination of their parental rights as a result of deportation. Although DHS does not keep statistics on parents in removal proceedings with children in the United States, a recent report produced by the International Human Rights Law Clinic at the University of California, Berkeley concluded that “more than 100,000 children have been affected by parental deportation between 1997 and 2007, and . . . at least 88,000 of these children were United States citizens.”

If parents can show that they have children residing in the United States, the Due Process Clause requires that they at least have a qualified right to counsel and the right to have the removal hearing in the jurisdiction in which the parent resides, two rights that the Supreme Court has required in termination proceedings. Under the first prong of Mathews, the individual interest in removal proceedings for noncitizen parents is comparable to parental termination hearings. The second and third prongs also support higher procedural safeguards, and the government has an especially strong shared interest in safeguarding the parent-child bond.

1. The Individual Interest: Parental Rights

Deportation can effectively terminate the relationship between a parent and child; after removal, a parent separated by hundreds of miles, a territorial border, or an immigration bar to lawfully returning to the United States may not be able to serve as a parent. One could argue that the termination hearing differs from removal proceedings because in the former situation, the state seeks to end the legal right of a parent over a child whereas...
the latter does not make a legal pronouncement about the parent-child relationship. But the consequences of both proceedings are the same: the state takes action that separates a parent from a child and prevents a parent from guiding the upbringing of the child. Additionally, in the termination proceeding, the parent has neglected a child, and the termination is meant to safeguard the child’s well-being. This child-protective rationale does not apply to removal proceedings, where the parental termination is a collateral effect of deportation.

Deportation has a particularly negative effect on the children of deportees, which means that a noncitizen parent in removal proceedings arguably has a stronger interest at stake than the parent in a termination proceeding. One recent study that quantified the adverse effects of deportation on United States-citizen children found that parents’ deportation adversely impacts children’s psychological well-being, financial capability, and ability to form meaningful relationships with other children of their age.\textsuperscript{147} Several qualitative and quantitative studies have confirmed the adverse psychological and financial consequences of parental deportation on children left behind.\textsuperscript{148} To the extent that deportation can be compared to incarceration—because deportation also prevents the parent from being free in the US and raising her child—data on criminal incarceration shows that “children of incarcerated parents are much more likely to experience psychological disorders and to exhibit behavioral problems. Children of incarcerated parents are more likely to experience trouble in school, including poor grades and behavioral problems, than children of non-incarcerated parents.”\textsuperscript{149} Because the noncitizen parent has a strong interest in ensuring that her child is not subjected to these significant costs, the Due Process Clause requires heightened procedure for her.

An additional reason why the individual interest in a parental termination hearing is akin to the interest at stake in removal proceedings for noncitizen parents is that the former is an involuntary termination; it is one of the few proceedings where the state affirmatively severs family ties and ends a family relationship. In almost all family law contexts, such as divorce, the proceeding is not involuntary: two private individuals are in the proceeding, and an individual, not the state, petitions the court for the dis-


\textsuperscript{148} See, e.g., RANDY CAPPS ET AL., NATIONAL COUNCIL OF LA RAZA, PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA’S CHILDREN 54 (2007), available at http://www.urban.org/UploadedPDF/ 411566_immigration_raids.pdf (studying three communities where workplace raids occurred and finding that consequences for children included financial hardship, feelings of abandonment, symptoms of trauma, fear, isolation, depression, and family fragmentation); IN THE CHILD’S BEST INTEREST, supra note 145, at 5–9 (analyzing the costs of detention and deportation of LPR parents and the adverse emotional and physical impact on children in the United States).

\textsuperscript{149} IN THE CHILD’S BEST INTEREST, supra note 145, at 5.
solution of the family relationship. Deportation, like involuntary parental termination, similarly involves the state acting to remove a noncitizen from the United States, severing her family relationships in this country.

Based on this reasoning, all noncitizens who can prove family ties to the United States potentially deserve heightened constitutional process; parental termination, the only proceeding that involves the state terminating a family relationship against the parent’s will, grants litigants the right to counsel and the right to have proceedings in the district where the parent resides. At the very least, the Due Process Clause requires that parents who have children in the United States ought to have these two safeguards.

2. The Other Two Prongs of Mathews and Parental Termination

For parents facing removal, the risk of erroneous deprivation prong is comparable to the discussion supra, in Section II.A.2, which supports the conclusion that the Due Process Clause requires heightened procedure for noncitizens with children in the United States. Without counsel, parents will have difficulty articulating claims for relief; there may not be accurate adjudication of their case, and there may be erroneous termination of their parental rights to children in the United States. By having removal proceedings in remote locations, parents will not be able to conduct the fact-finding necessary for their claims.

Under the third prong of Mathews, the government again has a possible administrative interest in extending greater procedure to a parent. In addition to creating a more efficient and accurate adjudication, the government can potentially save the costs that it could eventually incur when it has to counsel a child or place a child in foster care after removal of her parent.

The government also shares the parent’s interest in the parent avoiding deportation and retaining parental rights, especially where the child is a United States citizen or has lawful status in the United States. The Supreme Court has repeatedly recognized the family and social connections that noncitizens have to the United States,150 and emphasized the sanctity of the parent-child relationship.151 The INA also recognizes the importance of the

150. For example, in Zadvydas v. Davis, the Court ordered the release of two former Legal Permanent Residents (LPRs), Zadvydas and Ma, detained indefinitely after receiving final removal orders. 533 U.S. 678 (2001). While the Court’s analysis did not mention the roots that Zadvydas and Ma had in the United States, Martin argues that their former LPR status, with the ties that this status involves, may best explain the holding in the case. See David A. Martin, Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis, 2001 SUP. CT. REV. 47.

151. See Stanley v. Illinois, 405 U.S. 645, 651, (1972) (“It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children ‘come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.’”) (internal citation omitted); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (“[T]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This pri-
parent-child relationship. Eligibility for lawful permanent resident status corresponds to family ties to the United States, and noncitizens in removal proceedings may be eligible for cancellation of removal, which requires a certain residency period and proof of significant family connections to this country. Additionally, the United States is party to international treaties that affirm the importance of preserving the relationship between parents and children.

The Obama Administration recently affirmed the government’s strong shared interest with noncitizen parents facing removal. Through administrative regulation, the President announced that undocumented immigrants facing removal who have United States-citizen children or spouses can remain in the United States while seeking a waiver of the three-to-ten-year ban that potentially applies to their future legal immigration to the United States. Prior to this change, undocumented immigrant parents and spouses were required to return to their countries of origin without knowing whether they qualified for a waiver or whether they would have to wait three to ten years before returning to the US.

Accordingly, the strong shared interests between noncitizen parents and the US government, recognized by President Obama’s new regulation, support granting noncitizen parents heightened procedural safeguards as a matter of constitutional due process, including the right to counsel and the right to have removal proceedings in the district where the noncitizen resides; these two rights are granted to parents in parental termination hearings. By granting noncitizen parents these two rights, the government can more accurately adjudicate removal and attempt to ensure that the noncitizen is not wrongfully deported away from her child.

IV. CONCLUSION

Noncitizens placed in removal proceedings potentially face the most severe of penalties: permanent expulsion, away from family, friends, and a life built over decades. As the Supreme Court observed in 1945, “although deportation technically is not criminal punishment, it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling. . . . [D]eportation may result in the loss of all that makes life worth

mary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”); Pierce v. Soc’y of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534-535 (1925) (holding that the “liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control.”).
Noncitizens in removal proceedings, however, continue to lack important procedural safeguards. They do not have the right to counsel, the right against unreasonable searches and seizures, the right against the ex post facto application of immigration law, and the right to have removal proceedings in the district in which they reside.

Although a wealth of literature recognizes these procedural weaknesses, the recent "crimigration" trend in the literature continues to approach removal proceedings from the perspective of the civil-criminal procedural dichotomy. Assuming that there are two types of constitutional procedure in the US—civil and criminal—scholars argue that noncitizens in removal proceedings ought to have heightened procedural safeguards as a matter of constitutional law because immigration removal proceedings ought to be classified as criminal or quasi-criminal.

This Note attempted to move beyond "crimigration" and the civil-criminal procedural dichotomy by proposing an alternate non-bifurcated theory of constitutional procedure based on the Due Process Clause as interpreted in Mathews v. Eldridge. Under this model, the constitutional right to due process may require a variable level of specific procedural safeguards in any proceeding, depending on the balance between the individual interest at stake, the government interest, and the need to minimize the erroneous deprivation of the individual interest.

Based on this theory, this Note suggested that the Due Process Clause may require heightened procedural rights for three groups of noncitizens: (1) those detained during and after removal proceedings, (2) those for whom removal may result in stigmatization and social exclusion in a country of origin, and (3) parents who have children in the United States. The balance of the Mathews factors for these three groups closely resembles the balance of the Mathews factors in other proceedings that grant litigants the right to counsel, the right against unreasonable searches and seizures, the right to ex post facto protection, or the right to have removal proceedings in the district in which the litigant resides.

156. Bridges v. Wixon, 326 U. S. 135, 147 (1945) (internal citation and quotation marks omitted).