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CROSSING OVER: ASSESSING OPERATION STREAMLINE AND THE RIGHTS OF IMMIGRANT CRIMINAL DEFENDANTS AT THE BORDER

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Bent on curbing unauthorized immigration in the United States, the Department of Homeland Security has implemented Operation Streamline—a program aimed at criminally prosecuting all unauthorized immigrants along a five-mile stretch of the U.S.-Mexico border. While lauded by proponents as a success, Streamline has driven courts to conduct en masse hearings that ultimately compromise immigrant criminal defendants' due process rights. Although the Ninth Circuit recently held in United States v. Roblero-Solis *that these en masse proceedings violate Rule 11 of the Federal Rules of Criminal Procedure, this Article argues that by basing its holding on a procedural rule,* Roblero-Solis *fails to fully protect the rights of immigrant criminal defendants at the border. To eliminate this problem, this Article calls for courts to base these defendants' rights on the Constitution and to apply the civil theory of territoriality—and reject the civil doctrines of plenary power and the ascending scale of rights—in criminal proceedings. To help ensure the application of these theories, this Article proposes a system that allows the courts to reduce the number of unauthorized immigrants that it prosecutes and to remedy any violations of the rights of the immigrants that it does.*

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> *It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end.*
>
> —Justice Frankfurter[1]

I. INTRODUCTION

Since the Department of Homeland Security (DHS) implemented Operation Streamline ("Streamline") to combat unauthorized immigration along the U.S.-Mexico border in 2005,[2] as many as one hundred immigrants are brought in shackles each day to a Tucson federal courthouse to be prosecuted for illegal entry.[3] Streamline's zero-tolerance policy of criminally prosecuting all unauthorized immigrants,[4] coupled with the sheer volume of unauthorized immigrants being apprehended along the border,[5] has compelled the courts to conduct en masse hearings that ultimately compromise immigrant criminal defendants' due process rights.[6] Recently, in *United States v. Roblero-Solis*,[7] the Ninth Circuit Court of Appeals addressed Streamline's shortcomings and held that en masse proceedings violate Rule 11 of the Federal Rules of Criminal Procedure.[8] While the *Roblero-Solis* holding is undoubtedly a positive step in protecting the rights of immigrant criminal defendants at the border, it has not been a cure-all: even though courts have changed their procedures in an effort to comply with the *Roblero-Solis* decision, en masse proceedings in various forms still

1. Davis v. United States, 328 U.S. 582, 597 (1946) (Frankfurter, J., dissenting).

2. Donald Kerwin & Kristen McCabe, *Arrested on Entry: Operation Streamline and the Prosecution of Immigration Crimes*, MIGRATION POLICY INST. (Apr. 29, 2010), http://migrationinformation.org/feature/display.cfm?id=780.

3. Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 142 (2009).

4. Kerwin & McCabe, *supra* note 2.

5. Since Streamline's implementation in Tucson, Arizona, in 2008, for example, the district has reportedly prosecuted about 30,000 persons. Stephen Lemons, *Operation Streamline Treats Migrants like Cattle*, MIAMI NEW TIMES (Oct. 21, 2010), http://www.miaminewtimes.com/2010-10-21/news/operation-streamline-treats-migrants-like-cattle.

6. *See* United States v. Roblero-Solis, 588 F.3d 692, 693–94 (9th Cir. 2009).

7. 588 F.3d 692 (9th Cir. 2009).

8. *Id.* at 693–94.

persist.[9] Moreover, by narrowly grounding its holding in the Federal Rules of Criminal Procedure and not the Constitution, the court deprived these defendants of more protective rights by following a pattern typically only necessary in civil immigration proceedings.[10]

This Article suggests that such an approach, if adopted by subsequent courts, stands to undermine important constitutional protections for immigrant criminal defendants. This Article further recommends that, for criminal defendants prosecuted at the border, courts should situate due process rights in the Constitution rather than in specific statutes or procedural rules that are subject to congressional change. In reaching this conclusion, this Article rejects the application of the "plenary power doctrine," which advocates congressional deference in civil proceedings, and the "ascending scale of rights" theory, which grants rights to unauthorized immigrants only after they have gained substantial connections with the country, in criminal proceedings. Instead, this Article argues that courts should apply the theory of "territoriality," which premises constitutional rights on a defendant's physical presence on U.S. soil, in criminal prosecutions of unauthorized immigrants. In addition, this Article proposes that courts should only criminally prosecute as many immigrant criminal defendants as they can without depriving these defendants of their full procedural rights. Should the courts fail to protect these rights, then remedial efforts—such as dropping the criminal conviction and giving the defendant the option to either leave the United States voluntarily or go through civil removal proceedings—should be implemented to alleviate the harm.

Part II provides background on Streamline and the *Roblero-Solis* opinion. Part III discusses the way in which *Roblero-Solis* serves as an example in a criminal case of what has been commonly seen in the civil realm—namely, courts drawing from the Constitution but ultimately granting rights to immigrants under statutes—and cautions

9. Lemons, *supra* note 5 ("And yet [even after *Roblero-Solis*], these *en masse* hearings continue. And though Tucson magistrates now take pleas individually, some questions are still asked of 70 people at a time or of smaller groups of seven at a time."); *see* Joanna Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, WARREN INST. 14 (Jan. 2010), http://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf ("Tucson magistrate judges are using a variety of different plea procedures to comply with the Ninth Circuit's opinion, and while plea hearings are taking longer than they used to, the court still processes 70 Operation Streamline defendants each day.").

10. *See infra* Part III.

that this approach should not cross over into criminal proceedings. Part IV offers a critique of the plenary power doctrine and argues that it should have no place in criminal proceedings given the innate differences between criminal and civil proceedings. Part IV further argues that courts should strive to base their decisions on the Constitution to preserve criminal defendants' constitutional rights from the reach of plenary power. Part V rejects the ascending-scale-of-rights model and argues that territoriality should prevail in criminal proceedings. Part VI proposes a method for courts to ensure that immigrant criminal defendants receive the full protection of their procedural rights. Part VII concludes.

II. CHANGING THE IMMIGRATION LANDSCAPE: AN OVERVIEW OF STREAMLINE AND *ROBLERO-SOLIS*

This part begins by discussing Streamline—its policies and the critiques that have been leveled against it—and how the program has affected the United States' treatment of unauthorized immigrants. It then describes the Ninth Circuit decision of *United States v. Roblero-Solis* and how that court attempted to respond to some of Streamline's concerns.

A. Border Enforcement Post-Streamline

Before Streamline, the U.S. government primarily regulated immigration matters in civil proceedings.[11] After 9/11, however, the courts experienced an explosion of immigration-related prosecutions.[12] This explosion only augmented when, in 2005, DHS implemented Streamline, a program intended to enforce the nation's immigration laws and secure its borders along a five-mile stretch of

11. Chacón, *supra* note 3, at 137. Indeed, the concept of immigration is so connected with the civil sphere that scholars define "immigration law" as the "admission and expulsion of aliens," *see, e.g.*, Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 256 (1984), with "expulsion" referring to "deportation," *see id.*, a hearing that the Supreme Court has defined as "a purely civil action," INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

12. Chacón, *supra* note 3, at 139 ("The prosecution of migration-related offenses exploded in the wake of September 11, 2001. In 2004, U.S. magistrates convicted 15,662 noncitizens of immigration crimes, and U.S. district court judges convicted another 15,546."); *see* Lydgate, *supra* note 9, at 2 (noting that federal magistrate judges witnessed their misdemeanor immigration caseloads more than quadruple between 2002 and 2008).

the U.S.-Mexico border.[13] Before Streamline, Border Patrol officials would either return first-time unauthorized immigrants to their home countries or place them in the civil immigration system for removal.[14] However, under Streamline's zero-tolerance policy, officials within districts implementing the program must now refer practically all unauthorized persons to criminal prosecution.[15] First-time offenders are charged with the misdemeanor of illegal entry, while those who have been removed previously and attempt to unlawfully enter the United States again are charged with felony reentry.[16]

Since Streamline's implementation, DHS has lauded the program as an effective deterrence against unauthorized immigration.[17] The program, which began in Del Rio, Texas, has expanded to seven more of the eleven federal district courts that abut the southwestern border[18] and, because of its apparent success, may expand to even more.[19] Critics, however, have countered the claim that Streamline serves as a deterrent by arguing that the incentive to find work and reunite with family in the United States outweighs the consequences of criminal punishment.[20] They further contend that the

13. Kerwin & McCabe, *supra* note 2.

14. Lydgate, *supra* note 9, at 1.

15. Kerwin & McCabe, *supra* note 2 (noting that those excepted from prosecution include "juveniles, parents traveling with minor children, persons with humanitarian concerns, and those with certain health conditions").

16. Chacón, *supra* note 3, at 142–43.

17. Lydgate, *supra* note 9, at 5 (noting that DHS "has consistently given Operation Streamline credit for the reduction in apprehensions" of unauthorized immigrants at the border); *see* Michael Chertoff, *Turning the Tide on Illegal Immigration*, DEP'T HOMELAND SEC. (Nov. 24, 2008, 10:41 AM), http://www.dhs.gov/journal/leadership/2008/11/turning-tide-on-illegal-immigration.html (stating that the decrease in the number of apprehensions at the Streamline districts of Yuma and Del Rio is "not [a] seasonal anomal[y]," but rather, a reflection of "increased border security and the deterrence that comes with the prospect of spending time in a federal detention facility").

18. Lydgate, *supra* note 9, at 1. Those districts are: Yuma, Arizona; Tucson, Arizona; Las Cruces, New Mexico; El Paso, Texas; Laredo, Texas; McAllen, Texas; and Brownsville, Texas. *Id.* at 3. Although Streamline operates slightly differently in each of those districts, all of them share the same zero-tolerance policy of criminally prosecuting all unauthorized immigrants. *Id.* For an in-depth comparison of the Del Rio, El Paso, and Tucson districts, see Joanna Jacobbi Lydgate, Comment, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481, 496–514 (2010).

19. *See* Ted Robbins, *Claims of Border Program Success Are Unproven*, NPR.ORG (Sept. 13, 2010), http://www.npr.org/templates/story/story.php?storyId=129827870.

20. Lydgate, *supra* note 9, at 7. Indeed, many unauthorized immigrants who have been interviewed after emerging from criminal immigration proceedings have stated that Streamline would not keep them from trying to reenter the United States. Lemons, *supra* note 5.

poor economy, the increased cost of border crossings, and the risk of death are the true causes for any decrease in border apprehensions.[21] Because Streamline lacks deterrent value—and because of its enormous cost[22]—several commentators have criticized it for diverting the government's attention from more serious crimes.[23]

Aside from the arguments against the program on a pragmatic level, Streamline has spawned a number of troubling due process concerns. Indeed, after being apprehended through the program and spending usually a night in detention,[24] up to one hundred immigrants are brought in shackles each day to a courthouse to be prosecuted for illegal entry.[25] Often, these defendants are wearing the same clothes that they wore during their journey[26] and are undernourished.[27] Before trial, immigrant defendants briefly meet with a defense attorney—who can represent anywhere from six to forty defendants at one time—to determine whether they have any defenses, such as citizenship or authorization to enter.[28] If no defense exists, then counsel generally enters mass guilty pleas on behalf of his or her clients.[29] Given the speed at which Streamline proceedings are conducted, however, defenses are not always uncovered.[30] As a

21. Lemons, *supra* note 5; Lydgate, *supra* note 9, at 5–6.

22. Streamline itself does not have a set budget, drawing resources from other agencies involved in its implementation, such as Border Patrol, the federal judiciary, and the U.S. Attorneys', Marshals', and federal public defender's offices. Lemons, *supra* note 5. In Tucson, Arizona, for example, DHS reportedly spends about $52.5 million each year to detain Streamline defendants. *Id.*

23. *See id.*; Lydgate, *supra* note 9, at 7–8.

24. Chacón, *supra* note 3, at 146.

25. *Id.* at 142.

26. *Id.*; *see* Max Blumenthal, *"We're All Parasites." This Is Operation Streamline*, MAX BLUMENTHAL (Feb. 15, 2010), http://maxblumenthal.com/2010/02/were-all-parasites-this-is-operation-streamline ("All of the migrants were young and brown-skinned, with combed black hair, wearing the same clothes they wore during their perilous trek across the Sonoran Desert but without the belts and shoelaces they were forced to surrender to prevent suicide attempts.").

27. One Streamline defendant stated that, after being apprehended, Border Patrol officials only gave her cookies and juice to consume, while another defendant described how Border Patrol had thrown her the cookies instead of handing them to her. Lemons, *supra* note 5.

28. Chacón, *supra* note 3, at 143.

29. *Id.* In pleading guilty, defendants waive the right to a jury trial and the right to be represented by counsel at trial. FED. R. CRIM. P. 11(b)(1)(C)–(D). Virtually all Streamline defendants, however, plead guilty given that "[d]emanding a trial would mean a month or more in custody awaiting a trial date, far more time than a day or two of time served." Lemons, *supra* note 5.

30. Lydgate, *supra* note 9, at 14. A supervisor at the Federal Public Defender's office in Tucson, for example, has noted that there are times when she has discovered after a proceeding

result, these en masse hearings have ultimately compromised immigrant criminal defendants' due process rights—a concern that the Ninth Circuit recently attempted to confront in *United States v. Roblero-Solis*.

B. Roblero-Solis *and Rule 11*

On March 3, 2008, Abimael Roblero-Solis, Janet Roblero-Perez, Jose Vasquez-Morales, Gumercindo Martinez-Carrizosa, Jorge Rosales-Vargas, and Miguel Zarazua-Pichardo were apprehended by Border Patrol inside the United States without documentation.[31] Within the next two days, all six underwent one of two criminal proceedings before a Tucson magistrate judge in which they pled guilty to illegal entry with at least forty other defendants.[32] During these proceedings, their attorney, Assistant Federal Public Defender Jason Hannan, objected to the court's en masse procedure[33] and asked the court to address his clients individually to determine whether they understood their rights.[34] Hannan argued that the court could not determine whether his clients knowingly and voluntarily waived their rights unless it addressed them individually and that his clients, moreover, had a right to address the court personally.[35]

After hearing Hannan's objection in the first proceeding, the court asked Hannan's clients separately whether they understood that pleading guilty forfeited their right to a jury trial before it returned to

that a defendant spoke an indigenous language and, thus, did not understand his hearing. Lemons, *supra* note 5. At other times, she has learned that a defendant was a juvenile who should have undergone an entirely different proceeding. *Id.*

31. United States v. Roblero-Solis, 588 F.3d 692, 694 (9th Cir. 2009).

32. *Id.* at 694, 696. Roblero-Solis, Roblero-Perez, Vasquez-Morales, and Martinez-Carrizosa, along with forty-three other defendants, appeared before Magistrate Judge Jennifer Guerin on March 5, 2008, *id.* at 694, while Rosales-Vargas and Zarazua-Pichardo, whose proceeding consisted of forty-eight other defendants, appeared before Guerin on March 6, 2008, *id.* at 696.

33. In conducting proceedings, the Tucson court dealt with the following sorts of issues en masse: advising the defendants of their rights, informing them of the consequences of pleading guilty, asking the defendants whether they understood their rights and the consequences of pleading guilty, asking counsel whether they believed that their clients were competent to plead guilty and were doing so voluntarily, asking the defendants whether they committed the elements of illegal entry, and sentencing the defendants to time served. *Id.* at 694–96. There were only two instances in which the court addressed the defendants individually: when it accepted guilty pleas and took roll. *Id.* at 694.

34. *Id.*

35. *Id.* at 697.

addressing them as a group.[36] In the second proceeding, however, the court failed to even attempt to address Hannan's objection.[37] As a result, all six defendants appealed their convictions, and their cases came before four separate district court judges.[38] Of these judges, only one vacated a defendant's conviction by finding that the court had not resolved Hannan's objection after he had clarified it; the other three ultimately reasoned that the magistrate had not committed any due process violations by conducting en masse proceedings because the defendants had been represented by counsel during their proceedings.[39]

On December 2, 2009, the Ninth Circuit Court of Appeals in *United States v. Roblero-Solis* rejected the district court judges' reasoning by holding that en masse proceedings violate Rule 11 of the Federal Rules of Criminal Procedure.[40] Under Rule 11, a court must "address the defendant personally in open court and determine that [a guilty] plea is voluntary."[41] The *Roblero-Solis* court reasoned that the term "personally" implies that the judge must address the defendant not only in person, but also "in a personal manner."[42] Indeed, the fact that "personally" comes after "defendant" in the rule underscores the notion that the judge's speech must be made person-to-person.[43] Furthermore, while the Ninth Circuit conceded that proceedings containing more than one defendant do not necessarily violate Rule 11, it nevertheless stressed that "no judge, however alert, could tell whether every single person in a group of 47 or 50 affirmatively answered her questions when the answers were taken at the same time."[44] Indeed, the court went on to say in even stronger language that "[n]either . . . [a] medley of yeses nor a presumption that all those brought to court by the Border Patrol must have crossed

36. *Id.* at 696.

37. *Id.* at 697.

38. *Id.*

39. *Id.* at 697–98.

40. *Id.* at 692–93.

41. FED. R. CRIM. P. 11(b)(2).

42. *Roblero-Solis*, 588 F.3d at 700 (quoting WEBSTER'S THIRD INTERNATIONAL DICTIONARY (1986)).

43. *Id.*

44. *Id.*

the border" is enough to establish that a defendant has pled voluntarily.[45]

In this way, *Roblero-Solis* can be seen as a significant decision advancing immigrant criminal defendants' procedural rights. At the same time, however, the decision falls one step short of fully protecting the rights of immigrant criminal defendants by holding that en masse proceedings only violate the Federal Rules of Criminal Procedure and not the Constitution. Indeed, this omission becomes all the more glaring by the fact that the Ninth Circuit referenced the Constitution several times throughout its decision. For example, the court began its opinion by describing the Tucson District Court's adoption of en masse proceedings as "intended to preserve the rudiments of [Rule 11] and the [C]onstitution."[46] The court alluded to the Constitution again when it discussed whether the case was moot, given that the defendants had already served their sentences and had apparently been deported.[47] Ultimately, the court determined that the case was not moot, reasoning that "[a]lthough we do not reach a constitutional claim in this case, we believe that *analogous considerations* counsel treating as alive these cases where the 'time served sentences' are so short that no appeal would be practicable."[48] Interestingly, while the court denied explicitly ruling on a constitutional issue, it discussed the Constitution once again when it analyzed Rule 11's use of the term "personally." Indeed, after it concluded that "personally" mandates person-to-person communication between the judge and the defendant, the court commented that "'[p]erson' and its derivative 'personally' carry constitutional connotations."[49] In other words, the court appealed to the principles of the Constitution to bolster its argument that en masse proceedings violate a defendant's Rule 11 rights, but it declined to take the logical step of grounding its holding in the Constitution.

45. *Id.*

46. *Id.* at 693.

47. *Id.* at 698.

48. *Id.* (emphasis added).

49. *Id.* at 700.

III. *ROBLERO-SOLIS*: THE CROSSING OVER OF CONSTITUTIONAL "PHANTOMS"

By allowing constitutional principles to guide its interpretation of Rule 11, the *Roblero-Solis* court followed a pattern traditionally observed only in civil proceedings.[50] Professor Hiroshi Motomura has described this practice of using statutes that draw from the Constitution as decision-making based on "phantom" constitutional norms, since the courts use statutes—and not the Constitution itself—to impart rights to noncitizens.[51] For example, in *Wong Yang Sung v. McGrath*[52] an unauthorized immigrant challenged a statute allowing immigration inspectors to preside over deportation cases in which they had also performed prosecutorial tasks.[53] The Supreme Court held that deportation hearings must comport with the Administrative Procedure Act, which prohibited such doubling of duties, since doing otherwise would violate "procedural safeguards."[54] Thus, although the Court based its reasoning on legislative intent,[55] the decision was a "phantom" because the Court used a statute to determine a "constitutional due process matter."[56]

Likewise, in *Kwong Hai Chew v. Colding*[57] the U.S. government denied Chew, a permanent-resident alien, reentry after a five-month voyage on a U.S. vessel.[58] Invoking § 175.57(b) of the Code of

50. For a discussion of the courts granting more favorable rights to noncitizens under statutes than under the Constitution in civil immigration proceedings, see Deborah Anker, Jean v. Nelson*: Neutral Principles in the Supreme Court Without the Constitution*, IMMIGR. J., Oct.–Dec. 1985, at 1, 10; STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 233, 239–41 (1987); DAVID A. MARTIN, MAJOR ISSUES IN IMMIGRATION LAW 19, 25–27 (1987); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 564–75 (1990).

51. Motomura, *supra* note 50, at 564 ("In immigration law, the 'constitutional' norms that actually inform statutory interpretation—which are norms borrowed from public norms generally—conflict with the expressly articulated constitutional norm—unreviewable plenary power. The former are 'phantom' rather than 'real' constitutional norms in the sense that they do not serve the first function of 'constitutional' norms—namely, direct application to constitutional issues raised in immigration cases.").

52. 339 U.S. 33 (1950).

53. *Id.* at 45–46.

54. *Id.* at 52–53.

55. *Id.*

56. Motomura, *supra* note 50, at 569.

57. 344 U.S. 590 (1953).

58. *Id.* at 592–95.

Federal Regulations, the government furthermore denied Chew a hearing since it believed that disclosing the reasons for Chew's exclusion would be "prejudicial to the public interest."[59] In his appeal to the U.S. Supreme Court, Chew argued, first, that the regulation did not apply to him and, second, that even if it did, the regulation violated the Due Process Clause of the Fifth Amendment.[60] The Court ultimately accepted Chew's first argument, determining that the regulation did *not* apply to Chew because his voyage on a U.S. vessel did not terminate the rights he enjoyed as a lawful permanent resident.[61] In doing so, the Court was able to rule in Chew's favor without explicitly addressing whether the statute itself was constitutional or implicating the plenary power doctrine.[62]

Wong Yang Sung and *Kwong Hai Chew*—indeed, all of the immigration cases that Motomura discusses as having invoked "phantom" constitutional norms[63]—were cases in civil proceedings, which is the primary reason why Motomura does not necessarily consider the courts' use of phantom constitutional norms negatively.[64] For in civil proceedings, courts used statutes as a means to circumvent the plenary power doctrine[65]—a doctrine that originated in and has long pervaded civil proceedings to restrict judicial review of congressional immigration acts.[66] Under this

59. *Id.* at 592.

60. *Id.* at 595–96.

61. *Id.* at 600.

62. As the Court itself noted, "We do not reach the issue as to what would be the constitutional status of 8 CFR § 175.57(b) if it were interpreted as denying to petitioner all opportunity for a hearing." *Id.* at 602.

63. Motomura, *supra* note 50, at 567–72 (arguing that *Woodby v. INS*, 385 U.S. 276 (1966), *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948), and *Bridges v. Wixon*, 326 U.S. 135 (1945), are all cases involving "phantom" constitutional norms).

64. *See* Motomura, *supra* note 50, at 549 ("In my view, any fair assessment of phantom norm decisionmaking should reflect deep ambivalence. On the one hand, it has been an understandable and perhaps even noble response to the shortcomings of the plenary power doctrine, and for that reason I do not intend the term 'phantom' pejoratively. More generally, the use of phantom norms during a transitional phase may be a healthy form of constitutional change. On the other hand, statutory interpretation confuses and contorts the law when the interpreting court relies for an extended period on constitutional norms that are doctrinally 'improper' in the sense that they do not control in cases which explicitly involve interpreting the Constitution.").

65. *See id.* ("The result [of court's relying on phantom constitutional norms] has been to undermine the plenary power doctrine through statutory interpretation.").

66. *See id.* (noting that immigration law "has developed over the past one hundred years under the domination of the plenary power doctrine"). The Supreme Court first invoked the doctrine in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), in which it upheld the

doctrine, Congress possesses sovereignty over immigration matters,[67] and the judiciary only rarely—if ever—considers constitutional challenges on that subject.[68]

Roblero-Solis, however, is not a civil case but, rather, a *criminal* one. As such, the Ninth Circuit would not have needed to avoid a civil doctrine by grounding its reasoning on a "phantom" procedural rule and not on the Constitution. The fact that the court *did* base its holding on Rule 11, however, is all the more unsettling, as it suggests that the plenary power doctrine persists not only in civil immigration proceedings but in criminal immigration proceedings as well. Indeed, by grounding its decision in Rule 11—a procedural rule subject to congressional amendment[69]—the *Roblero-Solis* court has essentially allowed the issue of immigrant criminal defendants' procedural rights to be subject to the will of Congress.[70] By opening the door for the plenary power doctrine to enter into criminal proceedings, the Ninth Circuit's decision has ultimately—and unfortunately—created

constitutionality of a law that denied a Chinese immigrant reentry to the United States, even though prior to the immigrant's departure, Congress had promised that he could leave the country and return. *See id.* at 589; *see also id.* at 609 ("Whatever license, therefore, Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure."). For a more detailed discussion of the plenary power doctrine, see Motomura, *supra* note 50, at 550–54.

67. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.").

68. Motomura, *supra* note 50, at 547. An example of a case that actually ruled favorably toward noncitizens is *Yamataya v. Fisher*, 189 U.S. 86 (1903), in which the Supreme Court held that the government could not arbitrarily hold or deport a noncitizen who was within the United States, even if his presence was unlawful, without giving him a hearing. *Id.* at 101.

69. *See Foreword* to FED. R. CRIM. P.

70. One might argue that *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), serves as a counterexample to the assertion that courts are not establishing Constitution-based rights for noncitizens. In *Padilla*, the Supreme Court held that, under the Sixth Amendment, an attorney must advise his client whether pleading guilty to a criminal offense creates the risk of deportation. *Id.* at 1486. However, *Padilla* differs from *Roblero-Solis* in two key ways. First, unlike *Roblero-Solis*, *Padilla* is a Supreme Court case dealing with an issue that arose from state court. *See id.* at 1478. Thus, while *Roblero-Solis* could have been based on either the Constitution or the Federal Rules of Criminal Procedure, the Court in *Padilla* could only ground its ruling in the Constitution. While the *Padilla* majority could have accepted Justice Scalia's argument that statutory provisions, and not the Constitution, should remedy any effective-counsel concerns, the reason that they did not likely stems from the second difference between *Padilla* and *Roblero-Solis*. While both *Padilla* and *Roblero-Solis* dealt with issues affecting noncitizens, *Padilla* involved a legally permanent resident, *id.* at 1477, whereas *Roblero-Solis* involved unlawfully present defendants. This difference is important because, historically, the courts have treated the former group more favorably than they have treated the latter. *See infra* note 106 and accompanying text.

the risk of producing followers. *Roblero-Solis* thus stands to influence district courts in the Ninth Circuit, and perhaps even those in sister circuits, to conclude that plenary power applies in criminal, as well as civil, proceedings.

IV. THE PLENARY POWER DOCTRINE: A "CROSSOVER" THAT SHOULD NOT OCCUR

If the *Roblero-Solis* opinion means that the plenary power doctrine applies in criminal proceedings, we should be particularly wary. Indeed, there are several reasons why the plenary power doctrine should not apply to criminal proceedings of unauthorized immigrants: scholarly debate, contemporary court rulings, and the dangers inherent in the doctrine all counsel against it.

A. Plenary Power: A Doctrine on the Demise

Even though courts have evoked the plenary power doctrine in civil immigration proceedings for at least a century, this has not stopped scholars from disputing the doctrine's legitimacy. Indeed, some have attacked the doctrine by arguing that it has no constitutional support in either civil or criminal proceedings. As one scholar argues, although the Constitution does not overtly discuss noncitizens' rights, certain provisions in the Constitution suggest that the Constitution's framers never intended for plenary power to apply to Congress in immigration matters.[71] For instance, the fact that the framers included the Naturalization[72] and Migration and Importation Clauses[73] in the Constitution illustrates that they intended to place constitutional limits on Congress's power over immigration: if Congress had inherent power over immigration, then these clauses

71. Jim Rosenfeld, *Deportation Proceedings and Due Process of Law*, 26 COLUM. HUM. RTS. L. REV. 713, 718 (1995).

72. U.S. CONST. art. I, § 8, cl. 4 (granting Congress the power "[t]o establish an uniform Rule of Naturalization").

73. U.S. CONST. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.").

specifically discussing Congress's authority over the subject would have been unnecessary.[74]

Regardless of the veracity of this argument, it nevertheless remains that courts have relied on the plenary power doctrine in civil proceedings.[75] However, certain modern Supreme Court decisions suggest that the doctrine's stronghold over civil immigration proceedings is loosening.[76] Indeed, *Landon v. Plasencia*,[77] *Nguyen v. INS*,[78] and *Zadvydas v. Davis*[79] are all examples of immigration cases in which the Supreme Court heard each case on its merits instead of immediately deferring to Congress, as the plenary power doctrine would require.[80]

In *Plasencia*, for example, a lawful permanent resident challenged the constitutionality of an exclusionary hearing in which she was denied admission into the United States after she had attempted to transport several Mexican citizens into California.[81] Although the Supreme Court rejected the argument that Plasencia was entitled to a deportation hearing,[82] it nevertheless accepted her constitutional challenge and remanded the case to determine whether her exclusion hearing comported with due process.[83]

Likewise, in *Nguyen v. INS* the Supreme Court analyzed an equal protection argument brought by a lawfully present, removable noncitizen under the intermediate standard for gender-based

74. Rosenfeld, *supra* note 71, at 718 ("Although the Migration and Importation Clause primarily dealt with the slave trade, it is also thought to have addressed laws concerning non-slave migrants. However, if the framers had contemplated an inherent power over immigration, the Naturalization provision and—to the extent that it addressed alien laws—the Migration and Importation Clause would have been unnecessary." (footnote omitted)).

75. *See supra* notes 65–68 and accompanying text.

76. Matthew S. Pinix, *The Unconstitutionality of DOMA + INA: How Immigration Law Provides a Forum for Attacking DOMA*, 18 GEO. MASON U. C.R. L.J. 455, 479 (2008).

77. 459 U.S. 21 (1982).

78. 533 U.S. 53 (2001).

79. 533 U.S. 678 (2001).

80. Pinix, *supra* note 76, at 479–82.

81. *Plasencia*, 459 U.S. at 22–23.

82. Deportation hearings are now referred to as "removal" in civil proceedings. Chacón, *supra* note 3, at 140 n.28 ("Until 1996, immigration proceedings to prevent noncitizens from entering the country were termed 'exclusion' proceedings, while proceedings to remove a noncitizen that had already entered the country were termed 'deportation' proceedings. [The Illegal Immigration Reform and Immigrant Responsibility Act of 1996] consolidated exclusion and deportation, and labeled the resulting proceedings 'removal' proceedings.").

83. *Plasencia*, 459 U.S. at 22.

challenges instead of under the rational basis standard of review typically connected with plenary power.[84] The Court ultimately found constitutional a statute that imposed different requirements for attaining citizenship depending on whether the citizen parent is the mother or the father.[85] However, by choosing to entertain the argument, the Court demonstrated more consideration of an immigrant's rights than the plenary power doctrine would allow.[86]

The Supreme Court further demonstrated the diminishing influence of the plenary power doctrine in *Zadvydas* when it stated that Congress's power over immigration "is subject to important constitutional limitations."[87] In *Zadvydas*, a lawfully present noncitizen became removable after he committed a series of crimes.[88] Zadvydas challenged a statute that allowed the government to detain him over the set ninety-day period.[89] Although the Court did not strike the statute down as unconstitutional, it nevertheless interpreted the statute to mean that the government could not detain a noncitizen indefinitely,[90] thus imparting a certain number of rights to a noncitizen despite plenary power.

While these cases are not the norm in immigration jurisprudence—rather, they are the exceptions in the judiciary's long history of plenary power[91]—they nevertheless illustrate that the plenary power doctrine's pull in civil immigration proceedings appears to be weakening. Given this decline, it would therefore make little sense to apply the doctrine in the criminal realm.

B. Plenary Power: The Dangers of Crossing Over

Possibly the greatest reason against applying the plenary power doctrine in criminal courts, however, is the unique differences that make criminal proceedings more punitive than civil ones. Indeed, by

84. *Nguyen*, 533 U.S. at 72.

85. *Id.* at 56–59.

86. *See* Pinix, *supra* note 76, at 481.

87. Zadvydas v. Davis, 533 U.S. 678, 696 (2001).

88. *Id.* at 684.

89. *Id.* at 682, 685–86.

90. *Id.* at 659.

91. *See* Pinix, *supra* note 76, at 479 ("As recently as 1999, the Court continued to defer to Congress's seemingly limitless power in the immigration arena. Thus, for over one hundred years the Court has avoided constitutional challenges to immigration laws by relying on the plenary power doctrine." (footnote omitted)).

going through Streamline, immigrant criminal defendants now have criminal records, which can potentially carry significant sentences. For example, an immigrant criminal defendant convicted of illegal entry can be imprisoned for up to six months, while one convicted of illegal reentry can be imprisoned for up to two years.[92] Furthermore, defendants convicted of illegal entry and reentry face being stigmatized as criminals—a repercussion keenly absent in civil proceedings.[93] Given the harshness of the plenary power doctrine toward immigrants in civil proceedings, the doctrine seems all the more ill-suited in the high-penalty setting of criminal proceedings.

Without the plenary power doctrine, it appears that criminal immigration courts would be freer than their civil counterparts to base their decisions on the Constitution rather than on statutes or procedural rules. Granted, common-law tradition dictates that, when given the choice between a statute and the Constitution, courts should rule on the statute, as it is the narrower ground.[94] In this way, the *Roblero-Solis* opinion is not unreasonable. However, the court's outcome is also entirely consistent with the courts' general ill treatment of noncitizens in civil proceedings. Indeed, by avoiding the constitutional argument, the *Roblero-Solis* court creates dangerous precedent by leading other courts to protect the rights of immigrant criminal defendants less than they would under a constitutional ruling.

For instance, should the *Roblero-Solis* case reach the Supreme Court and the Court hold that en masse hearings violate Rule 11, its decision would only bind federal courts. A Supreme Court decision based on the Constitution, on the other hand, would bind federal and state courts alike. Indeed, although the topic of immigration is largely a federal issue,[95] state authorities *have* taken it upon

92. 8 U.S.C. § 1325(a)(3) (2006).

93. *See* Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1205 (1985) ("Almost every criminal punishment imposes some nonpecuniary disutility in the form of a stigma . . . . There is no corresponding stigma to a tort judgment.").

94. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.").

95. *See, e.g.*, Jay T. Jorgensen, *The Practical Power of State and Local Governments to Enforce Federal Immigration Laws*, 1997 BYU L. REV. 899, 902–03 (1997).

themselves to regulate immigration. In September 2005, for example, the Texas Border Sheriffs' Coalition began to implement Operation Linebacker ("Linebacker") in response to what it perceived as a "lack of federal support along the U.S.-Mexico border."[96] The program, like Streamline, aimed to increase border security, particularly in high-crime areas.[97] However, unlike in Streamline, undocumented immigrants apprehended through Linebacker and charged with state violations undergo state—not federal—proceedings.[98] What is more, the program appears to be growing, with border-county sheriffs from California, Arizona, and New Mexico all calling "to implement Operation Linebacker-type activities across the entire southwestern border" with Texas.[99]

Given this trend of prosecuting immigrants in state courts, it would be dangerous for federal courts not to base the rights of unauthorized immigrants in criminal immigration proceedings on the Constitution since the states might not follow suit. While states can grant more constitutional rights to individuals than the federal government can, they cannot grant less.[100] Thus, when the opportunity and ability exist for the courts to rule on the Constitution, as they existed in *Roblero-Solis*, the courts should do so as this will ensure that these defendants' constitutional rights are being protected, regardless of the kind of criminal proceedings that they are in.

V. ASCENDING SCALE OF RIGHTS AND TERRITORIALITY: DETERMINING WHICH CIVIL THEORY SHOULD CROSS OVER INTO CRIMINAL PROCEEDINGS

One may wonder why unauthorized immigrants who have only been in the country a few days should receive so much constitutional protection. After all, if our discussion of the plenary power doctrine

96. Adrian J. Rodriguez, Note, *Punting on the Values of Federalism in the Immigration Arena? Evaluating Operation Linebacker, a State and Local Law Enforcement Program Along the U.S.-Mexico Border*, 108 COLUM. L. REV. 1226, 1247 (2008).

97. *Id.* at 1247–48.

98. *Id.* at 1248.

99. *Id.* at 1249.

100. James G. Exum, Jr., *Rediscovering State Constitutions*, 70 N.C. L. REV. 1741, 1748 (1992).

has established anything, it is that, in cases involving immigration, courts have generally been reluctant to grant immigrants rights in civil proceedings.[101] Nevertheless, when courts have granted noncitizens constitutional rights—that is, rights based on the Constitution and *not* on statutes—they have usually based them on one of two models: the ascending scale of rights or territoriality.[102]

A. The Ascending Scale: A Theory on the Rise

Under the ascending-scale-of-rights theory, the number of constitutional rights that a noncitizen receives increases with his or her voluntary connections with the United States.[103] The Supreme Court first described this theory in *Johnson v. Eisentrager*,[104] a case in which the Court held that enemy German nationals convicted of engaging in military activities against the United States did not have the right to test the constitutionality of their confinement.[105] Still, the Court observed, in dicta, that the United States has traditionally been most hospitable to the lawfully present noncitizen, to whom it has "accorded a generous ascending scale of rights as he increases his identity with our society."[106]

While the Court quoted *Johnson*'s ascending-scale language three years later in *Kwong Hai Chew v. Colding*[107] and then again in

101. *See supra* notes 65–68 and accompanying text.

102. This is not to suggest that the two models are mutually exclusive; indeed, in making an argument for an ascending scale of rights, the Court has relied on some form of territoriality as a starting point at which the ascending scale begins. *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763, 770 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights . . . .").

103. *See* Mark A. Godsey, *The New Frontier of Constitutional Confession Law—The International Arena: Exploring the Admissibility of Confessions Taken by U.S. Investigators from Non-Americans Abroad*, 91 GEO. L.J. 851, 872 (2003) ("[T]he Supreme Court set forth a test, sometimes called the 'ascending scale of rights test' or the 'substantial connections' test, by which aliens are granted certain constitutional protections to the extent they have voluntarily connected themselves with the United States prior to the encounter with the United States government for which they seek constitutional protection." (footnotes omitted)).

104. 339 U.S. 763 (1950).

105. *Id.* at 765–67, 781.

106. *See id.* at 770. The Court then went on to note that these rights "become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and [that] they expand to those of full citizenship upon naturalization." *Id.*

107. 344 U.S. 590, 598 n.5 (1953).

Landon v. Plasencia,[108] it was not until *United States v. Verdugo-Urquidez*[109] that the Court applied the theory substantively to a case. In *Verdugo-Urquidez*, the Court held that a Mexican citizen who had been arrested and brought into the United States to be prosecuted for drug smuggling could not invoke the protection of the Fourth Amendment's Search and Seizure Clause.[110] In reaching this decision, Chief Justice Rehnquist, writing for the majority, reasoned that the Fourth Amendment refers to "the people" and, thus, only applies to a group of persons who have formed such a connection with the United States that they can be deemed part of its community.[111] As such, while Verdugo-Urquidez's presence in the United States was lawful, the Court stressed that it was also involuntary and, therefore, not the sort of presence that constituted a substantial connection with the United States.[112] Although the Court stated that it "need not decide" whether a prolonged stay in the United States, such as a prison sentence, would place Verdugo-Urquidez under the purview of the Fourth Amendment,[113] it ultimately reiterated *Johnson*'s view that noncitizens receive more rights as their identity with society increases.[114]

Although *Verdugo-Urquidez* dealt with a lawfully present noncitizen, the Court implied in dicta that unauthorized immigrants must also have substantial connections with the United States for the Fourth Amendment to apply to them.[115] As a result, several lower court decisions have interpreted *Verdugo-Urquidez* as requiring unauthorized immigrants to have substantial connections in order to

108. 459 U.S. 21, 33 (1982).

109. 494 U.S. 259 (1990). Although *Verdugo-Urquidez* dealt with the issue of the Fourth Amendment's Search and Seizure Clause in the criminal context, the case draws its logic extensively from civil immigration cases, which is why it is discussed here.

110. *Id.* at 261–62.

111. *Id.* at 265–66.

112. *Id.* at 271.

113. *Id.* at 272.

114. *Id.* at 269.

115. *See id.* at 271 ("These cases, however, establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."); Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 79 DUKE L.J. 1723, 1770 n.228 (2010) (noting that *Verdugo-Urquidez* "might be read to suggest that unauthorized migrants lack constitutional protections without some showing of connections to the United States").

invoke the protections of the Fourth Amendment.[116] For example, in *United States v. Guitterez*[117] the District Court for the Northern District of California applied the test and held that an unlawfully present immigrant could not suppress evidence incriminating him as a drug supplier because he did not possess "substantial connections with the United States to be considered one of 'the people.'"[118] More controversially,[119] in *United States v. Esparza-Mendoza*[120] the District Court for the District of Utah held that an unauthorized immigrant-felon who had previously been deported was not entitled to the search and seizure protections of the Fourth Amendment because he lacked "sufficient connection to this country" by virtue of his illegal presence.[121] And recently, in *Rasul v. Myers*[122] the Court of Appeals for the District of Columbia Circuit stated that "[t]he long line of cases dealing with constitutional rights of *both lawful resident aliens and illegal aliens* establishes 'only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.'"[123]

116. *See* Rasul v. Myers, 563 F.3d 527 (D.C. Cir. 2009); United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254 (D. Utah 2003), *aff'd*, 386 F.3d 953 (10th Cir. 2004); United States v. Guitterez, No. CR 96-40075 SBA, 1997 U.S. Dist. LEXIS 16446, at *12 (N.D. Cal. Oct. 14, 1997), *vacated*, 983 F. Supp. 905 (N.D. Cal. 1998), *rev'd*, 203 F.3d 833 (9th Cir. 1999); Torres v. State, 818 S.W.2d 141, 143 n.1 (Tex. App. 1991), *vacated*, 825 S.W.2d 124 (Tex. Crim. App. 1992). While Motomura argues that the "prevailing view" is that unauthorized immigrants in the United States are protected by the Fourth Amendment, Motomura, *supra* note 115, at 1770, and labels the cases that have applied *Verdugo-Urquidez*'s substantial-connection test as "outliers," *id.* at 1770 n.228, this does not change the fact that these cases exist and should not suggest that they should be taken lightly. *See* James G. Connell, III & René L. Valladares, *Search and Seizure Protections for Undocumented Aliens: The Territoriality and Voluntary Presence Principles in Fourth Amendment Law*, 34 AM. CRIM. L. REV. 1293, 1305 (1997) ("Recent lower court cases have raised the serious possibility that undocumented aliens in the United States are not protected by the Fourth Amendment.").

117. No. CR 96-40075 SBA, 1997 U.S. Dist. LEXIS 16446 (N.D. Cal. Oct. 14, 1997), *vacated*, 983 F. Supp. 905 (N.D. Cal. 1998), *rev'd*, 203 F.3d 833 (9th Cir. 1999).

118. *Id.* at *1, *6, *22–23.

119. For scholarly criticism of the decision in *Esparza-Mendoza*, see VICTOR C. ROMERO, ALIENATED: IMMIGRANT RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA 71–91 (2005); Anil Kalhan, *Rights and Remedies: The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1195 n.229 (2008); Isabel Medina, *Exploring the Use of the Word "Citizen" in Writings on the Fourth Amendment*, 83 IND. L.J. 1557, 1581–83 (2008); Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2523 (2005).

120. 265 F. Supp. 2d 1254 (D. Utah 2003), *aff'd*, 386 F.3d 953 (10th Cir. 2004).

121. *Id.* at 1271.

122. 563 F.3d 527 (D.C. Cir. 2009).

123. *Id.* at 531 (emphasis added).

B. A Dissent of the Ascending Scale

Although it appears that the ascending-scale approach has taken root in the civil sphere,[124] the theory should not cross over and apply to unauthorized immigrants in criminal proceedings. One primary reason is that the standard is much too vague. Although Rehnquist argued that Verdugo-Urquidez lacked substantial connection with the United States for him to be protected under the Fourth Amendment, he never actually *defined* "substantial connection." In fact, he declined to do so.[125]

Interestingly, Rehnquist conceded the inherent difficulty in defining "substantial" in his dissent in *Craig v. Boren*,[126] a case that held that gender-classified laws must be substantially related to an important governmental interest for them to be constitutional.[127] In his opinion, Rehnquist criticized the word "substantially" as being "so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation."[128] Indeed, the term *is* elastic. So elastic, in fact, that if a noncitizen's rights are directly proportional to the substantiality of his connections, clear judicial guidance would *still* be required to determine exactly when he has formed a substantial connection with the country.[129]

124. *See* Katherine L. Pringle, Note, *Silencing the Speech of Strangers: Constitutional Values and the First Amendment Rights of Resident Aliens*, 81 GEO. L.J. 2073, 2084 (1993) ("A tiered system of aliens' rights has emerged. . . . The alien seeking initial entry 'requests a privilege and has no constitutional rights regarding his application.' The admitted alien, however, is granted an 'ascending scale of rights' in relation to her ties to the United States . . . ." (footnote omitted)); *see also* Denmore v. Kim, 538 U.S. 510, 547 (2003) (Souter, J., concurring in part and dissenting in part) (noting that the law considers lawful permanent residents "to be at home in the United States" and, thus, grants them "greater protections than other aliens under the Due Process Clause" during removal proceedings).

125. United States v. Verdugo-Urquidez, 494 U.S. 259, 271–72 (1990) ("The extent to which respondent might claim the protection of the Fourth Amendment if the duration of his stay in the United States were to be prolonged—by a prison sentence, for example—we need not decide."); *see* Godsey, *supra* note 103, at 872 ("The Supreme Court has yet to clarify . . . what sort of 'significant voluntary connection' with the United States would suffice to trigger the protections in the Bill of Rights. Indeed, the Court expressly declined to address the issue in *Verdugo-Urquidez*.").

126. 429 U.S. 190 (1976).

127. *Id.* at 197.

128. *Id.* at 221 (Rehnquist, J., dissenting).

129. Indeed, of the courts that have considered whether a noncitizen has formed a substantial connection with the United States, none have been precisely uniform in applying the test. *See, e.g.*, Martinez-Aguero v. Gonzalez, 459 F.3d 618, 625 (5th Cir. 2006) (finding that "regular and lawful entry of the United States pursuant to a valid border-crossing card and . . . acquiescence in the U.S. system of immigration" (footnote omitted) satisfied the substantial-connection test);

In this way, Rehnquist's majority opinion in *Verdugo-Urquidez* differed markedly from Justice Brennan's dissent, which did provide a bright-line rule. According to Brennan, Verdugo-Urquidez satisfied the substantial-connection test by virtue of being subjected to U.S. law.[130] Indeed, if this were the test—namely, that constitutional protections apply to noncitizens if they are subject to U.S. law—the ascending-scale theory would not be difficult to follow.

However, Brennan's clear-cut view did not prevail,[131] and as such, the ascending scale as it currently stands is untenable. This is particularly true in criminal proceedings. Given that many unauthorized immigrants who are prosecuted for illegal entry have only been in the United States for a few days, courts are unlikely to find the substantial connection necessary to grant these defendants the full range of rights enjoyed by a citizen criminal defendant.[132] Indeed, *Verdugo-Urquidez* only underscores this point by throwing

United States v. Guitterez, No. CR 96-40075 SBA, 1997 U.S. Dist. LEXIS 16446, at *17–22 (N.D. Cal. Oct. 14, 1997) (reasoning that marrying a resident U.S. noncitizen, bearing and raising a child in the United States, paying three traffic tickets, paying sales and use taxes on certain items, and living in California for twelve years did not constitute a substantial connection with the United States), *vacated*, 983 F. Supp. 905 (N.D. Cal. 1998), *rev'd*, 203 F.3d 833 (9th Cir. 1999).

130. *Verdugo-Urquidez*, 494 U.S. at 284 (Brennan, J., dissenting) ("Respondent is entitled to the protections of the Fourth Amendment because our Government, by investigating him and attempting to hold him accountable under United States criminal laws, has treated him as a member of our community for purposes of enforcing our laws.").

131. Granted, some legal scholars have argued that *Verdugo-Urquidez*'s majority definition of "substantial connections" *can* be read as offering a clear-cut test. Although they concede that Rehnquist never expressly defined "sufficient connection," they nevertheless assert that the opinion suggested the per se rule that a noncitizen establishes a substantial connection with the United States by entering the country voluntarily. Connell, III & Valladares, *supra* note 116, at 1340–44. However, these scholars' interpretation of *Verdugo-Urquidez* is incorrect. For example, although Rehnquist asserted that lawful but involuntary presence in the United States "is not the sort to indicate any substantial connection with our country," *Verdugo-Urquidez*, 494 U.S. at 271, he immediately followed this statement by stating that "[t]he extent to which respondent might claim the protection of the Fourth Amendment if the duration of his stay in the United States were to be prolonged—by a prison sentence, for example—we need not decide," *id.* at 271–72. By juxtaposing these two statements, Justice Rehnquist therefore implied that voluntary presence *alone* does not satisfy a substantial connection. Indeed, it is voluntary presence *plus* a prison sentence—and this only *might* be sufficient. Furthermore, by assuming for the sake of argument that the unauthorized immigrants in *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), had Fourth Amendment rights, and by stating that they, unlike Verdugo-Urquidez, "were in the United States voluntarily and presumably had accepted some societal obligations," *Verdugo-Urquidez*, 494 U.S. at 272–73, Rehnquist established that the substantial-connection test requires not only voluntary presence but societal obligations as well.

132. The language barrier and en masse proceedings hardly help alleviate this problem. Moreover, while a prison sentence might extend the number of days in which a noncitizen remains in the United States, it is unlikely that such a restrictive setting would foster meaningful community ties sufficient to establish a substantial connection with the country.

doubt on whether unauthorized immigrants are per se entitled to Fourth Amendment rights. As such, the ascending-scale approach should not apply to unauthorized immigrants in criminal proceedings. Rather, the most appropriate model under which to provide criminal defendants their constitutional rights should be territoriality.

C. The Judicial Landscape of Territoriality

Despite the courts' apparent predilection for the ascending-scale-of-rights model, courts have discussed noncitizens' rights solely on the theory of territoriality. Under this theory, an individual receives rights from the sheer fact of being on U.S. soil.[133] For example, in *Yick Wo v. Hopkins*[134] a noncitizen challenged a San Francisco ordinance that prohibited the operation of laundry businesses without the board of supervisors' consent.[135] The Supreme Court ultimately found that, by discriminatorily denying consent to laundry businesses run by noncitizens, the ordinance violated the Equal Protection Clause of the Fourteenth Amendment.[136] In reaching this decision, however, the Court interpreted the Fourteenth Amendment's mandate that no state shall "deprive any person of life, liberty, or property, without due process of law . . . []or deny to any person within its jurisdiction the equal protection of the laws"[137] as having "universal . . . application, to all persons within the territorial jurisdiction."[138] Indeed, in stating that due process applies to "*all* persons," the Court suggested that these rights apply to all classes of immigrants; that is, to those who are in the United States lawfully as well as unlawfully.

In *Wong Wing v. United States*,[139] the Court not only accepted *Yick Wo*'s territoriality analysis but expanded on it. Citing that

133. *See* Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQUIRIES L. 389, 391 (2007) ("[T]he territorial conception of rights for immigrants treats a person's geographical presence itself as a sufficient basis for core aspects of membership. . . . It says: once someone is in the geographical territory of the state, that person must, for most purposes, be treated as fully *in*." (emphasis in original)).

134. 118 U.S. 356 (1886).

135. *Id.* at 356–58.

136. *Id.* at 373–74.

137. U.S. CONST. amend. XIV, § 1.

138. *Yick Wo*, 118 U.S. at 369.

139. 163 U.S. 228 (1896).

decision's interpretation of the Fourteenth Amendment, the *Wong Wing* Court reasoned that noncitizens within the territory of the United States must also be entitled to the protections of the Fifth and Sixth Amendments.[140] As a result, the government could not sentence a noncitizen to hard labor prior to his removal without first providing a jury trial.[141]

The Court once again discussed territoriality in *Shaughnessy v. United States ex rel. Mezei*.[142] While *Mezei*'s holding was ultimately unfavorable to immigrants,[143] it nevertheless conceded that noncitizens—even those who are in the United States illegally—can be removed "only after proceedings conforming to traditional standards of fairness encompassed in due process of law."[144] Thirty years after *Mezei* in *Plyler v. Doe*,[145] the Court reaffirmed *Mezei*'s reasoning by asserting that a person "within the State's territorial perimeter," even one who unlawfully entered the United States and can be expelled, "is subject to the full range of obligations imposed by the State's civil and criminal laws."[146] The *Plyler* Court, although focused on the Fourteenth Amendment,[147] furthermore reiterated *Wong Wing*'s conclusion that the Fifth and Sixth Amendments apply to all persons within the territory of the United States, even those who are in the country illegally.[148]

Significantly, *Plyler* held that states could not prevent undocumented immigrant children from accessing a public school education under the Equal Protection Clause.[149] Although scholars have argued that the courts have limited the decision to its context,[150]

140. *Id.* at 238.

141. *Id.*

142. 345 U.S. 206 (1953).

143. Indeed, the Court ruled that a noncitizen attempting to re-enter the United States *can* be held indefinitely on Ellis Island upon the Attorney General's judgment that the noncitizen posed a risk to national security. *Id.* at 212, 215–16.

144. *Id.* at 212.

145. 457 U.S. 202 (1982).

146. *Id.* at 215.

147. *Id.* at 205.

148. *Id.* at 212.

149. *Id.* at 230.

150. Motomura, *supra* note 115, at 1731–32 ("As a decision on constitutional claims by unauthorized migrants, *Plyler*'s holding has been confined to the context in which it arose. The Court's equal protection rationale . . . relied so heavily on the involvement of children and education that no court has ever used it to overturn a statute disadvantaging unauthorized

the case's territoriality analysis nevertheless remains relevant to the question of *whether* noncitizens receive constitutional rights in the first place.[151] For instance, in *Zadvydas* the Court held that a statute cannot be interpreted to mean that the government can hold a noncitizen in detention indefinitely.[152] In reaching this decision, the Court relied on *Plyler*, as well as on *Yick Wo* and *Mezei*, to assert that noncitizens within U.S. territory are protected by the Due Process Clause "whether their presence here is lawful, unlawful, temporary, or permanent."[153]

D. Territoriality: Providing the Grounds for Greater Rights

Although the territoriality cases did not expressly hold that noncitizens on U.S. soil should receive the protections of the Fifth, Sixth, and Fourteenth Amendments, no case expressly holds that they do *not* receive these rights. Thus, even though other considerations may have contributed to the Court ruling favorably toward noncitizens,[154] the fact that the Court has stated that noncitizens should receive these rights supports the argument that immigrant criminal defendants at the border should thus be entitled to them. As Streamline demonstrates, however, such protections do not comport with reality. Indeed, if it were settled law that the Fifth Amendment protects immigrant criminal defendants, the courts would not be conducting en masse proceedings in *any* form. As the system currently stands, even on U.S. soil these defendants do not receive the due process rights that the courts in the territoriality cases purport they deserve. As such, this Article accepts a form of Justice Brennan's approach in *Verdugo-Urquidez* and argues that the courts should grant immigrant criminal defendants the full range of criminal

migrants outside the context of K–12 public education." (footnotes omitted)); *see* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1927 (2000) ("Courts today, as has long been the case, are generally unwilling to extend serious consideration to claims of rights by undocumented noncitizens. *Plyler v. Doe* unfortunately has virtually no progeny of which to speak." (footnote omitted)).

151. *See* Motomura, *supra* note 115, at 1731 (arguing that "what matters is not whether but how the Constitution applies to unauthorized migrants" (emphasis omitted)).

152. Zadvydas v. Davis, 533 U.S. 678, 682 (2001).

153. *Id.* at 693.

154. For example, in *Plyler* an important fact was that the unauthorized immigrants were children seeking public education. *Plyler*, 345 U.S. at 230. In *Zadvydas* it was significant that the removable noncitizen was subjected to prolonged detention. *Zadvydas*, 533 U.S. at 684–85.

procedural rights not simply because they are on U.S. soil but, more importantly, because they are subjected to criminal prosecution.[155]

As discussed earlier in Part IV.B, the very nature of criminal proceedings is punitive.[156] In contrast, unauthorized immigrants in civil removal proceedings have the chance to leave the country voluntarily, if a lawful way exists, and avoid the criminal repercussions of attempting to cross the U.S. border again in the future.[157] Such an opportunity, however, does not exist for immigrant criminal defendants under Streamline.[158] After undergoing criminal prosecution and formal removal proceedings, these immigrants are barred from lawfully entering the United States for at least five years.[159] Moreover, if they again attempt to cross unlawfully into the country, they can be charged with illegal reentry,[160] which bars them from lawfully entering the country for another ten years.[161] Thus, as a result of being criminally prosecuted, these immigrants become not only criminals but, moreover, criminals who face a host of legal consequences.

Since immigrant criminal defendants face the legal repercussions of a criminal prosecution, it only makes sense that they should be entitled to the rights that come with being prosecuted in such a proceeding. Justice Brennan expressed this view in *Verdugo-*

155. Indeed, in conveying rights to parties, at times it is not *the proceeding's geographical location* that is most important but *the circumstances surrounding the proceeding* that are. In *Boumediene v. Bush*, 553 U.S. 723 (2008), for example, the Supreme Court held that although noncitizen-enemy combatants were detained at Guantanamo Bay, and thus were not in a country where the United States held de jure sovereignty, they nevertheless were entitled to a habeas corpus proceeding since the United States was in complete control of the territory in which the detainees were held. *Id.* at 770–71.

156. *See supra* notes 92–93 and accompanying text.

157. ROBERT JAMES MCWHIRTER, THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW: QUESTIONS AND ANSWERS 76 (2d ed. 2006). Voluntary departure can occur before the removal hearing if the noncitizen can pay his or her way out of the country after immigration proceedings have started, immediately before a master calendar hearing, or after a merit hearing has been completed. *Id.*

158. *See* Josiah Heyman & Jason Ackleson, *United States Border Security After 9/11*, *in* BORDER SECURITY IN THE AL-QAEDA ERA 37, 60 (John Winterdyk & Kelly Sundberg eds., 2010) ("Standard Border Patrol practice involves offering the vast majority of Mexican border arrestees a voluntary departure, which means almost immediate return to Mexico and no record of having been deported. Operation Streamline involves setting up criminal charges for unauthorized border entrants . . . followed by a formal deportation.").

159. 8 U.S.C. § 1182(a)(9)(A)(i) (2006).

160. *Id.* § 1326(a).

161. *Id.* § 1182(a)(9)(A)(i).

Urquidez when he stated that "fundamental fairness and the ideals underlying our Bill of Rights" require the government to give foreign individuals certain rights when it expects these individuals to follow its criminal laws.[162] The argument therefore is not that unauthorized immigrants should escape the consequences of breaking U.S. law, but rather that if the United States chooses to impose consequences—especially those that it deems to be beneficial by serving as a deterrent—it should, in fairness, entitle these individuals to the full procedural protections that they deserve in these proceedings.

Indeed, fully protecting immigrant criminal defendants' constitutional rights is crucial precisely because these defendants are often those with the least number of ties to the United States, and thus those whom we would deem least worthy of constitutional rights. However, as Justice Frankfurter stated in *Davis v. United States*,[163]

> It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end.[164]

In other words, in failing to protect immigrant criminal defendants' rights, the courts threaten to extinguish the rights of not only unauthorized immigrants but of U.S. citizens as well. John Stewart, who delivered the Virginia Resolution to the Virginia Assembly, expressed this fear when he stated, "If a suspicion that aliens are dangerous, constitute[s] the justification of that power exercised over them by Congress, then a similar suspicion will justify the exercise of a similar power over natives."[165] Thus, by protecting unauthorized immigrants' criminal procedural rights, the courts not only protect the rights of U.S. citizens but also reassure the public that the justice system is operating as it should: fairly. And territoriality—which, unlike the ascending scale, *is* a clear-cut test—serves as the most suitable model to achieve such results.

162. United States v. Verdugo-Urquidez, 494 U.S. 259, 284 (1999) (Brennan, J., dissenting).

163. 328 U.S. 582 (1946).

164. *Id.* at 597 (Frankfurter, J., dissenting).

165. THE VIRGINIA AND KENTUCKY RESOLUTIONS OF 1798 AND '99; WITH JEFFERSON'S ORIGINAL DRAUGHT THEREOF 8 (1832).

VI. PROPOSAL: SO WHERE HAVE WE CROSSED OVER TO NOW?

Because territoriality should be the theory that prevails in criminal immigration proceedings, the question then becomes one of application and implementation into the system as it currently stands. As this Article argues, to prevent injustice from occurring to immigrant criminal defendants, courts should only criminally prosecute as many defendants as they can without depriving the defendants of their full procedural rights. It furthermore argues that if the judicial system violates these defendants' rights, it should give the defendants the option to leave voluntarily or be placed in civil deportation proceedings as a way to remedy the violation.

A. Step One: Where Prosecuting Less Means More

If we are to give immigrant criminal defendants greater procedural rights, we must drastically decrease the number of unauthorized immigrants being prosecuted in our courtrooms. Although *United States v. Roblero-Solis* has led to a decrease in the number of criminal prosecutions of these defendants in federal district courts along the border, it has unfortunately not been enough to eliminate all violations of defendants' criminal procedural rights, given that en masse proceedings, in one form or another, still continue.[166] For example, although magistrates in Tucson now take pleas individually, they still ask certain questions to seventy defendants at a time.[167] Nevertheless, the number of defendants that undergo Streamline shows no signs of flagging.[168] Indeed, of the 2,613 immigration-related prosecutions in August 2010, the Justice Department reported that 2,132—or about 82 percent—were prosecutions for illegal reentry alone.[169] Moreover, although President Barack Obama signed a $600 million border security plan into law that same month, the plan's provisions failed to provide any

166. *See* sources cited *supra* note 9.

167. *See* Lemons, *supra* note 5.

168. *Id.*

169. IMMIGRATION PROSECUTIONS FOR AUGUST 2010 (2010), TRAC REPORTS, http://trac.syr.edu/tracreports/bulletins/immigration/monthlyaug10/fil/ (last visited July 17, 2011).

funds to ease the stress of the already overworked courts.[170] In Arizona, for example, the courts are able to prosecute only about 7 percent of the unauthorized immigrants that Border Patrol apprehends daily.[171] And yet, despite these numbers, many believe that Streamline should be expanded to more districts.[172]

To ensure that criminal immigrant defendants receive their full constitutional rights, courts must decrease their criminal caseload. One way the courts can accomplish this is by only prosecuting defendants who have committed more egregious immigration crimes, such as drug smuggling or human trafficking. Unauthorized immigrants who have been apprehended but have not committed such crimes would then either be sent back home or be placed in civil removal proceedings. In other words, these immigrants would largely be treated as they would have been treated before Streamline.[173]

Such a system achieves two important goals: not only does it prosecute individuals who are more deserving of the consequences and stigma that attach to a criminal conviction, but by diverting border crossers away from criminal proceedings, it relieves the federal criminal courts of a substantial caseload. This system therefore frees up the courts' time and revenue and, moreover, allows the courts to ensure that defendants are receiving their full constitutional rights. Indeed, with fewer prosecutions, criminal defense attorneys would have more time with each defendant, thereby increasing the chances that these attorneys will uncover potential issues or defenses. Most importantly, prosecuting fewer defendants eliminates the need for en masse proceedings. As a result, courts will be able to ask defendants questions individually, thereby assuring that each defendant's response is knowing and voluntary.

Granted, Streamline's advocates would argue that the program deters unauthorized immigration and, thus, should remain as it currently stands. As discussed above, however, Streamline may not

170. Amanda Lee Myers, *Obama's Border Plan Doesn't Include Money for Already Overwhelmed Courts*, HUFFINGTON POST (June 29, 2010), http://www.huffingtonpost.com/2010/06/29/obama-border-plan-courts_n_630252.html.

171. *See* Lemons, *supra* note 5.

172. Robbins, *supra* note 19.

173. Other scholars have made a similar argument. *See, e.g.*, Lydgate, *supra* note 9, at 16.

be as powerful a deterrent as supporters believe it to be.[174] If criminal prosecution does not actually serve as an effective deterrent, it makes little sense, then, for the United States to continue prosecuting as many individuals as it currently does. Furthermore, given Streamline's questionable deterrent value and exorbitant cost, we are left to ask ourselves: is it *worth* it? As this Article argues, it is not. Thus, even if the implementation of this proposal results in magistrate judges taking more time with each individual case, as the Supreme Court stated in *Stanley v. Illinois*,[175] "[T]he Constitution recognizes higher values than speed and efficiency."[176]

B. Step Two: "Removing" Procedural Deficiencies

For the various reasons discussed above, it is crucial that the courts protect immigrant criminal defendants' rights. If they fail in doing so, a remedy should be put in place to ameliorate the offense. One possible remedy that this Article suggests is for courts to drop the criminal charge and place defendants in civil removal proceedings where they have the option to voluntarily leave.

Doing so succeeds in serving many goals. For example, in requiring the courts to redress a constitutional injury, the government checks itself to prevent it from violating the procedural rights of other defendants. Furthermore, if the government expects unauthorized immigrants to obey its laws but does not follow through with its own obligation to impart rights to these immigrants, this Article argues that the system should try to ameliorate this deprivation in order to comport with fundamental fairness. And indeed, placing the defendant in a removal proceeding or allowing him to depart voluntarily allows the defendant to evade the harshness of a criminal conviction. At the same time, it also accomplishes the government's goal of decreasing unauthorized immigration by requiring the defendant to leave the country. In this way, the government not only protects those who are under its power and within its boundaries but also advances its desire to deter crime.

174. *See supra* note 20 and accompanying text.

175. 405 U.S. 645 (1972).

176. *Id.* at 656.

VII. CONCLUSION

In recent years, the fear of terrorism and crime has translated to harsher treatment of immigrants in the United States.[177] While this harshness has manifested itself in several ways,[178] possibly the severest treatment is that which has occurred in the criminal prosecutions of unauthorized immigrants at the border. Although *Roblero-Solis* was a positive step for the rights of unauthorized immigrants, by not basing its ruling on the Constitution, the *Roblero-Solis* court opened the door for the plenary power doctrine to enter into criminal proceedings. And given the current treatment of unauthorized immigrants at the border, it is not difficult to see plenary power already taking hold in our criminal courts. Unauthorized immigrants are bound in shackles and herded through a judicial system one hundred at a time in what one Tucson judge has described as "assembly-line justice."[179]

As this Article has argued, this treatment must change. In the criminal proceedings of unauthorized migrants, the courts should base their rulings on the Constitution, not on statutes, and apply the civil theory of territoriality rather than the ascending scale of rights. To implement this change, courts must prosecute fewer defendants and give those defendants whose rights have been violated the opportunity to either leave the country voluntarily or enter civil removal proceedings. A system that fully protects the rights of immigrant criminal defendants comports not only with justice but with humanitarian principles as well. It only makes sense, then, that the United States must cross over to such a system.

177. KEVIN JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 49 (2009) ("Bent on curbing undocumented immigration, deporting criminal aliens, protecting the nation from terrorists, and guarding the public fisc, Congress passed a series of 'get tough on immigrant' laws." (citing the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996); Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Personal Responsibility and Work Opportunity Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996))).

178. For example, criminal sentencing judges no longer have the power to recommend against deporting noncitizens after they have been convicted of a deportable crime. Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 498 (2007). Furthermore, while once the government could not deport noncitizens after a certain period of time elapsed, today statutes of limitations on deportation no longer exist. DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 125 (2010).

179. Lydgate, *supra* note 9, at 12.