

# RUMINATIONS ON THE FOURTH AMENDMENT: CASE LAW, COMMENTARY, AND THE WORD “CITIZEN”

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*“Words being what they are, people being what they are, perhaps it would be better always to say the opposite of what one means?”<sup>2</sup>*

## INTRODUCTION

Often it is when looking for one thing in particular that one finds or notices another, more interesting thing that, although not looked for or anticipated, becomes the thing deserving of study. In the spring of 2003 I found myself sitting in my living room in an apartment in Athens, Greece, conducting research on my laptop and dial-up Internet service on the Fourth Amendment. The research was prompted by news of a recent federal district court opinion out of Utah in which the court had denied a motion to suppress evidence in a criminal case on the grounds that the accused was “not one of ‘the people’ the Amendment protects.”<sup>3</sup> The accused was an undocumented person from Mexico, residing in the United States, arrested and charged with illegal reentry into the United States.<sup>4</sup> The decision was remarkable because it seemed contrary to Fourth Amendment law: that the Fourth Amendment applies to searches and seizures of persons and property in the United States. This principle applies regardless of the accused’s immigration status. A 1990 United States Supreme Court decision suggested in dicta that the Court had never actually decided the issue, and suggested that, in addition to U.S.

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<sup>2</sup> LAWRENCE DURRELL, *CLEA* (1960).

<sup>3</sup> *United States v. Esparza-Mendoza*, 265 F. Supp. 2d 1254, 1271-73 (N.D. Utah 2003), *aff’d on different grounds*, 386 F. 3d 953 (10th Cir. 2004).

<sup>4</sup> *Id.* at 1255.

citizens, only noncitizens with substantial connections to the United States might be entitled to protection; but the weight of cases to follow that decision continued to apply the Fourth Amendment to persons in the United States regardless of citizenship status.<sup>5</sup>

My research, however, suggests that courts and scholars are using the term “citizen” in relation to Fourth Amendment rights to define and describe those rights in cases and writings where citizenship status is not at issue. This brief essay draws attention to the practice and suggests that use of the term to describe and define Fourth Amendment rights makes sense when citizenship status is an issue in the case and when one is advocating that citizenship should be material in defining the rights. Since it is a material term, however, with legal consequences, I suggest that judges and commentators alike should avoid use of the term to define and describe the contours of Fourth Amendment rights in cases and writings that do not raise the issue of citizenship.

### I. UNDOCUMENTED PERSONS

Undocumented or unauthorized persons are persons, born in other countries, who have entered the United States without authorization (a visa) or inspection or who became undocumented after entry because they overstayed the terms of their visa.<sup>6</sup> These persons may risk undocumented status simply to unite with family members or pursue employment. Some undocumented persons may be eligible for admission into the United States under one of the admission categories, but may be denied actual admission to the country for substantial periods of time because of the numerical per-country quotas imposed by the immigration statute<sup>7</sup> as well as the numerical quotas imposed on permanent resident visas.<sup>8</sup> Undocumented entry is a federal civil offense that may rise to the level of a misdemeanor or felony in certain circumstances and may pose a bar to lawful admission as an immigrant for a set period of time or indefinitely.<sup>9</sup> The Department of Homeland Security estimates that there are approximately 11 million undocumented persons residing in the United States.<sup>10</sup> The majority are of Mexican national origin,

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<sup>5</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *see infra* text at notes 48-69.

<sup>6</sup> MICHAEL HOEFER ET AL., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2006 1 (2007), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ill\\_pe\\_2006.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ill_pe_2006.pdf).

<sup>7</sup> 8 U.S.C. § 1151 (2000 & Supp. 2006).

<sup>8</sup> For an explanation of the immigrant visa categories and the application of numerical quotas, see STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 241-46 (4th ed. 2005) and THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 274-87 (5th ed. 2003).

<sup>9</sup> 8 U.S.C. §§ 1325-1326 (2000 & Supp. 2006); 8 U.S.C. § 1183(a)(9)(A), (B), (C) (2000 & Supp. 2006).

<sup>10</sup> HOEFER ET AL., *supra* note 6, at 1; *see also* JEFFREY S. PASSEL, ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION (2005), available at <http://pewhispanic.org/files/reports/44.pdf>.

not surprising given the strong historical, cultural, geographic, economic, and familial ties between Mexico and the United States.<sup>11</sup> Moreover, many researchers have noted that Americans perceive the undocumented to be, for the most part, Latino.<sup>12</sup>

## II. "CITIZENS" AND SEARCH AND SEIZURE

At first news of the Utah decision, I thought I had missed something in my brief time away from the United States—a new Supreme Court decision, perhaps—thus, my impetus for a Lexis search of Fourth Amendment cases handed down over the past two years. The search did not yield a United States Supreme Court opinion holding that the Fourth Amendment did not apply to undocumented persons facing prosecution in the United States; nor did the search yield a wave of federal circuit court or district court opinions questioning the application of the Fourth Amendment to noncitizens who were the subject of criminal law enforcement efforts in the United States. Thus, I thought the Utah case an aberrant federal district court decision venturing far from established precedent that would be remedied by the respective federal appellate court. In fact, the U.S. Court of Appeals for the Tenth Circuit, and other courts faced with the same issue, have consistently ignored or rejected any distinction between citizens and noncitizens in the context of criminal process in the United States and Fourth Amendment protections.<sup>13</sup>

Something interesting, however, emerged from the cases. Most of the 707 cases that my search of the terms "citizen" and "search and seizure" had turned up did not involve citizenship issues. The list included five Supreme Court cases: *United States v. Drayton*,<sup>14</sup> *United States v. Knights*,<sup>15</sup> *Saucier v. Katz*,<sup>16</sup> *Kyllo v. United States*,<sup>17</sup> and *Atwater v. City of Lago*

<sup>11</sup> HOEFER ET AL., *supra* note 6, at 1.

<sup>12</sup> See, e.g., Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: *The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 283-84 (1997).

<sup>13</sup> The Tenth Circuit concluded that Esparza-Mendoza's encounter with the police was consensual and, therefore, did not implicate the Fourth Amendment. *United States v. Esparza-Mendoza*, 386 F.3d 953, 957-58 (10th Cir. 2004). The court expressly disavowed reliance on the lower court's reasoning. *Id.* For other cases on this issue, see *Martinez-Aguero v. Gonzalez*, 459 F.3d 618 (5th Cir. 2006); *United States v. Guierrez*, 983 F. Supp. 905 (N.D. Cal. 1998) *rev'd on other grounds*, 203 F.3d 833 (9th Cir. 1999) (unpublished table decision).

<sup>14</sup> 536 U.S. 194, 204-07 (2002).

<sup>15</sup> 534 U.S. 112, 119-21 (2001) ("citizen" used in a quotation on page 120).

<sup>16</sup> 533 U.S. 194, 197 (2001). The *Katz* opinion opens with a reference to the word citizen, saying, "In this case a citizen alleged excessive force was used to arrest him." *Id.* The case dealt with a claim of excessive force during an arrest of an animal rights protester at a political event. *Id.* The use of the word "citizen," thus, draws attention to the political rights at stake and tends to suggest that citizens enjoy greater First Amendment political protest rights than do noncitizens.

<sup>17</sup> 533 U.S. 27, 33-34 (2001) (noting that "it would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.").

*Vista*.<sup>18</sup> Like most of the cases the search turned up, these Supreme Court cases for the most part did not involve or raise the issue of citizenship or the extent to which the Fourth Amendment protected persons who lacked citizenship status in the United States. Instead, the opinions reflected use of the term as a generic substitute for “accused,” “person,” “defendant,” or “individual.” Judges seemed to be using the term “citizen” to define and describe the nature of the Fourth Amendment rights in cases where the issue of whether or not the accused was a defendant was not remotely at issue.

At first, I thought the culprit was 9/11. It seemed understandable that jurists would reflect the heightened tensions with national security by evincing a preference for the use of the word “citizen” when writing about constitutional rights.<sup>19</sup> But subsequent searches made clear that courts have been using the term “citizen” in reference to the Fourth Amendment for some time.<sup>20</sup> This practice arguably was most affected by the Supreme Court opinion in *United States v. Verdugo-Urquidez*,<sup>21</sup> the 1990 decision interpreting the Fourth Amendment Warrant Clause not to apply extraterritorially to a search by United States federal agents of a residence located in Mexico and owned by a foreign national, who was jailed and facing prosecution in the United States.<sup>22</sup> I will discuss this opinion below.<sup>23</sup>

Commentators, as well, increasingly use the terms “people” or “persons” interchangeably with “citizens” when writing about the Fourth Amendment. A search in the Lexis database for articles exploring Fourth Amendment issues and using the terms “citizen” and “person” suggested that a significant number of commentaries used the terms interchangeably in discussions that were not focused on citizenship or alienage issues.<sup>24</sup> Law

<sup>18</sup> 532 U.S. 318, 342 (2001).

<sup>19</sup> See e.g., *Mena v. City of Simi Valley*, 332 F.3d 1255, 1262 (9th Cir. 2003) (“The Fourth Amendment protects citizens from unreasonable seizures.”), *vacated and remanded by Muehler v. Mena*, 544 U.S. 93 (2005). The Ninth Circuit decision cited to the Fourth and Fourteenth Amendments and is an interesting example because Mena was a resident alien, not a U.S. citizen, and the court’s use of the word “citizen” follows directly after its pronouncement that “there is no doubt that Mena has alleged a violation of her constitutional rights under the Fourth Amendment.” *Id.*

<sup>20</sup> See e.g., *Carrroll v. United States*, 267 U.S. 132, 149 (1925).

<sup>21</sup> 494 U.S. 259 (1990).

<sup>22</sup> *Id.* at 271-72.

<sup>23</sup> See *infra* text at notes 48-69.

<sup>24</sup> See e.g., Jessica T. Kobos, Note, *Kyllo v. United States: A Lukewarm Interpretation of the Fourth Amendment*, 64 MONT. L. REV. 519, 520 (2003) (“The Fourth Amendment protects ordinary citizens from unjustifiable invasions of their homes and papers.”); Stephen W. Tountas, Note, *Carnivore: Is the Regulation of Wireless Technology a Legally Viable Option to Curtail the Growth of Cybercrime?*, 11 WASH. U. J.L. & POL’Y 351, 353 (2003) (“The Fourth Amendment . . . formally creates and protects a right to privacy for all U.S. citizens.”); Kathleen R. Sandy, Commentary, *The Discrimination Inherent in America’s Drug War: Hidden Racism Revealed by Examining the Hysteria Over Crack*, 54 ALA. L. REV. 665, 667 (2003) (“In the name of protecting citizens, the Court continues to weaken and reduce each citizen’s constitutional rights.”); Stanley H. Friedelbaum, *The Quest for Privacy: State Courts and an Elusive Right*, 65 ALB. L. REV. 945, 961 (2002) (citing a New Jersey court for the proposition that “ultimate responsibility was vested in the state court for protection of the fundamental rights of citizens,” when state laws gave more protection than the Fourth Amend-

scholars routinely refer to “citizen’s Fourth Amendment rights,”<sup>25</sup> or the “right of privacy of citizens,”<sup>26</sup> even though under established Fourth Amendment law any person, not merely any “citizen,” found within the United States who is the subject of United States law enforcement efforts is protected under the Fourth Amendment.

One problem with this practice is that it facilitates identification of constitutional protections in both the civil and criminal context with citizens rather than persons, an identification that is not required by current Fourth Amendment law. Moreover, use of these words as if they are interchangeable may contribute to the derogation or weakening of the continued application of the full panoply of constitutional or human fundamental rights to which persons residing in the territory of the United States have been entitled to or should enjoy.<sup>27</sup> Substitution of the word “citizen” for the word “person” or “individual” erects a barrier between classes of persons that negates the basic humanity common to all.<sup>28</sup> Moreover, an emphasis on “citizenship” as a preferred or privileged status has adverse impacts on im-

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ment); Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 941 (2002) (discussing framers’ concern with the “discretionary power of law enforcement officers to intrude on the privacy and security of citizens”); see also Dana E. Christman, *Change and Continuity: A Historical Perspective of Campus Search and Seizure Issues*, 2002 B.Y.U. EDUC. & L.J. 141, 143 (2002); Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1424 (2002); Akhil Reed Amar & Vikram David Amar, *The New Regulation Allowing Federal Agents to Monitor Attorney-Client Conversations: Why It Threatens Fourth Amendment Values*, 34 CONN. L. REV. 1163, 1165 (2002); Kathryn R. Urbonya, *Determining Reasonableness under the Fourth Amendment: Physical Force to Control and Punish Students*, 10 CORNELL J.L. & PUB. POL’Y 397, 400 (2001); Michael Steven Green, *The Paradox of Auxiliary Rights: The Privilege Against Self-Incrimination and the Right to Keep and Bear Arms*, 52 DUKE L.J. 113 (2002); William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2141 (2002); Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL’Y REV. 381 (2001).

<sup>25</sup> See e.g., Alyssa Saks, *Can Attempted Seizures Be Unreasonable? Applying the Law of Attempt to the Fourth Amendment*, 37 CAL. W. L. REV. 427, 429 (2001); Christopher Benjamin, *Shot Spotter and Facelt: The Tools of Mass Monitoring*, 2002 UCLA J.L. & TECH. 2 (2002).

<sup>26</sup> See e.g., Timothy P. Terrell & Anne R. Jacobs, *Privacy, Technology and Terrorism: Bartnicki, Kyllo and the Normative Struggle Behind Competing Claims to Solitude and Security*, 51 EMORY L.J. 1469 (2002); Steven A. Osher, *Privacy, Computers and the Patriot Act: The Fourth Amendment Isn’t Dead but No One Will Insure It*, 54 FLA. L. REV. 521 (2002); Ellen S. Podgor, *International Computer Fraud: A Paradigm for Limiting National Jurisdiction*, 35 U.C. DAVIS L. REV. 267 (2002); Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951 (2003).

<sup>27</sup> See *Yick Wo v. Hopkins*, 118 U.S. 351 (1886) (applying the protection of the Fourteenth Amendment to noncitizens).

<sup>28</sup> See Victor C. Romero, *Domestic Fourth Amendment Rights of Undocumented Immigrants: On Guitterez and the Tort Law/Immigration Law Parallel*, 35 HARV. C.R.-C.L. L. REV. 57, 84-91 (2000); Victor Romero, *Whatever Happened to the Fourth Amendment?: Undocumented Immigrants’ Rights After INS v. Lopez-Mendoza and United States v. Verdugo-Urquidez*, 65 S. CAL. L. REV. 999 (1992); see also T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9 (1990); Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955; Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707 (1996).

migrant communities, including Latina communities, by making it less likely that they will view governmental actors and agencies as sources of service and protection, and more likely that they will view them as entities to be avoided and shunned.

### III. ON FOURTH AMENDMENT LAW

The Fourth Amendment provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>29</sup>

The Fourth Amendment protects against unreasonable searches and seizures primarily by preventing the admission of evidence seized illegally to be used against a defendant to prove guilt.<sup>30</sup> In the case of persons whose Fourth Amendment rights are violated but nonetheless are not subject to criminal prosecution, vindication of those rights may be pursued through civil remedies.<sup>31</sup> Unless there has been substantial damage, i.e., torture or substantial destruction of property, a civil remedy may be somewhat illusory.<sup>32</sup> Moreover, in the case of undocumented migrants facing deportation or removal from the United States, this remedy is likely to be unrealized.<sup>33</sup>

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<sup>29</sup> U.S. CONST. amend. IV.

<sup>30</sup> See *Hudson v. Michigan*, 126 S.Ct. 2159 (2006); *Weeks v. United States*, 232 U.S. 383 (1914); *Mapp v. Ohio*, 367 U.S. 643 (1961). The Supreme Court has made it clear that the exclusionary rule is not constitutionally required. *Hudson*, 126 S.Ct. at 2164; see also *United States v. Leon*, 468 U.S. 897, 906-07 (1984); *Illinois v. Gates*, 462 U.S. 213, 223 (1983); *United States v. Janis*, 428 U.S. 433 (1976).

<sup>31</sup> See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1045-46 (1984) (allowing for the possibility of declaratory relief against the INS).

<sup>32</sup> See Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1 (2001); Daryl J. Levinson, *Making Government Pay: Markets, Politics and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000); Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1, 61-62 (1994); *Report to the Attorney General on the Search and Seizure Exclusionary Rule*, 22 U. MICH. J. L. REFORM 573, 626-29 (1989).

<sup>33</sup> In the words of Justice White:

The suggestion that alternative remedies, such as civil suits, provide adequate protection is unrealistic. Contrary to the situation in criminal cases, once the Government has improperly obtained evidence against an illegal alien, he is removed from the country and is therefore in no position to file civil actions in federal courts. Moreover, those who are legally in the country but are nonetheless subjected to illegal searches and seizures are likely to be poor and uneducated, and many will not speak English. It is doubtful that the threat of civil suits by these persons will strike fear into the hearts of those who enforce the Nation's immigration laws.

*Lopez-Mendoza*, 468 U.S. at 1055 (White, J., dissenting).

In determining whether Fourth Amendment protections apply to searches and seizures, the Court has looked to whether the person claiming the protection has a constitutionally protected reasonable expectation of privacy.<sup>34</sup> To determine that a person has a reasonable expectation of privacy, the Court requires “first, that a person have exhibited an actual (subjective) expectation of privacy, and second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”<sup>35</sup>

Fourth Amendment protections were applied to state prosecutions in *Mapp v. Ohio*.<sup>36</sup> Thus, federal and state law enforcement officers are held to the same standard. Fourth Amendment protections require as a general matter that, in order to search or seize a person, government officials must have probable cause to believe that the person is about to commit or has committed a crime. Government officials are allowed to briefly stop and frisk persons when they have individualized reasonable suspicion that the individuals have committed or are about to commit a crime, a procedure commonly known as a “Terry stop.”<sup>37</sup> Fourth Amendment protections are lessened in border areas, so that brief temporary stops and searches of vehicles may not require even reasonable individualized suspicion, but the different standards that apply at the border affect all persons crossing or traveling in border areas, including citizens.<sup>38</sup> Few cases have raised the issue of whether a noncitizen could be denied Fourth Amendment protections because of her status as a noncitizen.<sup>39</sup> A different issue, whether constitutional protections applies extraterritorially to actions of the federal government, has received more attention in the literature and the cases.<sup>40</sup> But it appeared unquestioned, at least until 1990, that persons who resided in the United States, committed a crime in the United States, and were indicted and prosecuted in the United States should be accorded constitutional protections, regardless of their citizenship status.<sup>41</sup>

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<sup>34</sup> *California v. Ciraolo*, 476 U.S. 207, 219 (1986).

<sup>35</sup> *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

<sup>36</sup> 367 U.S. 643 (1961).

<sup>37</sup> *United States v. Arvizu*, 534 U.S. 266, 273 (2002); *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

<sup>38</sup> *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004); *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985); *United States v. Ramsey*, 431 U.S. 606, 619 (1977).

<sup>39</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (Fourth Amendment Warrant Clause does not apply extraterritorially to the search of a foreign residence owned by a foreign national being prosecuted in U.S. courts); *United States v. Esparza-Mendoza*, 265 F. Supp. 2d 1254 (N.D. Utah 2003) (citing *Verdugo-Urquidez*, 494 U.S. at 271, for the proposition that “aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country”).

<sup>40</sup> *Reid v. Covert*, 354 U.S. 1 (1957) (discussing extraterritorial military trials of civilians); *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (nonresident enemy alien did not have a right of access to U.S. courts).

<sup>41</sup> See *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032 (1984). An early twentieth century treatment of the Fourth Amendment covered the topic in one brief paragraph, noting that “[a]n alien may claim the right on the same footing as any other.” NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 116 (1937). That it was a well-settled principle prior to the Court’s decision in *Verdugo-Urquidez* that aliens are also afforded Fourth Amendment protection is apparent from the absence in scholarly discussions on the topic in Fourth Amendment

## IV. DEPORTATIONS AND THE CIVIL/CRIMINAL DISTINCTION

In 1984, the Supreme Court drew a distinction between deportation and criminal proceedings for the purpose of applying the exclusionary rule.<sup>42</sup> In *Immigration and Naturalization Service v. Lopez-Mendoza*<sup>43</sup> the Court held that the exclusionary rule did not apply to deportation proceedings; thus, while evidence seized illegally or without probable cause could not be admitted to prove guilt against a defendant in a criminal proceeding, the same evidence could be admitted in a deportation proceeding to prove the deportability of an undocumented noncitizen.<sup>44</sup> Implicitly, the Court's opinion recognized that the Fourth Amendment protected noncitizens in deportation proceedings. In balancing the costs and benefits of applying the exclusionary rule, the Court noted "the availability of alternative remedies for institutional practices by the INS that might violate Fourth Amendment rights."<sup>45</sup> Four of the five Justices who made up the majority in *Lopez-Mendoza* suggested that "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained" could justify application of the exclusionary rule to the deportation process.<sup>46</sup> The *Lopez-Mendoza* opinion accepted without question the principle that the Fourth Amendment applied to undocumented persons in a criminal proceeding.<sup>47</sup> From the perspective

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commentary. See e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994). But see AKHIL REED AMAR, *THE BILL OF RIGHTS CREATION AND RECONSTRUCTION* 64-68 (1998), for an exploration of what "the people" might mean in the context of the Fourth Amendment.

<sup>42</sup> Professor Lasson pointed out that the Supreme Court in *Fong Yue Ting v. United States*, 149 U.S. 698 (1892), concluded that the Fourth Amendment, as well as other Bill of Rights protections, did not apply to deportation proceedings. LASSON, *supra* note 41, at 116 n.30. The *Fong Yue Ting* view of deportation as civil proceedings, but not its view of due process, is still used by the Court today. See *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Landon v. Plasencia*, 459 U.S. 21 (1982).

With regards to the Fourth Amendment and the exclusionary rule, the modern distinction between civil and criminal proceedings was introduced by the Court in *United States v. Janis*, 428 U.S. 433 (1976). In *Janis*, the Court held that the exclusionary rule did not apply in a federal civil tax assessment proceeding. *Id.* at 459-60. In *Lopez-Mendoza*, the Court described its *Janis* analysis as using a cost benefit analysis to weigh the "likely social benefits of excluding unlawfully seized evidence against the likely costs." *Lopez-Mendoza*, 468 U.S. at 1041. Rather than rely on, perhaps, the outdated analysis of the *Fong Yue Ting* Court, the *Lopez-Mendoza* Court placed its holding squarely within the reasoning established in other cases in which it had limited the reach of the exclusionary rule.

<sup>43</sup> 468 U.S. 1032 (1984).

<sup>44</sup> *Id.* at 1042-50.

<sup>45</sup> *Id.* at 1043-46.

<sup>46</sup> 468 U.S. at 1050-51; see also Judy Wong, *Egregious Fourth Amendment Violations and the Use of the Exclusionary Rule in Deportation Hearings: The Need for Substantive Equal Protection Rights for Undocumented Immigrants*, 28 COLUM. HUM. RTS. L. REV. 431 (1997).

<sup>47</sup> The Court stated: "Respondent Sandoval-Sanchez has a more substantial claim. He objected not to his compelled presence at a deportation proceeding, but to evidence offered at that proceeding. The general rule in a criminal proceeding is that statements and other evidence obtained as a result of an unlawful, warrantless arrest are suppressible if the link between the evidence and the unlawful conduct is not too attenuated. . . . The reach of the

of Fourth Amendment law, the *Lopez-Mendoza* opinion simply continued the curtailment of the application of the exclusionary rule to cases where the Court determined the costs of applying the rule were outweighed significantly by its benefits in deterring police misconduct.<sup>48</sup>

#### V. EXTRATERRITORIAL APPLICATION OF THE FOURTH AMENDMENT

In the 1990 *Verdugo-Urquidez* case, Chief Justice Rehnquist—who sat on the *Lopez-Mendoza* court—noted in dicta that the Court had actually never held that undocumented aliens were protected by the Fourth Amendment in the context of a criminal prosecution; it had merely assumed the question without deciding it.<sup>49</sup> The case was one of several to result from the kidnapping and murder of the U.S. Drug and Enforcement Agency (DEA) agent Enrique Camarena Salazar.<sup>50</sup> Special Agent Camarena had been investigating U.S.-Mexico narcotics trafficking rings when he was kidnapped in Mexico, tortured, and murdered in February 1985.<sup>51</sup> After an investigation by the DEA, the U.S. government obtained a warrant for Verdugo-Urquidez's arrest.<sup>52</sup> Verdugo-Urquidez, a Mexican citizen and resident, was arrested by Mexican authorities in Mexico, and transported to the U.S. Border Patrol station in Calexico, California, where he was arrested by U.S. marshals. He was incarcerated in the United States when DEA agents arranged with Mexican officials to search Verdugo-Urquidez's properties in Mexico. DEA agents participated in the actual searches.<sup>53</sup> The

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exclusionary rule beyond the context of a criminal prosecution, however, is less clear." 468 U.S. at 1040-41.

<sup>48</sup> *United States v. Leon*, 468 U.S. 897, 909 (1984) (decided the same year as *Lopez-Mendoza* and holding that the exclusionary rule does not apply when police officers act in objective good faith pursuant to a warrant based on probable cause); *Stone v. Powell*, 428 U.S. 465, 482 (1976) (Fourth Amendment violations may not be raised in writs of federal habeas corpus by state prisoners if they had a full and fair opportunity to litigate the Fourth Amendment violation in their state proceedings); *United States v. Janis*, 428 U.S. 433 (1976) (exclusionary rule does not apply in federal civil tax assessment proceeding); *United States v. Calandra*, 414 U.S. 338 (1974) (exclusionary rule does not apply to grand jury proceedings).

<sup>49</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990). *But see* Victor Romero, *The Domestic Fourth Amendment Rights of Undocumented Immigrants: On Guitterez and the Tort Law/Immigration Law Parallel*, 35 HARV. C.R.-C.L. L. REV. 57, 60-61 (2000) (suggesting that *Verdugo-Urquidez* does affect application of the Fourth Amendment to noncitizens facing prosecution in United States courts).

<sup>50</sup> *Verdugo-Urquidez*, 494 U.S. at 262-63.

<sup>51</sup> The DEA web site contains a biography of Special Agent Enrique Camarena Salazar. U.S. Dep't of Justice, Biographies of DEA Agents and Employees Killed in Action: Enrique S. Camarena, <http://www.usdoj.gov/dea/agency/10bios.htm#camarena> (last visited Feb. 22, 2008). Camarena's murder inspired Red Ribbon Week. *Id.*

<sup>52</sup> Verdugo-Urquidez was convicted for his part in the kidnapping and murder of Enrique Camarena Salazar. *See United States v. Verdugo-Urquidez*, No. CR-887-422-Er (C.D. Cal. Nov. 22, 1988). Humberto Alvarez Machain, the physician who was accused of supervising Camarena's torture, was kidnapped in Mexico and forcibly brought to the United States where he was arrested by DEA agents. *See United States v. Alvarez-Machain*, 504 U.S. 655, 657-58 (1992). He was ultimately acquitted. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697-98 (2004).

<sup>53</sup> *Verdugo-Urquidez*, 494 U.S. at 262.

searches yielded evidence that the government sought to use in its prosecution of Verdugo-Urquidez. Verdugo-Urquidez moved to suppress on the grounds that the DEA agents had searched his premises without a warrant.<sup>54</sup> The district court granted the motion and the circuit court affirmed.<sup>55</sup> The government appealed, and the Supreme Court held that the Fourth Amendment did not apply outside the territorial limits of the United States to the search of a non-citizen's properties in Mexico.<sup>56</sup>

Although unnecessary to resolve the issue directly before the Court, Chief Justice Rehnquist discussed what the phrase "the people" in the Fourth Amendment might mean. The Fourth Amendment, Chief Justice Rehnquist opined, extends its reach to "the people," not "persons."<sup>57</sup> Therefore, he reasoned, the reach of the Fourth Amendment was not coterminous or analogous with that of the Fourteenth Amendment, which had applied at least since 1886 to noncitizens found within the United States.<sup>58</sup> "The people," he went on to state, "refers to a class of persons who are [sic] part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."<sup>59</sup>

Notwithstanding the Court's language, the opinion implied that application of Fourth Amendment protections in the context of a criminal prosecution of an undocumented noncitizen might be justified if the defendant had "some voluntary connections" with the United States.<sup>60</sup> What exactly the Court meant by this reference is unclear; it would appear to be a reference to the fact that Verdugo-Urquidez's claim might be distinguished from that of undocumented noncitizens because he had not "voluntarily" entered the United States,<sup>61</sup> unlike most aliens who enter the United States without authorization and who, presumably, do so willingly. It is possible that the Court drew the distinction between persons with a substantial connection to the United States and those without in order to justify denying extraterritorial application of the Warrant Clause to extraterritorial U.S. law enforcement activity. Arguably, even this discussion was unnecessary to resolve the issue; it is hardly well-settled that the Fourth Amendment warrant requirement applies to searches of foreign residences of U.S. citizens conducted in accordance with foreign law and in conjunction with foreign law enforce-

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<sup>54</sup> *Id.* at 262-63.

<sup>55</sup> *Id.* at 263-64.

<sup>56</sup> *Id.* at 262.

<sup>57</sup> *Id.* at 265.

<sup>58</sup> *Id.* at 271 (discussing *Yick Wo v. Hopkins*, 118 U.S. 351 (1886)).

<sup>59</sup> *Id.* at 273.

<sup>60</sup> *Id.* at 272-73.

<sup>61</sup> *Id.* at 273 ("The illegal aliens in *Lopez-Mendoza* were in the United States voluntarily and presumably had accepted some societal obligations; but respondent had no voluntary connection with this country that might place him among 'the people' of the United States.").

ment officials.<sup>62</sup> The Court's opinion ultimately rendered the fact that the property that was the subject of the search was located in a foreign country as decisive in determining whether the Fourth Amendment applied to the search. As the Court noted:

The available historical data show, therefore, that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.<sup>63</sup>

Five Justices joined the *Verdugo-Urquidez* opinion, three Justices dissented, and one Justice concurred in the judgment.<sup>64</sup> Justice Kennedy, one of Justices who made up the majority, wrote a concurring opinion that expressly repudiated Chief Justice Rehnquist's thinking on "the people."<sup>65</sup> Justice Kennedy's opinion made it clear that "[i]f the search had occurred in a residence within the United States, I have little doubt that the full protections of the Fourth Amendment would apply. But that is not this case."<sup>66</sup>

Circuit courts have treated *Verdugo-Urquidez* as an opinion that speaks to extraterritorial application of the Fourth Amendment.<sup>67</sup> In fact, *Verdugo-Urquidez* may be read to secure stronger Fourth Amendment protections to noncitizens in the United States because it suggests that noncitizens with a substantial connection to the United States may have extraterritorial Fourth Amendment protection.

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<sup>62</sup> See, e.g., *United States v. Vilar*, No. S3 05-CR-621 (KMK), 2007 U.S. Dist. Lexis 26993 (S.D.N.Y. Apr. 4, 2007); *United States v. Bin Laden*, 126 F. Supp. 2d 264 (S.D.N.Y. 2000); see also *Reid v. Covert*, 354 U.S. 1 (1957) (holding that an American citizen spouse arrested and accused by U.S. military authorities in a foreign country for the murder of her military spouse was entitled to the protection of the Fifth and Sixth Amendments and, thus, could not be subjected to military process); Corey M. Then, Note, *Searches and Seizures of Americans Abroad: Re-Examining the Fourth Amendment's Warrant Clause and the Foreign Intelligence Exception Five Years After United States v. Bin Laden*, 55 DUKE L.J. 1059 (2006). *Reid* was discussed at length in the *Verdugo-Urquidez* opinions. 494 U.S. at 269-70, 277-78.

<sup>63</sup> 494 U.S. at 266.

<sup>64</sup> Chief Justice Rehnquist's majority opinion was joined by Justices White, O'Connor, Scalia, and Kennedy. Justice Stevens concurred in the judgment but, like Justice Kennedy, expressly disavowed the majority's discussion about the "people." Instead, Justice Stevens concluded that the challenged search was reasonable because it was conducted with the approval and cooperation of Mexican authorities. Justice Stevens believed the Warrant Clause did not apply to searches of noncitizen's homes in foreign jurisdictions "because American magistrates have no power to authorize such searches." *Id.* at 279 (Stevens, J., concurring in the judgment). Justice Brennan, joined by Justice Marshall, wrote a dissenting opinion, as did Justice Blackmun.

<sup>65</sup> 494 U.S. at 275-80 (Kennedy, J., concurring).

<sup>66</sup> *Id.* at 278.

<sup>67</sup> *Wang Zong Xiao v. Reno*, 81 F.3d 808 (9th Cir. 1996); *Lamont v. Woods*, 948 F.2d 825 (2d Cir. 1991).

## VI. OF WORDS

At least three different views of what “the people” might mean in the context of the Fourth Amendment were voiced in the *Verdugo-Urquidez* opinion. Chief Justice Rehnquist thought it meant to restrict application of the Fourth Amendment only to people who had a “substantial connection” with the United States.<sup>68</sup> Justice Kennedy, concurring in the result, thought the language to “underscore the importance of the right, rather than to restrict the category of persons who may assert it.”<sup>69</sup> Justice Brennan, joined by Justice Marshall in dissent, thought the term “better understood as a rhetorical counterpoint to ‘the Government,’ such that rights that were reserved to ‘the people’ were to protect all those subject to ‘the Government.’”<sup>70</sup>

The language of the Fourth Amendment bears other constructions as well. For example, the term takes on a different meaning if we treat as the operative term “people” rather than “the people.” Deprived of its article, “people” takes on a more inclusive and generic character. The impreciseness of the term and the specter of a land once again admitting of sharply different treatment for basic rights on the basis of status perhaps explain the reluctance of a majority of the Court to adopt Chief Justice Rehnquist’s view of “the people.”<sup>71</sup>

The power of words in the service of the law has been noted by many before me.<sup>72</sup> In the context of immigration, a number of scholars have noted the power of the term “alien.”<sup>73</sup> As Kevin Johnson states:

[T]he word alien immediately brings forth rich imagery. One thinks of space invaders seen on television and in movies, such as the blockbuster movie Independence Day. Popular culture rein-

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<sup>68</sup> 494 U.S. at 272-73.

<sup>69</sup> *Id.* at 276-77 (Kennedy, J., concurring).

<sup>70</sup> *Id.* at 287 (Brennan, J., dissenting).

<sup>71</sup> Chief Justice Taney also explored the meaning of the words “the people” in *Dred Scott v. Sandford*. 60 U.S. (19 How.) 393, 404 (1857) (“The words ‘the people of the United States’ and ‘citizens’ are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the ‘sovereign people,’ and every citizen is one of this people, and a constituent member of this sovereignty.”).

<sup>72</sup> See, e.g., Lucinda M. Finley, *Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989); Johnson, *supra* note 12.

<sup>73</sup> See Johnson, *supra* note 12; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 n.4 (1990); Gerald Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection*, 42 UCLA L. REV. 1425, 1428 (1995); Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 S. CT. REV. 275, 303; see also Teresa A. Miller, *Citizenship and Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 652 (2003) (noting use of the terms “criminal alien” and “aggravated felon” and the use of language in penology).

forces the idea that aliens may be killed with impunity and, if not, “they” will destroy the world as we know it. Synonyms for alien have included “stranger, intruder, interloper, . . . outsider, . . . barbarian,” all terms that suggest the need for harsh treatment and self-preservation. In effect, the term alien serves to dehumanize persons. We have few, if any, legal obligations to alien outsiders to the community, though we have obligations to persons. Persons have rights while aliens do not.<sup>74</sup>

Particularly with words or terms that have come to have legal significance, it behooves persons in the service of the law to use those words and terms with care and precision. The word “citizen” has legal significance in a variety of contexts. Citizens may not be deported, although their loved ones, children, and spouses may be.<sup>75</sup> Noncitizens may be deported for victimless crimes, for residing in the United States without documentation, or because they overstayed their permission to reside in the United States, regardless of the length of the residence and the significance of their ties to the United States community.<sup>76</sup> When facing deportation, noncitizens are deprived of most of the constitutional protections extended to persons who face criminal prosecution, including effective judicial review or an attorney at the state’s expense, for behavior they engaged in years prior to the deportation.<sup>77</sup> This difference alone justifies extreme care in using the term in a legal context.

Yet there are other distinctions that caution against use of the term “citizen” in a legal context, where it is not the term that applies. Citizens appear to enjoy greater freedom from executive detention than persons who lack citizenship status.<sup>78</sup> Citizens may not be intentionally discriminated against by the government on the basis of their race, national origin, color, or religion, except in narrowly tailored ways necessary to achieve a compelling interest, such as remedying identifiable and specific past discrimination or ensuring a diverse student body in an institution of higher learning,<sup>79</sup> whereas noncitizens appear to be vulnerable to such discrimination, particularly in immigration-related areas.<sup>80</sup> Most important, perhaps, citizens can

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<sup>74</sup> Johnson, *supra* note 12, at 272.

<sup>75</sup> *Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53 (2001).

<sup>76</sup> 8 U.S.C.A. § 1227 (2007).

<sup>77</sup> See *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 704 (6th Cir. 2002).

<sup>78</sup> *Demore v. Kim*, 538 U.S. 510 (2003); *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Carlson v. Landon*, 342 U.S. 524 (1952), *cf.* *Hamdi v. Rumsfeld*, 543 U.S. 507 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

<sup>79</sup> *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738 (2007); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>80</sup> See Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice’s 2003 Guidelines*, 50 LOY. L. REV. 67 (2004); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2003).

vote. They can affect the course of legislation and executive policy. Not so for noncitizens.<sup>81</sup>

The word “citizen” is a potent word full of meaning and rich in imagery, dualist in nature. The word “citizen” generally evokes positive images and feelings. “Citizen” evokes images and feelings of patriotism, love of country, ties to one’s homeland, courage, and bravery. “Citizen” is also aligned with that most basic of American political behaviors—voting and participation in the political process.<sup>82</sup> The badge of citizenship, thus, establishes one’s entitlement to participation, to belonging in not just the community marked by social, work, and geographical bonds, but to the political community. To some extent, then, references to “police-citizen” encounters and to “the rights of citizens” are understandable; they function not to demarcate the legal boundaries that decide who is protected from overzealous police enforcement tactics but as general markers of the community’s principal values, principal actors, and the individuals most likely to be affected by the activity being discussed.

Further, although “citizen” evokes strong images, the images do not always have positive connotations. As Chief Justice Marshall noted in *McCulloch v. Maryland*<sup>83</sup> about the word “necessary,” “[s]uch is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense.”<sup>84</sup> Citizenship has been used before to exclude in order to injure. Adolph Hitler used citizenship as the demarcating line between those who would be subject to detention and likely death in a concentration camp and those who would not.<sup>85</sup>

When it comes to fundamental human rights, there appears to be little reason to demarcate between citizens and noncitizens, except to make it easier to deprive the latter of those same rights. When it comes to the Fourth Amendment, whose plain language avoids use of the term “citizen,” there would similarly be little reason to demarcate between citizens and nonci-

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<sup>81</sup> For a defense of granting the suffrage to non-U.S. citizens, see Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993).

<sup>82</sup> There is a wealth of scholarship on citizenship, its legal significance, and its role in forming identity, among other things, and discussion of this scholarship is far beyond the province of this essay. See e.g., GERALD NEUMAN, *STRANGERS TO THE CONSTITUTION* (1996); LINDA BOSNAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2006); HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006); ROGERS M. SMITH, *CIVIL IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997). This essay is directed at the use of the word in legal writings when it is *not* material. Latcrit treatment of citizenship includes Raquel Aldana, *On Rights, Federal Citizenship, and the “Alien,”* 46 WASHBURN L.J. 263 (2007); George A. Martinez, *Immigration and the Meaning of United States Citizenship: Whiteness and Assimilation*, 46 WASHBURN L.J. 335 (2007); Ruben J. Garcia, *Across the Border: Immigrant Status and Identity in Law and Latcrit Theory*, 55 FLA. L. REV. 511 (2003).

<sup>83</sup> 17 U.S. 316 (1819).

<sup>84</sup> *Id.* at 414.

<sup>85</sup> See Kay Hailbronner, *Fifty Years of the Basic Law—Migration Citizenship and Asylum*, 53 S.M.U. L. REV. 519, 529-30 (2000).

tizens and good reason not to. The distinction draws attention to itself and suggests a preferred status for citizens that is not warranted under current understandings of Fourth Amendment law. If one wishes to advocate for such a change, of course, the practice makes sense. But in the vast majority of cases and commentary evincing the practice that is the focus of this essay, the usage does not appear to reflect conscious advocacy for reduced protection for noncitizens. Thus, I argue for a more conscious and intentional use of the word that reflects the actual relationship between the person and the degree of protection that person may be entitled to under the Fourth Amendment.

