The Domestic Fourth Amendment Rights of Undocumented Immigrants: On *Guitterez* and the Tort Law/Immigration Law Parallel

*Victor C. Romero**

Introduction

American history might suggest that our affection towards immigrants waxes and wanes like everything else,[1] but the current anti-immigrant backlash has seen unprecedented attacks on immigrants' rights.[2] Through California's Proposition 187,[3] the denial of welfare benefits to certain classes of legal permanent residents,[4] and the curtail-

* Associate Professor of Law, Pennsylvania State University, The Dickinson School of Law; e-mail: vcr1@psu.edu. An earlier version of this Article was presented at the Immigration Law Workshop held at the University of California at Berkeley School of Law, May 28–30, 1998. I would like to thank Alex Aleinikoff for his insightful comments as the moderator of the panel presentation, as well as Lenni Benson, Linda Bosniak, Kevin Johnson, John Scanlan, and Margaret Taylor for their useful remarks after the presentation. I also greatly appreciate the helpful advice of Harvey Feldman, Kevin Johnson, Steve Legomsky, and Michael Mogill, all of whom read a full draft of this piece. Of course, all errors that remain are mine. Thanks as well to Jeff Wong for his careful work drafting the appendix, and to Bill Dorgan, Jeff Wong, and Amy Phillips for their excellent research assistance. Most of all, I would like to thank my wife, Corie, and my family in the Philippines, for their untiring love and support.

[1] *See, e.g.*, Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615 (1981) (describing the cyclical nature of U.S. citizens' affection towards Mexicans and Mexican immigration).

[2] *See, e.g.*, IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan Perea ed., 1997) [hereinafter IMMIGRANTS OUT!] (containing several essays describing the current anti-immigrant backlash in the United States).

[3] *See generally* Lolita K. Buckner Inniss, *California's Proposition 187—Does It Mean What It Says? Does It Say What It Means? A Textual and Constitutional Analysis*, 10 GEO. IMMIGR. L.J. 577 (1996); Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 651 (1995) ("It is also possible that the passage of Proposition 187 resulted from sheer frustration with immigration."). In 1998, U.S. District Judge Mariana Pfaelzer declared the 1994 California ballot initiative constitutionally infirm. *See* League of United Latin Am. Citizens v. Wilson, 1998 U.S. Dist. LEXIS 3418 (C.D. Cal. March 13, 1998). California Governor Gray Davis has agreed not to appeal Judge Pfaelzer's ruling. *See* Patrick J. McDonnell, *Davis Won't Appeal Prop. 187 Ruling, Ending Court Battles; Litigation: Governor's Deal with Civil Rights Groups Effectively Kills 1994 Anti-Illegal Immigrant Measure. Accord Is Likely to Ignite Further Controversy*, L.A. TIMES, July 29, 1999, at A1. Meanwhile, an organization called Save Our State plans to submit a revised version of Proposition 187 for the November 2000 California ballot. *SaveOurState* (visited Jan. 23, 2000) <http://www.saveourstate.org/home.html>.

[4] *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub.

ment of judicial review of certain administrative decisions under both the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")[5] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"),[6] states and the federal government have deprived immigrants of rights many citizens take for granted. As immigration scholars have long argued, many of these limiting pronouncements may be a function of the plenary power doctrine that privileges citizen status over personhood.[7] The result is that the law denies noncitizens many of the basic personal rights that are allocated based on membership in the United States polity.[8] Although it is unlikely that the United States, or

---

L. No. 104-193, 110 Stat. 2105 (1996). *See generally* Michael Scaperlanda, *Who Is My Neighbor?: An Essay on Immigrants, Welfare Reform, and the Constitution*, 29 CONN. L. REV. 1587 (1997); Charles Wheeler, *The New Alien Restrictions on Public Benefits: The Full Impact Remains Uncertain*, 73 INTERPRETER RELEASES 1245 (Sept. 23, 1996). Fortunately, President Clinton is currently moving towards restoring many of the benefits to noncitizens abrogated by the welfare "reform" bill. *See* Michael Janofsky, *Legal Immigrants Would Regain Aid in President's Plan*, N.Y. TIMES, Jan. 25, 1999, at A1.

[5] Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8 U.S.C.).

[6] Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.). Both AEDPA and IIRIRA deprive federal courts of jurisdiction to decide certain immigration decisions. For example, section 306(a) of the IIRIRA strips federal courts of jurisdiction over noncitizens' claims arising out of proceedings brought by the Attorney General. *See* IIRIRA § 306(a), 8 U.S.C. § 1252(g) (Supp. II 1996)). For an analysis of the constitutionality of IIRIRA's "court stripping" provision, see Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997); *see also* Victor C. Romero, *Expanding the Circle of Membership by Reconstructing the "Alien": Lessons from Social Psychology and the "Promise Enforcement" Cases*, 32 U. MICH. J.L. REFORM 1 (1998) (calling for the repeal of the court stripping provisions of IIRIRA based on a review of social psychology research on negative noncitizen stereotypes). For a general discussion of AEDPA and IIRIRA, see Symposium, *The Impact of the 1996 Immigration Legislation*, 11 GEO. IMMIGR. L.J. 265 (1997).

[7] *See, e.g.*, Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress and the Courts*, 22 HAST. CONST. L.Q. 925 (1995); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992); Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After* Adarand Constructors, Inc. v. Peña, 76 OR. L. REV. 425 (1997); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WISC. L. REV. 965 (1996); Frank Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, 7 STAN. L. & POL'Y REV. 35 (1996).

[8] For example, while the Supreme Court has declared that the right to vote is fundamental, *see, e.g.*, Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626 (1969), the Constitution does not require noncitizen suffrage. *See* T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY 572 (4th ed. 1998). Nonetheless, some commentators have argued that noncitizens should be allowed to vote. *See* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977).

any other country for that matter, will abolish the citizen/noncitizen distinction,[9] a system that favors citizens' rights claims over those of noncitizens must include sufficient protections for personal rights.[10]

While the denial of public benefits to legal permanent residents might define one end of the debate,[11] this Article chooses to take up the other extreme: the possible denial of a basic constitutional right to so-called illegal aliens, or, less pejoratively, undocumented immigrants.[12] In particular, this Article provides a model for striking a better balance between the treatment of citizen and noncitizen Fourth Amendment claims. The model draws an analogy between the landowner/entrant classification

---

[9] The European Community members would be the exceptions to this statement because, under the Treaty on European Union, these nations have begun to experiment with a single immigration policy to govern interstate movement of union citizens within the community. *See* Giovanna I. Wolf, *Efforts Toward "An Ever Closer" European Union Confront Immigration Barriers*, 4 IND. J. GLOBAL LEGAL STUD. 223 (1996). Still, this is not the equivalent of a borderless continent. For more on the open border debate, see, for example, ALAN DOWTY, CLOSED BORDERS: THE CONTEMPORARY ASSAULT ON FREEDOM OF MOVEMENT (1987); OPEN BORDERS? CLOSED SOCIETIES? THE ETHICAL AND POLITICAL ISSUES (Mark Gibney ed., 1988); Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251 (1987); R. George Wright, *Federal Immigration Law and the Case for Open Entry*, 27 LOY. L.A. L. REV. 1265 (1994).

[10] At one extreme, it is difficult to imagine that the United States would condone the torture of noncitizen defendants in criminal cases in order to extort confessions from them. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278, 285–86 (1936) (holding that government agents may not beat confessions out of defendants under the Fourteenth Amendment). At the opposite extreme, it is difficult to imagine that the United States would enfranchise noncitizens, given the concern with maintaining the value of citizenship. *But cf.* sources cited *supra* note 8. Thus, this Article seeks to contribute to the legal literature exploring the appropriate level of protection for noncitizens' personal rights claims within the context of an American constitutional law that distributes rights based on degrees of polity membership. *See generally* T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9, 10 (1990) ("Immigration policy, conceived of as membership rules, is thought to lie at the core of national self-determination and self-definition."); T. Alexander Aleinikoff, *The Tightening Circle of Membership*, *in* IMMIGRANTS OUT!, *supra* note 2 at 324, 324–31 (arguing that denial of public benefits to permanent residents sends the message that the circle of citizenship is growing ever smaller); Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994); David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165 (1983); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707 (1996).

[11] *See, e.g.*, Hiroshi Motomura, *Alienage Classifications in a Nation of Immigrants: Three Models of "Permanent" Residence in* IMMIGRATION AND CITIZENSHIP IN THE 21ST CENTURY 199, 199–223 (Noah Pickus ed., 1998).

[12] I prefer the terms "noncitizen" and "undocumented immigrant" to "alien" and "illegal alien," respectively, because of the pejorative connotations attached to the word "alien." However, I prefer the phrase "alienage jurisprudence" to "citizenship jurisprudence" because the former captures the dehumanizing nature of such categorizations. *See* Romero, *supra* note 7, at 455–56 n.4; Victor C. Romero, *Equal Protection Held Hostage: Ransoming the Constitutionality of the Hostage Taking Act*, 91 NW. U. L. REV. 573, 573 n.4 (1997); *see also* Kevin R. Johnson, *"Aliens" and the U.S. Immigration Law: The Social and Legal Construction on Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 268 (1996-97) (discussing "how the term alien masks the privilege of citizenship and helps to justify the status quo").

scheme in premises liability law and the noncitizenship classifications in immigration law. Its goal is to show how immigration theorists can learn from states that have abandoned the traditional premises liability classifications in favor of a unitary "reasonable person" tort law standard. This abandonment reflects the belief that the traditional premises liability classifications dehumanize the injured party. Similarly, this Article contends that recent immigrants' rights law developments devalue noncitizens by depriving them of certain basic personal rights granted to citizens. Furthermore, the Article concludes that the denial of noncitizens' Fourth Amendment rights would be contrary to the Amendment's primary purpose of deterring unlawful government conduct.

Although the scope of Fourth Amendment rights for undocumented immigrants has been the subject of debate in the literature,[13] two recent decisions in *United States v. Guitterez* highlight the need for a reexamination of the issue.[14] In October 1997, in her initial decision in *United States v. Guitterez* [hereinafter *Guitterez I*], U.S. District Judge Saundra Brown Armstrong held that criminal defendant and undocumented immigrant Javier Guitterez could not invoke the exclusionary rule to suppress evidence because the Fourth Amendment's protections against unreasonable searches and seizures did not apply to him.[15] Citing dicta from the U.S. Supreme Court's decision in *United States v. Verdugo-Urquidez*[16] and the Ninth Circuit's decision in *United States v. Barona*,[17] the trial court ruled that Guitterez had not established a "significant voluntary connection" with the United States to grant him standing to assert any

---

[13] *See, e.g.*, James G. Connell, III & Rene 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 (1997); Michael Scaperlanda, *The Domestic Fourth Amendment Rights of Aliens: To What Extent Do They Survive* United States v. Verdugo-Urquidez?, 56 Mo. L. REV. 213 (1991); Victor C. Romero, Note, *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).

[14] No. CR 96-40075 SBA, 1997 U.S. Dist. LEXIS 16446 (N.D. Cal. Oct. 14, 1997) [hereinafter *Guitterez I*], *vacated*, 983 F. Supp. 905 (N.D. Cal. 1998) [hereinafter *Guitterez II*]. These decisions have received little scholarly attention thus far, and have been relegated to the footnotes of a few articles. *See, e.g.*, Linda Kelly, *Defying Membership: The Evolving Role of Immigration Jurisprudence*, 67 U. CIN. L. REV. 185, 192 n.50 (1998); Liliana M. Garces, Note, *Evolving Notions of Membership: The Significance of Communal Ties in Alienage Jurisprudence*, 71 S. CAL. L. REV. 1037, 1069 n.153 (1998); Jonathan L. Hafetz, Note, *The Rule of Egregiousness:* INS v. Lopez-Mendoza *Reconsidered*, 19 WHITTIER L. REV. 843, 868 n.170 (1998). Notably, the second *Guitterez* decision has been cited in a prominent treatise on federal civil practice in the treatise's discussion of standing. *See* 3 CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 674 (1999).

[15] *See Guitterez I*, 1997 U.S. Dist. LEXIS at *22–23. The holding in *Guitterez I* is remarkable given that the Supreme Court, while forbidding the use of the exclusionary rule in deportation proceedings, *see* INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984), implicitly allowed for the rule's use in criminal proceedings by distinguishing the two actions. *See Lopez-Mendoza*, 468 U.S. at 1038–39.

[16] 494 U.S. 259 (1990).

[17] 56 F.3d 1087 (9th Cir. 1995).

Fourth Amendment right against the U.S. government.[18] Fortunately, in January 1998, in a second *United States v. Guitterez* opinion [hereinafter *Guitterez II*], Judge Armstrong reversed herself sua sponte, holding that neither the Supreme Court nor the Ninth Circuit had given any guidance as to whether and how the significant voluntary connection test should apply.[19] Given this lack of appellate court directive, the district court de-

---

[18] *Guitterez I*, 1997 U.S. Dist. LEXIS at *16 (citing *Verdugo-Urquidez*, 494 U.S. at 271). This language in *Verdugo-Urquidez* was cited favorably by the Ninth Circuit in *Barona*, 56 F.3d at 1093.

Chief Justice Rehnquist's opinion in *Verdugo-Urquidez* has drawn much ire from the legal academy for its creation of a test requiring that undocumented immigrants prove their significant voluntary connections to the United States before they can avail themselves of Fourth Amendment protection. *See Verdugo-Urquidez*, 494 U.S. at 265 ("'[T]he people' protected by the Fourth Amendment . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.").

For criticism of Rehnquist's *Verdugo-Urquidez* opinion, see, for example, GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 103–17 (1996); Abraham Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 VA. J. INT'L. L. 151 (1991); Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444 (1990); Jon A. Dobson, Note, Verdugo-Urquidez: *A Move Away from Belief in the Universal Pre-existing Rights of All People*, 36 S.D. L. REV. 120 (1991); Gail T. Kikawa, Note, Verdugo-Urquidez: *How the Majority Stumbled*, 13 HOUS. J. INT'L L. 369 (1991); Janet E. Mitchell, Note, *The Selective Application of the Fourth Amendment*, 41 CATH. U. L. REV. 289 (1991); Mary Lynn Nicholas, Note, United States v. Verdugo-Urquidez: *Restricting the Borders of the Fourth Amendment*, 14 FORDHAM INT'L L.J. 267 (1990-91); Romero, *supra* note 13, at 999.

Eric Bentley suggests that Rehnquist may have based his approach on earlier writings by Professor Paul B. Stephan III supporting greater restrictions on noncitizens' rights claims in an effort to curb international terrorism. *See* Eric Bentley, Jr., *Toward an International Fourth Amendment: Rethinking Searches and Seizures Abroad After* Verdugo-Urquidez, 27 VAND. J. TRANSNAT'L L. 329, 346 n.68 (1994) (citing Paul B. Stephan III, *Constitutional Limits on International Rendition of Criminal Suspects*, 20 VA. J. INT'L L. 777 (1980); Paul B. Stephan III, *Constitutional Limits on the Struggle Against International Terrorism: Revisiting the Rights of Overseas Aliens*, 19 CONN. L. REV. 831 (1987) ("Two earlier articles by Professor Stephan appear to have provided some of the theoretical underpinning for the Chief Justice's opinion, and were cited by the Justice Department in its briefs.")).

[19] 983 F. Supp. 905, 916 (N.D. Cal. 1998). In commenting on an earlier draft of this paper at the 1998 Immigration Law Workshop, Alex Aleinikoff contended that the *Guitterez* problem might not be as significant as the author asserts. Discussion with T. Alexander Aleinikoff, Professor of Law, Georgetown University Law Center, in Berkeley, Cal. (May, 1998). Specifically, Aleinikoff saw current Fourth Amendment law as protecting the rights of undocumented immigrants in this country and therefore saw *Guitterez I* as an aberrant decision that was corrected by the Court in *Guitterez II*. *See id.* While Aleinikoff might have been right about the current state of the law, recent cases suggest that the result in *Guitterez I* might be repeated in other jurisdictions. In *Torres v. State*, for example, the Texas Court of Appeals cited Justice Rehnquist's dicta in *Verdugo-Urquidez*, and held that the undocumented immigrant defendant in that case had no standing to contest the search and seizure of contraband from his car because he had not developed sufficient connections with the United States. Torres v. State, 818 S.W.2d 141, 143 n.1 (Tex. Ct. App. 1991), *rev'd on other grounds*, 825 S.W.2d 124 (Tex. Crim. App. 1992). Although it is also dicta, *Barona*'s strong statement that undocumented immigrants may not always have standing to claim Fourth Amendment protections remains a powerful tool for the government to argue against the conferral of fundamental rights to a whole class of people. *See Barona*, 56 F.3d

cided to proceed on the presumption that undocumented immigrants had standing to assert Fourth Amendment claims, and then adjudicated Guitterez's motion on its merits.[20]

While the welfare benefits cases are troublesome because they represent the denial of economic support to those on the verge of becoming citizens, the *Guitterez* case is even more disturbing. Had *Guitterez I* not been vacated, the Fourth Amendment would not have provided even minimal protection to undocumented immigrants. Put differently, the issue of "welfare reform" as it affects legal permanent residents is about establishing a ceiling of immigrant benefits, while the issue of Fourth Amendment rights of undocumented immigrants *should be* about creating a floor of rights, beneath which the United States government may not fall. *Guitterez I* nearly dissolves any possible Fourth Amendment floor for undocumented immigrants by breathing life into Supreme Court and Ninth Circuit dicta that condition the right to be free from unreasonable government intrusion on a person's legal connections to the United States.[21] In effect, such an approach would make citizenship status a prerequisite for asserting Fourth Amendment rights. If the *Guitterez I* approach is followed elsewhere, it could lead to the erosion of Fourth Amendment rights for not only undocumented immigrants but, arguably, for legal nonimmigrants as well. For example, if the ideas in *Guitterez I* were to gain support, tourists and international students accused of crimes could be required to show significant voluntary connections with the United States before they could avail themselves of Fourth Amendment guarantees.

This possible collapse of the Fourth Amendment floor for undocumented immigrants can be viewed from a Fourth Amendment perspective or from an immigrants' rights perspective. As to the former approach, one might conclude that the result in *Guitterez I* was a symptom of the erosion of Fourth Amendment rights in U.S. society generally, and therefore not a product of discrimination against noncitizens. This Article

---

at 1087. Perhaps most importantly, decisions in *Miller v. Albright*, 523 U.S. 420 (1998) (upholding constitutionality of Immigration and Nationality Act ("INA") provision, 8 U.S.C. § 1409 (a) (4) (1988), denying citizenship to Filipina whose American father failed to file a timely paternity claim), and *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (holding that selective prosecution claim may not be raised as defense to deportation), suggest a climate in which the substantial connections test has a good chance of being upheld if adopted by the lower federal courts.

[20] *See Guitterez II*, 983 F. Supp. at 905.

[21] Stephen Legomsky notes that although the undocumented immigrant might be able to pursue a civil *Bivens* action, this would be difficult in practice given, among other things, a high likelihood that the person would be deported following conviction. *See* E-mail from Stephen Legomsky, Professor, Washington University School of Law (Mar. 30, 1999) (on file with the *Harvard Civil Rights-Civil Liberties Law Review*). *See also* INA § 237(a)(2), 8 U.S.C. § 1227 (1999) (describing classes of deportable criminal noncitizens).

leaves that analysis to those better versed in the Fourth Amendment.[22] Instead, this piece explores the phenomenon in the context of the rights of undocumented immigrants. Specifically, it examines whether immigration law's adherence to immigration classifications as the primary basis for determining noncitizen entitlements in the United States might have contributed to the near-collapse of the Fourth Amendment floor in the *Guitterez* decisions. In other words, could the classification of a defendant as an "illegal alien" become an acceptable reason for denying her Fourth Amendment rights in the near future, and, if so, is there a better way of ensuring the solidity of the hypothetical constitutional floor? This Article proposes the following solution: when the Fourth Amendment is at issue in a case, courts should give less significance to the immigration status of the noncitizen and instead should focus on *how* the right should apply in the individual case, taking the immigration status of the noncitizen as one factor among many. In reestablishing a floor of Fourth Amendment rights, such a scheme would have two salutary effects: first, it would reaffirm the idea that, in applying criminal constitutional rights, the personhood of noncitizens should carry more weight than their nonmembership in the U.S. polity;[23] second, it would reemphasize the purpose of criminal constitutional rights by correctly focusing on deterring unconstitutional government conduct rather than determining whether rights extend to some individuals but not to others.

To make its case, this Article looks to domestic tort law and the rules that govern a landowner's liability in tort for injuries to entrants upon her land.[24] Although many states retain the traditional entrant classification

---

[22] This Article discusses briefly the importance of the Fourth Amendment in Part III.C. Because much has been written about the origins of the Fourth Amendment safeguard against unreasonable searches and seizures, this Article will recap only the significant parts of that history to discern the purposes of the Amendment, leaving the interested reader to explore the greater part of that history elsewhere. *See generally* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (3d ed. 1996 & Supp. 1998); JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSITUTIONAL INTERPRETATION (1966); NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937).

[23] This Article addresses undocumented immigrants' Fourth Amendment rights, leaving aside the question of what other constitutional rights should be accorded undocumented immigrants specifically or noncitizens generally. Note, however, that the Supreme Court has held that various constitutional amendments protect noncitizens in different contexts. *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982) (holding that state statute denying public education to undocumented immigrant children was unconstitutional under the Fourteenth Amendment); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) (stating that a legal permanent resident is a "person" for Fifth Amendment purposes); Bridges v. Wixon, 326 U.S. 135 (1945) (deciding that legal permanent residents have First Amendment rights). Indeed, Stephen Legomsky has argued that the citizen/noncitizen distinction should be reserved for international issues but should be abolished with respect to domestic legislation. *See* Stephen H. Legomsky, *Why Citizenship?*, 35 VA. J. INT'L L. 279 (1994).

[24] The tort law/immigration law analogy set forth here is a variation on and expansion of ideas set forth by Peter Reich and Peter Schuck in earlier law review articles. *See* Peter L. Reich, *Jurisprudential Tradition and Undocumented Alien Entitlements*, 6 GEO. IMMIGR. L.J. 1 (1992); Schuck, *supra* note 7. Unlike these earlier pieces, however, this Article fully

system[25] for assessing tort duties in premises liability cases, states such as California and New York have abolished the tripartite *trespasser*, *licensee*, and *invitee* classes in favor of a due care standard. Immigration scholars could look to these states as models for rethinking ways to secure the domestic Fourth Amendment rights of undocumented immigrants. States that adhere to the general due care or reasonableness standard recognize the equal personhood of all injured entrants regardless of status, and limit landowner liability on foreseeability grounds. In such states, an entrant's status might be a factor affecting the foreseeability analysis, but it is not a factor that may foreclose liability. In contrast, in traditional entrant classification states, the entrant's status limits landowner liability at the outset, thereby privileging the entrant's status over her personhood.

The traditional entrant classification scheme is analogous to current U.S. immigration and immigrants' rights policy because both are based on classification systems that deny relief to certain persons based on their legal status. A reasonableness standard for premises liability, however, values the equal personhood of all entrants and provides an arguably more-balanced approach to thinking about the citizen/noncitizen distinction.

This Article contends that immigration scholars should look to the reasonableness standard to solve the *Guitterez I* problem that threatens a collapse of the Fourth Amendment floor of undocumented immigrants' rights. Instead of relying on the defendant's status as an "illegal alien" to determine whether she is entitled to Fourth Amendment rights, courts should focus on the right to be free from unreasonable governmental intrusion, much in the same way that the Supreme Court of California, in *Rowland v. Christian*, emphasized the right to be compensated for physical harm.[26] Such a paradigm shift would ensure that the floor of Fourth Amendment rights for non-citizens remains intact.

This Article is composed of three parts. Part I examines the problems raised by the *Guitterez I* regime, including the collapse of the protective constitutional floor of immigrants' rights portended by that decision. Part II contends that the current plenary power approach to immigration and immigrants' rights issues would likely support, rather than

---

expounds upon the tort law/immigration law analogy and applies it to a specific problem: the potential erosion of domestic Fourth Amendment rights of undocumented immigrants. At least one other commentator has drawn a similar analogy between property law and immigration law. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 120 (2d ed. 1997).

[25] The traditional system measures the landowner's duties depending on whether the injured plaintiff is a trespasser, licensee, or invitee upon the land. *See, e.g.*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984 & Supp. 1988).

[26] 443 P.2d 561, 564–65, 568 (Cal. 1968) (holding that plaintiff's right to be compensated was not determined solely by his entrant status but rather by whether the defendant acted reasonably).

dismantle, the *Guitterez I* approach to undocumented immigrants' Fourth Amendment rights. Part III provides an alternative to the plenary power regime by drawing a parallel between domestic tort law for premises liability and immigrants' rights law. This part concludes by showing that *Rowland* and its progeny could serve as the proper basis for rebuilding the floor of constitutional protection for immigrants charged with violating U.S. law.

I. The Problem: The *Guitterez I/Barona* Approach to Undocumented Immigrants' Fourth Amendment Rights

A. *Shades of* Barona *and* Verdugo-Urquidez*: Applying the Significant Voluntary Connections Test to the Domestic Search in* Guitterez

Javier Guitterez is an undocumented immigrant from Mexico who has lived in the United States since 1985.[27] In June 1996, after a period of surveillance,[28] the federal government filed a four-count indictment charging Guitterez with various drug offenses[29] and alleging him to be a narcotics supplier in a large-scale cocaine distribution ring.[30]

Following his indictment, Guitterez filed a motion to suppress incriminating evidence seized at a third party's residence and evidence obtained by police at a traffic stop.[31] Specifically, Guitterez contended that the affidavit underlying the residential search was defective and that the police had no probable cause to stop Guitterez's vehicle.[32]

In response, the government argued that Guitterez had no standing to object to any searches on Fourth Amendment grounds because he is an undocumented immigrant.[33] In the alternative, the government argued, even if the court found that Guitterez did have standing, the residential search and traffic stop were legal on their merits.[34]

In October 1997, District Judge Saundra Brown Armstrong issued her ruling on Guitterez's motion in *Guitterez I*.[35] Judge Armstrong agreed with the government's first argument and held that Guitterez could not avail himself of any Fourth Amendment protections because he was an

---

[27] *See* United States v. Guitterez, No. CR 96-40075 SBA, 1997 U.S. Dist. LEXIS 16446 (N.D. Cal. Oct. 14, 1997), at *17.

[28] *See id.* at *2–7; United States v. Guitterez, 983 F. Supp. 905, 908–10 (N.D. Cal. 1998).

[29] *See Guitterez II*, 983 F. Supp. at 910.

[30] *See Guitterez I*, 1997 U.S. Dist. LEXIS, at *1.

[31] *See id.* at *6.

[32] *See id.*

[33] *See id.* at *7.

[34] *See id.*

[35] *See id.* at *1.

undocumented immigrant who had not established "significant voluntary connections" with the United States.[36]

The court began its analysis by looking to the Ninth Circuit's decision in *United States v. Barona*[37] and the U.S. Supreme Court's pronouncements in *United States v. Verdugo-Urquidez*[38] to determine the scope of Fourth Amendment protections for undocumented immigrants.[39] In *Barona*, the Ninth Circuit reviewed a Fourth Amendment challenge by three noncitizens who claimed that they were wrongfully convicted on various drug charges based in part on wiretap evidence obtained in Italy and Denmark.[40] Relying on the U.S. Supreme Court's decision in *Verdugo-Urquidez* involving a similar Fourth Amendment claim in the context of a foreign search, the *Barona* court stated that the defendants first had to establish that they were in the class of persons protected by the Fourth Amendment before the court could rule on the merits of their appeal.[41] In the end, the panel majority decided to bypass the standing issue, opting to assume that the Fourth Amendment protected the defendants, but concluding that their substantive claims were without merit.[42]

Despite the fact that the Ninth Circuit avoided making a decision on the standing issue, its discussion of standing is particularly interesting because it closely tracks the discussion in *Verdugo-Urquidez*. To determine whether a noncitizen defendant may avail herself of the Fourth Amendment's protections against foreign searches, the *Barona* court followed *Verdugo-Urquidez*'s lead and held that the noncitizen must establish a "voluntary connection" to the United States.[43]

In *Verdugo-Urquidez*, the Supreme Court rejected a Fourth Amendment challenge brought by a Mexican citizen who was abducted from Mexico and tried in the United States on drug charges. Verdugo-Urquidez had attempted to suppress evidence obtained during a search of two of his residences in Mexico.[44] Reviewing the text of the Fourth Amendment,

---

[36] *Id.* at *17–18. The Court specifically noted that it rejected the government's contention that all undocumented immigrants are *per se* barred from asserting Fourth Amendment protections. *See id.* at *13 n.5. It held instead that an undocumented immigrant may be protected under the Fourth Amendment if she has established "significant voluntary connections" with the United States. *See id.* at *12. However, as discussed below, the Court's application of the "significant voluntary connections" test to Guitterez's situation suggests that an undocumented immigrant might never be able to develop significant voluntary connections with the United States as long as her presence is viewed as "illegal," thereby rendering her connections illegitimate for Fourth Amendment purposes. *See* discussion *infra* Parts I.A, I.B.

[37] 56 F.3d 1087 (9th Cir. 1995).

[38] 494 U.S. 259 (1990).

[39] *See Guitterez I*, 1997 U.S. Dist. LEXIS, at *8.

[40] *See Barona*, 56 F.3d at 1089–90, 1093–94.

[41] *See id.* at 1093–94.

[42] *See id.* at 1094.

[43] *Id.* at 1093.

[44] *See Verdugo-Urquidez*, 494 U.S. at 262–63. For a more complete discussion of this case, see sources cited *supra* note 18.

as well as relevant precedent, the Court held that the Fourth Amendment did not apply to the search of Verdugo-Urquidez's Mexican residences.[45] Although the six to three vote evidenced a strong agreement on the judgment in the case, three of the justices in the majority penned separate opinions. Even the most popular opinion, in which Chief Justice Rehnquist outlined the rationale for when a noncitizen is entitled to Fourth Amendment protection, garnered only four votes.[46] Nonetheless, Chief Justice Rehnquist's opinion has been cited favorably by lower courts, appearing in both *Barona* and *Guitterez I*.[47]

In defining the class protected by the Fourth Amendment, Rehnquist's plurality opinion distinguished the text of the Fourth Amendment,[48] which refers to "the right of the people," from the texts of the Fifth[49] and Sixth[50] Amendments, which refer to a "person" and to "the accused," respectively, in their protections against illegal government

---

[45] *See id.* at 274–75.

[46] *See id.* at 261 (showing breakdown of the vote and opinions filed). *See also* United States v. Guitterez, 983 F.Supp. 905, 915 (N.D. Cal. 1998) (noting that a majority of justices did not agree with Chief Justice Rehnquist's "substantial connection" test). *See also* Scaperlanda, *supra* note 13, at 217–27 (analyzing each of the *Verdugo-Urquidez* Supreme Court opinions).

[47] *See Barona*, 56 F.3d at 1093–94; United States v. Guitterez, No. CR 96-40075 SBA, 1997 U.S. Dist. LEXIS (N.D. Cal. Oct. 14, 1997), at *16–17.

[48] The text of the Fourth Amendment reads:

> 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.

U.S. CONST. amend. IV (emphasis added).

[49] The Fifth Amendment provides:

> No *person* shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any *person* be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V (emphasis added).

[50] The Sixth Amendment states:

> In all criminal prosecutions, the *accused* shall enjoy the right to a speedy public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI (emphasis added).

conduct.[51] The opinion concluded that "the people" was a narrower term of art than either "person" or "the accused." Rehnquist found that the term "the people" was selectively used throughout the Constitution to refer to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[52]

The Chief Justice drew a distinction here between Verdugo-Urquidez, a Mexican national and resident,[53] and the undocumented immigrant deportees in *INS v. Lopez-Mendoza*.[54] In *Lopez-Mendoza*, the Court ruled that the defendants could not avail themselves of the exclusionary rule in the context of a deportation proceeding, implying that the Fourth Amendment would be available to them in a criminal proceeding.[55] However, the plurality opinion in *Verdugo-Urquidez* argued that "the [undocumented immigrants] in *Lopez-Mendoza* were in the United States voluntarily and presumably had accepted some societal obligations; but [Verdugo-Urquidez] had no voluntary connection with this country that might place him among 'the people' of the United States."[56]

Next, reviewing the history of the Fourth Amendment, the *Verdugo-Urquidez* plurality held that the primary purpose of the Fourth Amendment was to deter unreasonable conduct by the United States government *domestically*, not extraterritorially.[57] Thus, because Verdugo-Urquidez's residences were in Mexico, the plurality held that the Fourth Amendment did not apply to them.[58] Based on this textual and historical analysis, the plurality decided that Verdugo-Urquidez, a Mexican national, had not established sufficient voluntary connections with the United States to bar evidence obtained during searches of his Mexican residences.[59]

The *Barona* court adopted this test, even though Chief Justice Rehnquist had not clearly defined what constitutes a "sufficient connection," "significant voluntary connection," or "substantial connection" to the United States (except to say that Verdugo-Urquidez did not meet the test).[60] However, in *Barona*, the Ninth Circuit avoided the problem of the test's application by deciding the Fourth Amendment challenge on its

---

[51] United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

[52] *Id.* Rehnquist noted that the term "people" appears in the Preamble and the First, Second, Ninth, and Tenth Amendments. *Id.*

[53] Interestingly, Verdugo-Urquidez had a "green card," conferring upon him "legal permanent resident" status in the United States. However, this fact did not even make its way into the Supreme Court's opinion. *See* Romero, *supra* note 13, at 1013–14.

[54] 468 U.S. 1032 (1984).

[55] *See id.* at 1040–41.

[56] *Verdugo-Urquidez*, 494 U.S. at 272–73.

[57] *See id.* at 266–67.

[58] *See id.* at 274–75.

[59] *See id.*

[60] These different terms were used at various places within the majority opinion. Compare "sufficient connection" with "significant voluntary connection" and "substantial connection." *Id.* at 265, 271.

merits.[61] In an interesting twist of fate, Chief Judge Wallace, who penned the *Barona* majority opinion, had been a dissenter on the Ninth Circuit's *Verdugo-Urquidez* panel, and his view in that case was ultimately adopted by Chief Justice Rehnquist in his *Verdugo-Urquidez* plurality decision.[62] Although his words were essentially dicta in *Barona*, Judge Wallace cited his Ninth Circuit *Verdugo-Urquidez* dissent to provide two examples of those whom he considered to be part of "the people" of the United States for purposes of the Fourth Amendment: "'American citizens at home and abroad' and lawful resident aliens within the borders of the United States 'who are victims of actions taken in the United States by American officials.'"[63] Like Rehnquist in *Verdugo-Urquidez*, Wallace did not define the boundaries of the substantial connection test, stating only that there remained an open question as to whether a legal permanent resident who had developed sufficient connections would be considered part of "the people" protected by the Fourth Amendment, even for purposes of challenging foreign searches.[64]

In citing *Barona* and *Verdugo-Urquidez*, the *Guitterez I* court might have done well to follow *Barona*'s lead and dodge the standing issue, especially since *Guitterez I* dealt with a domestic search while *Barona* and *Verdugo-Urquidez* both involved searches abroad. Because of this crucial factual difference, the significant voluntary connections test announced in those cases amounted to little more than dicta, as the *Guitterez I* court acknowledged.[65] Nonetheless, the *Guitterez I* court chose to apply a version of Rehnquist's "substantial connection" test from *Verdugo-Urquidez*:

> [A]n [undocumented] immigrant may invoke the protections of the Fourth Amendment only if he or she demonstrates "a

---

[61] United States v. Barona, 56 F.3d 1087, 1094 (9th Cir. 1995).

[62] This coincidence prompted *Barona* dissenting Judge Reinhardt to comment: "The government here was simply fortunate enough to draw a panel led by the dissenter in *Verdugo* and including another judge who agreed with his position." *Barona*, 56 F.3d at 1105 (Reinhardt, J., dissenting). Reinhardt's observations led to this response by Wallace's cohort, Judge Tanner:

> I concur in the opinion filed today. I write separately, however, to explicitly reject Judge Reinhardt's inference that the makeup of the panel affected the outcome of this case in any way other than in the normal course of the decision-making process that goes into every case heard before this court. Nothing could be further from the truth.

Id. at 1098 (Tanner, J., concurring) (internal citation omitted).

[63] *Barona*, 56 F.3d at 1094 (quoting United States v. Verdugo-Urquidez, 856 F.2d 1214, 1234 (9th Cir. 1988) (Wallace, J., dissenting), *rev'd*, 494 U.S. 259 (1990)).

[64] *Verdugo-Urquidez*, 856 F.2d at 1234.

[65] *See* United States v. Guitterez, No. CR 96-40075 SBA, 1997 U.S. Dist. LEXIS 16446 (N.D. Cal. Oct. 14, 1997), at *11 ("However, as the Ninth Circuit noted in [*Barona*], the Supreme Court has yet to determine whether [undocumented immigrants] residing within the United States are entitled to the protections of the Fourth Amendment.").

> significant voluntary connection with the United States." The salient issue in this case, therefore, is whether defendant Guitterez has developed substantial connections with this country by voluntarily assuming the societal obligations imposed upon "the people of the United States."[66]

The *Guitterez I* court applied this test by reviewing Guitterez's declaration, which provided evidence of the following connections to the United States, despite his undocumented status: (1) Guitterez had immigrated to the United States from Mexico in 1985; (2) he had been married at the time to a legal permanent resident; (3) he had a child who was born in the United States in 1993; (4) he had a California driver's license; (5) he had received and paid for three traffic tickets; (6) he had lived in California for more than ten years; and (7) he had paid sales and use taxes on various items such as gas, food, clothing, and other goods necessary to support himself and his family.[67]

The court rejected these various connections as insufficient, for five reasons.[68] First, Guitterez's twelve-year residence in the United States and ten-year sojourn in California were nullified by the court because of his illegal presence in the country.[69] If anything, the court reasoned, Guitterez's undocumented and undetected presence over a long period of time suggested that he had not established sufficient connections to the United States.[70] Second, while Guitterez's family ties to a child and spouse lawfully in the United States were voluntary, they were not deemed significant absent a showing that entering into these relationships constituted a choice to "'shoulder the burdens that [citizens] must bear.'"[71] Third, the court stated that none of Guitterez's proffered connections established that he had "voluntarily accepted any significant societal obligation while in the United States."[72] Specifically, the court dismissed Guitterez's payment of sales and use taxes as mere compliance with a general edict to pay incidental tariffs imposed on all individuals

---

[66] *Id.* at *16–*17 (citation omitted) (quoting *Verdugo-Urquidez*, 494 U.S. at 271).

[67] *See id.* at *17–*18.

[68] *See id.* at *18.

[69] *See id.*

[70] *See id.* at *18–*19.("Indeed, being able to reside in this country for a substantial period of time without detection evidences that the defendant has not, in fact, established significant connections to the national community.").

[71] *Id.* at *19 (quoting United States v. Barona, 56 F.3d 1087, 1093 (9th Cir. 1995)). Interestingly, the court never specified what it meant by "burdens that [citizens] must bear." This language was lifted from Judge Wallace's *Barona* opinion, which he in turn lifted from his own dissent in the Ninth Circuit's *Verdugo-Urquidez* decision. In his *Verdugo-Urquidez* dissent, Judge Wallace used this language to summarize his reading of precedent describing the relationship between the United States and noncitizens, and so he never clearly defined this cryptic phrase. *See* United States v. Verdugo-Urquidez, 856 F.2d 1214, 1236 (9th Cir. 1988) (Wallace, J., dissenting).

[72] *Guitterez I*, 1997 U.S. Dist. Lexis 16446, at *19.

who purchase goods and services in the United States.[73] Fourth, Guitterez's California driver's license was deemed an insufficient connection because he had failed to show that he had paid taxes or fees to the Department of Motor Vehicles, which would have indicated his contribution to the maintenance and repair of state roads.[74] Fifth, the court minimized Guitterez's payment of the three traffic tickets by stating that they paled in comparison to his undocumented status and his alleged drug crimes.[75] With these five points, the *Guitterez I* court dismissed all of Guitterez's connections to the United States, concluding that, because he had failed to demonstrate a "significant voluntary connection" with the United States, Guitterez could not "seek the protection of the Fourth Amendment in the instant case."[76]

The district court revisited the issue of Guitterez's Fourth Amendment standing three months later in *Guitterez II*.[77] In this latter opinion, the district court had a change of heart with respect to the applicability of the significant voluntary connections test. Re-reading both *Barona* and *Verdugo-Urquidez*, the *Guitterez II* court decided that, given that the test had appeared only in dicta as applied to a domestic search, it did not have sufficient appellate guidance as to when or how to apply the test.[78] Given this uncertainty, the court decided to adhere to the existing presumption that undocumented immigrants have standing to assert Fourth Amendment violations.[79] Adjudicating Guitterez's motion on its merits, the *Guitterez II* court suppressed the evidence obtained during and after the residential search, but not the evidence obtained during the traffic stop.[80]

Decisions such as *Guitterez I* represent a danger to the basic right to be free from unreasonable government searches and seizures. Part I.B of this Article details why, despite the *Guitterez* court's ultimate restoration of Fourth Amendment rights to the undocumented immigrant before it, immigration scholars should care about this danger. Specifically, Part I.B shows how decisions like *Guitterez I* incorrectly decide when to confer rights by focusing on degrees of connection to or membership in the United States polity, rather than on the inherent right of all people to be free from unreasonable government intrusion by virtue of their individual personhood.

---

[73] *See id.*
[74] *See id.* at *20.
[75] *See id.* at *21.
[76] *Id.* at *21–22.
[77] United States v. Guitterez, 983 F. Supp. 905, 910 (N.D. Cal. 1998).
[78] *See id.* at 916.
[79] *See id.*
[80] *See id.* at 916–23.

B. The Problem with the Significant Voluntary Connections Test

Although it was ultimately vacated, the *Guitterez I* decision essentially created a per se rule with respect to undocumented immigrants' Fourth Amendment rights: under the significant voluntary connections test, an undocumented immigrant's illegal residence in the United States vitiates any legitimate connections the person may have with this country. The five reasons offered by the *Guitterez I* court for rejecting the significance of all of Guitterez's connections illuminate the court's real basis for analysis: that Guitterez was an undocumented immigrant and, therefore, could not have had a legitimate connection to the United States.[81] All of Guitterez's examples of significant voluntary connections—his family ties, his payment of taxes, his acquisition of a valid driver's license—were negated by his undocumented presence in the United States.[82] The court concludes as much in its summary:

> At bottom, the Court finds that [Guitterez] has failed to demonstrate that he has a "significant voluntary connection" with the United States. There is no evidence that [Guitterez] has shouldered the responsibilities of contributing, through taxes or otherwise, to the health, education and welfare of the citizens of this country—an obligation generally imposed on every other lawful resident. *At most, defendant has established that he has been successful in avoiding detection by the immigration authorities, thereby facilitating his residence in this country for the past twelve years.*[83]

At one level, the court's reasoning is appealing: undocumented immigrants should not be able to claim lengthy, well-established connections with the United States when they are not legally entitled to be in the country in the first place. Thus, even though he might have been in this country much longer than a tourist on vacation (who is legally present) in the United States,[84] Guitterez's length of stay was automatically nullified as a factor because of his illegal presence in the country. Aside from encouraging compliance with the law generally, the *Guitterez I* holding would have created a disincentive for noncitizens to immigrate to the United States without the proper documentation. If a right as important as the Fourth Amendment protection against searches and seizures could be withheld from persons "illegally" present in the United States, then

---

[81] *See Guitterez I,* 1997 U.S. Dist. LEXIS 16446, at *21–22.

[82] *See id.*

[83] *Id.* (emphasis added) (internal citation omitted).

[84] Tourists typically need to apply for B-1 visitors' visas for entry into the United States for a temporary period. INA § 101(a)(15)(B) (1998); *see also* LEGOMSKY, *supra* note 24, at 273–74 (describing B-1 visitor status).

such persons would have a strong interest in pursuing only legal means of entry.

This analysis, however enticing, fails to persuade for two reasons. First, whether one is legally or illegally in the United States is less an issue of morality than an issue of public policy. Specifically, whether one's status is legal or illegal upon arrival in the United States without a visa may depend upon one's country of origin. For example, a temporary business visitor from Canada may enter the United States without a valid U.S. visa, while a Mexican national in the same situation may not.[85] Thus, if both the Canadian and Mexican immigrants were to enter the United States without visas, the Canadian immigrant would be deemed legal while the Mexican immigrant would not.[86] In addition, the government has, on occasion, granted amnesty to undocumented immigrants by allowing them to apply for citizenship despite their illegal status.[87] When it is politically expedient to do so, the government is willing to compromise the rigid categorization of legal versus illegal aliens.[88] Ultimately, the *Guitterez I* court's strong presumption of the immorality of an undocumented immigrant's stay in the United States makes little sense given the sometimes blurry distinctions between legal and illegal presence in the United States.[89]

---

[85] *See* North American Free Trade Agreement Implementation Act § 341(a), Pub. L. No. 103-82, 107 Stat. 2057 (1993).

[86] Even after the successful passage of the North American Free Trade Agreement in 1992, the United States still requires a visa or other immigration documentation from temporary business visitors from Mexico but not from Canada. *See* Harry J. Joe, *Temporary Entry of Business Persons to the United States Under the North American Free Trade Agreement*, 8 GEO. IMMIGR. L.J. 391, 399–400 (1994); *see also* Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937 (1994); Gerald A. Wunsch, *Why NAFTA's Immigration Provisions Discriminate Against Mexican Nationals*, 5 IND. INT'L & COMP. L. REV. 127 (1994).

[87] Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986); *see also* MAURICE A. ROBERTS & STEPHEN YALE-LOEHR, UNDERSTANDING THE 1986 IMMIGRATION LAW (1987).

[88] Indeed, the current INA, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.), provides for the cancellation of removal (previously, deportation) of a permanent resident who has resided continuously in the United States, whether or not the noncitizen has been in the country lawfully. Pursuant to INA § 240A(a)(2), 8 U.S.C. § 1229 (b) (1990), removal can be cancelled if the resident alien "has resided in the United States continuously for 7 years after having been admitted in any status, ..." Hence, a nonimmigrant who overstays her visa prior to adjusting her status to legal permanent residence may arguably count the period of her unlawful residence in the United States towards the seven-year period as long as her stay was continuous. *See* LEGOMSKY, *supra* note 24, at 473 (describing a hypothetical case). Thus, to the extent that the immigration code specifically allows noncitizens to count their years of unlawful presence to qualify for Section 240A relief, they should also be able to count such unlawful presence in situations where Fourth Amendment standing is at stake.

[89] One could argue that the amnesty provisions in the INA were simply temporary measures to stem the tide of undocumented immigration and that generally speaking the United States favors documented immigration. Moreover, one might contend that there is a rational basis for requiring Mexican nationals to acquire visas, while not requiring Canadians to do the same, because many more Mexicans tend to stay longer than permissible.

Second, and more significant, is the court's misguided reliance on the significant voluntary connections test set forth in *Verdugo-Urquidez* and *Barona*. Using the significant voluntary connections test to determine Fourth Amendment standing incorrectly shifts the focus from the Amendment's purpose of deterring unlawful government conduct (a purpose the Supreme Court in *Verdugo-Urquidez* acknowledges)[90] to allocating rights to individuals based on their relationship with the United States. The significant voluntary connections test achieves this paradigm shift, first, by highlighting the textual differences between "the people" protected by the Fourth Amendment and the "person" or "the accused" protected by the Fifth and Sixth Amendments, respectively.[91] The test then examines the bonds between the noncitizen and the United States as a means of determining whether the Fourth Amendment protects the foreigner.[92] Although Rehnquist never specifically described the factors that the trial court should review to determine whether one's ties are "significant" and "voluntary," or "substantial," the *Guitterez I* court took it upon itself to apply this indeterminate test.[93]

Even more objectionable than its indeterminacy is the test's wrongheaded approach towards Fourth Amendment law. The Supreme Court's significant Fourth Amendment decisions tend to focus on whether a person has a reasonable expectation of privacy or whether a search was conducted reasonably, rather than on whether a certain individual or class of individuals can claim Fourth Amendment protection in the first instance. In standard cases, substantive Fourth Amendment claims turn not on the identity of the person claiming protection, but on the sufficiency of that person's privacy interest in the place searched.[94] Thus, by creating an ob-

---

While the second argument might justify the reason for the different treatment, the first argument regarding amnesty certainly undercuts the idea that amnesty policies are based on morality rather than practicality.

[90] *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 266 (1990).

[91] *Id.* at 265–66.

[92] *See id.* at 271 ("[Noncitizens] receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.").

[93] United States v. Guitterez, No. 96-40075 SBA, 1997 U.S. Dist. LEXIS 16446, at *16–17 (N.D. Cal. Oct. 14, 1997).

[94] "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz v. United States, 387 U.S. 347, 351 (1967); *see also* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE 113 (2d ed. 1986) ("The Fourth Amendment only protects 'reasonable expectations of privacy' from government intrusion.").

Scott Sundby notes that many modern Fourth Amendment cases involve balancing the interests of the government in law enforcement and the individual's privacy interests, often to the detriment of the individual. *See* Scott Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1764 & n.44 (1994). However, these cases also presume that the individual has a Fourth Amendment right to assert, which differs from the *Guitterez I/Barona* approach, under which the undocumented immigrant must first prove that she is entitled to Fourth Amendment protection before the balancing of competing interests applies. Some might argue that

stacle to standing in the guise of the significant voluntary connections test for a select group of persons, *Guitterez I*, *Barona*, and *Verdugo-Urquidez* erode the Fourth Amendment's objective of deterring unreasonable government conduct.

Because the Fourth Amendment would protect only some individuals under the *Guitterez I/Barona* approach, it would create an incentive for government to be more intrusive in its efforts to investigate undocumented immigrants, and possibly documented nonimmigrants, accused of criminal activity. Suppose, for example, that the leadership of a suspected drug ring is composed of three Europeans—one legal permanent resident, one temporary nonimmigrant holding a valid college student visa, and one undocumented immigrant—and that all three have been arrested on the basis of evidence uncovered during an illegal search of their joint business office. Under the *Guiterrez I* analysis, each defendant's ability to raise a Fourth Amendment challenge would vary depending upon her immigration status. Presumably, the legal permanent resident would have no problem asserting her right to be free from an unreasonable search because she would be able to demonstrate her significant voluntary connections to the United States—her legitimate business interests, her long time legal residence in the United States, and so forth.[95] The undocumented immigrant would likely be unable to claim standing because any legitimate connections would be negated by her undocumented status.[96]

---

the Supreme Court's focus on *how* the Fourth Amendment applies rather than *whether* it applies to protect a defendant stems from the fact that most Fourth Amendment cases involve citizens, thereby obviating the need for the Court to determine whether the provision applies to noncitizens. However, prior to Rehnquist's pronouncements in *Verdugo-Urquidez*, the Court had long assumed that the Fourth Amendment applied to noncitizens. *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032 (1984). Indeed, this is precisely why Rehnquist's *Verdugo-Urquidez* opinion is so troubling: because he gave credence to the "significant voluntary connections" test, Rehnquist created an opportunity for lesser tribunals such as the *Guitterez I* court to deny undocumented immigrants Fourth Amendment rights by ruling that their foreign status precludes courts from reaching a decision on the merits of their constitutional claim.

[95] Of course, in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the defendant's status was one of legal permanent residence and yet he was denied Fourth Amendment protection. *See supra* note 53 and accompanying text. However, *Verdugo-Urquidez* involved an extraterritorial search. *See* 494 U.S. at 259. Eric Bentley suggests that the Rehnquist plurality opinion in *Verdugo-Urquidez* limiting the Fourth Amendment's reach to domestic searches lacked the support of a majority of the Court:

> Thus, only four Justices stood behind the broad proposition that Chief Justice Rehnquist advanced: that the Fourth Amendment terminates at the water's edge for all except United States citizens and resident aliens. Seven Justices (all except Brennan and Marshall) supported the far more limited proposition that the Amendment's warrant clause is inapplicable to searches of noncitizens abroad.

Bentley, *supra* note 18, at 361.

Thus, even post-*Verdugo-Urquidez*, there remains support for the idea that extraterritorial searches are subject to fewer constitutional restrictions than domestic ones.

[96] *See Guitterez I*, 1997 U.S. Dist. LEXIS 16446, at *17–18.

The remaining defendant, the international student, would be in a middle ground. Would her connections be more like those of the permanent resident or those of the undocumented immigrant? The indeterminacy of this person's protection under the Fourth Amendment is troubling.

The trial court would be able most effectively to weigh the noncitizens' Fourth Amendment claims by adjudicating them on their merits rather than by hiding behind the doctrine of standing, a procedural smoke screen parading as a legitimate constitutional device. Because all three of the noncitizens' claims to the business property would involve similar substantive issues, it would behoove the presiding court to take the matters concurrently, ruling on the merits of each argument and achieving consistent outcomes. Proceeding in this way would ensure that law enforcement officers would not be tempted to engage in constitutional violations knowing that their undocumented immigrant targets, and possibly their temporary nonimmigrant targets, would likely have no standing to raise a Fourth Amendment claim.[97]

In sum, application of the *Guitterez I/Barona* significant voluntary connections test to undocumented immigrants' domestic Fourth Amendment claims could produce several unjust consequences. Although the test would encourage compliance with the immigration laws, it would create that incentive in the midst of a system that burdened some immigrants more than others, depending upon their countries of origin. In addition, creating distinctions in standing among noncitizens would dilute the Fourth Amendment's deterrent effect on law enforcement, effectively permitting the government selectively to target certain vulnerable undocumented immigrants and temporary nonimmigrants for whom compliance with the significant voluntary connections test might be difficult.

Part II of this Article explains why current immigration law doctrine provides little relief to the aggrieved undocumented immigrant seeking to assert a Fourth Amendment claim. Indeed, because of the Supreme Court's long-standing belief in the plenary power of Congress over immigration law, current immigration doctrine would likely serve as a shield to justify the *Guitterez I/Barona* significant voluntary connections test rather than as a sword to dismantle it.

---

[97] While *Guitterez I, Barona,* and *Verdugo-Urquidez* all raise the possibility of an undocumented immigrant's fulfilling the "significant voluntary connections" test, the actual application of the test in *Guitterez I* leaves little hope that a future trial court will count one's unlawful presence or any relational ties to the U.S. during that period as sufficient to trump the perception that a lawbreaker should not profit from her misdeeds. *See Guitterez I,* 1997 U.S. Dist. LEXIS 16446, at *16–22; United States v. Barona, 56 F.3d 1087 (9th Cir. 1995); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

II. Why the Current Immigrants' Rights Law Would Support the *Guitterez II/Barona* Approach: The Tyranny of the Plenary Power Doctrine

Since the *Chinese Exclusion Case*,[98] the Supreme Court has affirmed time and again that the Congress has plenary power—virtually unbridled discretion—to formulate immigration policy as it deems fit. In addition to noting the Constitution's mandate that Congress create a uniform rule of naturalization,[99] the Court has located the legislature's power over noncitizens in Congress's implicit foreign relations power.[100] While many commentators have called for the abandonment of the plenary power doctrine,[101] the idea of Congress's unfettered command over immigration policy has remained remarkably resilient.[102]

While the Court has applied a rational basis test to federal alienage classifications outside of the strict immigration context,[103] rarely has the Court struck down any legislation on rational basis grounds,[104] opting instead to defer to the law-making branches of government if "any plausible reason" is proffered for the classification.[105]

Because the Supreme Court defers regularly to Congressional initiatives in the area of immigration and immigrants' rights, it is not surprising that the Court would also choose to favor the government over the undocumented immigrant when it comes to the Fourth Amendment.[106] To

---

[98] Chae Chan Ping v. United States, 130 U.S. 581 (1889).

[99] U.S. CONST. art. I, § 8.

[100] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318–19 (1936).

[101] *See, e.g.*, Romero, *supra* note 7; Wu, *supra* note 7.

[102] *See, e.g.*, Schuck, *supra* note 7, at 3 ("Classical immigration law proved to be remarkably durable."); Legomsky, *Ten More Years*, *supra* note 7.

[103] *See* Mathews v. Diaz, 426 U.S. 67 (1976); *see also* Mendoza v. INS, 559 F. Supp. 842 (W.D.Tex. 1982).

> No evidence presented even suggested that the INS and EPPD formulated their plan for the area control operation for the purpose of denying any Mexican-American equal protection of the laws. Discriminatory intent must be shown to recover for denial of equal protection. Discriminatory intent has not been shown; therefore, Plaintiffs are not likely to succeed in the merits of their equal protection claim.

Id. at 850 (internal citations omitted).

[104] *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996) (holding Colorado state constitutional Amendment Two invalid under rational basis test); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (invalidating city zoning ordinance under rational basis test); Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336 (1984) (invalidating Webster County tax system under rational basis test).

[105] FCC v. Beach Communications, Inc., 508 U.S. 307, 313–14 (1993) ("Where there are 'plausible reasons' for Congress' action, 'our inquiry is at an end.'") (internal citations omitted).

[106] *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (stating that a noncitizen defendant must have significant voluntary connections with the United States before she may avail herself of Fourth Amendment protection to challenge the search of her overseas residences); INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (holding

the extent that legal entry into the United States informs the Fourth Amendment standing principle embodied in the significant voluntary connections test, the Court's deferral to Congress's plenary power over immigration supports and reinforces the membership paradigm implicit in the significant voluntary connections test. Just as the *Guitterez II/Barona* approach to Fourth Amendment jurisprudence would draw a boundary between persons based on whether or not they were lawfully present within the United States, the plenary power doctrine grants Congress the power to draw a similar line between citizens and noncitizens when allocating certain public goods.

Hence, viewing the problem of undocumented immigrants' Fourth Amendment rights through the plenary power prism is an exercise in frustration for those opposed to the significant voluntary connections test. It is not surprising that *Guitterez I* was decided as it was given that the Supreme Court, in addition to sanctioning the ill-defined *Verdugo-Urquidez* significant voluntary connections test, has embraced a view that immigration law is less about immigrants' rights than it is about maintaining congressional power. Put another way, both the significant voluntary connections test and the plenary power doctrine privilege membership connections to the United States polity over the inherent rights of an individual, regardless of immigration status.

In an effort to escape the plenary power prison, Part III of this Article offers an alternative to the current approach by examining changes in traditional premises liability law that have emphasized the humanity of all injured plaintiffs. As discussed below, several states have abandoned the traditional landowner/entrant classification scheme for determining premises liability, opting instead for a reasonableness approach that not only comports with other areas of negligence law, but also correctly reestablishes the presumption that all plaintiffs deserve protection from unreasonable conduct. Immigration scholars might find this reasonableness approach useful as a method of critiquing the significant voluntary connections test because, like the traditional premises liability classifications, the significant voluntary connections test emphasizes the individual's legal status in society rather than her inherent right to be protected from unreasonable conduct.

---

that the Fourth Amendment's exclusionary rule does not exclude evidence used in civil deportation hearings).

III. A Tort Law Alternative to the *Guitterez II/Barona* Approach: A Question of Reasonableness

A. The Tort Law/Immigration Law Parallel

Just as immigration law and immigrants' rights law[107] classify noncitizens in order to determine what rights the U.S. government owes them, traditional tort law assigns rights to land entrants against landowners based on an entrant's status. In tort law, there are three general approaches to the question of landowner liability for harms suffered by persons entering the owner's property.[108] Most states follow the common law tradition of examining the status of an entrant to determine landowner liability ("Model 1"). In this model, a landowner would owe a duty of reasonable care towards an *invitee* (someone permissibly on the property for the landowner's benefit),[109] but would generally owe a lesser duty, such as the duty not to act willfully or wantonly, to a *licensee* (someone permissibly on the property for his or her own benefit)[110] or a *trespasser* (someone on the property without permission).[111]

Some states, notably California[112] and New York,[113] have abolished this traditional scheme of entrant classification in favor of a reasonable person standard. This standard assumes that all entrants have equal status as persons, and that the foreseeability of harm to the entrant, rather than the entrant's status as an invitee, licensee, or trespasser, should determine the landowner's liability ("Model 2").

A third group of states has chosen a middle ground by merging the invitee and licensee classifications but retaining the separate trespasser distinction ("Model 3"). These states see invitees and licensees as those

---

[107] *Immigration law* refers to the law governing the admission and exclusion of noncitizens; *immigrants' rights law* describes general laws that affect immigrants' rights while they reside in the United States. For example, the law regarding which visa a noncitizen must have to enter the United States is an immigration law concept, while the law requiring that the noncitizen be entitled to a jury trial while in the United States is an immigrants' rights law idea. In previous writings, the author has used the terms *immigration law* and *alienage law* to draw similar distinctions. *See, e.g.*, Romero, *supra* note 7, at 427.

[108] *See* Appendix *infra* for a survey of the governing premises liability law standards in the fifty states and the District of Columbia.

[109] *See* KEETON ET AL., *supra* note 25 § 61, at 425 & n.89 (5th ed. 1984) ("The occupier is not an insurer of the safety of invitees, and his duty is only to exercise reasonable care for their protection.")

[110] *See id.* § 60, at 412.

[111] *See id.* § 58, at 393. *See, e.g.*, Gladon v. Greater Cleveland Regional Transit Auth., 662 N.E.2d 287, 293 (Ohio 1996) (applying the willful or wanton standard to both licensees and trespassers). Keeton et al., however, note that generally an entrant gains more protection as her status improves from trespasser to licensee to invitee. *See* KEETON ET AL., *supra* note 25, § 58, at 393.

[112] *See* Rowland v. Christian, 443 P.2d 561 (Cal. 1968) (partially superceded by statute in two narrow and specific situations).

[113] *See* Basso v. Miller, 352 N.E.2d 868 (N.Y. 1976); *see also* Scurti v. City of New York, 354 N.E.2d 794 (N.Y. 1976).

with permission to enter the premises, while trespassers have no permission. Accordingly, this third group of states requires a lesser duty of landowners towards trespassers, but imposes a reasonable care standard with respect to invitees and licensees.[114] Figure 1 below illustrates the Model 1 and Model 3 classification schemes.

FIGURE 1: PREMISES LIABILITY UNDER CLASSIFICATION MODELS 1 & 3

Entrant Classification	*Entrant's Protection*
Invitee	Duty of Reasonable Care
Licensee	Model 3—Duty of Reasonable Care Model 1—Duty to Avoid Willful/Wanton Acts
Trespasser	Duty to Avoid Willful/Wanton Acts

In the context of immigrants' rights law, a similar tripartite classification scheme characterizes the *Guitterez I/Barona* approach to allocating Fourth Amendment rights to noncitizens. Under that approach, undocumented immigrants would be required to establish significant voluntary connections to the United States prior to asserting Fourth Amendment rights. Undocumented immigrants might never meet that burden, since the *Guitterez I* court found none of the undocumented immigrant defendants' proffered connections sufficient to confer Fourth Amendment standing.[115] The court even surmised that Guitterez' long-time domicile in California showed the *lack* of a connection to the United States, since during that time he had evaded detection by immigration officials.[116] Such a ruling implies that undocumented immigrants may never be able to use their length of stay in the United States as a basis for meeting the significant voluntary connections test. Indeed, if the *Barona* court's dicta limiting the applicability of the Fourth Amendment to "the people" (to citizens at home and abroad, and to legal permanent residents within the United States) prevails, undocumented immigrants will likely never be able to assert Fourth Amendment protections at all.[117] Then, undocumented immigrants would be left with only Fifth Amendment substantive due process protections against truly egregious searches—for example,

---

[114] *See* Vitauts M. Gulbis, Annotation, *Modern Status of Rules Conditioning Landowner's Liability upon Status of Injured Party as Invitee, Licensee, or Trespasser*, 22 A.L.R. 4th 294 (1981).

[115] *See* United States v. Guitterez, No. CR 96-40075 SBA, 1997 U.S. Dist. LEXIS 16646, at *17 (N.D. Cal. Oct. 14, 1997).

[116] *Id.*

[117] United States v. Barona, 56 F.3d 1087, 1094 (9th Cir. 1995) (quoting in part United States v. Verdugo-Urquidez, 856 F.2d 1214, 1234 (9th Cir. 1988) (Wallace, J., dissenting)).

confessions obtained through physical brutality[118]—without any Fourth Amendment relief.

Taken together, *Guitterez I* and *Barona*, if followed, would effectively deny Fourth Amendment protections to undocumented immigrants based on their illegal status in the country. In addition, neither *Guitterez I* nor *Barona* discussed the extent to which legal nonimmigrants would be protected by the Fourth Amendment. Accordingly, the matrix of Fourth Amendment rights under the *Guitterez I* and *Barona* decisions would appear as set forth in Figure 2.

FIGURE 2: THE *GUITTEREZ I/BARONA* TEST FOR FOURTH AMENDMENT PROTECTION

Immigration Classification	*Among "The People" per the Fourth Amendment?*	*Level of Protection from Illegal Searches*
Legal Permanent Resident	Probably yes	Fourth and Fifth Amendment protections apply
Legal Nonimmigrant	Unclear	Unclear whether Fourth Amendment applies; Fifth Amendment protection applies
Undocumented Immigrant	Probably no	No Fourth Amendment protection; Fifth Amendment protection applies

Comparing Figures 1 and 2, one notices certain similarities between the two regimes—tort law Models 1 and 3 on one hand, and the *Guitterez I/Barona* Fourth Amendment regime on the other. In both regimes, the protective rights granted to the different classified groups vary depending on each group's legal relationship to the landowner (in tort law) or to the United States (in immigration and immigrants' rights law). Specifically, the landowner's level of care falls from that of reasonable care to simply avoiding willful and wanton acts as the entrant's classification changes from invitee to licensee to trespasser. Similarly, under the *Guitterez I/Barona* model, the noncitizen's Fourth Amendment rights would di-

[118] The Fourteenth Amendment analogue to Fifth Amendment due process protections includes the right to be free from beatings by government agents for the purpose of coercing confessions out of criminal defendants. *See* Brown v. Mississippi, 297 U.S. 278, 285–86 (1936).

minish and reliance upon the Fifth Amendment's substantive due process protections would increase as the immigrant's status changed from legal permanent resident to legal nonimmigrant to undocumented immigrant.

Indeed, the parallels between the two classification systems are striking: the landowner in tort law is analogous to the U.S. government in immigration and immigrants' rights law; the invitee to the legal permanent resident; the licensee to the legal nonimmigrant;[119] and the trespasser to the undocumented immigrant. Furthermore, as illustrated in Figures 1 and 2 above, just as the tort law places a greater burden on the trespasser than on the invitee with respect to any claims each may have against the landowner, immigration and immigrants' rights law likewise confers fewer benefits and protections on the undocumented immigrant than on the legal permanent resident. Figure 3 illustrates this analogy between the two systems.

FIGURE 3: THE TORT LAW/IMMIGRATION LAW PARALLEL

Tort Law: Premises Liability	*Immigration & Immigrants' Rights Law*
Landowner	U.S. Government
Invitee	Legal Permanent Resident
Licensee	Legal Nonimmigrant
Trespasser	Undocumented Immigrant

The utility of this analogy between tort law and immigration and immigrants' rights law extends beyond the parallelism outlined in Figures 1 to 3. Immigration scholars might look to the unitary reasonableness standard in premises liability law—in contrast to traditional landowner/entrant classification schemes—to rethink how they might reconstruct and reinforce the floor of immigrants' Fourth Amendment rights. Part III.B explores that argument in depth by examining the holding in *Rowland v. Christian*, the landmark case in which the California Supreme Court abandoned the traditional entrant classification scheme in favor of a reasonableness approach to premises liability.[120]

---

[119] While the distinction between the invitee and licensee can sometimes be a tenuous one, much of the distinction turns on whether the landowner benefits from the entry—that is, licensees confer no benefit to the landowner and are on the land solely for their own purposes, while invitees confer a benefit to the landowner. *See* DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION 307–08 nn.2(a) & 3 (3d ed. 1997).

From this benefits analysis, the legal permanent resident (like the invitee) confers long-term benefits upon the United States through her labor and purchasing power, while the legal nonimmigrant (like the licensee) benefits largely herself, conferring only incidental benefits to the United States during her temporary visit.

[120] Rowland v. Christian, 443 P.2d 561 (Cal. 1968).

B. Lessons for the Immigration Scholar from Rowland v. Christian

In *Rowland v. Christian*,[121] the California Supreme Court was presented with an ideal set of facts to enable it to depart from the traditional entrant classification scheme in favor of a unitary reasonableness standard. A social guest of Nancy Christian, James Rowland, was injured by a defective faucet in Christian's bathroom.[122] Specifically, nerves and tendons in Rowland's right hand were severed. During Rowland's personal injury action against her, Christian moved for summary judgment, although she acknowledged that she had known of the defective faucet and had reported it to her landlord.[123] The trial court granted Christian's motion, holding that because Rowland was a social guest (and, therefore, a licensee), Christian owed him the duty to refrain only from wanton or willful conduct.[124] Had the applicable standard been one of reasonable care, the trial court probably would have left the determination of liability to the jury, who could have found that Christian owed a duty to inform Rowland of the defective faucet, which she had not done.[125]

On appeal, the California Supreme Court saw through the rigidity of the traditional classification system and rejected its approach.[126] While ruling that entrant status is relevant to determining landowner liability, the court rejected the notion that such status should be outcome determinative.[127] Instead, the court stated that the plaintiff's status as a trespasser, licensee, or invitee was but one factor in the assessment of whether the landowner defendant had acted reasonably under the circumstances.[128] The high court described the traditional tort classification system as contrary to California negligence law, which utilizes a standard of ordinary care.[129] In addition, the court noted that the historical bases for favoring the old classifications had become less persuasive over time, as evidenced by the growing number of exceptions created to accommodate unusual fact scenarios.[130] For example, courts had imposed a duty of due care towards licensees for "active operations" on the defendant's land as an exception to the general willful and wanton rule.[131] Indeed, the

---

[121] *See id.*

[122] *See id.* at 562.

[123] *See id.*

[124] *See id.* at 562–63.

[125] *See id.* at 563. Indeed, the court acknowledged that the ordinary negligence rule adopted in California is that "'[a]ll persons are required to use ordinary care to prevent others being injured as a result of their conduct.'" *Id.* at 564 (internal citations omitted).

[126] *See id.* at 568.

[127] *See id.*

[128] *See id.*

[129] *See* CAL. CIV. CODE § 1714(a) ("Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person.").

[130] *See Rowland*, 443 P.2d at 561, 568.

[131] *Id.* at 565 (citing Oettinger v. Stewart, 148 P.2d 19, 22 (Cal. 1944)).

inflexible nature of the traditional classification system prompted the United States Supreme Court to describe the classes and their exceptions as a "semantic morass" in *Kermarec v. Compagnie Generale.*[132]

In addition to highlighting the classification system's departure from ordinary negligence law and its growing irrelevance and rigidity in modern society, the *Rowland* court also noted that the traditional classifications drew what appeared to be arbitrary distinctions between persons of equal worth for purposes of limiting landowner responsibility in tort.[133] As the court so eloquently stated, "A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission [i.e., a trespasser] or with permission but without a business purpose [i.e., a licensee]."[134] Thus, under *Rowland*, a plaintiff's recovery is based upon the reasonableness of the defendant's actions, rather than upon the plaintiff's status as a trespasser, licensee, or invitee. Put another way, the *Rowland* court primarily assigned liability based on the conduct involved, not on the plaintiff's legal status.

Following *Rowland*, several jurisdictions have also abandoned the traditional entrant classification scheme.[135] The relevant premises liability decisions from such jurisdictions serve as useful case studies for immigration scholars seeking new ways to structure immigration policy so that it strikes a fair balance between polity membership and personhood. Specifically, Part III.C examines how observations gleaned from the *Rowland* opinion can serve to critique the *Guitterez I/Barona* approach to Fourth Amendment rights.

C. Applying the Rowland *Solution to the* Guitterez I/Barona *Problem: Emphasizing the Value of Personhood*

In *Rowland*, the California Supreme Court emphasized three principles in justifying its dismantling of the traditional entrant classifications: (1) that the traditional scheme was a departure from state negligence law;

---

[132] 358 U.S. 625, 630–31 (1959).

[133] *Rowland,* 443 P.2d at 567–68.

[134] *Id.* at 568.

[135] *See, e.g.*, Basso v. Miller, 352 N.E.2d 868, 873 (N.Y. 1976); Scurti v. New York, 354 N.E.2d 794, 798 (N.Y. 1976). In *Basso*, the New York Court of Appeals followed California's lead by abolishing the traditional land entrant classifications in favor of a unitary due care standard. *Basso*, 352 N.E.2d at 872. *Scurti*, which was decided the same day as *Basso*, added to the analysis by specifying that the traditional classes would be relevant to, but not determinative of, landowner liability. *Scurti*, 354 N.E.2d at 798. In assessing the reasonableness of a landowner's conduct, the court specifically listed three factors that would carry continued significance: (1) whether the injury occurred on the defendant's property; (2) whether the plaintiff entered the land with the defendant's permission; and (3) the age of the plaintiff. *Id.* at 796–99. Thus, in abolishing the traditional system, the New York court simply incorporated the entrant's status as a factor in assessing reasonableness.

(2) that the historical bases for the entrant classes had to be modified in order to adapt to modern conditions; and (3) that the common law classifications drew arbitrary distinctions among humans whose lives are of equal worth.[136]

These lessons have parallels in the critique of the *Guitterez II Barona* approach to the Fourth Amendment rights of undocumented immigrants. First, just as the traditional entrant classifications depart from general negligence law, the significant voluntary connections test departs from traditional Fourth Amendment jurisprudence. As discussed earlier, traditional Fourth Amendment cases focus on the reasonableness of the government's actions, while the significant voluntary connections test focuses on a defendant's status to determine standing to raise a Fourth Amendment claim; while the traditional approach is consistent with the Amendment's purpose of deterring government misconduct, the significant voluntary connections test shifts the focus to the entitlement of individual defendants to protection. In addition, the deprivation of a noncitizen's constitutional rights based on her immigration status is inconsistent with much of the Supreme Court's alienage jurisprudence.[137] In *Plyler v. Doe*, for example, the Court held that children of undocumented immigrants were protected by the Fourteenth Amendment's Equal Protection Clause.[138] Moreover, the Court has found that the Fifth and First Amendment protections conferred upon citizens apply to noncitizens as well.[139]

Second, just as tort law must adapt to changing conditions, Fourth Amendment law must do the same. The *Guitterez II Barona* approach is derived from Chief Justice Rehnquist's textual analysis of the Fourth Amendment in *Verdugo-Urquidez*, which led him to conclude that the Fourth Amendment applies to a more limited group than the First, Fifth, and Fourteenth Amendments. Rehnquist also contended that limitations on the conferral of rights are appropriate because, even in the First and Fifth Amendment cases granting constitutional protection to noncitizens, the noncitizens in question were legal permanent residents, and therefore had significant voluntary connections with the United States.[140] While this textual and historical analysis of the Fourth Amendment is a starting point for determining the Amendment's scope, it should not be the end point. Indeed, in articulating the purposes of the Fourth Amendment, the Court originally stressed the preservation of judicial integrity as a main goal of the exclusionary rule, the primary remedy for Fourth Amendment

---

[136] *Rowland*, 443 P.2d at 566–67; *see also* text accompanying notes 131–133.

[137] *See* cases cited *supra* note 23.

[138] 457 U.S. 202 (1982); *see also* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that the Fourteenth Amendment protects legal permanent residents).

[139] *See* Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) (holding that a legal permanent resident is a "person" within the context of the Fifth Amendment); Bridges v. Wixon, 326 U.S. 135 (1945) (holding that legal permanent residents have First Amendment rights).

[140] *See supra* text accompanying notes 44–59. *See also* United States v. Verdugo-Urquidez, 494 U.S. 259, 265–66 (1960).

violations.[141] Over time, however, the goal of deterring unreasonable government action gained popularity and became the primary rationale for the exclusionary rule.[142]

The Court should ask itself whether apportioning Fourth Amendment rights on the basis of citizenship or significant voluntary connections is consistent with modern trends in immigration policy. An examination of such modern trends suggests that it is not. Over time, immigration law has begun to tear down barriers between citizens and noncitizens. In state alienage jurisprudence, for example, the Court has applied strict scrutiny analysis to states' discrimination against noncitizens in the distribution of public benefits.[143] Even within the federal alienage cases, the Court has held Congress to a rational basis standard for legislation that discriminates between noncitizen groups in Medicare disbursements.[144] Furthermore, these cases involving greater scrutiny of government action considered only the distribution of public economic benefits, not the conferral of a constitutional right. If, despite the resilience of the plenary power doctrine, the Court is willing to scrutinize government action closely with respect to the conferral of public benefits, it should be willing to subject government searches and seizures to even closer examination whether or not the target of such action is a citizen. Surely, one's interest in personal liberty outweighs the economic interest in government support.

Third, and perhaps most importantly, the *Guitterez II Barona* significant voluntary connections test draws arbitrary distinctions between people in much the same way that the traditional tort entrant classes do.[145] If the modern goal of Fourth Amendment jurisprudence is to deter the government from unreasonably invading individual privacy,[146] then it should not matter whose privacy—the citizen's or the noncitizen's—is being invaded.[147] Just as the injured tort plaintiff should not be arbitrarily denied recovery depending on her land entrant status, the constitutional grievance suffered by the criminal defendant is just as serious whether or not that defendant is a citizen.

---

[141] The Court believed that allowing tainted evidence to be used at trial would amount to condoning a constitutional violation and would, therefore, compromise the trial's integrity. *See infra* notes 156–157.

[142] *See Verdugo-Urquidez*, 494 U.S. at 265–66.

[143] *See* Graham v. Richardson, 403 U.S. 365 (1971).

[144] *See* Mathews v. Diaz, 426 U.S. 67 (1976).

[145] *See* Rowland v. Christian, 443 P.2d 561, 566–67 (Cal. 1968); *see also supra* Part III.A.

[146] *See infra* note 156.

[147] Current equal protection doctrine requires that injured plaintiffs show an intent to discriminate prior to allowing a remedy. However, those injured by constitutional violations rarely care whether the perpetrator intended harm; they simply want recompense. For example, polls reveal that many African Americans see racism as a pervasive, institutional condition in modern America, whether intended or not. *See* DAVID CRUMP ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW 593 (3d ed. 1998).

Thus, just as the *Rowland* court incorporated the traditional entrant classifications into its due care approach, courts should bypass the standing requirement imposed upon noncitizens by the significant voluntary connections test in favor of adjudicating the merits of Fourth Amendment claims. This unitary approach to Fourth Amendment rights would avoid the problem of the slippery slope. Rather than trying to discern whether a defendant has standing under the significant voluntary connections test *ex ante*, trial courts would address each search and seizure on its merits, balancing the defendant's right to privacy against the government's need to secure evidence for the prosecution of a case.

A unitary approach that grants Fourth Amendment protection to all noncitizens would also be prudent foreign policy. As Justice Brennan suggested in his *Verdugo-Urquidez* dissent, subjecting noncitizen defendants to U.S. criminal sanctions should create an obligation upon the courts to accord such defendants corresponding protections of U.S. criminal procedural law.[148] This "mutuality"[149] of obligation would engender trust among the world's nations and would signal the United States' commitment to due process for foreigners subject to its law. In addition, affording noncitizen defendants the protection of American constitutional law would be consistent with the Universal Declaration of Human Rights, which provides similar protections against unlawful searches and whose provisions the U.S. Supreme Court has invoked on at least one occasion.[150]

In addition to recognizing the three principles emphasized in *Rowland*, a presumption of standing to assert Fourth Amendment claims would break down existing race-based stereotypes of the undocumented immigrant as the "other," such as the unfortunate but pervasive image of the dark-skinned "illegal alien" from Mexico[151] who crosses the border with his pregnant wife to live off welfare and to avail himself of the birthright citizenship of his child after her arrival in this world.[152] Ac-

---

[148] *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 284–85 (1960) (Brennan, J., dissenting). *See also* NEUMAN, *supra* note 18, at 107–17 (discussing Brennan's opinion and the concept of "mutuality").

[149] *Verdugo-Urquidez*, 494 U.S. at 284–85 (Brennan, J., dissenting).

[150] In *American Federation of Labor v. American Sash & Door Co.*, 335 U.S. 538, 549 n.5 (1948), Justice Frankfurter invoked Article 20(2) of the Universal Declaration in his concurrence supporting the Court's decision to uphold a state law designed to protect nonunion members. Article 12 of the Universal Declaration provides that "[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to protection of the law against such interference or attacks." G.A. Res. 217(III)A, U.N. Doc. A/810, art. 12 (1948) at 71.

[151] *See* Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1545–46 (1995) (describing the stereotypical "illegal alien" as being perceived to be a Mexican male).

[152] This pervasive negative image of the parents conferring birthright citizenship upon their unborn child by illegally entering the United States led to the introduction of a House bill calling for a constitutional amendment to restrict birthright citizenship to children of

knowledging that the Fourth Amendment should deter all governmental overreaching regardless of the citizenship of the accused would help to bridge the gap between the presumptively white or black American and the presumptively brown or yellow "alien."[153] Put another way, presuming Fourth Amendment standing for all persons regardless of citizenship would be another step towards recognizing the personhood of citizens and noncitizens alike. To the extent that race and alienage stereotypes intersect, breaking down the citizen/noncitizen barrier likewise dismantles the majority/minority racial divide. For example, subjecting law enforcement officers to a single Fourth Amendment standard regardless of the target's citizenship would assure that officers inclined to harass minority citizens with "foreign" appearances or "foreign-sounding names"[154] would be fully deterred.

Some may contend that the tort law/immigration law parallel would be most useful as a hypothetical construct or intellectual exercise, since the goals of private tort law differ substantially from those of constitutional law and immigration policy. Specifically, tort law is premised on the notion of reasonable compensation for injured plaintiffs, while public constitutional law is about the preservation of individual rights. However, both types of law seek to deter undesirable conduct. In tort law, one of the chief objectives of the negligence standard is to achieve the optimal level of accidents in society by assigning liability to deter unreasonable conduct.[155] Similarly, in the Fourth Amendment context, the Supreme

---

documented noncitizens. *See* H.R.J. Res. 117, 103d Cong. (1993). *See also* NEUMAN, *supra* note 18, at 165–87; Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54 (1997).

[153] *See, e.g.*, Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome," in* ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 1087, 1098 (Hyung-Chan Kim ed., 1982) (noting that, unlike blacks or whites, Asians are presumed to be foreigners). As the United States becomes more racially diverse, the concern about identifying likely undocumented immigrants may seem to be waning. However, following the passage of Proposition 187 in November 1994, people across California appointed themselves "immigration police" and reported many Latinos to the INS because they allegedly fit the profile of an undocumented immigrant. *See, e.g.*, Demetria Martinez, *Hatred Rumbles Along New Fault Line Called Proposition 187*, NAT'L CATHOLIC REP., Feb. 10, 1995, at 18 (recounting incidences of harassment of Latino Americans in the wake of Proposition 187).

[154] *See, e.g.*, Orhorhaghe v. INS, 38 F.3d 488 (9th Cir. 1994) (holding that arrest of noncitizen based solely on his foreign sounding name was an egregious violation of the Fourth Amendment); *see also* Joseph J. Migas, *Exclusionary Rule Available in Civil Deportation Proceedings for Egregious Fourth Amendment Violations*, 9 GEO. IMMIGR. L.J. 207 (1995) (analyzing the *Orhorhaghe* case).

[155] Judge Richard Posner asserts, and many would agree, that the foundation of tort law lies in the theory of negligence as defined by the standard of ordinary care. Richard A. Posner, *A Theory of Negligence, in* PERSPECTIVES ON TORT LAW 15 (Robert L. Rabin ed., 1995). The rules of negligence reflect cost/benefit assessments by society. Judge Learned Hand, for example, formulated a simple algebraic test to determine the proper balance of costs and benefits. In a negligence case, three things should be measured: the magnitude of the loss; the probability of the accident occurring; and the burden of taking precautions that would avert that accident. *See id.* at 18.

Court has recognized the deterrence of unreasonable governmental conduct as an aim of both the exclusionary rule[156] and the threat of *Bivens* suits.[157] Moreover, in both the *Rowland* approach to tort liability and the *Guitterez II* decision to rule on the merits of the Fourth Amendment claim, the courts relied on reasonableness standards—due care in *Rowland* and a reasonable search in *Guitterez II*[158]—to strike the proper balance between the parties' legitimate interests.

---

[156] The exclusionary rule prohibits the fruits of an unreasonable search and seizure from admission into evidence in a criminal case. *See* LAFAVE, *supra* note 22, at 1.1(a); *see also* Weeks v. United States, 232 U.S. 388 (1914) (creating the exclusionary rule).

The primary purpose of the rule has evolved from preserving judicial integrity to deterring illegal conduct of law enforcement officials. *See* 1 JOHN WESLEY HALL, JR., SEARCH AND SEIZURE § 4:6 (2d ed. 1991). Early application of the exclusionary rule focused on limiting the perceived legitimation of unconstitutional conduct by courts. *See id.* (citing Mapp v. Ohio, 367 U.S. 643 (1961); Olmstead v. United States, 277 U.S. 438 (1928); *Weeks*, 232 U.S. at 383). If evidence seized in violation of constitutional guarantees were to be admitted, the trial court's acceptance of such evidence "would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution[.]" HALL, *supra*, § 4:7 (citing *Weeks*, 232 U.S. at 394). However, over time, this early concern with judicial integrity gave way to the deterrence of unreasonable searches and seizures as the dominant purpose of the exclusionary rule. *See* LAFAVE, *supra* note 22, at 1.1(f). As the court stated in *Elkins v. United States*, "[t]he rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it." 364 U.S. 206, 217 (1960). The objective of the exclusionary rule is not to compensate the defendant or to penalize the offending officer; instead, the "emphasis is forward." *Id.*

One might argue that the deterrence rationale is not persuasive in the great majority of cases involving immigrants because the exclusionary rule has been held by the Supreme Court to not apply in deportation hearings. *See* INS v. Lopez-Mendoza, 468 U.S. 1032 (1980). However, this Article is most concerned with the applicability of the rule in criminal law contexts given the Court's own statements in *Lopez-Mendoza* distinguishing between civil deportation hearings and criminal proceedings. *See id.* at 1040–41.

[157] Because the exclusionary rule "is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal," LAFAVE, *supra* note 22, § 1.2(b) (quoting Terry v. Ohio, 392 U.S. 1 (1968)), Fourth Amendment guarantees are also enforced through suits for money damages under the *Bivens* rule. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the Supreme Court held that damages may be sought against specific federal agents for violations of the Fourth Amendment. 403 U.S. 388, 397 (1971). This system of monetary compensation differs from the exclusionary rule in at least two ways: it specifically deters individual federal agents rather than creating an evidentiary check that would not be useful should the authorities decide not to prosecute, and it provides direct compensation to the victim rather than a systemic, institutional remedy. *See* LAFAVE, *supra* note 22, § 1.2(b),(c).

[158] The phrase "unreasonable searches and seizures" creates a reasonableness standard with which law enforcement officers must comply. If the search or seizure is unreasonable, the exclusionary rule may bar such evidence. Indeed, the current reasonableness analysis had its genesis in *Katz v. United States*, 389 U.S. 347 (1967), where the Court stated that "the Fourth Amendment protects people, not places." Hon. Charles E. Moylan, Jr., *Introduction* to WILLIAM W. GREENHALGH, THE FOURTH AMENDMENT HANDBOOK 2 (1995). To emphasize this point, Justice Harlan's *Katz* concurrence created a reasonable expectation of privacy standard for defendants asserting their Fourth Amendment freedom. Instead of focusing on whether the defendant enjoys Fourth Amendment protection, the question became whether the defendant possesses a reasonable expectation of privacy. *See id.* at 3. Thus, Harlan's contribution changed the applicability of the Fourth Amendment right from a rigid all-or-nothing standard to a more flexible measure of evaluation based on the defen-

Even assuming the validity of the tort law/immigration law parallel, others may argue that doing away with the Fourth Amendment standing requirement would open the floodgates to nonmeritorious defenses. To the contrary, defense counsel presumably would not raise spurious Fourth Amendment claims if they believed that they could not win on the merits.[159] Furthermore, in the event of an unlikely increase in frivolous claims, the value of protecting constitutional rights might be worth the sacrifice of some judicial resources in order to ensure that justice is served.[160]

Some may submit that the unitary approach to Fourth Amendment law would be "soft" on crime and on undocumented immigration. If the rule of law is meant to encourage law abidance, creating a presumption of standing for all undocumented immigrants would, in one sense, reward illicit activity. Why should immigrants who enter the country illegally and then stand charged with a crime benefit from their actions by being able to challenge searches that would not have taken place but for their illegal activity and illegal presence in the United States?[161] This argument fails for two reasons. First, all criminal defendants are entitled to constitutional criminal procedural protections, such as the right to a fair and impartial jury trial,[162] yet such safeguards do not solely protect criminals.[163] Rather, these rights ensure that all who stand accused are given

---

dant's reasonable expectation of privacy. Today, courts evaluate defendants' Fourth Amendment claims based on the totality of the circumstances, using reasonableness as a guide. *See id.*

[159] For example, federal district courts have the power to sanction wayward attorneys through criminal contempt proceedings. *See* FED. R. CRIM. P. 42 (rule governing criminal contempt proceedings); 18 U.S.C.A. § 402 (1998) (statute regarding contempts that constitute crimes).

[160] The Supreme Court has noted that

> the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Stanley v. Illinois, 405 U.S. 645, 656 (1972).

[161] This was likely the argument underlying the *Guitterez I* court's thinking. Recent immigration law reforms also support this predisposition against criminal noncitizens. For example, the 1996 amendments to the INA added several crime-related grounds for deporting noncitizens. *See* AEDPA, Pub. L. No. 104-132, 110 Stat. 1214, § 440(g)(1)(A) (codified as 8 U.S.C. § 1252 (c) (1996)); IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009, § 306(d) (codified as 8 U.S.C. 1231 (1996)); INA, Pub. L. No. 101-649, 104 Stat. 4978, § 238(a)(1) (codified as 8 U.S.C. 1101 (1990)).

[162] *See, e.g.*, United States v. Pelullo, 14 F.3d 881, 894 (3d Cir. 1994) ("[W]e believe the literal language of the Sixth and Seventh Amendments supports a reading that the right to a jury trial in every criminal prosecution is absolute . . . .").

[163] *See, e.g.*, Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 643 (1996) ("[T]he fair trial right also protects the innocent man from an erroneous verdict of guilt . . . .").

more protection than the empty phrase "presumption of innocence" would otherwise provide.[164] Second, as mentioned earlier, a noncitizen's immigration legal or illegal status is based on factors that favor noncitizens from certain countries over others.[165] It is unpersuasive to impugn someone's moral worth when she might not have been adjudged "illegal" had she arrived from Canada.[166]

A final argument that one might raise against a unitary approach to the Fourth Amendment is that even within tort law, most jurisdictions have retained the traditional entrant classification system or, at the very least, have retained the category of trespasser, the analogue to the undocumented immigrant in the Fourth Amendment context.[167] This suggests that most courts would be unreceptive to an argument for a unitary Fourth Amendment approach that relies on the tort law/immigration law parallel because most states have chosen not to follow the *Rowland* approach advocated here. While this may be a practical hurdle, it is not an insurmountable one. The challenge is to persuade courts of the merits of the unitary approach. Specifically, a persuasive case can be made by emphasizing that the conferral of Fourth Amendment standing upon all noncitizens serves the multiple goals of effective government deterrence, equal treatment for all defendants regardless of citizenship, the establishment of a practical rule of reasonableness, and the dismantling of negative stereotypes of undocumented immigrants.

Conclusion

Immigration scholars can learn much from tort law in trying to reframe the debate on the Fourth Amendment rights of undocumented immigrants in domestic search cases. The tort law/immigration law parallel helps immigration advocates to construct a Fourth Amendment floor under which no government conduct may fall.[168] By following the rule of

---

[164] *See, e.g.*, Norfolk v. Flynn, 475 U.S. 560, 567 (1986) (noting that due process rights are guaranteed by primary reliance upon the adversary system and presumption of innocence); Coffin v. United States, 156 U.S. 432, 453 (1895) (describing the importance attached to the criminal law's presumption of innocence).

[165] *See supra* text accompanying note 86.

[166] *See supra* text accompanying note 86.

[167] *See* Appendix *infra*. Twenty-eight states continue to follow the tripartite Model 1 (trespasser, licensee, invitee) classification scheme. Nineteen states considered but rejected arguments to switch to a Model 2 (due care standard) or Model 3 (trespasser/invitee or licensee) system; however, 9 of the 28 Model 1 states have yet to consider the change. Nine states have abolished traditional entrant classifications and fall under Model 2. Thirteen states and the District of Columbia have adopted Model 3.

[168] While discussion here has been limited to the Fourth Amendment, Kevin Johnson suggests that the tort law/immigration law parallel might extend to a discussion of other constitutional (e.g., the Fifth and Fourteenth Amendment equal protection guarantees) and statutory (e.g., the federal minimum wage laws and labor standards) rights of noncitizens. *See* E-mail from Kevin Johnson, Professor, Univ. Cal.–Davis School of Law (Mar. 16, 1999, on file with the author).

reasonableness exemplified by *Rowland v. Christian*, immigration lawyers can begin to articulate a unitary standard for Fourth Amendment claims that assumes standing for all criminal defendants, regardless of citizenship. Such an approach reinforces the idea of equal personhood and tempers the role that citizenship plays in a society that is, after all, populated largely by immigrants.

Appendix: Premises Liability Laws

Introduction

This appendix contains a survey of the premises liability laws in the fifty states and the District of Columbia. Twenty-eight states continue to follow the tripartite Model 1 (trespasser, licensee, invitee) classification scheme. Nine states have abolished traditional entrant classifications and adopted the Model 2 (unitary due care) standard. Thirteen states and the District of Columbia have adopted Model 3 (trespasser versus invitee and licensee).

Leading Case or Statute Description

Alabama

McMullan v. Butler, 346 So.2d 950 (Ala. 1977)

The common law distinctions for entrants (trespasser, licensee, and invitee) continue to be viable under Alabama law.

Alaska

Webb v. City of Sitka, 561 P.2d 731 (Alaska 1977)

A landowner must maintain her property in a reasonably safe condition in view of all the circumstances.

Arizona

Robles v. Severyn, 504 P.2d 1284 (Ariz. Ct. App. 1973)

The rule set forth by the Arizona Supreme Court in *Shannon v. Butler Homes, Inc.*, 428 P.2d 990 (1967), finding that a landowner's duty to a person on her property is determined by the person's status, is extended in an express rejection of *Rowland*'s rationale.

Arkansas

Baldwin v. Mosley, 748 S.W.2d 146 (Ark. 1988)

The suggestion to discard legal distinctions between licensees and invitees is rejected. The conventional entrant classification rules continue to apply.

California

Rowland v. Christian, 443 P.2d 561 (Cal. 1968)

A possessor of land must act reasonably in view of the probability of injury to others. Although the plaintiff's status as a trespasser, licensee, or invitee may have some bearing on the question of liability, such status is not determinative.

Two California statutes partially supercede *Rowland* in specific situations. Tort victims injured on trains are denied recovery from the

railroad if they had no authority to be on board. Tort victims who are injured while committing one of a specified number of felonies are also denied recovery.

Colorado

COLO. REV. STAT. ANN. § 13-21-115 (West 1998)

A trespasser may recover only for damages willfully or deliberately caused by the landowner. A licensee may recover for a landowner's unreasonable failure to exercise reasonable care with respect to dangers of which the landowner actually knew. An invitee may recover for an unreasonable failure to exercise reasonable care to protect against dangers of which the landowner knew or should have known.

Connecticut

CONN. GEN. STAT. ANN. § 52-557(a) (West 1998)

The common law distinctions between licensees and invitees are abrogated. The standard of care owed to a social guest (licensee) is the same standard of care owed to a business invitee.

Delaware

Bailey v. Pennington, 406 A.2d 44 (Del. Super. Ct. 1979)

Because eliminating common law classifications would be impermissible judicial legislation, the proposed abandonment of liability distinctions among an invitee, licensee, and trespasser is rejected.

District of Columbia

Smith v. Arbaugh's Restaurants Inc., 469 F.2d 97 (D.C. Cir. 1972)

A landowner must maintain her property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk.

Sandoe v. Lefta Associates, 551 A.2d 76 (D.C. Ct. App. 1988)

Smith is limited to its facts. The trespasser classification is preserved, but the licensee and invitee categories are eliminated.

Florida

Wood v. Camp, 284 So.2d 691 (Fla. 1973)

The class of invitees entitled to reasonable care is expanded to include those who are "licensees by invitation" of the property owner, either by express or reasonably implied invitation. However, this does not extend to uninvited licensees.

Georgia

GA. CODE ANN. § 51-3-1 to -2 (1997)

An ordinary care standard is established for invitees, and a willful and wanton standard is established for licensees and trespassers.

Hawaii

Pickard v. Honolulu, 452 P.2d 445 (Haw. 1969)

An occupier of land has a duty to use reasonable care for the safety of all persons reasonably anticipated to be upon the premises, regardless of the legal status of the individual.

Idaho

Mooney v. Robinson, 471 P.2d 63 (Idaho 1970)

With respect to social guests, the distinctions between duty owed licensees and that owed invitees by an owner or occupier of land are preserved.

Illinois

740 ILL. COMP. STAT. ANN. 130/2 (West 1996)

The common law distinction between invitees and licensees is abolished. The duty owed to such entrants is that of reasonable care under the circumstances, with regard to the state of the premises or acts done or omitted on them.

Indiana

Burrell v. Meads, 569 N.E.2d 637 (Ind. 1991)

A landowner owes trespassers and licensees the duty to refrain from willful or wanton conduct. A landowner owes invitees the duty to exercise reasonable care.

Iowa

Wiesleler v. Sisters of Mercy Health Corp., 540 N.W.2d 445 (Iowa 1995)

Under Iowa premises liability law, the scope of the duty of care that a possessor owes to an entrant is based on the entrant's legal status as a trespasser, licensee, or invitee.

Kansas

Jones v. Hansen, 867 P.2d 303 (Kan. 1994)

The duty owed by an occupier of land to invitees and licensees is one of reasonable care under all of the circumstances. The owner owes a trespasser only the duty to refrain from willfully, wantonly, or recklessly injuring her.

Kentucky

Kirschner v. Louisville Gas & Elec. Co., 743 S.W.2d 840 (Ky. 1988)

The traditional entrant classifications create the different duties owed to trespassers, licensees, and invitees, and there is nothing unfair in requiring violation of a duty before liability can be imposed. The distinctions among trespassers, licensees, and invitees are preserved.

Louisiana

Cates v. Beauregard Elec. Coop., Inc., 328 So.2d 367 (La. 1976)

Although the plaintiff's status as a trespasser, licensee, or invitee may have some bearing on the question of reasonableness, the status is not determinative. *Rowlands v. Christian*'s approach is accepted by Louisiana.

Maine

Poulin v. Colby College, 402 A.2d 846 (Me. 1979)

The owner or occupier of land owes the same duty of reasonable care in all circumstances to all persons lawfully on the land. However, abandonment of the trespasser distinction would place an unfair burden on a landowner who has no reason to expect a trespasser's presence.

Maryland

Murphy v. Baltimore Gas & Elec. Co., 428 A.2d 459 (Md. 1981)

The common law distinctions between the duties owed to the various classes of users of another's property are preferable to applying a general negligence standard to all.

Massachusetts

Mounsey v. Ellard, 297 N.E.2d 43 (Mass. 1973)

The former common law classifications of licensee and invitee are governed by a common duty of reasonable care that the occupier owes to all lawful visitors. The duty to avoid only willful or wanton injury to trespassers is retained.

Michigan

Stanley v. Town Square Coop., 512 N.W.2d 51 (Mich. Ct. App. 1993)

The common law duty of a landowner to one who comes upon his land turns upon the status of the visitor as an invitee, licensee or trespasser.

Minnesota

Peterson v. Balach, 199 N.W.2d 639 (Minn. 1972)

An entrant's status as a licensee or invitee is no longer controlling, but is one element among many to be considered in determining the landowner's liability under ordinary standards of negligence. Therefore, reasonable care for the safety of all such persons invited upon the premises must be exercised, regardless of the status of the individual.

Mississippi

Astleford v. Milner Enters., Inc. 233 So.2d 524 (Miss. 1970)

The well-established distinctions for persons on property of another and the duty the possessor of the premises owes to such persons are maintained.

Missouri

Carter v. Kinney, 896 S.W.2d 926 (Mo. 1995)

The licensee/invitee distinction and the traditional common law classifications are retained, while a duty of reasonable care in all circumstances is rejected.

Montana

Limberhand v. Big Ditch Co., 706 P.2d 491 (Mont. 1985)

The test in premises liability is not the status of the injured party but the exercise of ordinary care by the landowner under the circumstances.

Nebraska

Heins v. Webster County, 552 N.W.2d 51 (Neb. 1996)

Landowners have only the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors. A separate classification for trespassers is retained because one should not owe a duty to exercise reasonable care to those not lawfully on one's property.

Nevada

Moody v. Manny's Auto Repair, 871 P.2d 935 (Nev. 1994)

Following *Rowland v. Christian*, all persons have an obligation to act reasonably; an owner or occupier of land is held to the general duty of reasonable care when another is injured on her land.

New Hampshire

Ouellette v. Blanchard, 364 A.2d 631 (N.H. 1976)

Owners and occupiers of land shall be governed by the test of reasonable care, considering all of the circumstances, in the maintenance and operation of their property.

New Jersey

Caroff v. Liberty Lumber Co., 369 A.2d 983 (N.J. Super. Ct. App. Div. 1977)

The historical distinctions among the invitee, licensee, and trespasser are maintained, and a single rule of reasonable care is rejected.

New Mexico

Ford v. Board of County Comm'rs, 879 P.2d 766 (N.M. 1994)

A landowner or occupier of premises must act as a reasonable person in maintaining her property in a reasonably safe condition in view of all the circumstances. This duty of care extends to all persons other than trespassers who enter the property with the express or implied consent of the landowner.

New York

Basso v. Miller, 352 N.E.2d 868 (N.Y. 1976)

Landowners are held to a single standard of reasonable care under the circumstances whereby foreseeability is a measure of liability.

North Carolina

Hood v. Queen City Coach Co., 107 S.E.2d 154 (N.C. 1959)

The landowner owes the invitee a duty to exercise ordinary care to keep the premises in a reasonably safe condition, and owes trespassers a duty not to injure them willfully or wantonly.

North Dakota

O'Leary v. Coenen, 251 N.W.2d 746 (N.D. 1977)

As to licensees and invitees, an occupier of premises must maintain her property in a reasonably safe condition in view of all the circumstances. An occupier owes a trespasser only a duty to refrain from willful or wanton harm.

Ohio

DiGildo v. Caponi, 247 N.E.2d 732 (Ohio 1969)

Distinctions based upon an entrant's status are maintained, and a rule of ordinary care under all the circumstances is not adopted as the measure of a landowner's duty.

Oklahoma

Lohrenz v. Lane, 787 P.2d 1274 (Okla. 1990)

There is no support for departing from common law principles governing the duty owed by a landowner to one upon her property without express or implied permission.

Oregon

Sargent v. Inger, 548 P.2d 1303 (Or. 1976)

The traditional common law distinctions between the duty owed licensees and invitees are maintained; the trespasser classification is not considered and is therefore implicitly retained.

Pennsylvania

Crotty v. Reading Indus., Inc., 345 A.2d 259 (Pa. Super. Ct. 1975)

The duty of a possessor of land toward a third person entering the land is measured by the status of the entrant at the time of the accident (whether invitee, licensee, or trespasser).

Rhode Island

Mariorenzi v. DiPonte, 333 A.2d 127 (R.I. 1975)

The common law status of an entrant onto the land of another is not determinative of the degree of care owed by the owner. Instead, the question is whether the owner has used reasonable care for the safety of all persons reasonably expected to be upon the premises.

South Carolina

Landry v. Hilton Head Plantation Property Owners Ass'n, Inc., 452 S.E.2d 619 (S.C. Ct. App. 1994)

A landowner's duty to maintain her land in certain conditions depends upon the entrant's status as trespasser, licensee, invitee, or child.

South Dakota

Hofer v. Meyer, 295 N.W.2d 333 (S.D. 1980)

Common law classifications are retained; however, a special concurring opinion suggests rejection of common law land entrant classifications, and proposes a single standard of ordinary care to govern all land entrants.

Tennessee

Hudson v. Gaitan 675 S.W.2d 699 (Tenn. 1984)

The duty owed to the former common law classifications of invitee and licensee is one of reasonable care under all of the attendant circumstances. The trespassers are still owed only a duty to avoid willful and wanton harm.

Texas

Nixon v. Mr. Property Management Co., 690 S.W.2d 546 (Tex. 1985)

Common law standards for landowner liability are retained; however, a concurring opinion argues for wholesale abolition of land entrant status.

Utah

Tjas v. Proctor, 591 P.2d 438 (Utah 1979)

A person's status when injured is controlling on the question of liability. The duty owed by a property owner to one who is injured on his property depends on whether that person is an invitee, licensee or trespasser.

Vermont

Cameron v. Abatiell, 241 A.2d 310 (Vt. 1968)

Persons entering upon the land of another are generally divided into the classes of trespasser, licensee, and invitee.

Virginia

Tate v. Rice, 315 S.E.2d 385 (Va. 1984)

The well-understood structure that has long regulated the duties owed by landowners to their visitors is retained.

Washington

Younce v. Ferguson, 724 P.2d 991 (Wash. 1986)

The use of common law classifications of invitee, licensee, and trespasser to determine the duty of care owed by an owner or occupier of

land is expressly reaffirmed; a unitary standard of reasonable care is rejected.

West Virginia

Self v. Queen, 487 S.E.2d 295 (W. Va. 1997)

Long-established common law rules defining the duty the owner of premises owes to persons upon those premises are retained, along with distinctions among invitees, licensees, and trespassers.

Wisconsin

Antoniewicz v. Reszcynski, 236 N.W.2d 1 (Wis. 1975)

The duty toward all persons who come upon property with the consent of the occupier is that of ordinary care.

Wyoming

Clarke v. Beckwith, 858 P.2d 293 (Wyo. 1993)

The basis of liability is the foreseeability of the injury, rather than the status of the lawful entrant. Therefore, trespassers are treated as a distinct group, but the rule of reasonable care under the circumstances is applied to all others.

FIGURE 4: PREMISES LIABILITY LAWS BY MODEL AND JURISDICTION

Model 1	*Model 2*	*Model 3*
Alabama	Alaska	Connecticut*
Arizona	California	District of Columbia
Arkansas	Hawaii	Florida
Colorado*	Louisiana	Illinois*
Delaware	Montana	Kansas
Georgia*	Nevada	Massachusetts
Idaho	New Hampshire	Maine
Indiana	New York	Minnesota
Iowa	Rhode Island	Nebraska
Kentucky		New Mexico
Maryland		North Dakota
Michigan		Tennessee
Mississippi		Wisconsin
Missouri		Wyoming
North Carolina		
New Jersey		
Ohio		
Oklahoma		
Oregon		
Pennsylvania		
South Carolina		
South Dakota		
Texas		
Utah		
Vermont		
Virginia		
Washington		
West Virginia		

* = statutorily imposed