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Liberty at the Cost of Constitutional Protections: Undocumented Immigrants and Fourth Amendment Rights

Linnet Suárez*

The Supreme Court has issued many opinions indirectly addressing the Fourth amendment rights of undocumented immigrants. However, none of these opinions answer the questions that matter most: do undocumented immigrants have Fourth Amendment protections and if so, what are they. These questions have increasingly become more important because advances in technology facilitate intrusive searches and seizures by law enforcement officers. This article will specifically focus on the Department of Homeland Security and its use of GPS ankle bracelets to monitor undocumented immigrants. This article compares existing Supreme Court opinions concerning undocumented immigrants and Fourth Amendment rights in the technological age. It is now more important than ever to find some legal clarity if we ever plan to answer how far is too far

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I. INTRODUCTION

The Statue of Liberty is engraved with the words “give me your tired, your poor, your huddled masses yearning to breathe free,” but it diplomatically omits any mention of subjecting these masses to

intrusive government searches.¹ It would be more accurate for Lady Liberty to add that freedom might come at the expense of privacy.

Currently, over nine million undocumented immigrants are living in the United States and between a half-million and one million more arrive each year.² Congress frequently creates laws in hopes of regulating immigration, but those laws adversely affect undocumented immigrants and would otherwise be unacceptable if applied to citizens or residents with a legal status.³ However, in the words of Supreme Court Justice Stevens, “even one whose presence in this country is unlawful, involuntary, or transitory is entitled to [some] constitutional protection.”⁴

The Fourth Amendment protects against unreasonable searches and seizures—that is assuming the Fourth Amendment applies.⁵ United States citizens and residents with a legal status are entitled to receive constitutional protections, such as that of the Fourth Amendment.⁶ Undocumented immigrants are not afforded such a clear-cut answer.⁷ Instead, when the Supreme Court is tasked with addressing whether the Fourth Amendment applies to undocumented immigrants it replies with the proverbial “it depends.” Undocumented immigrants in the United States are thus living in Fourth Amendment limbo.

The uncertainty concerning the Fourth Amendment and undocumented immigrants results in a chilling effect.⁸ Constitutional freedoms are delicate and require “breathing space” to survive.⁹ Constitutional freedoms suffer when the government excessively regulates

¹ *The New Colossus-full text*, NAT'L PARK SERV. (Jan. 2, 2016), <http://www.nps.gov/stli/learn/historyculture/colossus.htm>.

² Kevin J. Fandl, *Immigration Posses: U.S. Immigration Law and Local Enforcement Practices*, 34 J. LEGIS. 16, 16. (2008).

³ *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976).

⁴ *Id.* at 77.

⁵ U.S. CONST. amend. IV.

⁶ Henry G. Watkins, *The Fourth Amendment and the Ins: An Update on Locating the Undocumented and a Discussion on Judicial Avoidance of Race-Based Investigative Targeting in Constitutional Analysis*, 28 SAN DIEGO L. REV. 499, 501 (1991).

⁷ *Id.*

⁸ See generally Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

⁹ *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 432-33 (1963).

because the “threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.”¹⁰ Whatever constitutional freedoms undocumented immigrants do have are “chilled” because of the uncertainty regarding their rights and a fear of government sanctions.¹¹ Undocumented immigrants would rather suffer unreasonable searches than risk aggravating government officials by appealing to Fourth Amendment rights that they may or may not have.¹² The uncertainty surrounding the Fourth Amendment thus turns constitutional freedoms that the Founding Fathers intended to be a shield for protection into a sword that the government can wield against a vulnerable population.

The Department of Homeland Security (“DHS”) is currently testing the limits of Fourth Amendment protections with its Alternative to Detention Programs.¹³ DHS does not have sufficient detention centers to house all the undocumented immigrants coming into the United States.¹⁴ Additionally, the detention centers are expensive and cost an average of \$130 per day per person or up to \$330 depending on the detention center.¹⁵ As a result, DHS is experimenting with low-cost programs to monitor undocumented immigrants.¹⁶ The most recent experimental monitoring program from DHS is the RGV 250 program.¹⁷ Under this type of program, DHS releases undocumented immigrant families from custody, but requires that the heads of households wear a GPS ankle bracelet for an undetermined amount of time.¹⁸ The ankle bracelet alternative only costs an average of \$5 a day.¹⁹

¹⁰ *Id.*

¹¹ See *US: Immigrants ‘Afraid to Call 911’ States Should Reject Corrosive ‘Secure Communities’ Program*, HUMAN RIGHTS WATCH (May 14, 2014), <https://www.hrw.org/news/2014/05/14/us-immigrants-afraid-call-911>.

¹² *Id.*

¹³ Alicia A. Caldwell, *DHS Is Using GPS-Enabled Ankle Bracelets To Track Immigrant Families Crossing The Border*, MCGILL (Dec. 24, 2014), <http://oppenheimer.mcgill.ca/DHS-Is-Using-GPS-Enabled-Ankle?lang=fr>.

¹⁴ *Id.*

¹⁵ Molly Hennessy-Fiske, *Immigrants Object to Growing Use of Ankle Monitors After Detention*, LOS ANGELES TIMES (Aug. 2, 2015), <http://www.latimes.com/nation/immigration/la-na-immigrant-ankle-monitors-20150802-story.html>.

¹⁶ Caldwell, *supra* note 13.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Hennessy-Fiske, *supra* note 15.

Undocumented immigrants commonly refer to these ankle bracelets as *grilletes*, or shackles.²⁰ One of the reasons the ankle bracelets are reminiscent of shackles is because the devices have short cords and have to be charged frequently for an estimated two hours at a time.²¹ This makes finding job, let alone keeping a job, a difficult, if not impossible, task.²² Undocumented immigrants also complain that the ankle bracelets are hot and irritate their skin.²³ Most notably, the ankle bracelets are a conspicuous stigma that brands undocumented immigrants as criminals.²⁴ This affects the ability of undocumented immigrants to find employment as well as housing.²⁵ Despite the potential issues of legal consent and the debilitating criminal stigma attached to wearing ankle monitors, DHS monitored a total of 23,000 undocumented immigrants with ankle bracelets in 2015, and plans to increase that number to 53,000 in 2016.²⁶

The Supreme Court addressed the dangers that advanced technologies, such as ankle bracelets, pose to an individual's Fourth Amendment rights in multiple cases. The Supreme Court has even held the Government's use of GPS devices to conduct searches is a violation of the Fourth Amendment in more than one instance. In *United States v. Jones*, the Supreme Court held that GPS tracking on a car constitutes an unreasonable search under the Fourth Amendment.²⁷ More recently, the Supreme Court took another step towards establishing a precedent against the Government's use of GPS technology for searches. In *Grady v. North Carolina*, the Supreme Court held that a civil program that used GPS ankle bracelets to monitor recidivist sex offenders was a violation of the Fourth Amendment and constituted a search.²⁸

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Hennessy-Fiske, *supra* note 15.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *United States v. Jones*, 132 S. Ct. 945, 949 (2012).

²⁸ *Grady v. N. Carolina*, 135 S. Ct. 1368, 1371 (2015).

The Supreme Court displayed a high regard for privacy and strong disapproval of unreasonable government searches of a person's body or effects in *Jones* and *Grady*.²⁹ *Jones* and *Grady* are Fourth Amendment landmarks, but it is still unclear how a person's legal status in the country would factor into a Fourth Amendment analysis because it was not at issue in either *Jones* or *Grady*.

The Supreme Court addressed the constitutional rights of undocumented immigrants in several cases, but it still remains unclear what constitutional rights undocumented immigrants are entitled to have or when they can invoke those constitutional rights. In *Immigration and Naturalization Service v. Lopez-Mendoza*, the majority of Justices simply assumed that undocumented immigrants had Fourth Amendment rights.³⁰ The Supreme Court in *Lopez-Mendoza* stressed the importance of Fourth Amendment rights for all persons, but did not distinguish or define the word "persons."³¹ The Supreme Court in *United States v. Verdugo-Urquidez* limited the scope of Fourth Amendment rights for undocumented immigrants by debating the meaning of the word "persons" versus the word "people."³² Nevertheless, despite an extensive constitutional analysis, the Supreme Court Justices in *Verdugo-Urquidez* were still unable to reach a definitive decision about the Fourth Amendment rights of undocumented immigrants.³³ The Justices however did provide more clarity on the topic by creating a substantial connections test.³⁴

This article will explore how undocumented immigration status in the United States can influence a court's determination on whether the Fourth Amendment is implicated in DHS programs requiring ankle bracelet monitoring. This article is composed of three parts. Part I discusses the possible Fourth Amendment rights of undocumented immigrants. Part II examines the use of GPS devices and the constitutionality of the DHS programs such as the RGV 250 program. Part III concludes that the DHS programs using ankle bracelet monitoring are unconstitutional.

²⁹ *Id.*; *Jones*, 132 S. Ct. at 945.

³⁰ *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1046 (1984); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990).

³¹ *Lopez-Mendoza*, 468 U.S. at 1046.

³² *Verdugo-Urquidez*, 494 U.S. at 265.

³³ *Id.* at 272-73.

³⁴ *Id.* at 271-73.

II. ILLEGAL IMMIGRATION IN THE UNITED STATES

A. DHS in a Historical Context

The United States has been concerned with the issue of immigration since the late 1700's.³⁵ During that time, Congress began to take preemptive measures against the possibility of incoming immigrants because the United States feared a cold war with France.³⁶ Congress proposed multiple bills that were eventually signed into law by President John Adams.³⁷ These bills resulted in the Alien and Sedition Acts of 1798.³⁸ The Alien and Sedition Acts of 1798 gave federal agents the power and discretion to remove all dangerous immigrants.³⁹ As a result of this broad power, any political dissent was effectively criminalized.⁴⁰

Immigration was radically reformed again in 1933 when President Franklin D. Roosevelt issued Executive Order 6166 and created the Immigration and Naturalization Service ("INS").⁴¹ Following the Executive Order, the INS agency was tasked with the immigration and deportation functions that initially were assigned to the Bureau of Immigration and the Bureau of Naturalization.⁴²

The INS was the primary agency that addressed immigration concerns until President George W. Bush reevaluated immigration policies after the 9/11 terrorist attacks.⁴³ President Bush signed the Homeland Security Act on November 25, 2002, that dismantled INS and created DHS.⁴⁴ Under the Homeland Security Act, DHS is given broad jurisdiction so that it may "(A) prevent terrorist attacks within the United States; (B) reduce the vulnerability of the United States

³⁵ Joseph Summerill, *Immigration and Customs Enforcement Introduces "Friendly" Federal Detention Standards and New, Softer Detention Facilities*, 59-SEP FED. LAW. 46, 46 (2012).

³⁶ Kurt T. Lash & Alicia Harrison, *Minority Report: John Marshall and the Defense of the Alien and Sedition Acts*, 68 OHIO ST. L.J. 435, 438 (2007).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Summerill, *supra* note 35, at 46.

⁴² *Id.*

⁴³ Jonathan Thessin, *Department of Homeland Security*, 40 HARV. J. ON LEGIS. 513, 513 (2003).

⁴⁴ *Id.*

to terrorism; [and] (C) minimize the damage, and assist in the recovery, from terrorist attacks that do occur within the United States.”⁴⁵

Under the newly established DHS, the former duties of the INS were transferred to Immigration and Customs Enforcement (“ICE”).⁴⁶ ICE’s mission is to target undocumented immigrants, money, and material that could be linked to terrorism or general criminal activities.⁴⁷ ICE promotes and enforces the DHS’s mission through arrests, detainment, raids, and more recently, the use of ankle bracelets for monitoring.⁴⁸

The history of immigration in the United States reveals that “for reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.”⁴⁹ As a result, since the 1700’s, the regulation of immigration, especially in times of warfare or political turmoil, has pushed constitutional boundaries.⁵⁰ Despite the discretion of the executive and legislative branches over immigration, the Supreme Court has stressed that DHS is still “subject to important constitutional limitations.”⁵¹ DHS’s broad mission does not justify its possibly unconstitutional enforcement methods.⁵² DHS must only act by “constitutionally permissible means.”⁵³

B. The Problem: What Rights do Undocumented Immigrants Actually Have?

Immigration is within the domain of federal law, but the federal government and courts have not been successful at providing clear guidelines.⁵⁴ When it comes to immigration, there are many gaps in the law because there is no comprehensive immigration reform at

⁴⁵ Homeland Security Act of 2002 § 101.

⁴⁶ Summerill, *supra* note 35, at 46.

⁴⁷ *Id.*

⁴⁸ Fandl, *supra* note 2, at 21; Caldwell, *supra* note 13.

⁴⁹ Mathews, 426 U.S. at 8.

⁵⁰ See Lash & Harrison, *supra* note 36; Thiessen, *supra* note 43.

⁵¹ *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001); Kelsey E. Papst, *Protecting the Voiceless: Ensuring Ice’s Compliance with Standards That Protect Immigrants on Detainees*, 40 MCGEORGE L. REV. 261, 265 (2009).

⁵² Papst, *supra* note 51, at 265.

⁵³ *Id.* (quoting *INS v. Chadha*, 462 U.S. 919, 941-42 (1983)).

⁵⁴ Fandl, *supra* note 2, at 20, 22.

the federal level.⁵⁵ For example, as of November 2007, 46 states passed legislation related to immigration and over 1,562 bills were introduced in all 50 states.⁵⁶ In total, that was an increase of nearly 300% from year 2006.⁵⁷ These gaps create inconsistencies in the law and endow DHS and immigration officials with excessive discretion.⁵⁸

Immigration is at its core a complex matter that is further complicated by political disagreements regarding the best way to manage incoming immigrants while also maintaining national security.⁵⁹ Federal courts intervene when immigration officials or agencies overstep constitutional boundaries, but not even the Supreme Court has provided much guidance when it comes to immigration.⁶⁰ The lack of clarity regarding the constitutional rights of undocumented immigrants is largely in part because the Constitution does not distinguish between documented or undocumented immigrants when it comes to constitutional protections.⁶¹ The courts are therefore split and have only been able to agree that undocumented immigrants are entitled to *some* degree of Fourth Amendment protection.⁶²

1. The Assumption of Fourth Amendment Rights: *Immigration and Naturalization Service v. Lopez-Mendoza*

Adan Lopez-Mendoza was working at a transmission repair shop in San Mateo, California in 1976.⁶³ After receiving a tip, INS agents visited the transmission shop to investigate.⁶⁴ However, the INS agents arrived without a warrant to search the premises or a warrant to arrest any of the people on the premises.⁶⁵ The proprietor of the transmission shop refused to allow the INS agents to interview

⁵⁵ *Id.*

⁵⁶ *Id.* at 22.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Fandl, *supra* note 2, at 23.

⁶⁰ Marisa Antos-Fallon, *The Fourth Amendment and Immigration Enforcement in the Home: Can Ice Target the Utmost Sphere of Privacy?*, 35 FORDHAM URB. L.J. 999, 1014-15 (2008).

⁶¹ Fandl, *supra* note 2, at 29.

⁶² Antos-Fallon, *supra* note 60, at 1003.

⁶³ *Lopez-Mendoza*, 468 U.S. at 1035.

⁶⁴ *Id.*

⁶⁵ *Id.*

the workers, but one of the INS agents managed to speak to Lopez-Mendoza while another INS agent was having a conversation with the proprietor.⁶⁶

The INS agent asked Lopez-Mendoza multiple questions and Lopez-Mendoza ultimately revealed that he was from Mexico and had no family ties in the United States.⁶⁷ At this point, the INS agent placed Lopez-Mendoza under arrest and had him taken to an INS office.⁶⁸ At the INS office, Lopez-Mendoza revealed that he was born in Mexico, was a citizen of Mexico, and entered the United States illegally without inspection.⁶⁹

INS began deportation proceedings against Lopez-Mendoza, but Lopez-Mendoza challenged the legality of his arrest.⁷⁰ Lopez-Mendoza's case went through the judicial system until it reached the Court of Appeals.⁷¹ The Court of Appeals vacated the order of deportation and remanded the case in order to determine whether Lopez-Mendoza's Fourth Amendment rights had been violated during the course of his arrest.⁷² The Court of Appeals mentioned "Lopez-Mendoza's Fourth Amendment rights," but did not specify or analyze *which* Fourth Amendment rights Lopez-Mendoza was entitled to have under the Constitution.⁷³

By the time Lopez-Mendoza's case reached the Supreme Court, the Justices already assumed Lopez-Mendoza had Fourth Amendment rights even though he was an undocumented immigrant.⁷⁴ The Supreme Court instead focused on whether Lopez-Mendoza had the right to apply the Fourth Amendment exclusionary rule in civil proceedings.⁷⁵

Lopez-Mendoza argued to the Supreme Court that the exclusionary rule was necessary to safeguard his Fourth Amendment rights in

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Lopez-Mendoza*, 468 U.S. at 1035.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1035-36.

⁷¹ *Id.* at 1036.

⁷² *Id.*

⁷³ *Lopez-Mendoza*, 468 U.S. at 1036.

⁷⁴ *Verdugo-Urquidez*, 494 U.S. at 272.

⁷⁵ *Lopez-Mendoza*, 468 U.S. at 1034.

the United States.⁷⁶ At this point, even Lopez-Mendoza was assuming that he had Fourth Amendment rights.⁷⁷ The Supreme Court Justices did not correct Lopez-Mendoza's assumption or ask him to elaborate on which of his Fourth Amendment rights were in danger.⁷⁸

The Supreme Court instead ultimately held that the exclusionary rule was not applicable in civil deportation proceedings.⁷⁹ Justice O'Connor wrote on behalf of the majority and explained, "important as it is to protect the Fourth Amendment rights of *all* [emphasis added] persons, there is no convincing indication that application of the exclusionary rule in civil deportation proceedings will contribute materially to that end."⁸⁰ In the opinion, Justice O'Connor did not distinguish between the Fourth Amendment rights of undocumented immigrants versus the Fourth Amendment rights of a person with a legal immigration status.

The *Lopez-Mendoza* case does not explicitly state that undocumented immigrants have any Fourth Amendment rights.⁸¹ However, throughout the entire opinion the Supreme Court implies that undocumented immigrants have at a minimum *some* Fourth Amendment rights.⁸²

2. Limiting the Scope of the Fourth Amendment: *United States v. Verdugo-Urquidez*

Undocumented immigrants have relied on the holding of *Lopez-Mendoza* to invoke Fourth Amendment rights, but *Lopez-Mendoza* does not stand for the proposition that undocumented immigrants have Fourth Amendment rights.⁸³ If anything, *Lopez-Mendoza* limits the Fourth Amendment rights of undocumented immigrants because it bars the use of the exclusionary rule during civil deportation

⁷⁶ *Id.* at 1045.

⁷⁷ *Id.* at 1045-46.

⁷⁸ *See generally id.*

⁷⁹ *Id.*

⁸⁰ *Lopez-Mendoza*, 468 U.S. at 1046.

⁸¹ *See generally id.* at 1032.

⁸² *Id.*

⁸³ *Id.*

proceedings.⁸⁴ *United States v. Verdugo-Urquidez* clarifies the holding in *Lopez-Mendoza* and details the Fourth Amendment landscape for undocumented immigrants.⁸⁵

Rene Martin Verdugo-Urquidez was a Mexican citizen that resided in Mexico.⁸⁶ The Drug Enforcement Agency (“DEA”) suspected that Verdugo-Urquidez was associated with a drug organization that smuggled narcotics into the United States.⁸⁷ Verdugo-Urquidez was also a suspect in the murder and torture of a United States DEA agent.⁸⁸ The United States Government obtained a warrant for his arrest in 1985 and apprehended Verdugo-Urquidez in Mexico in January 1986 with assistance from Mexican law enforcement officers.⁸⁹ After the arrest, the United States Government brought Verdugo-Urquidez to a United States Border Patrol station in Calexico, California, where he was arrested by United States marshals and later moved to a correctional center in San Diego, California.⁹⁰

After Verdugo-Urquidez was arrested and detained in the United States, a DEA agent arranged for searches of Verdugo-Urquidez’s Mexican residences in Mexicali and San Felipe.⁹¹ The DEA agent sought authorization from the Director General of the Mexican Federal Judicial Police, but did not ask for consent from Verdugo-Urquidez or get a warrant from a neutral and detached magistrate.⁹² The Mexican law enforcement officials agreed to help the DEA with the searches and through a combined effort discovered incriminating evidence, such as a tally sheet reflecting quantities of smuggled marijuana, in the Mexicali residence.⁹³

Verdugo-Urquidez moved to suppress all the evidence from the searches in his Mexican residences because it was a violation of his

⁸⁴ Jonathan L. Hafetz, *The Rule of Egregiousness: INS v. Lopez-Mendoza Reconsidered*, 19 WHITTIER L. REV. 843 (1998).

⁸⁵ See *Verdugo-Urquidez*, 494 U.S. at 259.

⁸⁶ *Id.* at 262.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Verdugo-Urquidez*, 494 U.S. at 262.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 262-63

Fourth Amendment rights since the DEA did not have a warrant.⁹⁴ The District Court granted his motion to suppress, and a divided panel of the Court of Appeals for the Ninth Circuit affirmed.⁹⁵ By the time Verdugo-Urquidez's case reached the Supreme Court the question presented was, "whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country."⁹⁶

The Supreme Court began resolving the lower court constitutional disputes by distinguishing the Fourth Amendment from the Fifth and Sixth Amendments.⁹⁷ The Supreme Court wanted to clarify that just because Verdugo-Urquidez was entitled to due process under the Fifth Amendment and a fair trial under the Sixth Amendment that does not mean that he was entitled to Fourth Amendment protection against unreasonable searches.⁹⁸ The Fifth and Sixth Amendments are trial rights of criminal defendants, but the Fourth Amendment may be applicable regardless of whether a trial takes place or evidence is introduced at the trial.⁹⁹ Furthermore, unlike the Fifth and Sixth Amendments, Fourth Amendment violations are "fully accomplished" at the time of the unreasonable government intrusion.¹⁰⁰ In the case of Verdugo-Urquidez, this means that the possible Fourth Amendment violation took place outside of the United States in Mexico.¹⁰¹

The Supreme Court began its analysis by relying on historical data to explain that the Fourth Amendment was not intended to protect against searches and seizures outside of the United States.¹⁰² Historical research reveals that the Framers did not envision the United States as having the power to conduct searches and seizures outside of its borders.¹⁰³ This would mean that the Fourth Amendment protections would not extend to Verdugo-Urquidez because it

⁹⁴ *Id.* at 263.

⁹⁵ *Verdugo-Urquidez*, 494 U.S. at 263.

⁹⁶ *Id.* at 261.

⁹⁷ *Id.* at 264.

⁹⁸ *Id.* at 263.

⁹⁹ *Id.* at 264.

¹⁰⁰ *Verdugo-Urquidez*, 494 U.S. at 264.

¹⁰¹ *Id.*

¹⁰² *Id.* at 266.

¹⁰³ *Id.*

was intended to “protect the people of the United States against arbitrary action by their own Government” in domestic matters.¹⁰⁴

Despite the historical research, Verdugo-Urquidez relied on a series of cases that held aliens enjoy certain constitutional rights to argue that Fourth Amendment protections should apply to his case.¹⁰⁵ The Supreme Court distinguished the prior cases from Verdugo-Urquidez’s case by stating that unlike Verdugo-Urquidez, those aliens received constitutional protections when they came into the United States because they formed “substantial connections with this country.”¹⁰⁶ For example, the undocumented immigrant in *Lopez-Mendoza* “voluntarily and presumably had accepted some societal obligations.”¹⁰⁷ On the other hand, DEA agents forcibly brought Verdugo-Urquidez to the United States and a “lawful, but involuntary presence” was not sufficient to develop any substantial connections to the country.¹⁰⁸

The Supreme Court was ultimately not persuaded by Verdugo-Urquidez’s arguments and held that that the Fourth Amendment did not apply to his particular case.¹⁰⁹ Although the Supreme Court provided a better understanding of the Fourth Amendment and created the substantial connection test, it still did not answer whether the Fourth Amendment protects undocumented immigrants.¹¹⁰

III. THE FOURTH AMENDMENT LANDSCAPE

A. Introducing Technology to the Fourth Amendment

The Fourth Amendment states that people have the right to “be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.”¹¹¹ The Fourth Amendment has repeatedly been a topic of discussion in the courts because advancements in technology provide law enforcement officials with the tools to

¹⁰⁴ *Id.*

¹⁰⁵ *Verdugo-Urquidez*, 494 U.S. at 270-71.

¹⁰⁶ *Id.* at 271.

¹⁰⁷ *Id.* at 273.

¹⁰⁸ *Id.* at 262, 271.

¹⁰⁹ *Id.* at 274-75.

¹¹⁰ *Verdugo-Urquidez*, 494 U.S. at 286.

¹¹¹ U.S. CONST. amend. IV.

conduct aggressive and prolonged searches.¹¹² This conduct by law enforcement officials has inspired multiple judges to make “proliferating judicial references to dystopia and George Orwell’s 1984” because it feels as if “Big Brother” is always watching.¹¹³

Over the years, law enforcement officials have relied on technology, such as beepers, for tracking suspects.¹¹⁴ However, the more recent technological advancement used by law enforcement officials is a global positioning system (“GPS”).¹¹⁵ GPS is one of the preferred methods of tracking by law enforcement officers because it can “achieve outcomes that physical surveillance never could.”¹¹⁶

GPS is unique in three ways.¹¹⁷ First, GPS tracking allows for nearly continuous surveillance.¹¹⁸ For example, a GPS device can regularly emit signals to a constellation of twenty-seven satellites, which theoretically means that a law enforcement official could have constant surveillance.¹¹⁹ Second, a GPS does not require much human oversight.¹²⁰ For example, a single police officer could oversee multiple suspects being tracked with GPS at the same time.¹²¹ Third, a GPS can access historical data and go back in time to review locations and dates in a way that physical surveillance by a police officer could not.¹²² For example, law enforcement officials can access information from pre-existing GPS devices, such as one that has been installed on a suspect’s smartphone.¹²³

Unlike technologies of the past, a GPS has almost no technological limitations.¹²⁴ From a law enforcement official’s perspective

¹¹² Fabio Arcila, Jr., *GPS Tracking Out of Fourth Amendment Dead Ends: United States v. Jones and the Katz Conundrum*, 91 N.C. L. REV. 1, 3 (2012).

¹¹³ *Id.*

¹¹⁴ Jordan Miller, *New Age Tracking Technologies in the Post-United States v. Jones Environment: The Need for Model Legislation*, 48 CREIGHTON L. REV. 553, 557 (2015).

¹¹⁵ Arcila, Jr., *supra* note 112, at 3.

¹¹⁶ *Id.* at 54.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Miller, *supra* note 114, at 561.

¹²⁰ Arcila, Jr., *supra* note 112, at 54.

¹²¹ Miller, *supra* note 114, at 562.

¹²² Arcila, Jr., *supra* note 112, at 54.

¹²³ *Id.*

¹²⁴ Miller, *supra* note 114, at 560.

this make surveillance simpler, but from a Fourth Amendment perspective it can result in more unreasonable searches.¹²⁵ GPS surveillance can be intrusive and reveal intimate details to law enforcement officials that they would otherwise not learn through more traditional surveillance.¹²⁶ For example, when a GPS sends a signal to multiple satellites then those satellites can accurately triangulate the location of the GPS within a few feet, or in some cases, within ten inches.¹²⁷ Until the courts reach a clear and consistent holding concerning the legality of GPS technology in searches, Fourth Amendment protections should be enforced carefully so as to guard against unreasonable searches.¹²⁸

B. The Evolution of the Fourth Amendment: Katz v. United States

Courts traditionally used a common law trespass analysis to determine if the Government conducted an unreasonable search under the Fourth Amendment.¹²⁹ This is commonly known as the Fourth Amendment property model.¹³⁰ Under this model, courts would base their analyses on whether the search took place in a “constitutionally protected area.”¹³¹ However, the advancements in technology forced courts to adapt and consider new methods of analyzing the Fourth Amendment. One of the first cases to remodel traditional Fourth Amendment analyses was *Katz v. United States*.¹³²

The petitioner in *Katz* was convicted under an eight-count indictment in the District Court for the Southern District of California for transmitting wagering information from Los Angeles to Boston and Miami by telephone.¹³³ Unbeknownst to Katz, he was being recorded by the Federal Bureau of Investigation (“FBI”) with an electronic listening and recording device at the time he was making the

¹²⁵ *Id.* at 562.

¹²⁶ *Id.*

¹²⁷ *Id.* at 561.

¹²⁸ Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 805 (2004)

¹²⁹ *Jones*, 132 S. Ct. at 947.

¹³⁰ Arcila, Jr., *supra* note 112, at 5.

¹³¹ *Katz v. United States*, 389 U.S. 347, 350 (1967).

¹³² *See Katz*, 389 U.S. at 347.

¹³³ *Id.* at 348.

phone calls and transmitting wagering information in a public telephone booth.¹³⁴ At the trial, the Government was allowed to introduce evidence of Katz's phone calls over Katz's objections.¹³⁵ The Court of Appeals rejected that the recordings were a Fourth Amendment violation because there was no physical entrance into the phone booth where Katz was making the call.¹³⁶ The Supreme Court granted certiorari to answer the petitioner's two questions: whether a public telephone booth was a constitutionally protected area such that any evidence collected by an electronic listening device was a Fourth Amendment violation and whether physical entrance into a constitutionally protected area is necessary to have a Fourth Amendment violation.¹³⁷

The Supreme Court began its analysis by disagreeing with Katz's phrasing of the issues.¹³⁸ According to the Supreme Court, both Katz and the Government were incorrect to focus their arguments on whether or not the phone booth was a constitutionally protected area.¹³⁹ That type of argument deterred from the fundamental purpose of the Fourth Amendment, which is that "the Fourth Amendment protects people, not places."¹⁴⁰ The Supreme Court stated that the Fourth Amendment might constitutionally protect what a person seeks to keep as private.¹⁴¹ That means that the Fourth Amendment "cannot turn on the presence or absence of a physical intrusion."¹⁴² It is at that point that the Supreme Court began to move away from a Fourth Amendment common law trespass model towards a privacy model.¹⁴³

Under the privacy model, even though Katz entered a transparent, public phone booth, he still expected to exclude "the uninvited ear" from his private conversation.¹⁴⁴ The Supreme Court explained that, "one who occupies [a telephone booth], shuts the door behind

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 348-49.

¹³⁷ *Katz*, 389 U.S. at 349-50.

¹³⁸ *Id.* at 350.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 351.

¹⁴¹ *Id.* at 353.

¹⁴² *Katz*, 389 U.S. at 353.

¹⁴³ Arcila, Jr., *supra* note 112, at 5.

¹⁴⁴ *Katz*, 389 U.S. at 352.

him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.”¹⁴⁵ The Supreme Court reversed the lower court’s holding and concluded that whether Katz was in an office, a home, or a hotel room, he was “entitled to know that he will remain free from unreasonable searches and seizures,” especially when he clearly intended his conversations to remain private.¹⁴⁶

Katz is notable for its move towards a privacy model, but also for Justice Harlan’s concurrence. Justice Harlan’s concurrence agrees with the majority that the Fourth Amendment “protects people, not places,” but takes a step further in an attempt to answer what protection it affords people.¹⁴⁷ Justice Harlan attempts to answer this question by creating a reasonable expectation of privacy test.¹⁴⁸ The reasonable expectation of privacy test is twofold: does a person have a subjective expectation of privacy and would that expectation be one that society would recognize as reasonable.¹⁴⁹ According to Justice Harlan, the reasonable expectation of privacy test provides a better scope of Fourth Amendment protections.¹⁵⁰

C. The Supreme Court Directly Addresses the GPS: United States v. Jones

The Supreme Court’s holding in *United States v. Jones* is possibly one of the most important Fourth Amendment decisions since *Katz*.¹⁵¹ *Jones* produced multiple opinions, each with the potential to alter the Fourth Amendment search and seizure practices.¹⁵² Perhaps most importantly, the Supreme Court in *Jones* clarified that although the court had moved towards the privacy model in *Katz*, the more traditional common law trespass model had not been replaced.¹⁵³

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 359.

¹⁴⁷ *Id.* at 361 (Harlan, J., concurring).

¹⁴⁸ *Id.* at 361.

¹⁴⁹ *Katz*, 389 U.S. at 361.

¹⁵⁰ *Id.*

¹⁵¹ Arcila, Jr., *supra* note 112, at 5.

¹⁵² *Id.*

¹⁵³ Vikram Iyengar, *United States v. Jones: Inadequate to Promote Privacy for Citizens and Efficiency for Law Enforcement*, 19 TEX. J. C.L. & C.R. 335, 337 (2014).

Antoine Jones was the owner and operator of a nightclub in D.C. when he became a suspect for trafficking in narcotics.¹⁵⁴ The FBI and Metropolitan police investigated and applied for a warrant to the United States District Court for the District of Columbia to authorize using a GPS to track the movements of a car registered to Jones' wife.¹⁵⁵ The Court issued a warrant authorizing the use of the GPS, but only within the District of Columbia and limited to 10 days.¹⁵⁶ On the 11th day, the agents installed the GPS device on the car while it was parked in a public lot in Maryland.¹⁵⁷ The Government collected information from the GPS for the next 28 days and even replaced the GPS battery when it ran out.¹⁵⁸ The GPS relayed detailed information to the officers and revealed the car's location within 50 to 100 feet.¹⁵⁹ By the end of the GPS surveillance period, the GPS relayed "2,000 pages of data over the four-week period."¹⁶⁰

The Government used all the data from the GPS to obtain a multiple-count indictment against Jones and charged him with conspiracy to distribute cocaine.¹⁶¹ Jones was sentenced to life in prison, but the Court of Appeals reversed Jones' conviction because the GPS evidence was collected without a warrant, which was considered a Fourth Amendment violation. After the Government's petition for a rehearing was denied, the Supreme Court granted certiorari.¹⁶²

1. Majority Opinion: Justice Scalia

The majority opinion, written by Justice Scalia, returned to the more traditional common law trespass model to analyze whether there was a Fourth Amendment violation in Jones' case.¹⁶³ Justice Scalia began by explaining that until *Katz* Fourth Amendment jurisprudence was based on common-law trespass and that cannot be overlooked simply because of a rising trend with the privacy

¹⁵⁴ *Jones*, 132 S. Ct. at 947.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Jones*, 132 S. Ct. at 947.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 949.

¹⁶³ Iyengar, *supra* note 153, at 337.

model.¹⁶⁴ The Fourth Amendment enumerates privacy in “persons, houses, papers, and effects” because it has a close connection to property.¹⁶⁵ Fourth Amendment rights do not rise or fall based solely on the reasonable expectation of privacy test.¹⁶⁶ Otherwise, the Fourth Amendment would just state “the right of the people to be secure against unreasonable searches and seizures.”¹⁶⁷ He further reasoned that courts should rely on the common law trespass model before even asking whether a person had a reasonable expectation of privacy.¹⁶⁸ If his statements about the importance of the trespass theory were still not clear enough, Justice Scalia wrote that “the Katz reasonable-expectation-of-privacy test has *been added to*, not *substituted for*, the common-law trespassory test.”¹⁶⁹

After shifting towards the trespass model, Justice Scalia stated that the Government’s actions constituted a search under the Fourth Amendment because the Government physically occupied private property to obtain information when it attached a GPS to Jones’ car.¹⁷⁰ According to Justice Scalia, such a physical intrusion on a person’s property leaves “no doubt” that a search occurred within the scope of the Fourth Amendment.¹⁷¹ The Supreme Court concluded its analysis determining that a search occurred, but did not analyze whether that search was reasonable under the Fourth Amendment because that specific issue was not raised in the lower courts.¹⁷²

2. Concurrence: Justice Sotomayor

Justice Scalia’s views of the common law trespass model versus the privacy model are binding majority rules because of Justice Sotomayor’s fifth vote.¹⁷³ Justice Sotomayor added to Justice Scalia’s majority holding warning about the dangers of technology in her

¹⁶⁴ *Id.*

¹⁶⁵ *Jones*, 132 S. Ct. at 949.

¹⁶⁶ *Id.* at 950.

¹⁶⁷ *Id.* at 949.

¹⁶⁸ Iyengar, *supra* note 153, at 337.

¹⁶⁹ Arcila, Jr., *supra* note 112, at 27; *Jones*, 132 S. Ct. at 952.

¹⁷⁰ *Jones*, 132 S. Ct. at 949.

¹⁷¹ *Id.*

¹⁷² *Id.* at 954.

¹⁷³ Arcila, Jr., *supra* note 112, at 27-28.

concurrence.¹⁷⁴ Justice Sotomayor was concerned that technology has become so advanced that soon it will be possible for the Government to monitor people without physical intrusion on any space.¹⁷⁵

Justice Sotomayor specifically referenced the dangers of GPS tracking because of its unique attributes.¹⁷⁶ She noted that a GPS reveals aggregated information, has data storage and mining capacities, and is a readily accessible, affordable tool.¹⁷⁷ A GPS can accurately produce “a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.”¹⁷⁸ This is unrestrained power to collect information that could be easily abused by law enforcement officials.¹⁷⁹

The public’s awareness that law enforcement officials could be monitoring citizens with GPS is also dangerous because it “chills associational and expressive freedoms.”¹⁸⁰ The knowledge that GPS monitoring could be taking place at any moment could “alter the relationship between citizen and government in a way that is inimical to democratic society.”¹⁸¹ Justice Sotomayor concluded her concurrence by requesting that future law enforcement officials and judges consider the attributes of a GPS when determining what is a reasonable expectation of privacy in a modern day society.¹⁸²

D. Modern Day Monitoring: Grady v. North Carolina

Torrey Dale Grady was a recidivist sex offender who lived in North Carolina.¹⁸³ Grady was convicted of second-degree sexual offense in 1997 and was convicted again in 2006 for taking indecent

¹⁷⁴ Iyengar, *supra* note 153, at 335-336.

¹⁷⁵ *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring).

¹⁷⁶ *Id.*

¹⁷⁷ Arcila, Jr., *supra* note 112, at 20.

¹⁷⁸ *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring).

¹⁷⁹ *Id.* at 956.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* (citing *United States v. Cuevas-Perez*, 640 F.3d 272, 285 (C.A.7 2011) (Flaum, J., concurring)).

¹⁸² *Id.*

¹⁸³ *Grady*, 135 S. Ct. at 1369.

liberties with a child.¹⁸⁴ After serving his sentence, Grady was ordered to appear in court to determine whether he should be subjected to satellite-based monitoring because he was a recidivist sex offender under a North Carolina statute.¹⁸⁵

The satellite-based monitoring program was outlined in the North Carolina General Statutes.¹⁸⁶ The North Carolina statute delineating the logistics of the satellite-based monitoring program states,

“(c) The satellite-based monitoring program shall use a system that provides all of the following:

(1) Time-correlated and continuous tracking of the geographic location of the subject using a global positioning system based on satellite and other location tracking technology.

(2) Reporting of subject’s violations of prescriptive and proscriptive schedule or location requirements. Frequency of reporting may range from once a day (passive) to near real-time (active).”¹⁸⁷

In this case, the satellite-based monitoring would effectively require Grady to wear a tracking device at all times.¹⁸⁸ Grady argued that being forced to wear a tracking device would constitute an unreasonable search under the Fourth Amendment and that would violate his constitutional rights.

The trial court was not convinced by Grady’s argument and ordered him to enroll in the satellite-based monitoring program “for the rest of his life.”¹⁸⁹ Grady relied on *Jones* to appeal his case and proffered a Fourth Amendment challenge.¹⁹⁰ The Court of Appeals rejected Grady’s challenge a second time, and Grady then petitioned for discretionary review with the North Carolina Supreme Court, but

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*; see N.C. Gen. Stat. Ann. §§ 14–208.40(a), 14–208.40B (2013).

¹⁸⁶ *Grady*, 135 S. Ct. at 1369.

¹⁸⁷ NC Stat. § 14-208.40.

¹⁸⁸ *Grady*, 135 S. Ct. at 1369.

¹⁸⁹ *Id.* (citing record in No. COA13–958 (N.C. App.), pp. 3–4, 18–22).

¹⁹⁰ *Id.*

his appeal was dismissed.¹⁹¹ The U.S. Supreme Court ultimately issued a per curiam opinion to address Grady's case.

The Supreme Court began its analysis by citing prior cases that discussed Fourth Amendment violations that also occurred because the Government "physically occupied private property for the purpose of obtaining information."¹⁹² The Supreme Court stated that if there is a physical intrusion in a constitutionally protected area, then it is not necessary to analyze whether a person had a reasonable expectation of privacy.¹⁹³ The Supreme Court also emphasized that a search under the Fourth Amendment is possible even though a monitoring program is civil in nature because "it is well settled that the Fourth Amendment's protection extends beyond the sphere of criminal investigations."¹⁹⁴

In Grady's case, the satellite-based monitoring program triggers the Fourth Amendment because the program is designed to obtain information by physically intruding on Grady's person.¹⁹⁵ This physical intrusion results in a Fourth Amendment search.¹⁹⁶ The most important question to determine the constitutionality of the program is whether the search was reasonable.¹⁹⁷ The Supreme Court remanded the case to the North Carolina courts to determine the reasonableness of the search.¹⁹⁸ The Supreme Court provided the North Carolina courts with guidance for analyzing the reasonableness of the search by writing that reasonableness is determined by analyzing the totality of the circumstances.¹⁹⁹ In order to apply the totality of circumstances test, the North Carolina Court would have to look to the nature and purpose of the search as well as the extent to which the search intrudes upon reasonable expectations of privacy.²⁰⁰

¹⁹¹ *Id.* at 1370.

¹⁹² *Id.*

¹⁹³ *Grady*, 135 S. Ct. at 1370.

¹⁹⁴ *Id.* at 1371 (citing *Ontario v. Quon*, 560 U.S. 746, 755 (2010)).

¹⁹⁵ *Id.* at 1371.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Grady*, 135 S. Ct. at 1371.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

IV. PIECING THE FOURTH AMENDMENT PUZZLE TOGETHER

The courts in *Lopez-Mendoza* and *Verdugo-Urquidez* did not state that undocumented immigrants have no Fourth Amendment rights, but they also did not state that undocumented immigrants have Fourth Amendment rights.²⁰¹ There is simply no clear answer as to whether undocumented immigrants have Fourth Amendment rights or what those Fourth Amendment rights include.²⁰² However, *Lopez-Mendoza* and *Verdugo-Urquidez* provide some guidance as to how a court should make a Fourth Amendment analysis.²⁰³

The first factor to consider in a Fourth Amendment analysis is whether there are any substantial connections to the United States.²⁰⁴ According to the Supreme Court in *Verdugo-Urquidez*, an undocumented immigrant should form a substantial connection to the United States before invoking Fourth Amendment protections.²⁰⁵ Although the Supreme Court did not detail what constitutes a substantial connection, it did state that the connection should be voluntary.²⁰⁶

Justice Brennan and Justice Marshall expand on the substantial connection test in their dissent for *Verdugo-Urquidez*.²⁰⁷ According to Justice Brennan and Justice Marshall, Verdugo-Urquidez did form a substantial connection to the United States because he was subject to its criminal laws and he was being investigated for violation of those laws.²⁰⁸ Verdugo-Urquidez was facing criminal sanctions and possibly prison time; therefore, "the Government has made him a part of our community for purposes of the Fourth Amendment."²⁰⁹ The Government thus can, and did, supply the necessary

²⁰¹ See generally *Lopez-Mendoza*, 468 U.S.1032; see also *Verdugo-Urquidez*, 494 U.S. 259.

²⁰² *Watkins*, *supra* note 6, at 501.

²⁰³ See generally *Lopez-Mendoza*, 468 U.S. 1032; see also *Verdugo-Urquidez*, 494 U.S. 259.

²⁰⁴ *Verdugo-Urquidez*, 494 U.S. at 271-72.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 271.

²⁰⁷ *Id.* at 283.

²⁰⁸ *Id.* at 286.

²⁰⁹ *Verdugo-Urquidez*, 494 U.S. at 286.

substantial connection to justify invoking Fourth Amendment protections.²¹⁰

The second factor to consider in a Fourth Amendment analysis is where the potential Fourth Amendment violation took place.²¹¹ In *Lopez-Mendoza*, the Fourth Amendment violation took place in California, which is within the United States borders.²¹² The Supreme Court in *Lopez-Mendoza* assumed the Fourth Amendment was applicable and did not analyze the location of the possible Fourth Amendment violation.²¹³ Unlike *Lopez-Mendoza*, the possible Fourth Amendment violation in *Verdugo-Urquidez* took place outside of the United States borders in Mexico.²¹⁴ The Supreme Court in *Verdugo-Urquidez* stated that the Fourth Amendment was not intended to restrain the action of the Government outside of the United States borders.²¹⁵ Justice Kennedy even stated in his concurrence that “if the search had occurred in a residence within the United States, I have little doubt that the full protections of the Fourth Amendment would apply.”²¹⁶

A third factor to consider in a Fourth Amendment analysis is whether the undocumented immigrant has committed any crimes and whether his case is civil or criminal.²¹⁷ At this point it is important to reflect on the DHS’s mission and focus on targeting undocumented immigrants that could be linked to terrorism or general criminal activities.²¹⁸ Criminal activity is a priority for DHS, and therefore, DHS should theoretically be more lenient with undocumented immigrants involved in civil matters—especially considering its limited resources.²¹⁹ Courts also consider the criminal activity of an undocumented immigrant when determining how far to extend Fourth Amendment protections.²²⁰ The Supreme Court in

²¹⁰ *Id.* at 283.

²¹¹ *Id.* at 264.

²¹² *Lopez-Mendoza*, 468 U.S. at 1035.

²¹³ *Id.* at 1046; *Verdugo-Urquidez*, 494 U.S. at 272.

²¹⁴ *Verdugo-Urquidez*, 494 U.S. at 264.

²¹⁵ *Id.* at 266.

²¹⁶ *Id.* at 278.

²¹⁷ *Lopez-Mendoza*, 468 U.S. at 1038.

²¹⁸ Summerill, *supra* note 35, at 46.

²¹⁹ *Id.*

²²⁰ See generally *Lopez-Mendoza*, 468 U.S. 1032; see also *Verdugo-Urquidez*, 494 U.S. 259.

Lopez-Mendoza was more sympathetic of Lopez-Mendoza because he was not invoking the Fourth Amendment in a criminal case nor was he a suspect for a crime.²²¹ Lopez-Mendoza was an immigration detainee facing deportation, and therefore, his case was “purely civil.”²²² However, the Supreme Court in *Verdugo-Urquidez* was hesitant to rule in favor of Verdugo-Urquidez because he was suspected of drug smuggling and participating in the murder of a DEA agent.²²³

V. ANALYSIS

It is a challenge trying to apply any of the Fourth Amendment tests or factors to determine whether DHS’s use of GPS ankle bracelet monitoring is constitutional because the undocumented immigrant population is so diverse. There is no typical undocumented immigrant and to suggest otherwise would be to base a legal analysis on stereotypes and misinformation. However, for the purpose of this article, this note assumes certain shared characteristics based on the factors DHS claims to consider when determining who will wear the ankle bracelets versus who will stay in a detention center.

DHS immigration enforcement is somewhat of a priority-based system due to limited resources.²²⁴ In keeping with its mission, DHS focuses on undocumented immigrants that pose a direct threat to national security followed by undocumented immigrants that entered the country with criminal convictions such as human trafficking, drug trafficking, child pornography, and other serious crimes.²²⁵ According to Jennifer Elzea, an ICE spokeswoman, the undocumented immigrants that are allowed to leave detention centers and are forced to wear ankle bracelets are usually “those who don’t pose a threat to public safety.”²²⁶ DHS has also clarified that undocumented immigrants who are under 18, pregnant, or have significant medical issues are not issued ankle bracelets.²²⁷

²²¹ *Lopez-Mendoza*, 468 U.S. at 1038.

²²² *Id.*; Papst, *supra* note 51, at 265.

²²³ *Verdugo-Urquidez*, 494 U.S. at 262-63.

²²⁴ Fandl, *supra* note 2, at 36.

²²⁵ *Id.*

²²⁶ Caldwell, *supra* note 13.

²²⁷ Hennessy-Fiske, *supra* note 15.

Considering the scope of the DHS budget and the limitations on who can wear the ankle bracelets it is possible to assume a few shared characteristics amongst the undocumented immigrants wearing ankle bracelets. Undocumented immigrants that are subject to the Alternative to Detention Programs, specifically monitoring through ankle bracelets, are most likely (1) young to middle aged immigrants with (2) no criminal record that (3) came to the United States voluntarily. In order to examine whether the ankle bracelet monitoring programs, such as current the RGV 250 program, are constitutional this note will apply a few of the most commonly used Fourth Amendment tests.

The extent of constitutional protections afforded to undocumented immigrants is still an unanswered question by the Supreme Court. However, due to the fact that the undocumented immigrants wearing ankle bracelets are not criminals and are in the United States voluntarily, it is possible to assume from *Lopez-Mendoza* and *Verdugo-Urquidez* that they have at least minimal Fourth Amendment protections.²²⁸

A. Trespass Model

Justice Scalia's trespass model consists of a two-part test that determines if a constitutional violation occurred.²²⁹ The first part questions whether the Government engaged in a physical intrusion of a constitutionally protected area.²³⁰ The second part questions whether the intrusion was for the purpose of obtaining information.²³¹ Throughout the analysis it is helpful to keep in mind that the Fourth Amendment enumerates privacy "in their persons, houses, papers, and effects" because it establishes the scope of what is considered a constitutionally protected area.²³²

²²⁸ See generally *Lopez-Mendoza*, 468 U.S. 1032; see also *Verdugo-Urquidez*, 494 U.S. 259.

²²⁹ *Jones*, 132 S. Ct. at 955 (citing *United States v. Knotts*, 460 U.S. 276, 286, (1983) (Brennan, J., concurring in judgment)).

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at 949.

Undocumented immigrants are required to wear the GPS ankle bracelets for extended periods of time and are constantly being monitored by DHS.²³³ This means that GPS ankle bracelets are not only on the *person* of the undocumented immigrant, but the GPS ankle bracelets also enter into their *houses* and their *effects*.

Did the Government engage in a physical intrusion on a constitutionally protected area? Yes. Did the Government intrude in a constitutionally protected area for the purpose of obtaining information? Yes.

B. Privacy Model: Reasonable Expectation of Privacy Test

The privacy model test is effectively Justice Harlan's reasonable expectation of privacy test in *Katz*.²³⁴ Under this test, a Fourth Amendment violation occurs when the Government takes certain intrusive actions and a person had a reasonable expectation of privacy.²³⁵ The test to determine if there was a reasonable expectation of privacy is twofold: (1) Does a person have a subjective expectation of privacy? and (2) Would that expectation be one that society would recognize as reasonable?²³⁶

Undocumented immigrants wearing ankle bracelets have a lower reasonable expectation of privacy than other people living in the United States with a legal immigration status because they already understand that DHS is monitoring their every move. The ankle bracelets do not evaporate all privacy interests entirely though. Despite the ankle bracelets, undocumented immigrants can still have reasonable expectations of privacy.

Perhaps most notably, undocumented immigrants have a reasonable expectation of privacy when they are inside their homes. The GPS on the ankle bracelets can send signals to multiple satellites and those satellites can accurately triangulate the location of the GPS to within a few feet or sometimes within ten inches.²³⁷ That means that

²³³ John Burnett, *As Asylum Seekers Swap Prison Beds For Ankle Bracelets, Same Firm Profits*, NPR (Nov. 13, 2015), <http://www.npr.org/2015/11/13/455790454/as-asylum-seekers-swap-prison-beds-for-ankle-bracelets-same-firm-profits>.

²³⁴ *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Miller, *supra* note 114, at 561.

DHS would not only be able to know when you arrive to your home, but also where exactly you are in your home. DHS could learn intimate details, such as when you are cooking and showering. Undocumented immigrants most likely have a subjective expectation of privacy that DHS will not be such an extreme constant presence inside their homes. Society is likely to recognize that expectation as reasonable because society, as well as the courts, recognizes that arbitrary searches of one's home are a "chief evil" and that the Fourth Amendment aims to protect the "sanctity of the home."²³⁸

C. Mosaic Theory Test

The mosaic theory best applies to situations when there is long-term surveillance or advanced technology, such as a GPS, that can relay a great deal of information over a long period of time. In this case, DHS uses both long-term surveillance and advanced technology. The mosaic theory states that,

"Privacy interests, such as those protected under the Fourth Amendment, should be protected in a manner that guards against collections of small bits of information that individually may not be particularly revealing but when aggregated may reveal a great deal."²³⁹

Under the mosaic theory, a collection of a person's individual movements can create a rap sheet where the whole reveals "more than the individual movements it comprises."²⁴⁰ For example, if law enforcement officials learn that a person visited a specific coffee shop on a Sunday and ordered a small coffee, then they might not learn much even though the surveillance was detailed. If the surveillance is ongoing and law enforcements officials learn that this person visits the same coffee shop and orders the same small coffee every Sunday, then they have learned about that person's habits or patterns.²⁴¹

If this test is applied, the DHS ankle bracelet program is likely to be considered unconstitutional under the Fourth Amendment. The GPS on the ankle bracelets are accurate and can relay highly detailed

²³⁸ Katherine Evans, *The Ice Storm in U.S. Homes: An Urgent Call for Policy Change*, 33 N.Y.U. REV. L. & SOC. CHANGE 561, 580 (2009).

²³⁹ Arcila, Jr., *supra* note 112, at 12.

²⁴⁰ *Id.* at 13.

²⁴¹ *Id.*

information. Undocumented immigrants are also required to wear the bracelets throughout the day, every single day, for extended periods of time. Not only do the GPS ankle bracelets give DHS a whole picture of the private lives of these undocumented immigrants, but they also give an extremely accurate and intimate picture.

D. Balancing Test

The balancing test is typically applied in the civil context to evaluate the “reasonableness” of law enforcement officials in relation to the Fourth Amendment.²⁴² The test functions by “balancing the legitimate law enforcement interest with the level of intrusion on the individual’s Fourth Amendment privacy interest.”²⁴³ Before applying the balancing test, undocumented immigrants must have a Fourth Amendment privacy interest.²⁴⁴ The undocumented immigrants wearing ankle bracelets at a minimum have Fourth Amendment privacy interests in their person and their home.

The law enforcement officials in this case are the DHS agency. DHS’s interest is in preventing terrorist attacks and reducing the vulnerability of the United States to terrorism.²⁴⁵ Initially, it appears that DHS has a weighty interest, but after some analysis, its interests are not that substantial. The undocumented immigrants wearing the ankle bracelets do not have criminal records, which is why they were even allowed to leave the detention centers and enter the monitoring program. DHS is probably not concerned that the undocumented immigrants wearing the ankle bracelets are the type of people posing a terrorist threat to the United States or are making the United States vulnerable. DHS thus has an interest, but not a significant interest.

The undocumented immigrants wearing the ankle bracelets have an interest in having privacy in their home and their person. The privacy interest of undocumented immigrants is further strengthened because the home has always been afforded special protection by the Fourth Amendment.²⁴⁶ Keeping in mind that the ankle brace-

²⁴² Antos-Fallon, *supra* note 60, at 1014-15.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ Homeland Security Act of 2002 § 101.

²⁴⁶ Evans, *supra* note 238, at 580.

lets are on at all times and a GPS can relay extremely accurate information, the privacy interest of undocumented immigrants is much greater than the interest of DHS.

After balancing the interests of DHS and the interests of undocumented immigrants, the interests of undocumented immigrants tip the scale. The ankle bracelet monitoring programs would be considered unreasonable searches under the Fourth Amendment.

E. Evaluating the Results

The DHS ankle bracelet monitoring programs are unconstitutional under the trespass model, the privacy model, the mosaic theory, and the balancing test. The interests of DHS in continuously monitoring undocumented immigrants with ankle bracelets do not compare to the substantial Fourth Amendment privacy interests of undocumented immigrants.

First, the undocumented immigrants that are being subjected to ankle bracelet monitoring have no criminal records and do not pose a serious threat to the United States. Second, the undocumented immigrants wearing DHS ankle bracelets came into the United States voluntarily. Third, and perhaps most importantly, these undocumented immigrants have either made a substantial connection to this country or will soon make a substantial connection since they chose to comply with United States law by wearing the ankle bracelets.

DHS could have a better argument in favor of its ankle monitoring programs if the monitoring were more limited. For example, DHS could monitor the undocumented immigrants only if they were to leave the house or perhaps during certain hours of the day. However, the continuous monitoring reveals far too many intimate details that result in unreasonable Fourth Amendment searches.

There is little clarity in the Constitution regarding undocumented immigrants, but at least one thing has always been clear. The Fourth Amendment was intended to protect the home.²⁴⁷ DHS is the second-largest investigative force in the federal government and it should not be focusing its resources on monitoring undocumented immigrants in a manner that undermines a widely acknowledged constitutional truth.²⁴⁸

²⁴⁷ Antos-Fallon, *supra* note 60, at 1008.

²⁴⁸ Jason A. Cade, *Policing the Immigration Police: Ice Prosecutorial Discretion and the Fourth Amendment*, 113 COLUM. L. REV. SIDEBAR 180, 182 (2013).

VI. CONCLUSION

DHS has been consistently violating the Fourth Amendment constitutional rights of undocumented immigrants with their intrusive policing practices for years in the name of “immigration enforcement.”²⁴⁹ Until the Supreme Court directly answers the question of what Fourth Amendment rights undocumented immigrants are entitled to, it remains unclear as to what constitutional rights are afforded to undocumented immigrants. The lack of clarity concerning the constitutional rights of undocumented immigrants might be a sign that the United States is not ready to abolish citizen and noncitizen distinctions.²⁵⁰ However, if the United States is not willing to abolish distinctions based on immigration status, then it should at least guarantee a system of sufficient protections for personal rights.²⁵¹

The undocumented immigrants that are being subjected to the GPS ankle monitoring by DHS have already been classified as non-threatening to national security. In fact, it is because these undocumented immigrants do not pose a threat and have no criminal records that they are being released from the detention centers. For their good behavior and clean records, undocumented immigrants are rewarded by DHS with a release from detention centers and a sentencing of constant monitoring for an undetermined period of time.

This practice of “swapping prison beds for ankle bracelets” is effectively trading one detention center for a different type of detention center.²⁵² Undocumented immigrants report that living outside a detention center with ankle bracelet monitoring does not feel much different than living in a detention center.²⁵³ Fresvinda Ponce, a 41-year-old mother from Camayagua, Honduras describes her experience by stating “right now I feel free, but at the same time I think that I’m still not free, as long as I wear this shackle, I’m not happy.

²⁴⁹ *Id.*

²⁵⁰ Victor C. Romero, *The Domestic Fourth Amendment Rights of Undocumented Immigrants: On Gutierrez and the Tort Law/Immigration Law Parallel*, 35 HARV. C.R.-C.L. L. REV. 57, 58-59 (2000).

²⁵¹ *Id.*

²⁵² Burnett, *supra* note 234.

²⁵³ *See id.*

I feel like I'm still a prisoner."²⁵⁴ Ponce is condemned to psychologically and physically living with her unhappiness for a seemingly endless period of time because she does not even know when she can remove the ankle bracelet.²⁵⁵ Ponce is not alone. Other undocumented immigrants have reported that they too feel frustrated and demoralized because of the ankle bracelet monitoring programs.²⁵⁶ For example, Carolina Menjivar, a 28-year-old Honduran states that, "[the ankle bracelet] makes me ashamed, because they only put them on criminals, and I'm not a criminal yet."²⁵⁷ Immigrant advocates have stated that because of these experiences, the ankle monitors are not a "true alternative to detention, but rather a way to expand the scope of detention and further punish immigrants living in the U.S. illegally."²⁵⁸

It is unjust to treat undocumented immigrants like criminals without constitutional rights. Undocumented immigrants enter the United States as foreigners, but they form more than enough connections to the country such that they are entitled to at least minimal Fourth Amendment protections. After evaluating the Fourth Amendment, this article concludes that based on the trespass model, the privacy model, the mosaic theory, and the balancing test, the DHS ankle bracelet monitoring programs are unconstitutional.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ Burnett, *supra* note 234.

²⁵⁸ Marlon Bishop, *Why Are Immigrant Mothers Wearing Ankle Monitors?*, LATINO USA (Oct. 23, 2015), <http://latinousa.org/2015/10/23/why-are-immigrant-mothers-wearing-ankle-monitors/>.