Violence at Our Border: Rights and Status of Immigrant Victims of Hate Crimes and Violence along the Border between the United States and Mexico

Michael J. Nunez
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by
MICHAEL J. NUñEZ*

The bosom of America is open to receive not only the Opulent and respectable Stranger, but the oppressed and persecuted of all nations and religions, whom we shall welcome to a participation of all our rights and privileges . . . .

—George Washington, 1783

Hello, Beaners! Starting a war with the white man, down on Dairy Mart road? We will definitely accommodate you! We don't want any more greaseballs coming up here illegally . . . your filth has been degenerating this country for years, and now the white man is going to act determinedly to stop you in your tracks. California is not Greaseville, you have no right to be here, and you will be stopped. Dig it? So tell your compadres they are playing with fire, and the white man will rub two Mexicans together to make his fire, can you dig it?

—Warboys, A white aryan faction of the Great Aryan Nations

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Introduction

The 2,062-mile border that joins the United States and Mexico has increasingly become a region of hatred and violence. For the thousands of aliens who cross the border illegally every month, the journey in search of a better life is often scarred by the realities of prejudice and abuse. Robbery, assault, rape, excessive force upon arrest, and even


4. Immigrants are often victimized by bandits who make their living robbing people coming across the border. Patrick McDonnell, Border Crime Site To Get Lights, More Officers, L.A. TIMES, June 21, 1990, at B1 (San Diego County ed.) (floodlights placed along heavily traveled crossing points in attempt to stop increased crimes against immigrants); Chet Barfield, New Border Patrol Chief Guns For Bandit “Bad Guys,” SAN DIEGO TRIB., June 16, 1990, at B-1 (bandit violence and activity along the border increased to unprecedented levels); Ernesto Portillo, Jr., Burgreen Seeks Tijuana Help in Drive Against Border Crime, SAN DIEGO UNION, June 14, 1990, at B1, B11 (San Diego Police Chief Burgreen announces all time high in border crimes); 86 Arrested In Tijuana Border Sweep, SAN DIEGO UNION, April 16, 1990, at B7 (coordinated operation between San Diego police, United States Border Patrol, and Tijuana Municipal Police rounds up 86 people suspected of robbery or assault on undocumented migrants); Martin Wisckol, Crime In The Hills: Overtones of Racism Apparent, TIMES-ADVOC., Jan. 14, 1990, at B1, B2 (United States citizens are among the various bandit groups that victimize immigrants); Teresa Simons, “Illegals” Are Back in Full Force; So Much for the ’86 Immigration Act, SACRAMENTO BEE, Oct. 7, 1990, at F1 (The Bi-National Center for Human Rights in Tijuana claims that 65% of immigrants are robbed, raped, beaten, extorted, or killed by the time they cross the border, usually by border bandits or Mexican police.).

5. Immigrants often face both physical and verbal assault from sources including bandit groups, vigilantes, and United States Immigration and Naturalization Service (INS) agents. See Patrick McDonnell, Burgreen Vows Police Beef-Up Along Border, L.A. TIMES, June 14, 1990, at B1, B10 (San Diego County ed.) (in response to an increase in violence along the border, Burgreen calls for more police enforcement); Chet Barfield, Youths Terrorize Migrants With Gunfire, Paint Pellets, SAN DIEGO TRIB., Oct. 11, 1989, at B-1 (youths harass migrant workers with paint pellet guns shots); Patrick McDonnell, Latinos Tell of Rising North County Harassment, L.A. TIMES, Oct. 14, 1989, at B1 (San Diego County ed.) (some youths verbally and physically abuse migrant workers while the latter look for day jobs); John M. Giliona, FBI Investigating Alleged Abuse Of Migrant Worker In Carlsbad, L.A. TIMES, Jan. 18, 1990, at B1 (San Diego County ed.) (FBI investigates kidnapping and tying up of a migrant who was left in a field with a bag over his head with the inscribed words, “No mas aqui”—“Don’t come back”). Unfortunately, increased militarization is often not the answer but part of the problem. See, e.g., Four Marines Will Stand Trial, UPI, Apr. 14, 1984, available in LEXIS, Nexis Library, UPI File (four marines ordered to stand trial for a series of nighttime attacks on Mexicans, which one of them described as “Beaner raids”).


7. An Americas Watch report describes several particularly abusive arrests, including that of Francisco Ruiz and Evelyn Castañeda Serna:

As Castañeda climbed out of the levee on the U.S. side, she was spotted by Border Patrol Agent Walter Mark Davenport. Davenport caught up with her,
death are some of the perils that await these people in their journey to this country. Often the "illegal alien" does not know whom to trust. The assailants in these crimes may be Mexican bandits who lie in wait to prey on passing illegal aliens, white vigilante groups who hunt the border for easy targets on which to vent their hatred, or overzealous Bor-

jumped from his vehicle, and pulled her to the ground by her hair [Casteñeda was seven months pregnant]. Ruiz watched his wife's progress from the Tijuana side of the levee. Concerned for her safety, he crossed the levee toward her and the officer. Davenport slammed her head against the ground by her hair. As Ruiz approached, Davenport placed his boot on her neck. Ruiz, now about ten feet away from Davenport, reached for a rock. As he did so he shouted to Davenport to arrest his wife if he wanted to, but not to abuse her. Davenport then moved his boot onto Casteñeda's pregnant abdomen. When Ruiz raised his arm to throw the rock, Davenport fired. Medical evidence revealed that the first bullet, fired at a distance of about seven feet, struck Ruiz in the stomach; the second, fired from about twenty feet, entered in the left buttock.

ELLEN L. LUTZ, AMERICAS WATCH, BRUTALITY UNCHECKED: HUMAN RIGHTS ABUSE ALONG THE UNITED STATES' BORDER WITH MEXICO 16 (1992). See also Border Violence, supra note 3.

8. Since 1980, Border Patrol agents have shot dozens of people along the border between the United States and Mexico, killing at least 11 and permanently disabling 10 more. In addition, the Border Crime Prevention Unit, a joint Border Patrol-San Diego Police task force that operated from 1984 to 1989, was involved in 26 shooting incidents in which 19 people were killed and 24 were wounded. LUTZ, supra note 7, at 9. Although a considerable number of migrant deaths at the hands of INS, bandit, and vigilante groups are reported each year, a great many other deaths are unexplained. See, e.g., Body Found In Roadway, SAN DIEGO UNION, June 12, 1989, at B3 (unidentified Hispanic found dead from severe, unexplained head trauma). See generally Border Violence, supra note 3.

9. I will continue to use the term "illegal alien" throughout this Note simply because it is commonly used. It must be noted, however, that the term itself is negative in its description of the immigrant. This reflects the prejudice with which the immigrant must contend in his or her struggle for equal rights.

10. As bandit attacks have increased along the border, the Mexican government has responded with the formation of Grupo Beta, a specialized Mexican police unit that patrols the border region with the mission of stemming the violence and crimes being committed against immigrants. Because its primary mission is to protect the immigrant and not to implement immigration policy, Grupo Beta has succeeded in curbing some of the violence along the border. A similar agency was founded by the San Diego Police Department in 1976, but was eventually disbanded after a string of controversial shootings. See Sebastian Rotella, Reducing the Misery at the Border, L.A. TIMES, March 10, 1992, at A3.

11. The Naco, Arizona Border Patrol station received a pledge of assistance in rounding up illegal aliens from a paramilitary group called "Civilian Materiel Assistance" (CMA). The group, armed with assault rifles and other weapons, wore camouflage clothing and used infrared spy glasses to spot Mexicans as they entered the United States. James Coates, Border Commandos Have U.S. on Edge, CHI. TRIB., July 13, 1986, § 1, at 1. At one point, 20 armed members of the CMA, purportedly in search of drug smugglers financing the efforts of Central American Communists, detained 16 illegal aliens. Ranchers in Arizona Resent Citizen Group's Border Patrol, N.Y. TIMES, July 20, 1986, § 1, at 19. Around the same time, the Ku Klux Klan reportedly burned a cross near the border in Texas to frighten illegal aliens away. Coates, supra at 1. Although there have been no recent reports of the CMA group, its exist-
der Patrol agents who place their duty to arrest and expel above consideration for the health and safety of the deportee.12

The increased tension and violence along the border region stems in part from the feeling among Americans that the United States has lost control of the border.13 This encourages many to believe that more force is needed to repel the onslaught of illegal immigration. Acceptance of such a "force theory" may in turn lead to a desensitization towards reports of increased violence against illegal aliens along the border. Furthermore, there is a common misperception that a flood of illegal aliens is

ence illustrates the ability of civilian groups to operate along the border with little governmental interference.

Other examples of random violence inflicted by civilians abound, see, e.g., J. Harry Jones, Aliens Hunted by Students, Burgreen Says, SAN DIEGO TRIB., Apr. 26, 1990, at B-1, B-8 (reporting on the racially motivated shootings of illegal aliens by local teenagers); H.G. Reza, 3 Encinitas Teens Held in Gun Attack on Aliens, L.A. TIMES, Nov. 22, 1986, § 1, at 40 (same), but few better demonstrate the climate of fear than the sinister events along the Texas border. The Rio Grande Valley has long been rife with rumors of occult and satanic activities; such stories spread throughout the region after the discovery of 13 bodies in a mass grave at Rancho Santa Elena just south of the border. Mexican officials speculated that drug trafficking and an "occult network" were behind those and many other bizarre murders in the area. See Peter Applebome, Torrent of Violence by the Rio Grande, N.Y. TIMES, April 17, 1989, at A14.

12. Activists from the California Border Violence Delegation Project have criticized the oversight of the Border Patrol department of the INS. Vibiana Andrade of the Mexican-American Legal Defense and Education Fund has called for a better system of investigating shootings and other abuses by the INS. Inquiry Urged in Acts Against Aliens, L.A. TIMES, Feb. 9, 1991, at A31. As one reporter described:

While violence has long been a part of border life, a series of shootings involving Border Patrol agents has focused attention on the situation. One of the most controversial cases involved the wounding of a 15-year-old Mexican boy who was shot [in November 1990] as he was atop a fence separating Calexico from Mexicali, Mexico. Border Patrol agents claimed the boy . . . was preparing to throw a rock at an agent. Ashley Dunn, Rights Coalition Plans Border Violence Probe, L.A. TIMES, Feb. 15, 1991, at A3. Moreover, "Mexican authorities, asserting that Border Patrol agents are seldom if ever prosecuted in connection with the shooting of immigrants, have begun to call on the United States government to end 'impunity' for American agents, who are generally said to have been acting in self-defense." Marjorie Miller & Patrick McDonnell, Rise in Violence Along the Border Brings Call For Action, L.A. TIMES, Dec. 9, 1990, at A4. Americas Watch, a human rights organization, charged in a 1990 report that "U.S. Border Patrol agents have committed 'serious abuses against Mexican Nationals, including unjustified shooting deaths.'" The report also notes that in 1989, the American Friends Service Committee documented cases of five Mexicans killed and seven wounded by Border Patrol agents in the Tijuana area." Carol McGraw, Police Brutality an Institution in Mexico, Study Finds, L.A. TIMES, June 14, 1990, at A4. Border violence has also received negative attention overseas, as evidenced by a 1987 Soviet press agency release: "'The [American] authorities hunt illegal aliens like animals. . . . These immigrants also suffer physical violence at the hands of right wing extremists who claim that Hispanics 'steal jobs from 100% Americans.'" Tass Blames U.S. For Alien Deaths, L.A. TIMES, July 5, 1987, § 1, at 4.

13. Alan K. Simpson, Immigration Reform and Control, 34 LAB. L.J. 195 (1983); Davidson, supra note 2, at 579; see also United States v. Brignoni-Ponce, 422 U.S. 873, 878-79 (1975) (INS finds it impossible to prevent illegal crossings along the border between the United States and Mexico).
overrunning the country, bringing with them an entire range of social ills, including crime\textsuperscript{14} and unemployment.\textsuperscript{15} These beliefs and other manifestations of xenophobia have led many along the border region to become suspicious and resentful of illegal aliens\textsuperscript{16} and to question the aliens' contributions and loyalty to this country.\textsuperscript{17}

Regardless of the identity of the person harming them, alien victims often will not report incidents of confrontation or abuse.\textsuperscript{18} Fears of discovery and deportation lead many illegal aliens to believe that the better course is to not report such incidents.\textsuperscript{19} Aside from the fear of being discovered, many illegal aliens believe that reporting crimes would be

\begin{itemize}
  \item \textsuperscript{14} See generally Investigative Division of INS, U.S. Dept. of Justice, Alien Terrorists and Undesirables: A Contingency Plan (1986) (aliens blamed for many social ills including pollution, unemployment, disease and terrorism).
  \item \textsuperscript{15} Many believe that the availability of undocumented labor prevents American employers from being forced to provide decent pay and working conditions, thereby discouraging United States citizens from taking low-level jobs. Linda Sue Johnson, Comment, The Antidiscrimination Provision of the Immigration Reform and Control Act, 62 Tul. L. Rev. 1059, 1064 (1988); see also Debra A. Falduto, Comment, INS Surveys of Business Establishments: Reasonable, Individualized Suspicion of Illegal Alienage, 78 NW. U. L. Rev. 632, 632 (1983) (A growing interest in stemming the influx of illegal aliens arises from the belief that the illegal alien causes a variety of problems that impinge on the public welfare. These include the "depression of domestic wages, reduction in the quality of working conditions, loss of tax revenues, increase in potential health hazards, and generation of animosity by unemployed citizens and legal aliens towards the illegal aliens.").
  \item \textsuperscript{16} The deaths and violence along the border have occurred amidst what human rights advocates and Mexican authorities refer to as a growing anti-immigration sentiment in Southern California. In an attempt to stem the rising tide, President Bush and Mexican President Carlos Salinas de Gortari issued a joint denunciation of the violence after a meeting in Monterrey, Mexico in 1990. Miller & McDonnell, supra note 12, at A4. Audrey Bergner, an organizer of the "Light up the Border" protest in San Diego—a form of protest where cars park near the border and turn their lights towards Mexico in an attempt to draw attention to problems of illegal immigration—claimed that "illegal immigrants are responsible for increased drug smuggling, burglaries, drunken driving, stolen cars, measles epidemics, and welfare fraud.")
  \item \textsuperscript{17} Racism, Overwhelmed Border Patrol Feed Violence at Border, UPI, June 22, 1990, available in LEXIS, Nexis Library, UPI File.
  \item \textsuperscript{18} See, e.g., Ambach v. Norwich, 441 U.S. 68, 80-81 (1979) (those aliens who refuse to declare an intention to become United States citizens retain “primary duty and loyalty” to a foreign country); see also Philip L. Martin & Marion F. Houstoun, European and American Immigration Policies, Law & Contemp. Probs., Spring 1982, at 29, 44 (June 1980 poll found that 91% of Americans wanted an all-out effort to stop illegal immigration).
  \item \textsuperscript{19} The current system has "created an extralegal society whose members are unable to have wrongs redressed through legitimate channels without risking discovery and subsequent
useless. This belief usually stems from the fact that illegal aliens, who are unaware of their rights, believe they have none. Aliens who seek remedies for their injuries often face summary deportation with no realistic opportunities to lodge complaints. Indeed, because the undocumented immigrant's mere presence in this country is viewed as "illegal," courts and scholars are faced with the dilemma of whether the "illegal alien" should be afforded the same constitutional and civil rights as citizens and legal resident aliens.

A determination of the rights to which illegal aliens are entitled must take into account the violence being committed against aliens coming across the border. Critics of current border enforcement policies liken the border to a militarized zone. Indeed, given that some Border Patrol units are armed with assault rifles and other military equipment, the analogy may reflect the truth. Furthermore, if government agencies such as the Immigration and Naturalization Service (INS) treat the alien as a threat or a danger, it is not surprising that these agencies do not actively prosecute or even discourage bandit or vigilante groups that commit acts of violence against illegal aliens. As long as the alien is viewed as a menace, hatred and violence along the border region will continue and may, in fact, be nurtured.

To prevent this kind of violence, the illegal alien must be treated with the same dignity and respect afforded United States citizens and legal immigrants. Ineffective and often harmful methods of controlling and securing the borders must be replaced with a more thoughtful and
deportation." INTERAGENCY TASK FORCE ON IMMIGRATION POLICY, STAFF REPORT 363-64 (1979).

20. As David Hiller, a former Associate Deputy Attorney General in the Reagan Administration, commented on the presence of illegal aliens:

Their invisibility risks the creation of a permanent fugitive class living outside society's sanctions as well as its protection.

. . . . Many have lived and worked here for some time, yet they have had to live in the shadows and in fear. Few have dared to avail themselves of their rights under labor and other laws lest they be recognized and deported.


21. The American Friends Service Committee (AFSC), a humanitarian aid organization, currently monitors border violence incidents in the region along the border between California and Baja California, Mexico. See Border Violence, supra note 3, at 14-34 (statement of Maria Jimenez, Director, AFSC Immigration Law Enforcement Monitoring Project); id. at 47-60 (statement of Roberto L. Martinez, Director, AFSC United States/Mexico Border Program).

22. The increased violence along the border has prompted Border Patrol agents to wear bulletproof vests and carry assault rifles. Furthermore, in April 1989 the Border Patrol began using five state-of-the-art helicopters. Much of the arms buildup is attributable to the recruitment of the Border Patrol and other agencies responsible for keeping the border secure into the "War on Drugs." Frank Gibney, Jr., Every Agent's a Drug Agent, NEWSWEEK, May 1, 1989, at 27.
humane system that serves the needs of immigration services without ex-
acting the present human toll of abuse and violence.

This Note examines the current status and rights of the illegal alien\textsuperscript{23} within the American judicial system. In particular, this Note fo-
cuses on the extent to which the Fourth and Fifth Amendments protect illegal aliens from violence. Although other avenues of redress—such as state tort or criminal laws—may be open to the aggrieved alien, it is criti-
cal to first examine the illegal alien’s general constitutional status. On
the basis of this constitutional foundation, additional means of redress as
advocated in this Note will be more clearly justifiable, if not mandated.

Part I of this Note examines constitutional issues raised by the cir-
cumstances of border violence. In particular, it addresses problems with,
and roadblocks in the way of, extending Fourth, Fifth, and Fourteenth
Amendment protections to the illegal alien who has been harmed under
color of federal or state law. Part II then examines the real-life applica-
tion of those constitutional rights theoretically afforded the illegal alien.
Specifically, Part II examines the roles of the judiciary and Congress in
applying Fourth and Fifth Amendment mandates and analyzes the mer-
its of a \textit{Bivens}-type remedy\textsuperscript{24} in the context of border violence. Part II
also examines the civil rights protections extended by the legislature to
victimized aliens. In the past, federal civil rights laws protected illegal
aliens from discriminatory private and state action. As this Note ex-
claims, however, some courts recently have refused to afford this protec-
tion, holding instead that illegal aliens cannot assert civil rights claims
based on alienage discrimination or, even if they can, that they cannot
bring such claims against private parties. This dangerous trend makes
illegal aliens open targets for some groups along the border.

In conclusion, Part III emphasizes the shortcomings of the current
means of redress available to victimized aliens and recommends the es-
tablishment of an independent civilian review board. This board would
receive and review complaints from aliens in a manner similar to that
adopted by the citizen complaint review boards that oversee various met-
ropolitan police departments. The board must be easily accessible to
aliens, who know little about their rights or the American judicial
system.

The violence along the border must stop. Examination of the rights
and status of illegal alien victims of hate crimes and violence reveals that
rights and remedies found in the federal Constitution, statutes, and the
equitable powers of the courts are readily available to redress these
problems effectively. However, such rights are hollow if, in reality, they

\textsuperscript{23} This Note focuses primarily on abuses committed against illegal aliens. However,
Mexican-Americans and resident aliens are often mistaken for illegal immigrants and subjected
to the same mistreatment.

\textsuperscript{24} \textit{See infra} notes 74-91 and accompanying text.
are not protected in a meaningful manner. Passive indifference must give way to a concerned activism.

I. Constitutional Protection

Although United States citizens enjoy the full protections of the federal and applicable state constitutions, aliens, as this Part demonstrates, are afforded only limited constitutional protection.

A. The Fourth Amendment

(1) Laying Some Ground Rules

The Fourth Amendment of the United States Constitution provides that the right of the people to be secure against unreasonable searches and seizures of their persons, houses, papers, and effects, shall not be violated.\footnote{25} This amendment limits the exercise of federal power and guarantees citizens freedom from harm inflicted pursuant to federal authority. The relevant question here concerns the extent to which illegal aliens enjoy the protection of the Fourth Amendment.\footnote{26}

In \textit{INS v. Lopez-Mendoza},\footnote{27} the Supreme Court examined whether an alien's admission of his or her unlawful presence in the United States, obtained during an unlawful arrest that violated the Fourth Amendment, must be excluded from a civil deportation hearing. The Court held that the exclusionary rule did not apply in a civil deportation proceeding,\footnote{28} but it did not stop there; it also reasoned that use of the exclusionary rule would not be beneficial in a deportation hearing. The Court pointed out that 97.5\% of the aliens arrested by INS agents each year agree to voluntary deportation. According to these figures, only a small number of aliens actually request a formal hearing; moreover, the Court noted that of those aliens that do request a formal hearing, few challenge the circumstances of their arrest.\footnote{29} When the occasional challenge is made, the Court saw the potential deterrent effect of the exclusionary rule on the particular INS officer's overall arrest procedure as trivial.\footnote{30}

The \textit{Lopez-Mendoza} Court acknowledged that illegal entry is a crime under section 1325 of title 8 of the United States Code. Nonetheless, the Court maintained that a suppression hearing would unduly bur-

\footnote{25. U.S. CONST. amend. IV.}
\footnote{26. Yick Wo v. Hopkins, 118 U.S. 356 (1886), held the protections of the Fourteenth Amendment to be universal in nature and applicable to all persons within the territorial jurisdiction of the United States. \textit{Id.} at 368-69; \textit{see also} Plyler v. Doe, 457 U.S. 202, 210-16 (1982). However, as this Note suggests, there often will be a large difference between the rights that are theoretically available to the illegal alien and the reality of the situation.}
\footnote{27. 468 U.S. 1032 (1984).}
\footnote{28. \textit{Id.} at 1046.}
\footnote{29. \textit{Id.} at 1044.}
\footnote{30. \textit{Id.}}
den the administration of immigration laws.\textsuperscript{31} In addition, the Court was satisfied that the INS had adopted sufficient safeguards to insure that aliens were given Fourth Amendment protection.\textsuperscript{32}

The Court's opinion is curious in its refusal to hold simply that criminal constitutional protections available under the Fourth Amendment do not apply in a civil context. Even though a deportation hearing is a civil matter, illegal entry is a crime. Nonetheless, the Court broadly posited that the exclusionary rule would not apply to an unlawful arrest subsequent to an illegal entry. Application of the exclusionary rule in this context, the Court felt, would not deter INS misconduct. That the Court was willing to disregard one of the primary safeguards against constitutional violations implies that the illegal alien has a lesser Fourth Amendment right than do legal aliens and citizens.

However, the Court maintained that its decision would not apply to egregious violations of the Fourth Amendment,\textsuperscript{33} such as those that often occur in the border violence context. The Court also noted that it was only examining the exclusion of credible evidence gathered in connection with a peaceful arrest.\textsuperscript{34} Thus, an officer may violate an alien's Fourth Amendment rights as long as the arrest is peaceful.

\textit{United States v. Verdugo-Urquidez}\textsuperscript{35} also limits the class of persons that enjoy the full protections of the Fourth Amendment. \textit{Verdugo-Urquidez} involved the illegal search and seizure, in Mexico, of a Mexican national's home by United States drug enforcement agents. In rejecting a challenge to this action, the Supreme Court held that the Fourth Amendment did not apply. To justify its position, the Court interpreted the term "the people," as it appears in the First, Second and Fourth Amendments, to implicitly 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."\textsuperscript{36} Without such a connection, the Court found that Mr. Verdugo-Urquidez had no rights under the Fourth Amendment.

The \textit{Verdugo-Urquidez} Court also revisited the holding of \textit{INS v. Lopez-Mendoza}. Although in effect \textit{Lopez-Mendoza} may confer at least limited Fourth Amendment protection upon the illegal alien, the Court noted that that case did not resolve whether Fourth Amendment protections extend to illegal aliens within the United States.\textsuperscript{37} Instead, \textit{Lopez-
Mendoza decided only the narrow question of whether the exclusionary rule should be extended to a civil deportation hearing. 38

The danger of interpreting the Fourth Amendment's reach by means of a Verdugo-Urquidez analysis is that the Court is deciding the issue of who deserves Fourth Amendment protection. By asking such questions as who has developed "sufficient connections" with a particular location to be considered part of the "community," the Court passes judgment on an entire class of persons; it withholds constitutional protection and makes concessions contingent upon a showing of sufficient connection to or membership in the community. As Justice Brennan argued in his dissenting opinion in Verdugo-Urquidez, such a bestowing of rights and delineations of protected groups is inconsistent with the drafters' fundamental conception of the Bill of Rights as a limitation on the government's conduct with respect to all whom it seeks to govern. 39

In the border violence context, a slight modification of the Verdugo-Urquidez holding might lead to the conclusion that an illegal alien in this country for a short period of time, perhaps less than one hour, would not have had the opportunity to develop "sufficient connections with this country to be considered part of the community." What this potentially represents, then, is a fundamental limitation of the protections available under the Fourth Amendment. The Court has shown the willingness to be selective and judgmental on the issue of who will fall within the boundaries of the Fourth Amendment's protection. 40 To the victimized illegal aliens along the border, the trouble is that the boundaries might be narrower than our own national borders.

(2) Exclusion and Membership

Faced with a lesser Fourth Amendment protection for illegal aliens, the next inquiry must be whether there are any legitimate justifications for the distinction.

Linda Bosniak has compared the status and protections afforded citizens to the status and protections provided immigrants who seek entry to the United States. 41 Bosniak theorized that a concept of "We" as opposed to "Them" is essential to any notion of a consensual political iden-

38. Id. (Stevens, J., concurring).
39. Id. at 288 (Brennan, J., dissenting).
40. This selective application of constitutional protection follows what could be called a contractarian approach. This approach interprets the Constitution as "a social compact that binds by mutual obligations the government and 'We the People' of the United States." Note, The Extraterritorial Applicability of the Fourth Amendment, 102 HARV. L. REV. 1672, 1674-75 (1989). An organic view, in contrast, reads the Constitution as a constraint on governmental power. This approach would extend protection to anyone injured by the acts of a United States official regardless of his or her locale. See id.
In order for the community to survive, limited resources must be preserved for the membership. This basic premise may be viewed as the root of exclusion in immigration policy. The alien at the border seeking entry is seeking the privilege of entry, not the right. Hence, the process afforded the alien is limited by the discretion of the legislative body with the authority to grant such a privilege.

An ideological conflict of interest emerges from an analysis of the problems of border violence, the illegal alien, constitutional protection, and immigration policy. Although INS v. Lopez-Mendoza holds that the illegal alien is entitled to the protections of the Fourth Amendment, the theory behind immigration policy and border enforcement—excluding certain persons—places the illegal alien in a precarious position. On one hand, the Court has found that illegal aliens are entitled to a limited degree of Fourth Amendment protection. On the other hand, the government through its armed police force actively seeks to expel illegal aliens. Thus, because of the competing interests, concessions must be made to effectuate both of these policies.

In contrast with the exclusion theory, which limits constitutional protection for the illegal alien, universalism seeks to expand protection. This theory of constitutional protection maintains that constitutional provisions that do not contain express limitations as to the persons or places covered should be interpreted as applicable to all people in all places. Both the natural rights background of the American constitutional tradition and concepts of human rights lend further support to a universalist approach. A universalist approach dismisses out of hand the notion that certain rights granted by the Constitution are inapplicable in certain places. This is especially true of those provisions that require a balancing test, which is precisely the situation where illegal aliens' Fourth Amendment rights are balanced against the policy of exclusion.

A universalist analysis of the Fourth Amendment favors seeking protection for illegal aliens who are victims of violence. This approach rejects the "sufficient connections" test found in United States v. Verdugo-Urquidez. In holding that Mr. Verdugo-Urquidez was not one

42. Id. at 963.
43. Id.
44. Id. at 970.
45. Id.
46. See supra notes 27-34 and accompanying text.
48. Id.
49. Id.
50. See supra notes 35-39 and accompanying text.
of the "people" protected by the Fourth Amendment, the Court obviously was not swayed by the arguments in favor of universalism.

In contrast, the *Lopez-Mendoza* Court did not hold that the Fourth Amendment was inapplicable. Instead, it balanced the competing interests of illegal immigrants and the government. Although the illegal alien at the border is entitled to a limited degree of Fourth Amendment protection, the objectives of immigration policy may be invoked to limit the provision of meaningful protection. This approach is troubling in light of the ease with which constitutional safeguards may be withheld in the interest of furthering general immigration policy. While the Court continues to maintain that egregious constitutional violations may be subject to review in the court system, the increase in border violence indicates that immigrants need more than open doors to the courts to be free from violence along the border.

B. The Fifth Amendment

In addition to Fourth Amendment protection, the Supreme Court has held that the Fifth Amendment prohibits the federal government from depriving illegal aliens of life, liberty, or property without due process of law. Whereas who is protected by the Fourth Amendment remains a subject of debate, the Fifth Amendment clearly extends to illegal aliens. Any person present in the United States is entitled to equal justice before the law, including procedural protections in conjunction with any deprivation of liberty. The Court has specifically acknowledged that illegal

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52. Because *INS v. Lopez-Mendoza* effectively prevents illegal aliens from invoking the exclusionary rule to deter Fourth Amendment violations, their only remaining redress is to file civil suits with the hope of obtaining money damages or an injunction. In his dissent, Justice White was quick to point out the inadequacy of such an alternative:

The suggestion that alternative remedies, such as civil suits, provide adequate protection is unrealistic. Contrary to the situation in criminal cases, once the Government has improperly obtained evidence against an illegal alien, he is removed from the country and therefore is in no position to file civil actions in federal courts.

468 U.S. 1032, 1055 (White, J., dissenting).

53. *Id.* at 1050-51 & 1051 n.5.

54. U.S. CONST. amend. V; *see* Mathews v. Diaz, 426 U.S. 67, 77 (1976) (Fifth and Fourteenth Amendment protections apply even though presence is unlawful, involuntary, or transitory). In *Choudhry v. Jenkins*, 559 F.2d 1085 (7th Cir.), *cert. denied*, 434 U.S. 997 (1977), the court noted that aliens enjoy the protections of the Bill of Rights, at least in matters wholly unrelated to immigration and naturalization. *Id.* at 1087 n.1. Although it may be said that INS arrests along the border "relate to immigration and naturalization," agents using excessive force or perpetrating other unauthorized abuses are not acting in their capacity as immigration officials.

55. Flores v. Meese, 942 F.2d 1352, 1359 (9th Cir. 1991) (holding, in a class action challenging governmental detention of children during the pendency of deportation proceedings, that the children as persons within the United States must be afforded procedural protections
aliens merit the due process protection of the Fifth Amendment. In the border violence context, however, comparing the words and spirit of the Fifth Amendment as interpreted by the Court with the realities of the daily abuses reveals a vast disparity between the protection theoretically afforded illegal aliens and the protection they actually receive.

_Haitian Refugee Center v. Smith_ involved a class action suit brought against the INS complaining that the agency had instituted a program "to achieve expedited mass deportation of Haitian nationals irrespective of the merits of an individual Haitian's asylum application and without regard to the constitutional, treaty, statutory, and administrative rights of the plaintiff class." Mindful of the large number of potential claimants that might wish to challenge INS practices on due process grounds, the Court affirmed the district court's order that the INS create a detailed plan for a fairer procedural mechanism for handling asylum applications.

The foundation of _Haitian Refugee Center's_ holding lies in _Mathews v. Diaz_, which mandated that illegal aliens not be deprived of due process rights. Justice Stevens stated:

> There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.

The court in _Haitian Refugee Center_ was aware of the implications of imposing constitutional restraints that might inhibit the ability of the political branches to effectuate immigration control. To limit its holding, therefore, the court stated: "[W]e hold simply that the government violates the fundamental fairness which is the essence of due process when it creates a right to petition and then makes the exercise of that right utterly impossible."

*in conjunction with any deprivation of liberty), cert. granted sub nom. Barr v. Flores, 117 L. Ed. 2d 490 (1992). Judge Tang, concurring in _Flores_, observed: "Liberty is the norm; arrest, detention, or restraint by the state is the exception. To operate otherwise makes a mockery of 'government of the people, by the people.'" _Id._ at 1366 (Tang, J., concurring).  
56. _Mathews_, 426 U.S. at 77.
57. 676 F.2d 1023 (5th Cir. Unit B 1982).
58. _Id._ at 1026 (citation omitted).
59. _Id._ at 1039.
60. _Mathews_, 426 U.S. at 77 (citations omitted).
61. _Haitian Refugee Center_, 676 F.2d at 1039. In defining what process is due, the court continued: "the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus, it has become a truism that "some form of hearing" is required before the [individual] is finally deprived of a protected . . . interest." _Id._ (quoting Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982) (quoting Board of Regents v. Roth, 408 U.S. 564, 570-71 n.8 (1972))) (alteration by court). "Moreover, the hearing must
The protection afforded to victims of border violence by Haitian Refugee Center's holding is minimal and ineffective; although it is not "utterly impossible" for illegal aliens to exercise petitioning rights, such exercise is in fact highly impractical and unlikely to occur. And even where illegal aliens do attempt to avail themselves of this "right," overriding concerns of immigration policy deprive the proceedings of substance—reducing them to a mere formality. If, in the name of effective border control, and in light of the large number of deportations that occur every day, procedural due process for instances of abuse is respected, but the right to petition in individual cases is placed beyond reach for practical purposes and highly unlikely to succeed, the Haitian Refugee Center standard would, nevertheless, appear to be satisfied.

Haitian Refugee Center demonstrates that even though the courts stand behind the proposition that illegal aliens are entitled to Fifth Amendment protection, political considerations—namely, deference to the executive branch in immigration matters—typically supersede application of the Fifth Amendment's guarantees in the context of border violence. That aside, extending Fifth Amendment protection to victimized illegal aliens presents serious practical difficulties. Specifically, in many cases of alien abuse, deportation usually follows shortly after the incidents of abuse have occurred. Even if an alien files a complaint with the proper agency, deportation proceedings may go forward unless the alien is able to file and is granted a stay of deportation. Once an illegal alien who may have a valid complaint against the INS is deported, it is not uncommon for the immigrant to "disappear" from the scene; that is, the alien may remain in Mexico or shortly after deportation clandestinely re-enter the United States. Resurfacing to pursue a claim again places the alien in jeopardy of deportation. Furthermore, filing a complaint from Mexico against the offending party may not be within the means of

be conducted 'at a meaningful time and in a meaningful manner.'” Id. (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

62. See generally Hiroshi Motomura, Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation, 100 YALE L.J. 545 (1990). Motomura points out the relationship between alien policy and foreign policy. As such matters are exclusively entrusted to the political branches, they are largely immune from judicial inquiry or interference.

63. See LUTZ, supra note 7, at 2 (low morale among Border Patrol agents stems from their knowledge that most of the undocumented aliens they arrest will be sent back to Mexico without charge or punishment and that many will attempt to reenter the United States another day).
the deported illegal alien. For several reasons, including aliens’ lack of financial resources, a complete understanding of the American judicial system, or both, the possibility of filing a complaint from Mexico may be available, but the impracticability of this option makes it meaningless. Understandably, this can be a cause of frustration for immigration advocates who seek to protect aliens and attempt to obtain legal remedies. Without assurance that the alien will not be deported before complaints can be heard, any “guarantee” of Fifth Amendment protection for the alien rings hollow.

Describing the constitutional rights and protections that aliens enjoy after entering this country is easy; it is another matter to protect these rights in a meaningful way. Although aliens may theoretically enjoy some protections under particular constitutional provisions, in reality, such a limited degree of protection has no meaning or significance. The illegal alien population in the United States has been called the “shadow population.” This term aptly conveys why the problem along the border is ignored, overlooked, and considered to be of little importance.

Today, the illegal alien who seeks constitutional protections must do so in courts that either deny the existence or limit the availability of such rights. Attempts to focus attention on areas where state action has violated aliens’ constitutional rights have met with only limited success. Thus, it is not surprising that the violations continue. Because of

66. See infra notes 71-72 and accompanying text.
67. See EEOC v. Tortilleria “La Mejor,” 758 F. Supp. 585 (E.D. Cal. 1991) (holding that undocumented workers may sue for employment discrimination under Title VII of the Civil Rights Act of 1964 regardless of their immigration status). This form of protection—treating one’s immigration status as irrelevant to the availability of civil remedies—must be extended to immigrant abuse cases along the border for the alien to enjoy true Fifth Amendment protection.

68. Plyler v. Doe, 457 U.S. 202, 218 (1982); see also id. at 219 n.18 (Government policies have created an illegal alien population “whose presence is tolerated, whose employment is perhaps even welcome, but who are virtually defenseless against any abuse, exploitation, or callous neglect to which the state or the state’s natural citizens and business organizations may wish to subject them.”) (quoting Doe v. Plyler, 458 F. Supp. 569, 585 (E.D. Tex. 1978), aff’d, 628 F.2d 448 (5th Cir. 1980), aff’d, 457 U.S. 202 (1982)).

69. For example, in Plyler a Texas statute attempted a flat-out denial of education privileges to children of illegal aliens. Although the state statute did not withstand constitutional challenge, one must question the state’s rationale that illegal aliens are less deserving of an education than United States citizens. As Justice Brennan pointed out in his opinion of the Court, “the illegal alien of today may well be the legal alien of tomorrow” and . . . without an education, these undocumented children, “[already] disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices, . . . will become permanently locked into the lowest socio-economic class.” Id. at 207-08 (footnote omitted) (quoting Doe v. Plyler, 458 F. Supp. at 577) (alteration and omission by court). The compassion and understanding the Court demonstrated for the children of illegal aliens in Texas should be focused on aliens along the border as well.

70. Though the Plyler Court stuck down a Texas ordinance denying school access to immigrant children, it refused to regard illegal aliens as a “suspect class,” which would have
cultural or educational disadvantages,\textsuperscript{71} aliens who are subject to abuse or denied their rights may not be fully aware that a limited degree of constitutional protection is extended to all persons unlawfully within the jurisdiction of the United States.\textsuperscript{72} At the same time, state and federal courts are willing to overlook violations of aliens' rights in furtherance of a valid immigration policy. As a result, aliens are unlikely or unable to vigorously pursue legal protection.\textsuperscript{73}

\section*{II. Application of Constitutional Protections}

\subsection*{A. Judicial Equitable Jurisdiction and the \textit{Bivens} Option}

In \textit{Bivens v. Six Unknown Agents of Federal Bureau of Narcotics},\textsuperscript{74} a case involving a violation of the Fourth Amendment by federal agents\textsuperscript{75} acting under the color of federal law, the Supreme Court held that the Fourth Amendment does not merely afford federal agents a defense to state law claims for damages; rather, the Fourth Amendment acts as an independent limitation upon the exercise of federal power and creates a valid federal cause of action for damages resulting from its violation.\textsuperscript{76} Bivens, a United States citizen,\textsuperscript{77} was subjected to an unwarranted (literally and figuratively) search of his apartment by federal drug agents. As

insured a higher degree of scrutiny in reviewing statutes and ordinances aimed at aliens. \textit{Id.} at 219 n.19; \textit{see also} Pierre v. United States, 547 F.2d 1281, 1289-90 (5th Cir.) ("Congress clearly has the power to draw distinctions between classes of aliens which, if drawn among classes of citizens, would appear to violate the equal protection clause or other constitutional rights."). \textit{Vacated on other grounds}, 434 U.S. 962 (1977).


73. The Supreme Court has indicated that with regard to aliens at the border, the government is free to provide whatever protective procedures it deems appropriate without interference from the courts. \textit{United States ex rel. Knauff v. Shaughnessy}, 338 U.S. 537, 542-44 (1950). \textit{See T. Alexander Aleinikoff, \textit{Aliens, Due Process and Community Ties: A Response to Martin}}, 44 U. Pitt. L. REV. 237, 258-59 (1983). ("Not only has due process ... withered on the vine at the border, but the government in such cases continues to argue that the courts have no authority to intervene at all because the cases involve 'political questions' and issues of international relations.").

74. 403 U.S. 388 (1971).

75. In considering the personal interests protected by the Fourth Amendment, the \textit{Bivens} court distinguished between harm inflicted by government officials acting in their official capacity and harm inflicted by individuals. \textit{Id.} at 391-92. This distinction may be inappropriate in the context of border violence crimes. Whether harm is committed by INS officials, organized bandits, or vigilante groups, the harm inflicted upon these people is perceived by them as "institutionalized harm" and is equally egregious in all cases. \textit{But see Monroe v. Pape}, 365 U.S. 167, 193-98 (1961) (Harlan, J., concurring) (arguing that Congress did not intend civil rights acts prohibiting discrimination "under color of law" to apply to harm inflicted by those acting without governmental authorization).

76. \textit{Id.} at 394.

77. For a case involving an illegal alien raising a \textit{Bivens}-type action, see Lopez v. INS,
a result, Bivens was arrested in front of his family. Further, the agents threatened to arrest his entire family. The district and appellate courts denied his $15,000 claim for humiliation, embarrassment, and mental suffering damages based on the violation of his Fourth Amendment rights.

Although there was no congressional authorization for a damages award in this situation, the Supreme Court reversed the holding of the appellate court and remanded for further proceedings to compensate for the violation of the plaintiff's constitutional rights. The holding was consistent with a long-standing civil liberties doctrine that grants individuals the protection of the laws whenever they have suffered an injury. In essence, the absence of statutory authority does not always prevent the courts from acting in equity to grant a remedy when harm has been done. Pursuant to this equitable jurisdiction, the courts share with the legislature the duty of guarding the liberty and welfare of the people.

This basic tenet of constitutional protection applies to situations involving the INS. After Bivens, a United States citizen harmed by an INS agent, either through a false arrest or the use of excessive force, would have a claim for money damages based on a Fourth Amendment violation. In the case of an alien, however, particularly an illegal alien, the same violation is somehow put into question. This discriminatory treatment of the illegal alien in connection with border matters is inconsistent with prior Supreme Court holdings that mandated Fifth and Fourteenth Amendment protection for the illegal alien. Although there may be legitimate reasons for limiting some constitutional privileges to the citizenry, such as the right to vote, such logic does not hold true for illegal aliens victimized by border violence. It is reasonable to


78. Bivens, 403 U.S. at 398.

79. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

80. The Bivens Court noted that historically, damages have been the ordinary remedy for the invasion of one's personal liberty interests. 403 U.S. at 395. The Court further noted that although the Fourth Amendment does not specifically provide for its own enforcement by an award of money damages, "'it is ... well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.'" Id. at 396 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)) (omission by court).


82. Undocumented aliens are denied many of the protections afforded United States citizens. They are not entitled to Miranda warnings, no public monies may be used for their defense, and hearsay evidence is common at deportation hearings, at which the Government need not meet a burden of proof. Furthermore, the Board of Immigration Appeals can ignore those decisions of the United States Courts of Appeals that originate in another circuit. See Sal Manna, Human Rights Human Wrongs, STUDENT LAW., Mar. 1980, at 32, 35-37.

83. See supra text accompanying note 60.

84. See Wong Wing v. United States, 163 U.S. 228, 238 (1896).
require the newly arrived alien to wait for a period of time before being given the right to vote. A period of time is necessary for the alien to become acquainted with the political system of his or her new country. With time, the new alien may acquire the ability to cast an educated and rational vote. There is no comparable legitimate reason why aliens should be required to wait for some period of time before they are offered protection from abuse.

The fact that an agent acting in the name of the United States possesses a far greater capacity for harm than an individual acting on his own further supports extending constitutional protection to the illegal alien victim. One is less likely to resist abuse from an agent purporting to act under governmental authority. This harm is multiplied when immigrants, ignorant of United States laws and customs, are faced with attacks or abuses by uniformed officers representing the United States. The prejudice and abuse that immigrants encounter from INS officers may lead to suspicion of all uniformed officers, including police or fire department personnel. Furthermore, this mistrust may spread from the uniformed agents in this country to encompass all members of the dominant culture, leading to polarization between immigrant and non-immigrant communities within this country and frustrating efforts at integration.

If Bivens is to be understood as granting courts discretion in fashioning remedies for violation of constitutional rights regardless of whether the legislature has addressed such violations, courts should extend this protection to the immigrant seeking remedy for constitutional harm done. In other words, protection should be extended to the illegal alien where her constitutional interests have been harmed, so long as such harm is not of the type that should be redressed only if suffered by United States citizens. These latter instances should be few. An obvious example involves voting rights, which are enjoyed exclusively by United States citizens. Such a distinction is logical: United States citizens might be harmed if recently arrived aliens, unaware of all the issues involved in a particular political campaign, affect its outcome by casting uninformed

85. Voter qualification rules based on the interest of insure intelligent voting have been found to be legitimate so long as the state could demonstrate that its classification is carefully tailored to that objective. Generally, long-time residents of a community are likely to be more knowledgeable about local affairs than newcomers. That difference in relative understanding of local issues makes a durational residence requirement for voting rational. Gerold M. Rosberg, Aliens and Equal Protection: Why Not the Right to Vote?, 75 MICH. L. REV. 1092, 1117-18 (1977).


87. See Manna, supra note 82, at 55. ("[I]llegal aliens frequently are reluctant to deal with any government officials, for fear that the INS will be notified of their presence.")
votes. Such harm to the general populace is absent where protection is granted to the illegal alien victim of crime or violence.

Justice Burger, in his *Bivens* dissent, suggested that Congress impose statutory guidelines on federal agencies to prevent the further occurrence of the harm in question, rather than having the Court judicially create a cause of action for money damages.\(^8\) It seems wholly appropriate that similar guidelines be imposed in the border crime context to prevent abuses by overzealous INS agents.\(^9\) Until federal and state legislatures create protective standards, *Bivens* should stand for the proposition that the courts themselves may create remedies when confronted with legislative silence in an area that can no longer be overlooked.

This argument for extending the equitable powers of the courts concededly advocates judicial activism. Such advocacy is of course dangerous: inconsistency and unfavorable results for aliens and their immigration attorneys are two hazards of this approach. However, as a prerequisite to such activism, the particular violation must be in an area of legislative silence.\(^9\) This Note argues that the silence with respect to border violence stems from either legislative ignorance of the extent and severity of the crisis or an unwillingness to adequately address the problem.\(^9\) Because of the uncertainties that result from relying on a court's

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8. *Bivens*, 403 U.S. at 422-23 (Burger, C.J., dissenting) (suggesting that a judicially created remedy was inappropriate and recommending that Congress pass a statute providing for damages or penalties against the particular officers who were responsible for the harm done, which award of damages or penalties would then undoubtedly become a part of an officer's personnel file and could result in an order for further training to curb the violence and mistreatment).


90. In denying an independent cause of action for damages for an alleged violation of the plaintiff's Fifth Amendment due process rights, the Court stated that *Bivens*-type remedies are available only where there exist "no 'special factors counselling hesitation in the absence of affirmative action by Congress,' no explicit statutory prohibition against the relief sought, and no exclusive statutory alternative remedy." *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988) (emphasis added) (quoting *Bivens*, 403 U.S. at 396, and citing *Davis v. Pressman*, 442 U.S. 228, 246-47 (1979) and *Carlson v. Green*, 446 U.S. 14, 18-20 (1980)). The Court, satisfied that the legislature had addressed the problem created by a state agency's wrongful termination of disability benefits under Title II of the Social Security Act, would not create new substantive legal liability. *Id.* at 426-27, 429. Dissenting in *Chilicky*, Justice Brennan argued: "The mere fact that Congress was aware of the prior injustices and failed to provide a form of redress for them, standing alone, is simply not a 'special factor counselling hesitation' in the judicial recognition of a remedy. Inaction ... is a notoriously poor indication of congressional intent ...." *Id.* at 440 (Brennan, J., dissenting).

91. Unlike the context of Social Security, in which *Chilicky* limits application of a *Bivens*-type remedy under the theory that the legislature has addressed the problem and thus has preempted judicial intervention for constitutional violations, it is not clear that the legislature's silence in the border violence context was intentional. Justice Brennan, dissenting in *Chilicky*, pointed out that in *Carlson v. Green*, 446 U.S. 14 (1980), a *Bivens* action was permitted for redress of injuries flowing from alleged unconstitutional conduct by federal prison officials, notwithstanding the fact that Congress had expressly provided a statutory remedy in the Fed-
discretion, this form of action must remain the last resort of those advocating an effective response to the problem of border violence. Nonetheless, it cannot be ignored that the judiciary may be the only recourse for the harmed alien facing the barren landscape of border justice.

B. Federal Statutory Law and Equal Protection

The civil rights protections found in sections 1981 and 1983 of title 42 of the United States Code may be used to grant a remedy to an alien who is a victim of abuse and violence. Problems arise in applying section 1981, however, because the circuit courts disagree as to the illegal alien's right to bring suit for private violations. Historically, section

Section 1981 provides:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) Definition

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected by impairment against non-governmental discrimination and impairment under color of state law.


Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.


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BORDER VIOLENCE AND IMMIGRANT RIGHTS

1981 has been employed to protect minority group members who have been harmed by discriminatory laws and practices of particular communities. Its protections are ideal for safeguarding the rights and extending a remedy to the victimized alien along the border.

(1) Applicability to Alien Victims of Border Violence

One of the most troublesome cases standing in the way of extending section 1981 protection to the victimized alien is Bhandari v. First National Bank of Commerce.\(^{94}\) In Bhandari the Fifth Circuit, sitting en banc, held that the civil rights protection of section 1981 did not provide a remedy for discrimination against aliens by private persons.\(^{95}\)

Bhandari sought protection under section 1981 after the First National Bank of Commerce refused, based in part on his alienage status, to issue him a credit card.\(^{96}\) While examining the legislative history of section 1981, the court found its genesis in section 16 of the 1870 Voting Rights Act,\(^{97}\) which was enacted to protect Chinese aliens against the discriminatory laws of California.\(^{98}\) The court denied extension of section 1981 protection in Bhandari because the discrimination based on alien status was between private parties.\(^{99}\) The court, in deciding that section 1981 would apply only to discriminatory state actions against aliens, made a clear distinction between racial and citizenship discrimination. The former is intolerable; the latter, however, is not.\(^{100}\)

The Bhandari court, in holding that only a moral obligation to the alien exists in the civil rights context,\(^{101}\) moved significantly away from settled precedent granting the alien civil rights protection. By contrast, in Runyon v. McCrary,\(^{102}\) African-American children who were denied admission to a private school were allowed to bring a section 1981 action. Runyon held that section 1981 reaches private acts of racial discrimina-

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\(^{94}\) 829 F.2d 1343 (5th Cir. 1987) (en banc), vacated, 492 U.S. 901, reinstated on remand, 887 F.2d 609 (5th Cir. 1989) (en banc), cert. denied, 494 U.S. 1061 (1990).

\(^{95}\) Id. at 1349-50.

\(^{96}\) The facts are described in the Fifth Circuit panel opinion. See Bhandari v. First Nat'l Bank of Commerce, 808 F.2d 1082, 1084 (5th Cir.), on reh'g en banc, 829 F.2d 1343 (5th Cir. 1987) (en banc), vacated, 492 U.S. 901, reinstated on remand, 887 F.2d 609 (5th Cir. 1989) (en banc), cert. denied, 494 U.S. 1061 (1990).

\(^{97}\) Act of May 31, 1870, ch. 114, § 16, 1140 (N.D. Cal. 1977) (same). The 1991 amendments to section 1981 place the continued vitality of these latter cases in serious doubt. See infra notes 104-105 and accompanying text.

\(^{98}\) Bhandari, 829 F.2d at 1348.

\(^{99}\) Id. at 1349.

\(^{100}\) Id. at 1352.

\(^{101}\) "When an alien settles with you in your land, you shall not oppress him. He shall be treated as a native born among you, and you shall love him as a man like yourself." Id. at 1352 n.17 (quoting Leviticus 19:33 (New English Bible)).

\(^{102}\) 427 U.S. 160 (1976).
If Runyon left any doubt, the Civil Rights Act of 1991 settled this question: the "rights protected by [section 1981] are protected against impairment by nongovernmental discrimination and impairment under color of State law." Moreover, several appellate and Supreme Court decisions have also specifically extended section 1981 protection to discrimination against legal aliens. Given that section 1981 prohibits both public and private acts of discrimination, and that its protections apply to aliens, Bhandari's reasoning can only survive if section 1981 does not protect illegal aliens at all. This is not the case.

The legislative history of the Civil Rights Act of 1866, the predecessor to section 1981, supports an expansive reading of the protection afforded by the statute. Senator Trumbull, who introduced the act as the Civil Rights Bill, Senate Bill No. 61, on January 5, 1866, described it as a bill that would apply to "every race and color" and would "protect all persons in the United States in their civil rights, and furnish the means of their vindication." Representative Bingham further explained that the act proposed to protect not just the newly freed slaves, but also "the alien and stranger." Thus, although the language of the act could have been narrowly tailored to address solely the issue of recently emancipated African-Americans, the language was written broadly. The remarks of Senator Trumbull and Representative Bingham suggest that the use of such all-inclusive language was intentional.

The Bhandari court's logic is flawed. By basing its holding on moral obligation and patriotism, the court ignored the history of section 1981.

103. Id. at 173-75.
105. In Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974), overruled by Bhandari, 829 F.2d at 1346-47, Mexican aliens brought a discrimination action against employers to recover back pay. The appellate court interpreted section 1981 as covering aliens. Id. at 653. See also Graham v. Richardson, 403 U.S. 365, 377 (1971) (section 1981 held applicable to alienage discrimination in the denial of welfare); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1947) (civil rights protections extend to aliens as well as to citizens). Professor Kaufman, in examining the parameters of section 1981, noted that the most expansive reading of the statute can be found in cases that afford protection to members of groups who suffer discrimination because they are perceived by defendants, correctly or incorrectly, to be separate and distinct from whites. See Kaufman, supra note 93, at 278. The victimized alien along the border would surely fit this description.
106. Section 1981's "language is of extraordinary breadth. It does not speak in terms of race, religion or nationality but, on the contrary, speaks of 'all persons.' It is hard to imagine what broader language Congress could have adopted." Ortiz v. Bank of Am., 547 F. Supp. 550, 553 (E.D. Cal. 1982), aff'd, 824 F.2d 692 (9th Cir. 1987).
107. CONG. GLOBE, 39th Cong., 1st Sess. 211 (1866).
108. CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866). Bingham also noted his concern that Congress had no power to bar discrimination under color of law, id. at 1292-93, but the subsequent ratification of the Fourteenth Amendment eliminated this problem. See U.S. CONST. amend. XIV, § 5.
Congress passed the law that became section 1981 in order to put an end to the remnants of slavery as they manifested themselves in the mistreatment of African-Americans in the emancipated South.\(^\text{109}\) In addition, the legislative history of section 1981 demonstrates that Congress was also concerned about the mistreatment of Chinese aliens under California laws.\(^\text{110}\) Finally, the Civil Rights Act of 1991 explicitly rejected any distinction between state and private actors for section 1981 purposes.\(^\text{111}\) Bhandari's interpretation to the contrary is insupportable.

The Mexican illegal alien, subject to abuse and violence, is clearly in a situation similar to that of the emancipated African-American of the South and the Chinese alien of nineteenth century California. In *Hernandez v. Texas\(^\text{112}\)* the Court referred to the need to constantly reexamine under the Fourteenth Amendment society's prejudices to determine which groups require additional judicial protection:

> Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. . . . The Fourteenth Amendment is not directed solely against discrimination due to a "two-class theory"—that is, based upon differences between "white" and Negro.\(^\text{113}\)

Similarly, because illegal aliens are a distinct, identifiable group in American culture that is the subject of prejudice and mistreatment by individual and state action, section 1981 should apply to them just as it applies to other classes that have invoked its protection.

**(2) Benefits of Extending Civil Rights Protection to the Illegal Alien Along the Border**

Illegal aliens along the border have been described as the "ideal crime victims"\(^\text{114}\) because they deal primarily with cash, and they do not

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110. Bhandari v. First Nat. Bank of Commerce, 829 F.2d 1343, 1346 (5th Cir. 1987) (en banc), vacated, 492 U.S. 901, reinstated on remand, 887 F.2d 609 (5th Cir. 1989) (en banc), cert. denied, 494 U.S. 1061 (1990). Critics have claimed that these two histories—one of discrimination against African-Americans as the genesis of section 1981 and the other crediting Chinese discrimination—are incompatible. Id. at 1346 n.6. However, regardless of the applicable legislative history, mistreatment of an entire class of persons cannot be tolerated and is worthy of proscription.
111. See supra text accompanying note 104.
113. Id. at 478.
114. This remark was made by Father Carlos Titolo during my visit to his Tijuana, Mexico shelter, which receives many victims of border violence.
usually report crimes to the authorities.\textsuperscript{115} Bandit activity along the border has been allowed to flourish for decades as generation after generation of illegal aliens continues to cross the border. Illegal aliens along the border therefore constitute a distinct group. It is also "illegal aliens" collectively upon whom right wing extremist groups have vented their anger.\textsuperscript{116} This group also bears the brunt of INS mistreatment. Section 1983 is designed to ensure that all groups enjoy the protection of civil rights and equality before the law in all respects.\textsuperscript{117}

Justice Blackmun has described the protections of section 1983 as the product of an assault on the "Old South," remarking: "Today, section 1983 properly stands for something different—for the commitment of our society to be governed by law and to protect the rights of those without power against oppression at the hands of the powerful."\textsuperscript{118}

The illegal alien's right to state a claim under section 1981 is clearly recognized in \textit{Commercial Standard Fire & Marine Co. v. Galindo}.\textsuperscript{119} The Texas Court of Civil Appeals, upholding an illegal alien's suit for workers' compensation, recognized that although section 1981 was not originally created for the alien, its provisions have been held to apply to both legal and illegal aliens.\textsuperscript{120} Thus, in light of \textit{Commercial Standard}'s holding that illegal aliens have the right to bring suit under section 1981, and the \textit{Runyon} Court's holding, now codified as positive law, that section 1981 reaches private acts that violate civil rights, the \textit{Bhandari} decision—denying illegal aliens protection from private violations—not only contravenes relevant legal reasoning and precedent, but also permits the abandonment of a distinct class of persons that would benefit from extension of section 1981's protection.

\textsuperscript{115} See supra note 18. \\
\textsuperscript{116} See supra note 10. \\
\textsuperscript{117} At a minimum, section 1983 reaches discrimination against an individual because he or she is genetically part of an ethnically and physiognomically distinctive subgrouping of humans. Distinctive physiognomy is not, however, essential to qualify for section 1981 protection. Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987). The settled mandate of section 1981 is that all persons within the jurisdiction of the United States shall have the same rights as those enjoyed by white citizens. Keys v. Continental Illinois Nat. Bank & Trust Co., 357 F. Supp. 376, 379 (N.D. Ill. 1973). \\
\textsuperscript{119} 484 S.W.2d 635 (Tex. Civ. App. 1977). \\
\textsuperscript{120} Id. at 637; see also Doe v. Plyler, 458 F. Supp. 569, 572 n.3 (E.D. Tex. 1978) (broadly stating that “existing case law indicates that the rights of illegal aliens are protected by 42 U.S.C.A. and the Fourteenth Amendment”), aff’d, 638 F.2d 448 (5th Cir. 1980), aff’d, 457 U.S. 202 (1982); Montoya v. Gateway Ins. Co., 168 N.J. Super. 100, 103-04, 401 A.2d 1102, 1103-04 (Super. Ct. App. Div.) (holding that illegal aliens have rights of access to the courts and are eligible to sue therein to enforce contracts and redress civil wrongs, and noting that the public policy of discouraging illegal immigration will not be subverted by according such court access.), certif. denied, 81 N.J. 402, 408 A.2d 796 (1979).
Thus, there is a divergence of opinion with regard to the extension of civil rights to the alien along the Mexican border. Some observers justify the Bhandari holding on the basis of the so-called "outlaw" theory. Under this theory, since the alien's presence in this country violates national immigration law, no rights of accredited citizens should be extended to the illegal alien. The opposing perspective views legal presence at the border as less important than the undocumented alien's participation in and contribution to society.

The social perspective of the outlaw theory can best be explained by viewing the nation as a community. At its extreme, this community analysis maintains that the security and well-being of the individual are contingent upon the maintenance of the community and prevention of illegal entry into the community. Outlaw theorists embrace the notion that the nation cannot provide for the well-being of humanity as a whole, and that limited resources should be maintained and reserved only for those for whom a legal responsibility has been undertaken. The illegal alien is not a member of the group with which the state has entered into a relationship that grants rights in exchange for such obligations as taxes and loyalty.

Critics of the outlaw theory maintain that the theory is unrealistic in light of the realities of the relationships between the United States and countries that provide the United States economy with large numbers of undocumented workers. The notion of the United States as an enclosed community ignores the interdependence between the United States economy and the world economy. In fact, viewing illegal aliens as outsiders may harm the community. Forcing a group of people to live clandestinely creates many problems, including maintaining health care and preventing criminal activity.

Recognizing the illegal aliens present in the United States and providing them with constitutional and civil rights protections is a more realistic approach to the problem of border violence. Bhandari and the outlaw theory amount to nothing more than a means of justifying a particular end, and cannot be maintained without ignoring the controlling law and worsening an already troubled situation.

121. Bosniak, supra note 41, at 965.
122. Id.
123. Id. at 1001.
124. Id. at 1002 & n.193.
125. Id. at 1002-03.
126. Id. at 1003. Bosniak cites the example of a typhoid epidemic in Oregon in 1983. Undocumented workers exposed to the disease were aware of the fact that they would be deported if they sought assistance from state hospitals. As a result, health risks arose as these people remained in society without obtaining proper treatment. Id.
(3) Applicability of Sections 1981 and 1983 to Federal Officers

INS officials charged with violating sections 1981 or 1983 may be able to rely on the defense of qualified immunity. According to this defense, "government officials performing discretionary functions generally are shielded from liability for civil damages as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."\(^{127}\) While determining what constitutes a "reasonable person" is a complicated task in any context, the problem is particularly difficult when dealing with the situation along the border.

In many instances INS arrests and other activities occur along deserted parts of the border. Hence, in the few cases brought by illegal aliens alleging abuse by INS officials or other parties, the evidence will almost exclusively be the testimony of the participating INS officers and the victims themselves.\(^{128}\) This may, in many situations, put the alien victim at a disadvantage. Of course, this is not to say that all INS officials guilty of abusive behavior will falsify testimony. However, the INS officer who, with an understaffed agency,\(^{129}\) experiences on a daily basis the immense problems of border enforcement, will often have a viewpoint quite different from that of the victim.

The "reasonable person" standard, then, is questionable. Does the standard apply to the reasonable Border Patrol agent who faces the impossible task of stopping a flood of immigrants along a 2,000-mile border, when the INS is understaffed and the border is plagued with criminal activities of bandit groups? Or does the "reasonable person" standard refer to ideal INS conditions? Ideally, the INS would be fully staffed and free of the perils that currently subject Border Patrol agents to danger every day.

Although these questions pose an intriguing dilemma that cannot be readily answered, it is clear that a qualified immunity defense will not protect the abusive Border Patrol agent in all cases.

Congress has explicitly given district courts power to consider cases in the nature of mandamus against federal officials. When it is claimed that federal officials are acting contrary to law, abusing their discretion, and when official conduct extends beyond any rational exercise of discretion, even though it is within the letter of the authority granted, mandamus affords the appropriate judicial relief.\(^{130}\)


\(^{128}\) The majority of Border Patrol arrests occur at night in remote areas, and are witnessed only by other undocumented immigrants who are themselves vulnerable to threats of legal action. See Lutz, supra note 7, at 29.

\(^{129}\) Steven Garcia, president of Local 1613 of the Border Patrol union, testified that the Border Patrol faces a monumental task in its attempt to stem the wave of border crossings with limited personnel and equipment shortages. Border Violence, supra note 3, at 36.

\(^{130}\) NAACP v. Levi, 418 F. Supp. 1109, 1117 (D.D.C. 1976). This case discussed the
Clearly, the more serious harms committed by INS officials—such as the shooting deaths and vehicular deaths suffered by illegal immigrants fleeing Border Patrol vehicles—are more likely to be addressed if these acts are interpreted as section 1981 or 1983 civil rights violations. With regard to the many other forms of abuse faced by the alien, the Federal Tort Claims Act (FTCA) may provide additional remedies.

plaintiff's ability to bring suit against the FBI for failing to investigate thoroughly the shooting death of her husband at the hands of Alabama law enforcement officers. *Id.* at 1112-13.

131. 28 U.S.C. §§ 1346(b), 2671-2680 (1988 & Supp. II 1990). The FTCA was enacted to provide a means whereby a person could seek redress against the United States in actions for money damages, because of negligent or wrongful acts committed by federal employees while acting within the scope of their office or employment that result in injury to the claimant. Donald T. Kramer, Annotation, *Federal Tort Claims Act: When Is Government Officer or Employee “Acting Within the Scope of His Office or Employment” for Purpose of Determining Government Liability Under 28 USC § 1346(b)*, 6 A.L.R. Fed. 373, 382 (1971); Roelofs v. United States, 501 F.2d 87, 92 (5th Cir. 1974) (stating that the purpose of the FTCA was to put citizens and the national sovereign on an equal footing in tort suits); Indian Towing Co. v. United States, 350 U.S. 61, 64-65 (1955) (where plaintiffs sued for injuries allegedly resulting from negligent operation of a lighthouse, remarking that the FTCA was enacted to provide a remedy in such situations: to hold the United States liable in the same manner and to the same extent as a private individual under similar circumstances). As civil suits against individual INS agents may be barred by the defense of qualified immunity, the FTCA may provide an effective mechanism for aliens to bring suit for harm done. *See, e.g.*, Garcia v. United States, 826 F.2d 806, 807-08 (9th Cir. 1987) (Garcia, a Mexican citizen, brought suit under the FTCA after being shot by an INS agent along the United States-Mexico border. Garcia had allegedly threatened the agent with a stick.). Three conditions must be met before liability can be imposed under the FTCA: 1) the person responsible for the harm must be a federal employee; 2) the act must have been within the scope of such person's employment; and 3) the act or omission must have been negligent, wrongful, or both. Furthermore, liability will only be imposed upon the federal officer if said officer would be liable as a private individual under the law of the state where the tort occurred. *See* 28 U.S.C. § 1346(b) (1988).

Thus, at first glance the FTCA would seem to provide the illegal alien with an ideal means of bringing claims against government officials. The first requirement, that the tortfeasor be a government employee, is easily satisfied in cases involving INS agents because the INS is a government agency. Second, the requirement that the allegedly abusive act be within such person's scope of employment may also be easily met. Most of the documented cases of abuse by INS officials arise out of arrest situations. Unnecessary force upon arrest, unauthorized use of firearms, and vehicular injury during pursuit are all injuries that arise from and are related to the arrest and deportation proceedings of the INS. Clearly, then, harm arising out of the above-mentioned incidents would fall under the FTCA's "scope of employment" requirement.

The last requirement for a successful FTCA suit, proof that the act or omission was either negligent or wrongful or both, is the most difficult to satisfy, as it often will involve questions of fact. As mentioned earlier, evidentiary requirements may prove harmful to the alien's case, because often the testimony of the alien is contested by the evidence of INS officers, who may be better versed in the law, communication skills, or both, and may also have several officers available to substantiate their claims.

Aside from the problems of evidence and verifiability of testimony, there may be further difficulties for the alien who seeks a remedy under the FTCA. First, an agent acting unconstitutionally is not deemed to be acting within the scope of his or her employment for FTCA purposes. Baker v. F&F Investment Co., 489 F.2d 829, 835 (7th Cir. 1973) (where black plaintiffs brought suit against federal agencies and officials for charging excessive and discrimi-
C. Equal Protection

A suggested solution to the problem of extending full constitutional protection to illegal aliens involves denouncing them a “suspect class” deserving of heightened scrutiny under an equal protection analysis.132

Suspect classification developed as a response to legislative or government action that disadvantaged a particular group.133 It aimed to focus additional attention on those groups that were historically subject to governmental mistreatment, with the hope of ensuring equal protection under the law. In the classic case of racial classification, one would naturally suspect that such a classification was motivated primarily by the

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133 Equal protection analysis may be inapplicable to the border violence context. There the harm is not brought about by specific legislative classifications disadvantaging the illegal alien, nor by state action in the deeds of abusive INS agents. INS agents who abuse illegal aliens do so without authority, because abuse is beyond the scope of their authority. Thus, there is no state action and the opportunity for equal protection analysis may not arise. However, state neglect or inaction with regard to a problem such as border violence may become so pervasive that it might be construed, in theory, as state action. But, as the cases in this Part indicate, even if such state action could be found, the illegal alien may still not be able to benefit from a “strict scrutiny” standard of equal protection.
desire to disadvantage the racial group in question. In an equal protection analysis involving a suspect class, the courts have developed a "two-tiered" approach to judicial review. A "strict scrutiny" or "compelling reason" standard will be applied when the classification impermissibly interferes with the exercise of a fundamental right or operates to the particular disadvantage of a suspect class. Otherwise, discriminatory government action may be justified merely by offering some rational basis therefor—an easy task. Because illegal aliens are being subjected to increasing abuse and discriminatory treatment, the heightened scrutiny applied with suspect class treatment is necessary to protect their constitutional rights.

Opponents of this adoption, however, note that a classification of illegal alien status, unlike traditional suspect classes, is temporary and subject to alteration through a grant of citizenship or legal residency. The Supreme Court in Plyler v. Doe held that illegal aliens were not a suspect class. Considering the generally conservative make-up of the current Supreme Court, this aspect of Plyler is not likely to be overturned any time soon. Regardless of the permanent or temporary character of the affected group's defining characteristics, the distinction in this context may no longer be justifiable. Although traditional suspect classification has been reserved for distinct minority groups that have in the past been harmed by prejudicial state authority, the fact that individual illegal aliens may leave the class by becoming citizens or legal residents, or by leaving the country, does not mean the group as a whole has changed. For example, women have been regarded as a quasi-suspect

136. See Jim Clark, Broadening the Boundaries of Intermediate Scrutiny in Equal Protection Cases, 36 Ark. L. Rev. 383, 395 (1983) (illegal aliens are not a suspect class because their status is voluntary and subject to change); see also Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (denying suspect classification for homosexuals as their characteristic is "behavioral in nature"), cert. denied, 494 U.S. 1003 (1990). As the Woodward court noted, the Supreme Court has identified only three suspect classes: racial status, national ancestry and ethnic origin, and alienage. Two other classifications have been identified by the Court as quasi-suspect: gender and illegitimacy. Id. at 1076 n.9.
138. Plyler dealt with a Texas statute that denied funds for the education of children who were not legally admitted into the United States. The Court found that illegal aliens may claim the benefit of the Fourteenth Amendment's guarantee of equal protection, id. at 215, but rejected the claim that illegal aliens are a suspect class, primarily because entry into the class is the product of a voluntary act, id. at 219 n.19.
139. Loewy, supra note 132, at 30-35 (examining aliens as unrepresented groups in legislatures subject to discrimination in our society). See Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (legal aliens are suspect class for the purpose of equal protection review).
140. In order to be classified as a suspect class, a group must possess immutable characteristics, have a history of past discrimination, and be politically impotent. E.g., Ellen Chaitin & V. Roy Lefcourt, Is Gay Suspect?, 8 Lincoln L. Rev. 24, 37 (1973).
group deserving of heightened protection when legislative classifications operate to their detriment.\textsuperscript{141} Even though an individual woman could technically leave this class by means of a sex change,\textsuperscript{142} women as a class are still accorded suspect class treatment. Therefore, absolute immutability is not an absolute requirement for suspect classification. As a group then, even though the specific individuals may change, illegal aliens crossing the border are continually subject to mistreatment and abuse from the various groups that target them on their journey into this country.

The illegal alien crossing the border is in a unique position. He is a member of a class that represents a substantial portion of the population of the southern United States. Further, as outlined above, he is within the jurisdiction of the United States and therefore entitled to limited constitutional protections that are extended to United States citizens.\textsuperscript{143} Yet, for all the rights that should be extended, and despite the magnitude of their presence in this country, aliens remain unrepresented in the legislatures. Aliens, therefore, can do little to alter the deficiencies in the current immigration structure. Instead, the alien is forced to rely on the goodwill and solutions contrived by others. As long as those who represent the alien's interest in the legislatures and courts feel the current systems are not in need of alteration, the alien will continue to face problems with securing basic constitutional protection.

The rights extended to victimized aliens no longer can be examined by brief overview. As the abuses continue, it is no longer feasible to state that in theory the alien victim enjoys limited protection under the constitution while he is denied such protections in practice. Not only must the alien victim's rights and protections be reexamined, but once these rights are clearly established, they must be thoroughly implemented.\textsuperscript{144} In effectuating this plan, the courts and legislatures must recognize the many barriers that aliens face. Special attention should be given to the language, cultural and educational differences, the overt racial discrimination,\textsuperscript{145} and the unwillingness of state and federal agencies to recognize the problem and work towards a tenable solution.

\textsuperscript{141} Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982).
\textsuperscript{142} See ELY, supra note 134, at 145-70 (examining alienage, poverty, and gender as classifications that the courts have determined to be suspect. Unlike race, these classifications are alterable.).
\textsuperscript{143} See Mathews v. Diaz, 426 U.S. 67, 77 (1976) (granting Fifth and Fourteenth Amendment protection to illegal aliens); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (all persons within the territorial United States are entitled to Fifth and Sixth Amendment protection, whether documented or undocumented).
\textsuperscript{144} See generally A. PETER MUTHARIA, THE ALIEN UNDER AMERICAN LAW (1985) (examining the rights and disabilities of aliens in the United States); cf. Loving v. Virginia, 388 U.S. 1, 10 (1967) (stating the goal of equal protection as the elimination of "all official state sources of invidious racial discrimination").
\textsuperscript{145} See Joe C. Ortega, Plight of the Mexican Wetback, 58 A.B.A.J. 251, 251-54 (1972)
III. Civilian Oversight

The INS is the country's only national uniformed police force. The problem of Border Patrol misconduct is not unlike the general police misconduct found in every major metropolitan police force in the country. To address such abuses, many municipalities have turned to civilian review boards as a means of stemming the abuse and providing channels through which complaints can be effectively lodged. The INS might benefit from the implementation of such a review board. Although the INS currently has a review process in place, the review unit is understaffed, and its findings are unpublished and are frequently biased in favor of the INS agent as the investigators themselves are often former Border Patrol agents. A truly independent civilian review board could be tailored to meet the needs of all victims of border violence and abuse, whether the incidents occur at the hands of INS agents or private actors.

In light of the opposition that is usually raised when civilian review boards attempt to encroach upon police power, it is likely that the INS will be strongly opposed to the implementation of a civilian review board. However, as the mounting violence along the border continues to

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146. One of the reasons the INS is becoming more of a police force than a service as the name implies, is the increased power being conferred on immigration agents as a result of the "war on drugs." The INS often works closely with police and Drug Enforcement Administration agents in narcotics and other criminal investigations. Maria Jimenez, director of the Immigration Law Enforcement Monitoring Project of the American Friends Service Committee comments: "In effect you've created a national police force with authority to arrest on any federal violation." M.P. McQueen, Project Bodega Really A Shakedown?, NEWSDAY, May 23, 1991, at 7.

147. Traditionally, the most visible efforts to control police misconduct have come from the judiciary. The civilian review board represents a mechanism to provide citizens, especially minorities, with a vehicle by which to air and redress grievances resulting from police action. Edward J. Littlejohn, The Civilian Police Commission: A Deterrent of Police Misconduct, 59 J. URB. L. 5, 6, 11 (1981).


149. Historically, police departments have been opposed to implementing civilian review boards as an encroachment on their power that would lead to a less effective police force, a demoralization amongst the ranks, and an improper politicization of the complaint process. Richard J. Terrill, Alternative Perceptions of Independence in Civilian Oversight, 17 J. POLICE Sci. & ADMIN. 78 (1990). The late J. Edgar Hoover, former Director of the Federal Bureau of Investigation, expressed a common law enforcement view:

Police review boards inhibit the enforcement of laws and this, in turn, encourages those who are eager to take the law into their own hands . . . . [V]iolence in the streets can be directly attributed to a breakdown in respect for law and order, precipitated in part by the creation of such review boards. Once the violence has erupted, restoration of the law is hampered by the restrictive influence of the review board on officers.

result in unredressed injuries,\textsuperscript{150} opposition to a review board based on arguments that the current review system is adequate or that the victims have other avenues of redress\textsuperscript{151} is decreasingly persuasive.

Another challenge faced by advocates of a civilian review board is the lack of support from state or federal bodies responsible for funding such a board. As many citizens are unaware of the problems that exist at our borders, indifference to the occasional report of violence that reaches the media is a typical response. Educating and exposing the general populace to the problems and violence that is occurring at our borders is essential before meaningful change can be achieved.

\textbf{Conclusion}

From a moral standpoint, few would deny that illegal aliens must be free from abuse and victimization when crossing the border between the United States and Mexico. Furthermore, the illegality of the various acts of violence being directed towards the illegal alien is also indisputable. Frustration in the face of border violence is the product of continuous and escalating incidents of violence and the lack of an institutional response. The reality of the situation is that border violence has not been exposed for the pressing social ill that it represents; the response from the judiciary, the legislature and the INS has been to maintain the status quo. This response has proven to be ineffective.

While the judiciary is limited in its ability to implement immigration policy, this limitation should not influence its decision making on matters wholly within its authority. The illegal alien is recognized under the laws and Constitution of this country to the same degree in many areas as citizens. Protection of these rights must be pursued with the same vigor and thoroughness for all persons, illegally present or otherwise. The failure to adequately and fully protect the rights of a particular class of persons conveys the message that these rights are unimportant and tacitly approves the further infringement of such rights.

\textsuperscript{150} David Rudovsky argued in a 1982 essay, \textit{The Criminal Justice System and the Police}, that “the public's fear of crime has given the police carte blanche to 'control the streets and enforce the status quo.' This has led to an 'institutional tolerance of police abuse.' In essence, \ldots 'the courts have legitimized police misconduct.'” Darlene Ricker, \textit{Does Society Condone Police Brutality in Exchange for Getting Criminals off the Streets?}, A.B.A.J., July 1991, at 45. One can only speculate on how much carte blanche the INS possesses to keep the illegal alien out in our current immigration system.

\textsuperscript{151} Another common objection to civilian oversight is the charge that victims of violence have sufficient avenues of redress through the justice system. There are several problems with this objection. First, victims will not usually have the funds to bring suit. Second, there will usually be a general lack of witnesses (this is especially true in the border region where the only permanent residents are the INS agents). Third, the judge and jury will tend to believe a government official over the victim. \textit{See Lutz, supra} note 7, at 32.
The implementation of a civilian review board would further insure that the rights of illegal aliens will be protected. As a practical matter, a court can best provide redress for harms when the harmed party is before the court. The civilian review board represents access to the court system. In the border violence context such access is as important as fair and equal treatment before the court.

Civilian review, coupled with vigorous enforcement of rights and remedies for the victims of border violence represents a positive response to the problems at our border rather than the denial that has until now been accepted. By implementing civilian review and recognizing and enforcing the rights of illegal aliens, neglect and indifference may begin to give way to justice and humanity.