

**BORDER VIOLENCE AGAINST ILLEGAL  
IMMIGRANTS AND THE NEED TO CHANGE  
THE BORDER PATROL’S CURRENT  
COMPLAINT REVIEW PROCESS**

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I. INTRODUCTION

The United States of America is considered to be the land of opportunity,<sup>1</sup> which is why every year more than one

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1. See Katherine L. O'Connor, Regional Reports, *An Overview of Illegal Immigration Along the United States-Mexican Border*, 4 J. INT'L L. & PRAC. 585, 585 (1995) (stating that immigrants historically saw America as the land of opportunity where they could realize their individual hopes and dreams).

million people cross the Mexico-U.S. border illegally.<sup>2</sup> These people leave behind their homes and families searching for a better life in the United States. They have dreams and aspirations of making a fresh start in a country created by immigrants.<sup>3</sup> They bring few personal belongings, but they carry the very heavy burden of crossing the border undetected. Upon their arrival to this great country, however, many of these illegal immigrants come face to face with the harsh reality that they are not welcome here.<sup>4</sup> Standing directly in their path to freedom is the ever-present law enforcement officer wearing the green uniform, whose primary mission is to prevent them from entering the United States illegally.<sup>5</sup> The U.S. Border Patrol agent waits to apprehend and deport illegal immigrants crossing the Mexico-U.S. border.<sup>6</sup> One would expect a law enforcement officer to treat detainees humanely, but it appears that more and more illegal immigrants are learning firsthand, courtesy of a fist, boot, or nightstick, the harsh reality that some Border Patrol agents abuse illegal immigrants.<sup>7</sup> In his journey across the border, the illegal immigrant has to protect himself not only from bandits and white vigilante groups, but now he must add Border Patrol agents to his list.<sup>8</sup>

There continues to be a steady flow of people entering the United States illegally through Mexico<sup>9</sup> and a significant

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2. See Victor C. Romero, Note, *Whatever Happened to the Fourth Amendment?: Undocumented Immigrants' Rights After INS v. Lopez-Mendoza and United States v. Verdugo-Urquidez*, 65 S. CAL. L. REV. 999, 999 (1992).

3. See *id.* at 1000 (explaining that modern immigrants come to the United States for many of the same reasons as the original settlers from Europe).

4. See *id.*

5. See Bill Ong Hing, *Border Patrol Abuse: Evaluating Complaint Procedures Available to Victims*, 9 GEO. IMMIGR. L.J. 757, 759 (1995) ("The Border Patrol has been assigned the imposing task of stopping the unauthorized flow of migrants across the nation's borders."); see also Stephen A. Rosenbaum, *Keeping an Eye on the INS: A Case for Civilian Review of Uncivil Conduct*, 7 LA RAZA L.J. 1, 28 & n.167 (1994) (stating that the "Green Wall" of silence obstructs abuse investigations in reference to the green uniforms worn by Border Patrol agents).

6. See Hing, *supra* note 5, at 763.

7. See Rosenbaum, *supra* note 5, at 2.

8. See Michael J. Nuñez, Note, *Violence at our Border: Rights and Status of Immigrant Victims of Hate Crimes and Violence Along the Border Between the United States and Mexico*, 43 HASTINGS L.J. 1573, 1575-76 (1992).

9. See Michelle Mittelstadt, 'Abysmal' Situation on Border: Group Says Agents Abuse Immigrants, HOUS. CHRON., Apr. 12, 1995, at A1 (reporting that there are at least 3.5 million people living in the United States illegally and that another 300,000 people enter illegally each year); see also *U.S. Border Patrol: Tucson Sector*, ARIZ. DAILY STAR, Oct. 2, 1998, at B1 (stating that Border Patrol

number of Border Patrol abuse reports and allegations.<sup>10</sup> A history exists of reported illegal immigrant abuse by the Border Patrol, ranging from beatings and rapes<sup>11</sup> to homicides.<sup>12</sup> However, many complaints go undocumented because the current complaint procedure available to victims of abuse is inadequate. A complaint's validity is measured by the subjective investigation of the immigration supervisor within the Border Patrol who may or may not forward it to the Justice Department's Office of Inspector General to investigate.<sup>13</sup> The Border Patrol's internal complaint procedure has outgrown its usefulness, and the implementation of a new complaint procedure is required so that illegal immigrants' complaints do not go unheard. It is time to re-examine Border Patrol enforcement measures and policies.

Part I of this paper focuses on the relationship between illegal immigration and the U.S. Border Patrol. It provides a brief historical background of the Border Patrol, and it traces the agency's legal development throughout its existence. Part II then discusses the broad law enforcement power and discretion given to Border Patrol agents by the Immigration and Nationality Act of 1990,<sup>14</sup> followed by a discussion of the

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officers in Arizona apprehended a record number of aliens in the 1998 fiscal year).

10. See Mittelstadt, *supra* note 9, at A1 (reporting that over 1300 complaints were filed against Immigration and Naturalization Service (INS) personnel, including Border Patrol agents, between October 1988 and September 1994).

11. See *United States v. Davila*, 704 F.2d 749, 750 (5th Cir. 1983) (upholding convictions of several Border Patrol agents who had sexually abused illegal aliens); see also *U.S. Border Agent Accused in Sexual Assault on an Illegal Alien*, N.Y. TIMES, Dec. 22, 1995, at A29 [hereinafter *U.S. Border Agent*].

12. See ARIZONA, CALIFORNIA, NEW MEXICO, AND TEXAS ADVISORY COMMITTEES TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS, FEDERAL IMMIGRATION LAW ENFORCEMENT IN THE SOUTHWEST: CIVIL RIGHTS IMPACTS ON BORDER COMMUNITIES 4 (1997) [hereinafter FEDERAL IMMIGRATION]. A 1990 American Friends Service Committee Immigration Law Enforcement Monitoring Project (ILEMP) report summarizing 380 alleged civil rights violations in several border areas between May 1988 and May 1989 stated that the majority of deaths and serious injury occurred in the San Diego area, including 5 deaths from the use of firearms. See *id.*

13. See ROBERT E. KOULISH ET AL., U.S. IMMIGRATION AUTHORITIES AND VICTIMS OF HUMAN AND CIVIL RIGHTS ABUSES: THE BORDER INTERACTION PROJECT STUDY OF SOUTH TUCSON, ARIZONA, AND SOUTH TEXAS 13 (University of Ariz. Mex. Amer. Studies & Research Center Working Paper Series No. 20, 1994) [hereinafter U.S. IMMIGRATION AUTHORITIES] (reporting that in 1992, the Justice Department's Office of Inspector General (OIG) received 463 allegations resulting in only 30 formal investigations, "suggesting that the OIG did not consider most allegations to be very serious.").

14. See 8 U.S.C. § 1357 (Supp. V 1994).

causes of illegal immigration and Border Patrol abuse. Part III of this paper examines human rights abuses of illegal immigrants by Border Patrol agents at the Mexico-U.S. border. This examination focuses on several Border Patrol abuse cases, and it explains the legal rights possessed by illegal immigrants who find themselves the victims of abuse by Border Patrol agents. Part IV of this paper focuses on the current complaint procedure available to illegal immigrants who are abused by Border Patrol agents and explains why it is ineffective. Part IV also discusses the citizen review committee currently in force and concludes by providing support for a permanent independent review commission as an alternative to the subjective review process currently in place.

## II. THE RELATIONSHIP BETWEEN ILLEGAL IMMIGRATION AND THE BORDER PATROL

### A. *Border Patrol History and Current Development*

The current U.S. Border Patrol is part of the Immigration and Naturalization Service (INS), an agency of the U.S. Department of Justice.<sup>15</sup> The Border Patrol's mission is to stop illegal immigration into the United States.<sup>16</sup> Congress created the Border Patrol in 1924 as part of the Immigration Bureau, the predecessor of the INS.<sup>17</sup> The Border Patrol's mission, when initially created, was to "patrol the land border and stop smuggling."<sup>18</sup> During World War II, the responsibilities of the Border Patrol were expanded to include guarding detention camps and protecting foreign diplomats.<sup>19</sup> Little attention was given during this time to the flow of illegal immigrants who came to America and helped offset the labor shortage due to the war.<sup>20</sup> However, in the 1950s, Border Patrol resources again focused on preventing

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15. See NAT'L ARCHIVES & RECORDS ADMIN., THE UNITED STATES GOVERNMENT MANUAL 1997/1998 at 352 (1997) [hereinafter U.S. GOV'T MANUAL]; see also Mittelstadt, *supra* note 9, at A1.

16. See U.S. GOV'T MANUAL, *supra* note 15, at 352; see also Hing, *supra* note 5, at 759.

17. See FEDERAL IMMIGRATION, *supra* note 12, at 8 (explaining that the Border Patrol has evolved from its original form of a "loose-knit band of former Texas Rangers and gunslings who engaged in shootouts with tequila smugglers along the Rio Grande.").

18. U.S. IMMIGRATION AND NATURALIZATION SERVICE, AN IMMIGRANT NATION: UNITED STATES REGULATION OF IMMIGRATION, 1798-1991, 23 (1991).

19. See FEDERAL IMMIGRATION, *supra* note 12, at 8.

20. See Romero, *supra* note 2, at 1000 n.5.

immigrants from illegally entering the United States across the Mexican border.<sup>21</sup> In 1954, the INS launched *Operation Wetback*, a series of mass deportations of Mexican illegal immigrants.<sup>22</sup> The goal of the operation was to expel the thousands of undocumented Mexican workers that the United States encouraged to cross over the border during World War II.<sup>23</sup> American soldiers were returning from war to the United States, so the immigrant workers were expelled to make room for U.S. soldiers returning from overseas.<sup>24</sup>

In the mid-1980s, major attention was once again focused on illegal immigration along the Mexico-U.S. border region.<sup>25</sup> Congress responded by passing the Immigration Reform and Control Act (IRCA) of 1986.<sup>26</sup> IRCA authorized an increase in the Border Patrol staff by fifty percent.<sup>27</sup> Then, in 1994, the Clinton administration “announced a new ‘border initiative’” that added a total of 1010 Border Patrol agents.<sup>28</sup> The targeted areas for the Clinton initiative were the El Paso and San Diego sectors because these areas are where sixty-five percent of the illegal crossings normally took place.<sup>29</sup> This new initiative included providing Border Patrol agents with state of the art technology and resources such as “new lighting, fencing, improved sensors, and mobile infrared scopes.”<sup>30</sup> In addition, August of 1997 brought in the “Operation Rio Grande” initiative, which significantly increased the number of Border Patrol agents in the southern region of the Mexico-Texas border.<sup>31</sup> Operation Rio Grande is

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21. See FEDERAL IMMIGRATION, *supra* note 12, at 8.

22. See *id.* at 7.

23. See *id.*

24. See Paul Meehan, *Combatting Restrictions on Immigrant Access to Public Benefits: A Human Rights Perspective*, 11 GEO. IMMIGR. L.J. 389, 396–97 (1997).

25. See James F. Smith, *A Nation that Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT’L L. & POL’Y 227, 236–37 (1995).

26. 8 U.S.C. § 1101-1525 (Supp. V 1994).

27. See FEDERAL IMMIGRATION, *supra* note 12, at 9.

28. *Id.*

29. See *id.*

30. *Id.*; see also Gregory Gross, *Operation Gatekeeper Adds Danger at the Border*, SAN DIEGO UNION & TRIB., Oct. 5, 1998, at B3 (explaining that illegal immigrant arrests are at an 18-year low in the San Diego sector as a result of the operation).

31. See *INS Aims High-Tech Crackdown Along the Border*, HOUS. CHRON., July 27, 1997, at A36 (stating that, as a result of the operation, the number of Border Patrol agents in Texas were to increase by 53% from 1,756 to 2,693).

one of the latest operations to curb the high rate of illegal immigrant crossings.<sup>32</sup>

*B. Law Enforcement Power and Discretionary Authority*

As a law enforcement agency, the Border Patrol makes more annual arrests than any other law enforcement agency in the United States.<sup>33</sup> The additional resources and personnel provided by the new Clinton initiative of 1994 undoubtedly assists the Border Patrol in achieving its annual one million arrests of illegal immigrants crossing the Mexico-U.S. border.<sup>34</sup> To most U.S. citizens and legal residents living at the southwest border or to those who are trying to cross it illegally, the Border Patrol Agency represents the symbol of U.S. law enforcement power in the border region.<sup>35</sup> The Immigration Act of 1990, giving Border Patrol agents greater law enforcement power than they previously possessed, has provided a mixed influence on the number of annual arrests of illegal immigrants.<sup>36</sup> This Act permits immigration agents to make arrests without a warrant for any offense committed in the officer's presence.<sup>37</sup> The Act also permits INS agents to carry firearms and serve warrants and subpoenas.<sup>38</sup>

Border Patrol agents have a great deal of discretion when dealing with detention and arrest situations. For example, a person may be stopped or searched if an agent has reasonable suspicion to believe the person entered the United States illegally.<sup>39</sup> Furthermore, Border Patrol agents with reasonable suspicion have the right to stop and question a

32. *See id.* (reporting that Operation *Rio Grande* continues the mission of other initiatives and provides the "critical mass of resources" needed to be effective in preventing illegal immigration).

33. *See* FEDERAL IMMIGRATION, *supra* note 12, at 8.

34. *See id.*

35. *See* Patrick J. McDonnell & Sebastian Rotella, *When Agents Cross Over the Borderline*, L.A. TIMES, Apr. 22, 1993, at A1 (referring to Border Patrol agents as "guardians of U.S. law and order on the frontier with Mexico.>").

36. *See* Martha Angle, *CQ Roundtable: Immigration Bridge's Ups and Downs*, 51 CONG. Q. WKLY. REP. 710 (1993) (noting that after reaching a record 1.8 million arrests of illegal aliens in 1986, arrests decreased to below one million in 1989 before increasing again to 1.2 million in 1991). However, besides increasing the law enforcement powers of the Border Patrol, the Act also increased legal immigration, which suggests a lower number of attempted illegal border crossings and arrests. *See id.*

37. *See* 8 U.S.C. § 1357(a)(5)(A) (1994); *see also* U.S. IMMIGRATION AUTHORITIES, *supra* note 13, at 4.

38. *See* 8 U.S.C. § 1357(a)(5); *see also* FEDERAL IMMIGRATION, *supra* note 12, at 11.

39. *See* 8 U.S.C. § 1357(c) (1994); *see also* U.S. IMMIGRATION AUTHORITIES, *supra* note 13, at 4.

person solely to determine whether the person has the right to be or the right to remain in the United States.<sup>40</sup> Because the current immigration law allows agents to subjectively determine, by weighing the totality of the circumstances, whether such reasonable suspicion exists to merit an interrogation or arrest at the time of the confrontation, Border Patrol agents are given great latitude in their enforcement powers.<sup>41</sup>

Courts use a reasonableness standard of judicial review, which is based on the conclusions that an agent might reasonably draw in determining whether to stop and question a person.<sup>42</sup> This standard of review seems to give an agent the ability to use race or alienage as a factor when making his or her determination, despite Fourth Amendment restrictions that these cannot be the only factors.<sup>43</sup> Furthermore, a Border Patrol agent can “arrest any person if there exists probable cause, or if there is reason to believe the subject is likely to escape before a warrant could be obtained.”<sup>44</sup> The U.S. Supreme Court, in *United States v. Cortez*, interpreted the “reason to believe” standard to mean something less than probable cause and to be based on what is reasonable considering the totality of the circumstances.<sup>45</sup> However, the higher standard of probable cause can be met, for example, when a person fails to produce an alien resident card or other documentation to prove that he or she is a legal resident.<sup>46</sup> The broad law enforcement power given to Border Patrol agents by Congress and confirmed by the Supreme Court provides field agents few boundaries and a great deal of discretion in the way they perform their jobs.

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40. See 8 U.S.C. § 1357(a)(1) (1994); see also U.S. IMMIGRATION AUTHORITIES, *supra* note 13, at 4.

41. See U.S. IMMIGRATION AUTHORITIES, *supra* note 13, at 4.

42. See *United States v. Cortez*, 449 U.S. 411, 421–22 (1981).

43. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 888 (1975) (holding that stopping a vehicle solely because the occupants appeared to be of Mexican ancestry “was a patent violation of the Fourth Amendment.”).

44. U.S. IMMIGRATION AUTHORITIES, *supra* note 13, at 4.

45. See *Cortez*, 449 U.S. at 421–22 (holding that the test is not whether agents had probable cause, but whether, “based upon the whole picture,” they could reasonably conclude that the vehicle stopped would contain illegal aliens).

46. See *United States v. Wright*, 706 F. Supp. 1268, 1274 (N.D. Tex. 1989).

C. *Border Patrol Detention Process*

Once in the custody of the Border Patrol, the alien is interrogated on the legality of his stay in the United States.<sup>47</sup> Congress has given the Border Patrol the right to interrogate any person suspected of being an illegal alien.<sup>48</sup> Though the Border Patrol has been given minimal limitations on the interrogation process, it may not use coercion to extract information from the alien.<sup>49</sup> During this investigation, the Border Patrol can subpoena witnesses and compel the production of documents.<sup>50</sup> Once the investigation is complete, an Order to Show Cause is issued and filed with an immigration court.<sup>51</sup> This process officially begins the deportation proceedings.<sup>52</sup>

D. *Reasons for Illegal Immigration into the United States*

Several factors, classified as “push” factors, are considered to cause high levels of illegal immigration in the United States.<sup>53</sup> Examples of push factors include governmental oppression, poverty, high unemployment rates, political unrest, and overcrowding.<sup>54</sup> They are called push factors because they tend to push illegal immigrants away from their native countries.<sup>55</sup> By contrast, the United States possesses several “pull” factors that pull or attract immigrants into the country, such as jobs, education, political stability, economic strength, and health and other welfare benefits.<sup>56</sup>

One push factor that contributed to an increased flow of illegal immigrants into the United States is the Mexican peso devaluation of 1994.<sup>57</sup> As a result of the peso devaluation, about 6.5 million Mexicans were either unemployed or

47. See 8 U.S.C. § 1357(a)(1) (1994).

48. See *id.*

49. See *Choy v. Barber*, 279 F.2d 642 (9th Cir. 1960).

50. See 8 U.S.C. § 1225(a) (1994).

51. See 8 C.F.R. § 3.14(a) (1998).

52. See *id.*

53. See O'Connor, *supra* note 1, at 598 (calling “push” and “pull” factors “catalysts to immigration”).

54. See *id.*

55. See *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1438 (1983) (defining push factors as “the aspects of life in the migrant’s country that produce dissatisfaction and provide the impetus to move.”).

56. See O'Connor, *supra* note 1, at 598 (claiming that the strongest pull factor is the “endless supply of jobs in the United States” at higher wages than those available in Mexico).

57. See *id.* at 588–89.

underemployed, the majority of which were from Mexico's lower class.<sup>58</sup> In addition, the already low minimum wage at border plants fell drastically during this time from about US\$1.60 to US\$0.95 per hour.<sup>59</sup> Mexico experienced a severe recession as a result,<sup>60</sup> and those hit the hardest by the recession believed they had no choice but to find better living conditions elsewhere.<sup>61</sup> The extreme economic conditions caused by the peso devaluation forced many of these desperate people to turn northward to the United States in search of a better life.<sup>62</sup> For example, the INS reported that more than 100,000 illegal immigrants were deported back to Mexico during January 1995.<sup>63</sup> This represented twice the normal number of deportations for the month of January.<sup>64</sup> In El Paso, Texas, the Border Patrol for that area alone reported that it apprehended 9,106 illegal immigrants in January 1995 and that the people who crossed undetected could be five times this figure.<sup>65</sup>

The United States responded to the increased flow of illegal immigrants entering from Mexico as a result of the peso devaluation by increasing the number of Border Patrol agents stationed along the Mexico-U.S. border in the early months of 1995.<sup>66</sup> Mexican officials criticized the U.S. response as being too "overzealous."<sup>67</sup> Human rights activists throughout the United States argue that increasing the number of Border Patrol agents at the Mexico-U.S. border is

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58. See *id.* (stating that Mexico's lower class makes up 85% of the population).

59. See *id.* at 589 (claiming that foreign companies took advantage of this low national minimum wage).

60. See *id.* at 588 (noting that the peso "lost forty percent of its value with respect to the American dollar.").

61. See *id.* at 589 (describing how the peso devaluation lowered the overall living conditions of Mexicans).

62. See *id.* (explaining how the lowering of overall living conditions left Mexicans with no alternative but to try to gain U.S. employment).

63. See *id.*

64. See *id.* But see *62 New Guards will Reinforce Arizona Border*, N.Y. TIMES, Feb. 6, 1995, at A12 [hereinafter *62 New Guards*] (reporting that San Diego area apprehensions in January of 1995 reduced sharply to 31,000, compared with 38,000 in January of 1994, as a result of heightened Border Patrol operations in that sector, which was once considered the easiest location from which to sneak into the United States).

65. See O'Connor, *supra* note 1, at 589.

66. See *id.* at 589-90; see also *62 New Guards*, *supra* note 64, at A12 (noting that the increase of Border Patrol agents came as a result of the increased number of border crossings by illegal immigrants due to the peso devaluation crisis in Mexico).

67. O'Connor, *supra* note 1, at 589-90.

not the answer to curbing illegal immigration.<sup>68</sup> Congress' belief that more force is needed to attack the illegal immigration problem can lead to a general desensitized attitude toward reports of Border Patrol abuse of illegal immigrants.<sup>69</sup> Human rights advocates argue that increasing the number of agents along the border simply adds to the already existing suspicious and resentful attitude of border-town communities towards illegal immigrants.<sup>70</sup>

The Mexican peso devaluation had a direct impact on the increased number of new Border Patrol agents stationed along the border because many Mexicans were forced to enter illegally into the United States in search of employment.<sup>71</sup> Allyson Collins, Advocacy Director for Human Rights Watch-Americas, stated that the peso devaluation, coupled with the strong anti-immigrant sentiment in the United States, leads to an increased number of abuses against illegal immigrants at the Mexico-U.S. border.<sup>72</sup> In the first four months of 1995, there were as many substantiated reports of abuse by immigration agents at the Mexico-U.S. border as there were in all of 1994.<sup>73</sup> For example, one Mexican man alleged that he was pushed into a ravine and left there overnight with a broken back.<sup>74</sup> Three other Mexican illegal immigrants complained of "being beaten and forced by Border Patrol to drink water from the polluted Tijuana River."<sup>75</sup> With the increasing number of illegal immigrants trying to cross the border after the peso devaluation, coupled with the increased number of Border Patrol agents attempting to prevent illegal entry into the United States, it was not surprising that there were increased incidents of Border Patrol abuse.

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68. See Carlos Byars, *Increased Border Patrol Not Way to Go, Activists Say*, HOUS. CHRON., Jan. 26, 1997, at A34 (reporting that what is needed is a better Mexican economy, a better understanding of the illegal immigration problem by the American public, and more humane law enforcement tactics by immigration officers).

69. See Nuñez, *supra* note 8, at 1576.

70. See *id.* at 1576-77 & n.16.

71. See O'Connor, *supra* note 1, at 588-90.

72. See Karen Brandon, *Mexicans Swarm on U.S. Border*, CALGARY HERALD, May 7, 1995, at A11.

73. See *id.*

74. See *id.*

75. O'Connor, *supra* note 1, at 590.

*E. Causes of Border Patrol Abuse*

Part of the Border Patrol's problem, as a whole, is its impersonal attitude toward fulfilling its mission. In August of 1992, Aryeh Neier, Executive Director of Human Rights Watch, stated that "agents behave in the field as if they are accountable to no one" and that "[b]eatings, rough physical treatment, intimidation tactics and verbal abuse are routine."<sup>76</sup> Immigrant advocates argue that overzealous Border Patrol agents place "their duty to arrest and expel [illegal immigrants] above consideration for the health and safety of the deportee."<sup>77</sup> Furthermore, the border area now resembles a militarized zone with some Border Patrol agents carrying heavy assault rifles and other military equipment.<sup>78</sup> This militarization can create an attitude of hostility on the part of agents toward illegal immigrants because the immigrants are looked upon as menaces.<sup>79</sup>

Another factor that fosters abuse of illegal aliens is the recent anti-immigration wave sweeping the nation.<sup>80</sup> Illegal immigrants arrive in the United States in search of the "American dream," but instead find themselves victims of criticism and abuse by a "largely xenophobic populace."<sup>81</sup> Illegal immigrants are blamed for many of the societal ills facing this nation, like unemployment and crime.<sup>82</sup> Mexican President Ernesto Zedillo acknowledges that the incidents of abuse "are part of a new, hard-line anti-immigration attitude by some factions in the United States."<sup>83</sup> An official in the Mexican human rights commission stated that Border Patrol agents "are beating people because they are angry, and they are angry because of the campaign against immigration."<sup>84</sup>

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76. Robert L. Koenig, *McNary Denies Reports of Border Patrol Abuse*, ST. LOUIS POST DISPATCH, Aug. 6, 1992, at A14.

77. Nuñez, *supra* note 8, at 1575-76 & n.12.

78. *See id.* at 1578.

79. *See id.*

80. *See* Mark Fineman, *Zedillo Condemns Violence to Mexicans*, L.A. TIMES, Apr. 17, 1996, at A3.

81. Romero, *supra* note 2, at 1000.

82. *See* Nuñez, *supra* note 8, at 1576-77 (noting that illegal immigrants are blamed for bringing with them a variety of social ills, including crime and unemployment).

83. Fineman, *supra* note 80, at A3. Zedillo said, "The attack on their dignity offends us and it insults us deeply that they are victims of abusive treatment and intimidating acts that physically threaten them and even have meant the loss of life." *Id.*

84. Nancy Nusser, *Abuse Frequent at U.S. Border, Mexicans Say*, L.A. DAILY NEWS, Apr. 14, 1996, at N14.

U.S. politicians have contributed greatly to the anti-Mexican sentiment in the United States.<sup>85</sup> The belief that the government has lost control of our borders compounds the tension in the border region.<sup>86</sup> Mexican officials argue that U.S. politicians have created a xenophobia among Border Patrol agents and U.S. citizens.<sup>87</sup> Jose Angel Conchello, Chairman of the Mexican Senate's Foreign Relations Committee, said that "[t]his aggression is a natural consequence of the direction that political opinion has taken in the United States against foreigners, and Mexicans in particular."<sup>88</sup> To combat these anti-immigrant sentiments, the Mexican government has redoubled their efforts to protect their citizens through Mexico's forty consulate offices throughout the United States.<sup>89</sup>

The Clinton Administration and Congress have provided the INS with more personnel and resources than any other presidential administration.<sup>90</sup> Critics of the Border Patrol's hiring process say that too many agents are being added too fast without proper training and that this rapid growth will result in more violence toward illegal immigrants.<sup>91</sup> Dan Hann, President of the Southern Arizona Border Patrol Union, is concerned that background checks are not completed by the time applicants are hired and sent to the training academy.<sup>92</sup> The INS claims that all background checks are completed prior to "the person getting on board."<sup>93</sup> Several incidences have been reported where an agent's criminal record was discovered while the agent was at the academy or after the agent had successfully completed training and was working in the field.<sup>94</sup>

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85. *See id.*

86. *See* Nuñez, *supra* note 8, at 1576.

87. *See* Nusser, *supra* note 84, at N14; *see also* Molly Moore, *Mexico Says U.S. Abuses Its Illegals*, WASH. POST, Apr. 9, 1996, at A16 (quoting a Mexican newspaper for the allegation that "the violation of justice and of human rights is rooted in xenophobia and racism."); *see also* Nuñez, *supra* note 8, at 1577 (noting that manifestations of xenophobia exist in the United States toward illegal immigrants).

88. Moore, *supra* note 87, at A16.

89. *See* Fineman, *supra* note 80, at A3.

90. *See* *Border Patrol Applicant Screening Criticized, Official Defends Process*, DALLAS MORNING NEWS, July 6, 1998, at A13 [hereinafter *Application Process*] (noting that the Border Patrol has doubled its staff to 8,000 agents in the last four years and will triple its staff by 2001).

91. *See* Nusser, *supra* note 84, at N14.

92. *See* *Application Process*, *supra* note 90, at A13.

93. *Id.*

94. *See id.*

Furthermore, “immigration service officials are quick to point out that [Border Patrol] agents undergo ‘cultural sensitivity’ training” and that “citizens advisory groups have been set up in border cities.”<sup>95</sup> The U.S. Justice Department stated that Border Patrol cadets receive cultural sensitivity classes from the Mexican government.<sup>96</sup> The cultural sensitivity classes should be a permanent requirement for Border Patrol cadets because agents will be less likely to physically and verbally abuse illegal immigrants if they have a better understanding of the immigrants’ culture and the conditions that cause them to seek a better life in the United States.

Because illegal immigrants rarely report incidents of abuse, Border Patrol agents know they will not be held responsible for their actions; this realization leads to instances of abuse.<sup>97</sup> Illegal immigrants fear that if they report cases of abuse they run the risk of being deported back to their country.<sup>98</sup> This fear leads many victimized illegal immigrants to choose not to report abuses at all.<sup>99</sup> Linda Wong, a member of the Mexican-American Legal Defense and Education Fund, stated, “Violence against undocumented immigrants has always been there, but very little has been done about it because illegal immigrants have been terrified to file complaints against abusing officers.”<sup>100</sup> Seemingly, some Border Patrol agents take advantage of this fear and use it to their advantage in mistreating the illegal immigrants they arrest. Furthermore, due to their misplaced belief that they have no rights in this country, most illegal immigrants believe that reporting the abuse would be pointless.<sup>101</sup> Illegal immigrants believe that they have no rights because they are in the country illegally.<sup>102</sup> They would rather focus their attention on trying to stay in the United States than on wasting their time filing complaints of abuse for which they are unaware they have a remedy.<sup>103</sup> Illegal

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95. Nusser, *supra* note 84, at N14.

96. See Fineman, *supra* note 80, at A3.

97. See Nuñez, *supra* note 8, at 1577.

98. See *id.*

99. See *id.*

100. Lee May, *Violence by Border Agents Against Aliens Grows, Coalition Charges*, L.A. TIMES, Nov. 21, 1987, at A40.

101. See Nuñez, *supra* note 8, at 1577–78.

102. See *id.* at 1578.

103. See *id.* at 1577–78.

immigrants see the abuse as part of the price they have to pay for coming across the border.<sup>104</sup>

### III. BORDER PATROL ABUSE AND THE RIGHTS OF ILLEGAL IMMIGRANTS

#### A. *Examples of Border Patrol Abuse of Illegal Immigrants: Cases and Reports*

One reported incident of Border Patrol abuse is the case of *Arizona v. Manypenny*.<sup>105</sup> Manypenny, a six-year Border Patrol agent, was assigned to patrol the federally-owned land known as Sweetwater Pass in Pima County, Arizona, an area frequently traveled by illegal immigrants once they crossed the border.<sup>106</sup> One evening, Manypenny and a fellow Border Patrol agent ordered three Mexican males to stop so that the agents could question them concerning their resident status.<sup>107</sup> “[O]ne of the men turned and ran back south toward the border.”<sup>108</sup> Manypenny ordered the man to stop running, but when the man continued to run Manypenny fired at the man three times with his shotgun.<sup>109</sup> One of the shots struck the man in the buttocks causing serious wounds, and another shot “struck him in the upper spine, severing the cord and leaving him a quadriplegic.”<sup>110</sup> It turned out that the three Mexican men were illegal immigrants looking for work in the United States.<sup>111</sup> All three men were unarmed.<sup>112</sup> Manypenny was eventually convicted in federal district court of assault with a deadly weapon in violation of Arizona law.<sup>113</sup>

Several American human rights organizations have issued reports alleging abuse of illegal immigrants by Border Patrol agents.<sup>114</sup> For example, the American Friends Service Committee’s Immigration Law Enforcement Monitoring Project issued a report documenting numerous cases of

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104. See H.G. Reza, *Illegal Aliens Fearful of Border Bandits, Patrol*, L.A. TIMES, May 12, 1985, at B1 (quoting a San Diego police lieutenant as saying that illegal immigrants “don’t report crimes unless they are caught by the Border Patrol.”).

105. 451 U.S. 232 (1980).

106. See *id.* at 234.

107. See *id.* at 234–35.

108. *Id.* at 235.

109. See *id.*

110. *Id.*

111. See *id.* at 234 & n.3.

112. See *id.* at 234–35 & n.3.

113. See *id.* at 235–36.

114. See Rosenbaum, *supra* note 5, at 5–6.

abuse against illegal aliens from May 1989 to May 1991.<sup>115</sup> The report documented 1274 cases of abuse by immigration officers at the Mexico-U.S. border.<sup>116</sup> The report accused Border Patrol agents of sexual, verbal, and physical abuse, false arrests, and illegal deportations.<sup>117</sup> Maria Jimenez, Director of the American Friends Service Committee, believes that stress among agents working long lonely hours is to blame for the abuse.<sup>118</sup>

Americas Watch, now known as Human Rights Watch-America, also published a report in May of 1992 documenting numerous cases of Border Patrol abuse of illegal immigrants at the Mexico-U.S. border.<sup>119</sup> The report included cases of shootings, beatings, sexual assaults, and torture of illegal immigrants by Border Patrol agents.<sup>120</sup> Americas Watch accused the Border Patrol and other immigration officers of routinely abusing illegal immigrants.<sup>121</sup> The report also accused the INS of not adequately training or supervising its immigration agents and of covering up incidents of abuse.<sup>122</sup> According to the report, excessive physical abuse is so common among Border Patrol agents that some agents regard the abuse as a joke.<sup>123</sup>

Immigrant advocate groups have long complained about the “hiring, training and supervision of agents.”<sup>124</sup> Human rights activists say that the INS has traditionally not used “psychological tests and other modern screening tools” when recruiting new Border Patrol agents.<sup>125</sup> They say that “during periods of rapid hiring, sluggish background checks have allowed dubiously qualified recruits to slip through” the current faulty hiring process.<sup>126</sup> Immigrant advocates argue that reports of abuse would decline if the INS identified and

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115. *See id.* at 6.

116. *See id.*

117. *See id.*

118. *See Aliens on U.S. Border Mistreated, Group Says*, AUSTIN AM.-STATESMAN, Apr. 17, 1991, at B1 [hereinafter *Aliens*].

119. *See* AMERICAS WATCH, HUMAN RIGHTS WATCH, BRUTALITY UNCHECKED: HUMAN RIGHTS ABUSES ALONG THE U.S. BORDER WITH MEXICO 1 (1992) [hereinafter BRUTALITY UNCHECKED] (noting that in spite of its limited focus, the results of the report are appalling).

120. *See id.*

121. *See id.* at 1.

122. *See id.*

123. *See id.* at 27.

124. *Case Highlights Alleged Abuse at Border*, L.A. TIMES, Jan. 14, 1996, at A3 [hereinafter *Case Highlights Alleged Abuse*].

125. *Id.*

126. *Id.*

removed from the hiring pool those people likely to create problems to the agency.<sup>127</sup> In 1992 Mexico's National Commission of Human Rights (CNDH), a government body, issued its *Report on Human Rights Violations of Mexican Migratory Workers on Route to the Northern Border, Crossing the Border and upon Entering the Southern United States Border Strip*.<sup>128</sup> The report documented numerous examples of human rights violations by U.S. Border Patrol agents against Mexican illegal immigrants.<sup>129</sup> According to the Commission, discrimination against illegal immigrants "is not a new phenomenon," but "there is evidence that in the past few years, acts of violence against them has increased."<sup>130</sup> The report documented incidents such as illegal immigrants being injured after being run down by Border Patrol vehicles.<sup>131</sup>

The National Commission of Human Rights report documented "a total of 117 cases of violence and abuse against Mexican migratory workers by different U.S. law enforcement officers."<sup>132</sup> In addition to the report, Mexico's Foreign Ministry also issued a press release in April of 1996.<sup>133</sup> The press release came on the heels of the April 1, 1996, Riverside incident, where two California Riverside County sheriff's deputies were caught on videotape beating a Mexican immigrant couple with their night sticks.<sup>134</sup> The videotaped chase and beating was aired throughout both

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127. See generally *id.* (noting that "immigration advocates . . . have complained about the hiring, training, and supervision of agents," as well as criticizing the lack of "psychological tests and other modern screening tools.>").

128. See COMISION NACIONAL DE DERECHOS HUMANOS, REPORT ON HUMAN RIGHTS VIOLATIONS OF MEXICAN MIGRATORY WORKERS ON ROUTE TO THE NORTHERN BORDER, CROSSING THE BORDER AND UPON ENTERING THE SOUTHERN UNITED STATES BORDER STRIP (David Robichaux trans., 1992).

129. See *id.* at 135-81. According to the 1992 CNDH Report, U.S. violations against Mexican undocumented immigrants include the following: (i) beatings; (ii) denying of medical attention; (iii) Border Patrol vehicles' running over Mexicans; (iv) hitting them with flashlights and batons; (v) kicking them; (vi) threatening them, so that they will not file any complaints; (vii) abusing them sexually; (viii) handcuffing them with violence; (ix) subjecting them to humiliating inspections; (x) destroying or confiscating of documents; (xi) intimidating them; and (xii) insulting them. See *id.*

130. *Id.* at 35.

131. See *id.* at 145, 146, 149, 156.

132. *Id.* at 53.

133. See Nusser, *supra* note 84, at N14.

134. See *id.*; see also *Lawsuit Over Police Beating of 2 Illegal Immigrants Settled for \$740,000*, HOUS. CHRON., June 21, 1997, at A14 (reporting that the couple agreed to drop their federal civil rights lawsuit against Riverside County in exchange for the settlement money).

Mexico and the United States.<sup>135</sup> The Foreign Ministry's press release claimed that it registered 72,864 incidents of abuse of Mexican illegal immigrants at the hands of U.S. officials in 1995.<sup>136</sup> The Foreign Ministry suggested that part of the reason for so many abuses of the civil, human, labor, and migration rights of Mexican nationals was the "anti-immigrant climate" in some parts of the United States.<sup>137</sup>

The INS paints a different picture of the incidents of Border Patrol abuse against illegal immigrants. The INS claims that the number of complaints against Border Patrol agents is steadily decreasing and that incidents of violence involving Border Patrol agents are rare.<sup>138</sup> In response to attacks by human rights organizations, INS officials claim that their agents are well trained and supervised and that the agency does not condone any acts of abuse towards illegal immigrants.<sup>139</sup> Immigration officials further claim that the human rights organizations' reports are insulting and that they represent the views of anti-law-enforcement immigration groups.<sup>140</sup> The INS boasts a lower complaint-per-arrest rate than other U.S. law enforcement agencies, with only one in seventeen thousand apprehended aliens filing complaints.<sup>141</sup> In June of 1992, former U.S. Attorney General William Barr stated in a hearing in front of the Senate Judiciary Committee that while the number of reports was decreasing,

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135. See Nusser, *supra* note 84, at N14.

136. See *id.*

137. *Id.*

138. See *id.*; see also Mittelstadt, *supra* note 9, at A1 (noting that University of Texas professor Frank Bean believes that "complaints are 'to be expected given the nature of the Border Patrol's job.'"); Rene Sanchez, *Violence Questions Grow in U.S. Crackdown on Border Crossers*, WASH. POST, Oct. 3, 1998, at A3 (describing how federal officials justified the use of deadly force in two instances where agents shot and killed illegal immigrants in California).

139. See *United States: Crossing the Line: Human Rights Abuses Along the U.S. Border with Mexico Persist Amid Climate of Impunity*, HUMAN RIGHTS WATCH, Apr. 1995, at 4 [hereinafter *Crossing the Line*] ("The report [Human Rights Watch] submitted concerning Border Patrol brutality was not a study; it was not thoughtful; and it had no value whatsoever."); Rosenbaum, *supra* note 5, at 3 n.15 (quoting Alan Nelson, former INS chief, who called INS officers "well-trained, well-disciplined and . . . very good."); Mittelstadt, *supra* note 9, at A1.

140. See Martin Van Der Werf, *INS, Border Patrol Abuse Aliens, Rights Group Says Lawmen Deny 'Insulting' Report Charging Beatings, Racism*, ARIZ. REPUBLIC, May 31, 1992, at A3.

141. See Mittelstadt, *supra* note 9, at A1; see also Laura Laughlin, *Agent's Arrest Hailed*, DALLAS MORNING NEWS, Sept. 13, 1992, at A45 (quoting Border Patrol Agent Steve McDonald as saying, "We feel we have an outstanding human rights record and civil rights record based on the number of complaints we receive.").

the publicity was increasing.<sup>142</sup> Virginia Kice, a spokeswoman for the INS, said that she was “angry at the allegations, because abuse is isolated.”<sup>143</sup> Furthermore, Amalia Meza, a deputy U.S. attorney in San Diego, claims that there are bad apples within the agency, but that “abuse is not widespread.”<sup>144</sup> According to the INS, the 65 complaints sent to its civil rights division in 1995 are a decrease from the 196 complaints sent in 1994.<sup>145</sup>

Although the INS claims that reports of Border Patrol abuse against illegal immigrants are rare, there are those who argue to the contrary.<sup>146</sup> For example, Human Rights Watch-America, a New York-based civil rights group that monitors illegal immigrant abuse at the border, claims that abuse is not rare.<sup>147</sup> Human rights officials claim that the INS numbers depicting a decrease in the number of reported abuses is misleading; because illegal immigrants are afraid to report cases of abuse to the proper authorities, the total number of incidents may be understated.<sup>148</sup> Human rights groups also cite numerous examples of abuse by immigration officers. For example, in 1994 a Border Patrol agent shot an illegal immigrant in the chest as he attempted to flee.<sup>149</sup> The case was not prosecuted.<sup>150</sup>

In April of 1995, Human Rights Watch-Americas issued a report citing numerous examples of Border Patrol abuse of illegal immigrants.<sup>151</sup> The report, entitled *Crossing the Line*, was the third in a series of critical reports alleging numerous cases of abuse by Border Patrol agents.<sup>152</sup> The report was

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142. See *Oversight of the Department of Justice: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong. 23 (1992).

143. Nusser, *supra* note 84, at N14.

144. *Id.*; see also Koenig, *supra* note 76, at A14 (quoting former INS Commissioner Gene McNary as saying, “Contrary to the allegations of widespread abuse of aliens, the Border Patrol has a record of discipline and devotion to the preservation of human life.”).

145. See Nusser, *supra* note 84, at N14.

146. See *id.* (noting several instances of alleged abuse and that in three months in 1994 on the California border 863 Mexican immigrants complained of abuse).

147. See Mittelstadt, *supra* note 9, at A1; see also *U.S. Border Agent*, *supra* note 11, at A29 (noting that Roberto Martinez, Director of the Border Project of the American Friends Service Committee, a national human rights organization, claims that abuse “goes on all the time, . . . and it’s getting worse.”).

148. See Nusser, *supra* note 84, at N14.

149. See *id.*

150. See *id.*

151. See *Crossing the Line*, *supra* note 139, at 10–30.

152. *Id.* at 4.

based on a fact-finding mission in the western portion of the Mexico-U.S. border area in July of 1994.<sup>153</sup> Responding to the report, INS Commissioner, Doris Meissner, stated that these incidents of abuse “are the exception,” and that the INS was doing all it could to investigate and correct complaints of abuse.<sup>154</sup> However, Allyson Collins, one of the principal authors of the report, claims that the Justice Department is actually doing very little to improve its human rights record.<sup>155</sup> The report alleges that the Justice Department received 1322 complaints of abuse by INS officers, including Border Patrol agents, between 1988 and 1994.<sup>156</sup> However, only sixteen cases were presented to a grand jury for possible indictment.<sup>157</sup> Furthermore, the report states that only two out of twelve Border Patrol agents indicted on federal civil rights charges since September 1983 received convictions.<sup>158</sup>

Sexual abuse by Border Patrol agents is an area receiving much attention.<sup>159</sup> Cases of sexual abuse of female illegal immigrants at the hands of Border Patrol agents do exist.<sup>160</sup> For example, in 1993 a Mexican illegal immigrant said that she was raped in a van by a Border Patrol agent in Nogales, Arizona.<sup>161</sup> At first, the agent was charged with rape and kidnapping, but then those charges were dropped in a plea bargain where the agent pleaded no contest to the lesser offense of attempted transporting of persons for immoral purposes.<sup>162</sup> In another unrelated incident in Nogales, Arizona, agent Raul Teran was charged with one count each of kidnapping, sexual assault, and molestation of a twelve-year-old illegal immigrant girl in 1994.<sup>163</sup> Furthermore, in December of 1995, agent Charles Vinson of the San Diego Border Patrol unit was accused of raping an immigrant who

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153. *See id.* at 3.

154. *Trouble on the Mexican Border*, U.S. NEWS & WORLD REP., Apr. 24, 1995, at 10.

155. *See Mittelstadt*, *supra* note 9, at A1 (quoting Allyson Collins, principal author of the 1995 Human Rights Watch report, as saying, “The Clinton Administration has abdicated its responsibility to correct the ongoing abuse problem by failing to follow through with its pledges of reform and by refusing to consider alternatives, such as an independent review of Border Patrol agents.”).

156. *See Crossing the Line*, *supra* note 139, at 28.

157. *See id.*

158. *See id.* at 29.

159. *See U.S. Border Agent*, *supra* note 11, at A29 (reporting several high-profile cases of sexual assault brought against Border Patrol agents).

160. *See id.*; *see also* Nusser, *supra* note 84, at N14.

161. *See* Nusser, *supra* note 84, at N14.

162. *See id.*

163. *See U.S. Border Agent*, *supra* note 11, at A29.

had crossed into the United States illegally.<sup>164</sup> Vinson, an eight-year agent, was arrested and charged with multiple counts of felony sexual assault.<sup>165</sup> In its May 1992 report, Americas Watch also alleged that sexual abuse of illegal immigrants is “rampant.”<sup>166</sup>

In some, if not in most cases of sexual assault, the agents use their authority to coerce the women into having sexual relations with them.<sup>167</sup> Many incidents of sexual abuse by Border Patrol agents are unreported because the victims fear they will be deported if they disclose the fact that they are in the United States illegally.<sup>168</sup>

Border Patrol agents often work in the most desolate terrain along the Mexico-U.S. border; far removed from any supervision.<sup>169</sup> The fact that agents often work unsupervised presents the opportunity for abuse, thus all complaints of sexual assault should be taken seriously. This is especially true since most complaints against the Border Patrol are generally deemed unfounded at the outset.<sup>170</sup> Some Border Patrol agents even accuse immigrants of fabricating allegations of abuse in hopes of winning legal immigration status or lawsuits.<sup>171</sup> Allegations of sexual assault against Border Patrol agents should not be presumed to be unfounded, and they should not be investigated half-heartedly, because doing so leaves the door open for the possibility of continued abuse.

### *B. Legal Rights of Illegal Immigrants*

Contrary to popular opinion, illegal immigrants do possess some Constitutional rights despite the fact that they are not legal citizens or residents of the United States. In *Yick Wo v. Hopkins*<sup>172</sup> the U.S. Supreme Court held that all aliens are “persons” within the meaning of the Fourteenth

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164. *See id.*

165. *See id.*

166. BRUTALITY UNCHECKED, *supra* note 119, at 35.

167. *See, e.g., United States v. Davila*, 704 F.2d 749, 750–51 (1983), which upheld the conviction of two Border Patrol agents who forced two female, illegal Mexican immigrants to have sex with them in order to be freed.

168. *See U.S. Border Agent*, *supra* note 11, at A29 (quoting Claudia Smith, regional counsel for California Rural Legal Assistance, as stating “that the reluctance to report sexual abuse by the Border Patrol was based on the women’s fear and their unfamiliarity with United States immigration laws.”).

169. *See Case Highlights Alleged Abuse*, *supra* note 124, at A3.

170. *See id.*

171. *See id.*

172. 118 U.S. 356 (1886).

Amendment's Due Process clause.<sup>173</sup> Furthermore, the U.S. Supreme Court has also held that illegal immigrants are protected by the Fifth Amendment's procedural Due Process clause<sup>174</sup> as well as by all of the rights granted to people in criminal cases by the Fifth and Sixth Amendment.<sup>175</sup> The Court held that as long as the illegal immigrants are physically within the territorial boundaries of the United States, the immigrants are afforded most of the same constitutional protections as citizens and legal residents.

Furthermore, in *United States v. Otherson*<sup>176</sup> the Ninth Circuit Court of Appeals upheld the conviction of two Border Patrol agents under 18 U.S.C. § 242<sup>177</sup> for violating and conspiring to violate the rights of illegal immigrants.<sup>178</sup> In that case, Otherson and his partner were called in to transport three or four illegal immigrants to the immigration processing center, but instead of transporting the detainees straight to the processing center they drove the illegal immigrants to the area being patrolled by another agent, Brown.<sup>179</sup> When one of the detainees did not respond to a question Brown asked him, Brown slapped the man a few times across the face and then beat the man's hand with his nightstick.<sup>180</sup> Otherson joined the attack by punching the man in the stomach, while Brown continued striking the man in the face and hitting his injured hand with his nightstick.<sup>181</sup> According to another agent, Otherson and Brown playfully referred to each other as the "designated hitter."<sup>182</sup> Otherson and Brown overstepped their legal authority and physically abused the detained illegal

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173. *Id.* at 369.

174. *See Yamataya v. Fisher*, 189 U.S. 86, 101 (1903); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (holding that the Fifth and Fourteenth Amendments protect illegal immigrants even though their presence in the United States is unlawful, involuntary, or transitory).

175. *See Wong Wing*, 163 U.S. at 238; *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (holding that undocumented aliens are entitled to the right to petition for habeas corpus); *see also United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (holding that illegal immigrants are entitled to the Fourth Amendment's protections against unreasonable searches and seizures).

176. *United States v. Otherson*, 637 F.2d 1276, (9th Cir. 1980).

177. *See* 18 U.S.C. § 242 (1976) (allowing for penalties against those who, under color of law, deprive the rights of others on the basis of color, race, or citizenship).

178. *See Otherson*, 637 F.2d at 1285.

179. *See id.* at 1277.

180. *See id.*

181. *See id.*

182. *Id.* at 1278.

immigrants before transporting them to the immigration-processing center.

Otherson and Brown were convicted of depriving illegal immigrants of their Constitutional rights and of conspiring to deprive these federal rights under 18 U.S.C. § 242.<sup>183</sup> At the time of the case, this particular statute read as follows:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.<sup>184</sup>

Otherson and the other agents argued that the illegal immigrants were not “inhabitant[s] of any State, Territory, or District,” as required by 18 U.S.C § 242 and that § 242 only covered actions under color of state law and not actions under federal law.<sup>185</sup> Citing Justice Rutledge’s concurring opinion in *Screws v. United States*<sup>186</sup> and relying principally on legislative history, the Ninth Circuit affirmed the convictions.<sup>187</sup> In *Screws v. United States* Justice Douglas said, “He who acts under ‘color’ of law may be a federal officer or a state officer. He may act under ‘color’ of federal law or of state law.”<sup>188</sup> Furthermore, the Otherson court concluded that the word “‘inhabitant’ as used in section 242 “does include all persons, without exception, present within the jurisdiction of the United States.”<sup>189</sup> The Court ruled that illegal immigrants possess federal rights under 18 U.S.C. § 242.<sup>190</sup> The Ninth Circuit rejected the defendant’s arguments and ended its opinion with the following words, which all immigration law enforcement officials should heed:

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183. *See id.* at 1277.

184. 18 U.S.C. § 242 (1976).

185. *Otherson*, 637 F.2d at 1279.

186. *See Screws v. United States*, 325 U.S. 91 (1945).

187. *See Otherson*, 637 F.2d at 1279–85 & n.6.

188. *Screws*, 325 U.S. at 108.

189. *Otherson*, 637 F.2d at 1285.

190. *See id.*

The message of this case is clear. So long as the American flag flies over United States courthouses, the federal courts and the federal justice system stand as bulwarks to assure that every human being within the jurisdiction of the United States shall be treated humanely and dealt with in accordance with due process of law by those entrusted with the power to enforce the law.<sup>191</sup>

The U.S. Supreme Court denied certiorari,<sup>192</sup> and thus the Ninth Circuit's view that conduct by the Border Patrol that violates the rights of illegal immigrants is illegal under 18 U.S.C. § 242 remains valid law.<sup>193</sup> The other federal circuits should follow the Ninth Circuit's precedent in protecting the human rights of all illegal immigrants abused by Border Patrol agents.

Additionally, the immigration officers, including Border Patrol agents, must provide the detained illegal immigrant with a notice of their rights.<sup>194</sup> The notice explains some of the rights possessed by the detained illegal immigrant.<sup>195</sup> For example, the notice refers to representation by an attorney or representative, a hearing before an immigration judge, a bond determination, and communication with the appropriate consul.<sup>196</sup> The immigration official must give the detained illegal immigrant a list of organizations that speak the immigrant's language and provide free or inexpensive legal services.<sup>197</sup> However, despite the required notice, there remains evidence that many immigrants are still unaware both of their rights and the procedure available to ensure that the rights are enforced.<sup>198</sup>

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191. *Id.*

192. *See* United States v. Otherson, 454 U.S. 840 (1981).

193. *See Otherson*, 637 F.2d at 1278-79.

194. *See* Jorge A. Vargas, *Consular Protection to Illegal Migratory Workers and Mexican Undocumented Minors: Two Sensitive Issues Addressed by the Thirteenth Annual Meeting of the United States-Mexico Binational Commission*, 6 FLA. ST. U. J. TRANSNAT'L L. & POL'Y 143, 163 (1996).

195. *See id.*

196. *See id.*

197. *See id.* at 163-64.

198. *See, e.g.*, Alice Ann Love, *INS Will Educate Migrants on How To File Complaints*, SAN DIEGO UNION-TRIBUNE, Dec. 24, 1997, at A2 (describing the government's new policy to educate illegal immigrants about their civil rights and how to file complaints against the INS).

#### IV. THE INS COMPLAINT PROCEDURE AND POSSIBLE SOLUTIONS

##### C. *Current Complaint Procedure*

The current INS complaint procedure contains an internal complaint review system.<sup>199</sup> Complaints by illegal immigrants are lodged with the Border Patrol itself, other INS personnel, police authorities, Mexican consulates, or the Justice Department's Civil Rights Division.<sup>200</sup> In addition, all filed complaints are forwarded to the Office of Inspector General (OIG).<sup>201</sup> The Justice Department created the OIG in 1989, in part, to investigate complaints of abuse by Border Patrol agents.<sup>202</sup> It is important to recognize that although some OIG investigators come from outside the immigration arena, many are former INS employees.<sup>203</sup> When a complaint is received, the OIG either initiates an investigation on its own or refers the matter back to the INS's Office of Internal Audit to conduct the investigation.<sup>204</sup> The OIG's investigators have broad discretion in the way they conduct their investigations, and it is usually done in secrecy.<sup>205</sup> This process of investigating complaints internally facilitates the possibility that the complaint will not receive a thorough investigation.

Some human rights groups argue that under the current complaint procedure investigations are "almost invariably perfunctory" and that most of the time the accused agents go unpunished.<sup>206</sup> They also claim that the internal complaint review process facilitates cover ups.<sup>207</sup> Jonathan Jones, spokesman for the Harlingen-based Proyecto Libertad legal office for Central American immigrants, states that under the

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199. See Hing, *supra* note 5, at 765.

200. See *id.*

201. See *id.*; see also Field Officers; Powers and Duties, 8 C.F.R. § 287 (1993) (stating that under 8 C.F.R. § 287.10(a) allegations of violations of the standards for enforcement activities set forth in 8 C.F.R. § 287.8 "shall be investigated expeditiously" by the Office of Professional Responsibility and the OIG).

202. See Hing, *supra* note 5, at 758.

203. See *id.* at 767.

204. See *id.* at 768-69.

205. See U.S. IMMIGRATION AUTHORITIES, *supra* note 13, at 13; see also Hing, *supra* note 5, at 773 (describing the investigation of complaints, and the level of discretion by federal prosecutors).

206. *Abuse by Border Patrol Alleged Illegal Aliens are Killed, Tortured, Raped, Rights Group Says*, ST. LOUIS POST DISPATCH, May 31, 1992, at A11 [hereinafter *Abuse by Border Patrol*].

207. See *id.*

current system agents conducting investigations are biased in favor of the Border Patrol because they are former immigration agents.<sup>208</sup> Jones said, “There does not exist a process whereby we can file complaints and expect to get some sort of acknowledgment, expect to get some sort of impartial investigation.”<sup>209</sup>

Justice Department officials claim the current complaint procedure functions effectively, providing adequate protection to illegal immigrants claiming abuse.<sup>210</sup> Officials deny charges that cover ups take place within the agency.<sup>211</sup> INS officials claim that the OIG thoroughly investigates all allegations of Border Patrol abuse under the current complaint review system.<sup>212</sup> Don Nielson, spokesman for the Dallas INS office, said that the Justice Department handles all complaints impartially.<sup>213</sup> INS officials claim that the current system identifies those immigration officers who overstep their authority and that the agents receive adequate disciplinary action if abuse is found.<sup>214</sup>

In response to attacks by human rights groups in 1995, Justice Department spokeswoman Ana Cobian defended the INS internal complaint process by saying, “We feel confident that the department has established a very stringent and very thorough, adequate and responsive review process.”<sup>215</sup> The Justice Department does not feel that an independent review commission is required because it claims that its immigration officers do not commonly abuse illegal immigrants.<sup>216</sup>

Although the INS claims that the Justice Department’s internal complaint procedure is effective, there are those who argue that this is not the case. Representative Xavier Becerra, a Democrat from California, has said, “Not only have immigrants and U.S. citizens suffered abuses and indignity at the hands of the Border Patrol, but the complaint

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208. See *Aliens*, *supra* note 118, at B1.

209. *Id.*

210. See *Mittelstadt*, *supra* note 9, at A1.

211. See *Abuse by Border Patrol*, *supra* note 206, at B1.

212. See *Van Der Werf*, *supra* note 140, at A3.

213. See *Aliens*, *supra* note 118, at B1.

214. See *Van Der Werf*, *supra* note 140, at A3.

215. *Mittelstadt*, *supra* note 9, at A1; see also Laughlin, *supra* note 141, at A45 (reporting that Border Patrol agent Steve McDonald believes that the Justice Department adequately investigates all allegations of abuse against illegal immigrants).

216. See *Mittelstadt*, *supra* note 9, at A1 (quoting Justice Department spokeswoman Ana Cobian as saying, “We do not believe that INS officers commonly abuse legal or illegal immigrants.”).

mechanism has been woefully inadequate.”<sup>217</sup> Many argue that the INS needs to change the current complaint review process.<sup>218</sup>

#### D. Citizen Advisory Panel

In response to the steady number of complaints about abuse by Border Patrol agents and other immigration officers, President Clinton announced the establishment of an INS citizen’s advisory group in 1995.<sup>219</sup> In 1992 Senator Dennis DeConcini, a Democrat from Arizona, suggested the idea of a citizen advisory panel, in response to attacks against the Border Patrol by human rights organizations.<sup>220</sup> The fifteen-member citizen panel stated that the panel’s main concern involved how the INS deals with complaints of misconduct and abuse by Border Patrol agents and other immigration officers.<sup>221</sup> The panel, comprised of both U.S. and Mexican citizens,<sup>222</sup> will compile recommendations for reducing the causes of complaints against Border Patrol agents and will make recommendations for improving the overall INS process.<sup>223</sup> The panel also stressed its concern over the training process of new agents and how sensitivity to other cultures should be a factor to consider in the training.<sup>224</sup> The panel argues that training at the entry level is important, but that the main focus should be to try to correct the sergeants (supervisors of small groups of employees) which would then alleviate many of the incidents of abuse by Border Patrol

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217. Maria Puente, *Immigration ‘Issue of the 90s’: Critics Cite Border Influx, Rights Abuses*, USA TODAY, Sept. 30, 1993, at A10.

218. See William E. Clayton, Jr., *INS Panel Focuses on Agent’s Conduct*, HOUS. CHRON., Apr. 14, 1995, at A4.

219. See Mittelstadt, *supra* note 9, at A1 (reporting that the function of the panel will be to make recommendations on how to reduce complaints against immigration officers).

220. See *Senate Bill Urges Border-Abuse Review*, ARIZ. REPUBLIC, July 24, 1992, at B7 [hereinafter *Senate Bill*] (quoting Senator DeConcini as saying, “Recent reports of abuse along the Southwest border have created the perception that INS . . . is not responsive to complaints.”).

221. See Clayton, *supra* note 218, at A4.

222. See *id.* Some members of the panel include Bill Ong Hing, a law professor; Armando Ortiz Rocha, the Mexican Consul General at El Paso; Miguel Conchas, Laredo’s Chamber of Commerce President; Jose Moreno of the Diocesan Migrant and Refugee Services in El Paso; and Justice Department worker Yvonne Campos. See *id.*

223. See *id.*; see also *Senate Bill*, *supra* note 220, at B7 (noting that Senator DeConcini believed that setting up the citizen advisory panel would “go a long way toward assuring people that abuse is not tolerated.”).

224. See Clayton, *supra* note 218, at A4.

agents.<sup>225</sup> Professor Hing, one of the members of the advisory panel, has also argued for the need to establish a permanent citizen review board to monitor INS operations.<sup>226</sup>

*E. Independent Review Committee*

Proponents of reform propose a permanent citizen review committee to monitor INS operations, not just a citizen advisory panel.<sup>227</sup> Human Rights Watch-America, a national civil rights group, advocates the creation of an independent commission to investigate complaints of abuse by illegal immigrants at the hands of immigration officers.<sup>228</sup> The U.S. Civil Rights Commission and the OIG are critical of the Border Patrol, and Senator DeConcini has called for the formation of an independent citizen's review panel to investigate complaints of abuse by Border Patrol agents.<sup>229</sup> Establishment of a complaint process system that includes public monitoring was also supported by the U.S. Commission on Immigration Reform, headed by former Representative Barbara Jordan, a Democrat from Texas.<sup>230</sup> In September of 1993, a House subcommittee heard testimony on a bill, introduced by Democrats, that would set up an independent civilian review board to monitor complaints against the Border Patrol.<sup>231</sup> The Border Patrol and the INS strongly opposed the bill, claiming that such outside interference would violate the agency's right to due process.<sup>232</sup> The bill did not pass. The INS also claimed that out of the 1.2 million arrests made in 1992, only a handful of cases of abuse were reported, thus there was no need for any independent external monitoring of the Border Patrol.<sup>233</sup>

Establishing a permanent citizen review panel could ensure accountability of the conduct of Border Patrol

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225. *See id.*

226. *See Hing, supra* note 5, at 798.

227. *See FEDERAL IMMIGRATION, supra* note 12, at 2, 81-82.

228. *See Mittelstadt, supra* note 9, at A1.

229. *See Senate Bill, supra* note 220, at B7.

230. Mittelstadt, *supra* note 9, at A1; *see also Rosenbaum, supra* note 5, at 2 (noting that one of the problems the U.S. Commission on Civil Rights identified included delays in investigations).

231. *See Immigration Enforcement Review Commission Act, H.R. 2119, 103d Cong. (1998).*

232. *See Puente, supra* note 217, at A10; *see also Richard J. Terrill, Alternative Perceptions of Independence in Civilian Oversight, 17 J. POLICE SCI. ADMIN. 78 (1990)* (noting that generally police departments oppose citizen review boards as an encroachment to their law enforcement power).

233. *See Puente, supra* note 217, at A10.

agents,<sup>234</sup> because complaints would not be left in the subjective hands of individual immigration field supervisors or OIG investigators.<sup>235</sup> Rather, the complaints may receive a more thorough and comprehensive investigation. A neutral review board would ensure that all decisions or investigations are not biased or motivated in favor of the Border Patrol agent. Having citizens involved in the complaint review process would afford balanced judgments. Under the current complaint review system, the investigation findings are not published;<sup>236</sup> leaving the public unsure that Justice Department investigators have conducted a thorough investigation. Creating an independent citizen review board would remedy this situation because the use of such a board to investigate complaints of abuse ensures that investigations are no longer conducted away from the public eye.<sup>237</sup> The citizen review board would function like the existing citizen review boards that investigate complaints of police abuse in various American cities.<sup>238</sup> Although citizen review boards do not have the power to impose disciplinary action directly,<sup>239</sup> the boards' public investigations prevent internal cover ups and keep the public educated. To remedy the problem of Border Patrol abuse of illegal immigrants, the complaint-investigation power should be removed from the hands of people who are biased in favor of the Border Patrol and given to an impartial citizen review board.

More is needed to alleviate the problem of Border Patrol abuse of illegal immigrants in addition to the establishment of a permanent review commission. Implementing permanent training techniques to allow new agents to be more culturally sensitive is a good start.<sup>240</sup> Many of the people who cross the Mexico-U.S. border come from areas where police brutality and intimidation by government officials is common,<sup>241</sup> which may cause many illegal immigrants to panic and flee at the

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234. See Hing, *supra* note 5, at 798.

235. See *supra* notes 199–205 and accompanying text.

236. See Nuñez, *supra* note 8, at 1603.

237. See Laughlin, *supra* note 141, at A45 (suggesting the public aspects of a criminal trial serve to educate the public about Border Patrol abuses); see also Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551, 596 (1997) (stating that most civilian review boards publish information concerning their activities).

238. See Nuñez, *supra* note 8, at 1579; see also Hecker, *supra* note 237, at 594 (noting that a majority of large cities, like Baltimore, Chicago, Detroit, New York City, and Milwaukee, have implemented citizen review boards).

239. See Hecker, *supra* note 237, at 596.

240. See Clayton, *supra* note 218, at A4.

241. See *supra* text accompanying notes 53–54.

sight of what appears to be a government official. Though many American citizens believe people who cross the border are criminals, in reality they are often fleeing war, oppression, and poverty.<sup>242</sup> The people are usually poor and frightened when they cross the border.<sup>243</sup> If Border Patrol agents receive cultural sensitivity classes, they will at least be familiar with some of the reasons why people attempt to start a new life in the United States. A more culturally sensitive agent will be less likely to abuse an illegal immigrant because there would no longer be the cultural ignorance factor.

#### IV. CONCLUSION

Historically, the Mexico-U.S. border has been the gateway into the United States for most who want to enter this country illegally. Thousands of people cross the border illegally each month in search of a new life in the United States.<sup>244</sup> The U.S. response to the problem of illegal immigration has been to increase the number of Border Patrol agents, but increasing the number of agents creates its own problems. As a spokeswoman for American Friends Services Committee said, “[Border Patrol personnel] are being added so rapidly they can’t be trained. . . . The whole situation has become more dangerous for everyone involved.”<sup>245</sup>

For the most part, Border Patrol agents are to be commended for the dangerous and hard work they diligently perform out in the field. However, cases of Border Patrol abuse do exist. As mentioned previously, reports of beatings, rape, torture, deaths, and verbal abuse by Border Patrol agents are occurring at frequent rates along the border. The Border Patrol’s ignorance as to cultural differences and the recent anti-immigrant sentiment created by Congress makes the situation at the border very tense. Accusations of Border Patrol abuse of illegal immigrants are a serious and alarming matter, and this is why impartial and thorough investigations are required.

The current Justice Department complaint procedure does not provide adequate safeguards to the human rights of illegal immigrants who are abused at the hands of Border Patrol agents. All allegations of Border Patrol abuse of illegal

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242. See Romero, *supra* note 2, at 999–1000.

243. See *supra* notes 53–55 and accompanying text.

244. See Nuñez, *supra* note 8, at 1574.

245. Nusser, *supra* note 84, at N14.

immigrants require an impartial investigation. The current internal complaint process is prone to abuse and cover ups because most of those who review complaints are former immigration officers who are biased towards the Border Patrol. Furthermore, complaints often are deemed to be unfounded, which may lead to half-hearted investigations. The INS internal complaint procedure is too subjective, thus permitting abuse to go undisciplined.

What is required is a permanent independent review commission to investigate complaints of Border Patrol abuse. An independent review commission would ensure impartial and thorough investigations, and it would hold Border Patrol agents accountable for their actions. The internal nature of the Justice Department's current complaint review procedure keeps most Americans uneducated about the problems of abuse that exist at the border.<sup>246</sup> This in turn creates an attitude of indifference when a few of the incidents reach the media.<sup>247</sup> Creating an independent citizen review board would make the American public aware of the serious problem of abuse that exists at the border by making this review process public. Illegal immigrants deserve the same constitutionally-mandated humane treatment expected by American citizens and legal residents. Border Patrol abuse of illegal immigrants must end.

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246. See Nuñez, *supra* note 8, at 1603–04.

247. See *id.*

<sup>†</sup> This Comment won the Joan Garfinkel Glantz Annual Prize in Civil Liberties.