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Desensitization to Border Violence &
The Bivens Remedy to Effectuate Systemic Change
Steve Helfand†

INTRODUCTION

After hopping the border fence at a railroad crossing near the San Ysidro Port of Entry in July 1996, Jorge Soriano Bautista ran, until he was hit hard in the back by a Ford Bronco that pursued him, knocking him to the ground, causing him to lose consciousness. Upon regaining consciousness, Bautista heard his arm snap while being handcuffed by a Border Patrol agent, and he again lost consciousness. Bautista was given no medical attention for either his broken arm or the blow to his body caused by the Ford Bronco. Instead, he was returned to the border and stuffed back under the fence onto the Mexican side where he later received medical attention at a Tijuana hospital.1

I.

A. The Border Patrol

On May 28, 1924, the United States Congress established the United States Border Patrol to serve as the uniformed law enforcement agency of the Immigration Bureau.2 The Border Patrol was created to prevent and detect illegal entry along the border, between the nation’s ports of entry, and to otherwise enforce the immigration laws of the United States.3 The following year, Congress authorized agents of the Immigration and Naturalization Service, the federal agency housing the Border

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2. CLIFFORD ALAN PERKINS, BORDER PATROL: WITH THE U.S. IMMIGRATION SERVICE ON THE MEXICAN BOUNDARY 1910-54, 89 (1978) [hereinafter PERKINS]. The precursor to what is known as today’s “Border Patrol” was the border mounted guards of the United States Immigration Service, whose duty was to control the entry of Chinese railroad laborers into Texas. The United States Congress formalized this organization in 1924 by establishing the El Paso Border Patrol Sector.

3. Id.
Patrol, sweeping powers to arrest and detain undocumented immigrants. Today's Border Patrol carries out a similar mission, albeit on a far greater scale.

Over ninety-five percent of the apprehensions of undocumented immigrants are performed by the Border Patrol. While the majority of undocumented immigrants within the United States are individuals who have overstayed their visas, people's perceptions are that most apprehensions of undocumented immigrants occur at the southern border. Nearly all of these apprehensions are of persons seeking to enter without inspection (EWI). The overwhelming majority of these apprehensions are made along the U.S.-Mexican border. In fiscal year 1996, the Border Patrol apprehended about 1.6 million aliens nationwide, of whom 1.5 million were apprehended in sectors along the southwest border.

The two thousand-mile U.S.-Mexico border is without question the largest entry point for undocumented immigrants. Due to the political pressures directed


5. As of July 1997, the Border Patrol had about 6,500 agents nationwide. By the year 2001, the Border Patrol is scheduled to expand to a force of 10,000 agents. In conjunction with other federal law enforcement agencies, the Border Patrol has increased emphasis on narcotics intervention and anti-terrorism. United States General Accounting Office, Report to the Committee on the Judiciary, U.S. Senate and the Committee on the Judiciary, House of Representatives: Illegal Immigration Southwest Border Strategy Results Inconclusive; More Evaluation Needed 7 (GAO/GGD Rep. 98-21 Dec. 1997) [hereinafter General Accounting Office Report].


8. In 1987, ninety-seven percent of arrests were made on individuals seeking to enter without inspection. Bean, supra note 6, at 30.


11. Bean, supra note 6, at 30. See also Richard D. Lamm & Gary Imhoff, Immigration Time Bomb (1985) [hereinafter Lamm].

12. The United States Department of Justice, Immigration and Naturalization Service (INS) has estimated that there were about five million undocumented immigrants residing in the United States as of October 1996, and their numbers increased at an average rate of about 275,000 per year between October 1992 and October 1996. General Accounting Office Report supra note 5, at 1. This increase has turned illegal immigration into a major political issue. Many public opinion polls mention illegal immigration of the most important political problem effecting U.S.-Mexico relations. Marcelo M. Suarez-Orozco, Crossings: Mexican Immigration in Interdisciplinary Perspectives 375 (1998) [hereinafter Suarez-Orozco].

Additionally, moves to restrict the eligibility of social benefits towards both legal and illegal immigrants are indicative of public attitudes towards immigration and racism. For example, California voters approved three state propositions that limited state benefits to both undocumented and legal aliens.
at stemming the flow of undocumented immigrants into the United States, the Border Patrol engages in aggressive measures to seal the border. While such measures have increased the number of apprehensions made and the costs associated with smuggling activities, the new border protocols have also been accompanied by an

Proposition 187, passed in November 1994, was the California ballot initiative making undocumented aliens ineligible for public education, public social services, and public health care services while allowing such services for legal residents. Many political commentators attributed the success of the proposition to racial bias. See Doug Willis, California Governor Exits After Eight Years of Tumult, CHARLESTON GAZETTE AND DAILY MAIL, Jan. 3, 1999, at 1, available in 1999 WL 6705328 (discussing California Governor Pete Wilson's assertion that his support of Proposition 187 was not racially motivated); Ana Maria Patino, Orange County Voices: Democracy is Suffering, L.A. TIMES, Sept. 13, 1998, at B11 (describing Proposition 187 as an effort to penalize Mexicans); Howard Mintz, California's Proposition 227 Foes Face Uphill Court Battle, SAN JOSE MERCURY NEWS, June 8, 1998, available in 1998 WL 12995511 (discussing popular support for Proposition 187). Proposition 209, passed in November 1996, provided that "the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Quoting Cal. Const. art. 1, § 31(a). 1996. The goal behind Proposition 209 was to effectively kill affirmative action programs relating to public education, employment and public contracting in California. See Samuel Autman, Former NAACP Shares Her Story of Struggles with San Diegans, SAN DIEGO UNION AND TRIBUNE, May 21, 1999 (discussing the undercurrent of racism and Proposition 209); John Nichols, Going For Governor, THE PROGRESSIVE, April 1, 1998 at 1 (describing supporters of Proposition 209 as pursuing a "racism-lite" agenda). On June 2, 1998, Proposition 277, the California ballot initiative, was passed. This initiative required that "all children in California public schools shall be taught English as rapidly and effectively as possible." quoting from Cal. Educ. Code § 300 (West Supp. 1999). The implementation of this initiative required that students be placed in rapid English language immersion programs rather than a lengthy bi-lingual education program. As with Propositions 187 and 209, many political commentators attributed the success of the initiative to racial bias. See Anthony M. Platt, Confessions of a Model Meritocrat, SOCIAL JUSTICE, Sept. 22, 1998 (attributing "English First" campaign which Proposition 227 espoused to 20th-century nativism, racism, and xenophobia); Christopher Reed, California's Adios to Bilingual Lessons, THE GUARDIAN, August 8, 1998 available in 1998 WL 3113606 (describing passage of Proposition 227 as popular electoral will plus "a tinge of racism.").

13. In October 1994, the INS undertook several programs including Operation Gatekeeper (directed at the San Diego portion of the U.S.-Mexico border) which used "new fencing, high intensity lights, and additional manpower." DAVID M. REIMERS, UNWELCOME STRANGERS 71 (1998).


15. In 1996, the Justice Department unveiled a new protocol to strengthen the border dubbed "prevention through deterrence." The objective of the program was to raise the risk of detection of illegal entrants along the border to a point where "[the undocumented immigrants] would consider it futile to try to enter the United States illegally." In order to effectuate the protocol, the Border Patrol implemented a four prong program which would enable it to: (1) concentrate personnel and technology resources in a four phased approach, starting first with the border sectors with the highest level of illegal immigration activity and moving to areas with the least activity; (2) make maximum use of physical barriers to deter entry along the border. (3) increase the proportion of time Border Patrol agents spend on border control activities; and (4) identify the appropriate quantity and mix of technology and personnel needed to control the border. GENERAL ACCOUNTING OFFICE REPORT supra note 5, at 2.
increase in border crossing fatalities and a dramatic rise in violence directed at undocumented immigrants along the border.

B. Why Undocumented Aliens Cross the Border

Illegal entrants face numerous and grave difficulties in crossing the border’s physical terrain. Additionally, they must deal with the threat of being victimized by violence directed at them by Border Patrol agents. Absent significant changes in the public perception of immigration, and of illegal entrants in particular, violence at the border will remain commonplace. However, such violence at the border will only continue as long as individuals attempt illegal entry across the border. In order to obtain a more thorough understanding of why individuals attempt to cross the border despite the risk of violence, it is necessary to examine the motivations of illegal entrants in crossing the border.

Economic motivations are the primary impetus for the majority of individuals seeking illegal entry into the United States. Most of these individuals do not stay in the United States for an extended period of time and operate in what some label a “transnational commuter” mode. This mode is characterized by short stays in the United States for employment followed by returns across the border for


18. Diego Cevallos, Immigration Mexico-United States: Border-Crossing Deaths Up 41 Percent, IPS, January 4, 1999, available in 1999 WL 5946443. The Mexican government has reported that 271 Mexican nationals died while attempting to cross the Mexico/US Border in 1998. Among the 271 immigrants who died last year were cases of dehydration, exhaustion, exposure and snake and scorpion bites. Furthermore, the Mexican Foreign Ministry reported that the number of fatalities along the border in 1998 could have been even higher. U.S. and Mexican border agents rescued 595 immigrants who were on the verge of dying of starvation, suffocation or exhaustion.

19. Id. According to the Mexican government, 89 Mexican nationals were killed or beaten and otherwise injured by US Border Patrol agents, nearly twice as many as 1997.

20. Based on gender, 59% of Mexican men associated economic motives to their illegal entry. SILVIA PEDRAZA & RUBEN G. RUMBAUT, ORIGINS AND DESTINIES: IMMIGRATION, RACE, AND ETHNICITY IN AMERICA 258 (1996) [hereinafter PEDRAZA].

21. The duration is dependent on where in Mexico the individual comes from. The border states of Mexico (Baja California, Sonora, Chihuahua, Coahuila, Nuevo Leon, and Tamaulipas) generally have average duration (of first stays) of between 20 days and 200 days. The Mexican states further away from the border generally stay longer (between 300 days to 400 days). However, most illegal entrants (from Mexico) come from border states - thus, the majority of economic entrants are here for short-moderate term stays. BEAN, supra note 6, at 55-90.

22. SUAREZ-OROZCO, supra note 12, at 350.
socio-familial purposes. However, stronger protocols to seal the border make “transnational commuting” more difficult, and tend to lead to stays of longer duration and/or permanent migration.

Weak economic growth rates in Latin America increase the pool of unemployed laborers and generate downward pressure on Latin American wages, resulting in increased migration to the United States. According to the International Labor Organization (ILO), unemployment across Latin America in 1999 is likely to rise to record levels due to a regional economic recession. This fiscal downturn makes Latin America unattractive to foreign investors, resulting in further economic decline. According to the ILO report, regional unemployment was at 8.4 percent up from 7.2 percent in 1997. The ILO estimates that unemployment in 1999 will reach a record 9.5 percent—shattering the previous unemployment record of 8.7 percent set in 1983. Individuals who are unemployed have a greater propensity to migrate. Thus, as the Latin American economic outlook worsens, illegal immigration is likely to rise dramatically.

The wage disparity between the United States and Mexican labor markets is another significant cause of mass illegal immigration into the United States. Wages

23. PEDRAZA, supra note 20, at 256 - 58.

24. With tightened border control measures, undocumented immigrants are more dependent on the usage of professional smugglers and document forgers. SUAREZ-OROZCO, supra note 12, at 350.

25. Id. Quoting Urban Institute’s Jeffrey Passel who states that “there’s a trade-off between deterring illegal immigration and converting temporary migration into permanent migration. And a staff report of the U.S. Commission on Immigration Reform (1995) which concluded that “some migrants are choosing to remain in the United States for longer periods so that they do not face the problem of re-entering when they are ready to return to the U.S.”


28. Id.

29. Id.

30. “Mexico uses the International Labor Organization (ILO) standard to register someone as employed or unemployed, namely, having worked at least an hour during the week prior to the interview. Given the availability of informal sector jobs in Mexico, many of which are self-created, measured unemployment is a poor guide of GDP performance or general welfare. Low unemployment rates, for instance, can disguise high levels of underemployment in the informal sector.” Augustin Escobar & Bryan Roberts, Surveys as Instruments of Modernization, 42 AM. BEHAV. SCIEN.2, 244 – 45 (1998).


in Mexico are one-tenth of those in the United States.\textsuperscript{33} The average hourly wage for manufacturing work in the U.S. in 1997 was $18.24.\textsuperscript{34} In Mexico, it was $1.75.\textsuperscript{35} In 1996, the average monthly earnings for an undocumented immigrant working within the United States are $1,066.\textsuperscript{36} Clearly, this wage differential provides a strong impetus for illegal immigration.

Additionally, the increased availability of unemployed laborers in Latin America heightens the wage disparity between the United States and Latin American labor markets by compressing Latin American wages.\textsuperscript{37} This downward pressure of Latin American wages leads to increased migration.\textsuperscript{38} For example, in 1999, the Mexican economy is expected to grow 2.5 percent, nearly less than half the growth rate from 1998.\textsuperscript{39} According to Pedro Venegas, an economist at the Mexico City economic think tank CAPEM, an estimated "1,350,000 people will enter the job market next year, and if the economy grows by 2.8 percent, then only 600,000 jobs will be created."\textsuperscript{40} Additionally, Venegas reported that if crude oil prices remain depressed, Mexico's economy could grow by only 1 percent in 1999 — leaving many more without jobs.\textsuperscript{41} This over supply of Mexican labor will intensify the downward pressure on wages in the overall Mexican economy, resulting in a greater disparity between United States and Mexican wages.\textsuperscript{42}

The 1993 North American Free Trade Agreement (NAFTA), whose supporters touted it as a mechanism to reduce migration from Mexico, has increased unemployment in Mexico by displacing small farmers, business owners and other workers.\textsuperscript{43} Additionally, Mexican economic "liberalization" policies have slowed

\begin{itemize}
  \item \textsuperscript{33} Id.
  \item \textsuperscript{34} Id.
  \item \textsuperscript{35} Id.
  \item \textsuperscript{36} SUAREZ-OROZCO, supra note 12, at 119.
  \item \textsuperscript{37} See id. at 115 - 167.
  \item \textsuperscript{38} Id.
  \item \textsuperscript{39} 3% Economic Growth Forecast. MEX. BUSINESS MONTHLY, Apr. 1, 1999, available in 1999 WL 8520009.
  \item \textsuperscript{40} Simon Webb, Analysts Unimpressed By Low Unemployment Rate, THE NEWS, Jan. 20, 1999, available in 1999 WL 5638747.
  \item \textsuperscript{41} "The government expects GDP growth to slow considerably in 1998 and 1999 because of the global financial crisis. Mexico will only create about 700,000 jobs this year, far short of its goal of 1 million jobs, said Labor Secretary Jose Antonio Gonzalez Fernandez." Government Reports Jobless Rate. SOURCEMEX ECON. NEWS, Nov. 4, 1998, available in 1998 WL 8779144.
\end{itemize}
job growth and helped to widen the wage gap between Mexico and the United States. Mexico City's experience vividly demonstrates their economic hardships. Between 19.7 million and 20 million people live in the metropolitan area of Mexico City. An estimated fifty percent of the population live as squatters in illegal dwellings. Nearly sixty percent of city residents are either unemployed or underemployed. As Jaime Ros, of the Hesburgh Institute of International Studies puts it, "the weak economy in Mexico, with underemployment and low wages, combined with the U.S. economy's strong demand for labor, makes immigration attractive for Mexicans." In the end, pressures on Mexicans to migrate north have increased rather than decreased.

II.

A. Hostility Towards Undocumented Immigrants

It is my contention that public hostility towards immigration in general manifests itself as a desensitization to the physical abuses directed at illegal entrants. Additionally, the desensitization process and/or societal unawareness of border violence relegates such physical abuse to minimal importance in the political realm, which makes the imposition of systemic change to control or limit such abuses more difficult. Because public hostility to such violence is mitigated by desensitization or lack of awareness, the judicial branch appears to be the best positioned to provide a remedy for civil rights deprivations. By attaching liability to individual agents who engage in civil rights deprivations against illegal entrants, systemic change to curtail such abuses will be enabled in spite of the unawareness or the desensitization process. Therefore, a thorough understanding of the process of desensitization is necessary to grasp fully the legal hurdles facing illegal entrants who are victims of Border Patrol agents. This process plays an important role when

44. Id.


46. Id.

47. Id.


49. Id.

50. A fundamental change in the perceptions and attitudes of Border Patrol agents towards illegal entrants. See AMNESTY REPORT, supra note 17, at 17. Amnesty Int'l has made several recommendations to increase oversight of border patrol operations. These fundamental changes, however, can only be implemented when new regulations are imposed. Absent specific legislative action, the attachment of personal liability to individuals who cause constitutional deprivations is difficult and may not curtail future abuses. See generally Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) and further discussion of its application to this issue in Part III.
trying to develop a mechanism to create systemic changes that will limit future abuses and/or obtain compensation for civil rights deprivations.

Dr. Amy Aidman refers to the desensitization process as "the idea of increased toleration of violence" which is "predicated from exposure to extensive or graphic portrayals and humorous portrayals of violence."\(^{51}\) Moreover, Alicia Kalamas and Mandy Gruber have described the desensitization process as a "psychological consequence" of the integration of violence into the social norms of society.\(^{52}\) This integration results in an increased familiarity with exhibited violence, lessening societal shock and outrage to the conduct.\(^{53}\) The desensitization process can be summed up as the psychological effect of rendering a person less sensitive to the pain and suffering of others, and more willing to tolerate ever increasing levels of violence in our society.

In order for violent behavior to rise above the desensitization process, three things must take place. First, the violent conduct exhibited must be so outrageous and shocking that there is no societal familiarity with it.\(^{54}\) Second, the victim of such violence must be an individual with whom society can sympathize.\(^{55}\) Third, such violent conduct must not be far removed or remote from society.\(^{56}\) Without fulfillment of these parameters, the exhibited violent acts will not be able to overcome the desensitization process.

\(^{51}\) Dr. Amy Aidman, Television Violence: Content, Context, and Consequences <http://www.hi-ho.ne.jp/taku77/refer/tvvio.html>.

\(^{52}\) Alicia D. Kalamas & Mandy L. Gruber, Electrodermal Responses to Implied versus Actual Violence on Television, 125 J. GEN. PSYCHOL. 31 (1998).


\(^{54}\) See generally Donald P. Judges, When Violence Speaks Louder than Words: Authoritarianism and the Feminist Antipornography Movement, 1 PSYCHOL. PUB'Y & L. 643, 696 - 97 (1995) (arguing that repeated exposure to pornography results in a desensitization to subsequent pornographic imagery); National Institute of Mental Health, U.S. Dep't of Health and Human Services, Television and Behavior 1 (1982) (establishing a causal link between repeated exposure to television violence and desensitization in adults and children); Margaret Hanratty Thomas, et. al., Desensitization to Portrayals of Real Life Aggression as a Function of Exposure to Television Violence , J. PERSONALITY SOC. PSYCHOL. 450-458 (1977) (detailing a study in which individuals where shown video footage of violent riots at the 1968 Democratic National Convention. Members of the study who had seen the video footage earlier exhibited less sensitivity to subsequent viewings of the footage. The study concluded that those exposed to repeated displays of the footage were desensitized to the subsequent displays of violence).

\(^{55}\) See Murray, supra note 53 (noting that victims of television violence tend to be non-white, foreign born, elderly and female).

\(^{56}\) Fred H. Cate, Through a Glass Darkly, available at http://www.fas.harvard.edu/~asiactr/fs_cate2.htm (discussing how the media can make humanitarian crisis' less remote).
B. Incidents of Abuse

According to Amnesty International, “the INS has had a long and troubled history in the U.S.-Mexico border region, with many allegations of officer misconduct such as unlawful lethal shootings, physical assaults and ill-treatment of detainees in custody.” The specific allegations of abuse include “people struck with batons, fists and feet, often as punishment for attempting to run away from Border Patrol agents; denial of food, water and blankets ... while detained in Border Patrol stations; denial of medical attention, and abusive, racially derogatory and unprofessional conduct towards the public sometimes resulting in the wrongful deportation of US citizens to Mexico.”

In order for the violent conduct to escape the desensitization process, the violence must have enough shock value to survive society’s filter. Two recent examples of violent acts passing through this filter and reaching the attention of the general public were the Abner Louima and Amadou Diallo incidents which took place in New York City in 1997 and 1999, respectively.

In August of 1997, Abner Louima, a Haitian immigrant, was handcuffed, beaten, and sodomized by New York City police officers in a police precinct house bathroom. More recently, on February 4, 1999, four white New York City police officers fired 41 shots at Amadou Diallo, a West African immigrant, in the vestibule of his apartment building. The New York City Police Department offered no official explanation, but defense lawyers for the four officers stated that the officers believed that Diallo was reaching for a gun. Later, it was clear that Diallo was unarmed.

While Amadou Diallo’s and Abner Louima’s mistreatment at the hands of governmental officials escaped the desensitization process, the overwhelming majority of abuses occurring on the U.S. /Mexico border documented by Amnesty International do not rise to the level of outrageousness necessary to draw public attention. Abner Louima was severely beaten and sodomized and Amadou Diallo was killed in a hail of bullets. However, the largest category of abuse reported by Amnesty International, the Mexican Foreign Ministry, and the Border Patrol itself is verbal abuse. The specific allegations of such abuse include threats, racial

57. AMNESTY REPORT, supra note 17, at 3.
58. Id.
59. See Murray, supra note 53; Judges, supra note 54; Thomas et al., supra note 54; Cate, supra note 56.
63. Id.
64. See AMNESTY REPORT, supra note 17.
disparagement, and non-physical intimidation. The distinction between conduct which overcomes societal desensitization and that which does not is based on the type of violence exhibited and the severity of the injuries sustained. The greater the shock value of the exhibited violence, the more likely the desensitization process will be overcome by society in general.

The level of outrageousness needed to overcome the desensitization process is also contingent upon whether the aggressor has a position of authority. Law enforcement officers are public agents charged with the enforcement of laws and regulations endorsed by society. The public agent, as a holder of official status within society, must conduct himself/herself by a standard that is indicative of public confidence. A deviation from this societal expectation of behavior by a governmental official, can by itself, arise to the level of shock value and outrageousness necessary to overcome the desensitization process. Note, a violation of this confidence by inappropriate conduct can overcome the desensitization process even if the type of violence exhibited is relatively minimal and the severity of the injuries sustained is not great. This is because the

65. Id. at 12 – 25. In this section, the report sets forth specific allegations of mistreatment.

66. See generally, Donald P. Judges, When Violence Speaks Louder than Words: Authoritarianism and the Feminist Antipornography Movement, 1 PSYCHOL. PUB. POL’Y & L. 643, 696 - 97 (1995) (arguing that repeated exposure to pornography results in a desensitization to subsequent pornographic imagery); National Institute of Mental Health, U.S. Dept of Health and Human Services, Television and Behavior 1 (1982) (establishing a causal link between repeated exposure to television violence and desensitization in adults and children); Margaret Hanratty Thomas, et. al., Desensitization to Portrayals of Real Life Aggression as a Function of Exposure to Television Violence , J. PERSONALITY SOC. PSYCHOL. 450-458 (1977) (detailing a study in which individuals where shown video footage of violent riots at the 1968 Democratic National Convention. Members of the study who had seen the video footage earlier exhibited less sensitivity to subsequent viewings of the footage. The study concluded that those exposed to repeated displays of the footage were desensitized to the subsequent displays of violence).

67. Daniel G. Linz et al., Effects of Long-Term Exposure to Violent and Sexually Degrading Depictions of Women, 55 J. PERSONALITY & SOC. PSYCHOL. 758, 758-59 (1988) (discussing the effects of emotional desensitization to films showing violence against women. An analysis of the Linz study suggests that the displays of violence and degradation of women was so shocking that the test subjects were desensitized.)

68. David N. Dorfman, Proving the Lie: Litigating Police Credibility, 26 AM. J. CRIM. L. 455, 461 (1999) (describing the responsibility of “public officials to represent fair and equal treatment is a bedrock of public trust, from which we derive the necessary confidence to live peaceably in a complex society.”); See Murray, supra note 53; Judges, supra note 54; Thomas et al., supra note 54; Cate, supra note 56.

69. Dorfman, supra note 68 (describing the responsibility of “public officials to represent fair and equal treatment is a bedrock of public trust, from which we derive the necessary confidence to live peaceably in a complex society.”).

70. Not Guilty? (The Amadou Diallo Case), THE NATION, Mar. 20, 2000 (describing the public outrage over the police killing of Amadou Diallo in New York City).

71. Elaine Rivera, Black and Blue: The Four Cops Who Killed Amadou Diallo Are Acquitted, TIME, Mar. 6, 2000 (noting various police tactics such as racial profiling which have shocked
governmental agent’s breach of trust is, in and of itself, considered to be shocking and outrageous regardless of the severity of the injuries sustained. However, this reaction can only occur if the desensitization process has not been enabled as a result of the lesser status of the victim and/or the remoteness of the incident.72

Border Patrol agents are employees of the federal government with law enforcement authority. This requires the Border Patrol agent to conduct him/herself in a manner conducive to the public trust vested in him. A breach of the public trust may allow for such instances of relatively minor abuse to overcome the desensitization process. Therefore, it is possible that less severe instances of abuse reported by Amnesty International may escape society’s filter so long as the victim of such abuse overcomes the status and remoteness factors of the desensitization process.

The frequency of physical abuse also plays a significant role in the desensitization process.73 The more often minimal to moderate abuses take place, the greater the likelihood of societal desensitization to such exhibited violence.74 This result stems from society’s familiarity with the exhibited violence, and the failure of the recent displays of similar violence to outrage and shock the public.75 Thus, ironically, a greater number of minimal to moderate abuses directed at a group of individuals can result in less public attention to remedy such abuses.76 However, at a certain threshold point, the shear numbers of minor to moderate abuses that were previously desensitized by society can generate the level of outrage and shock value necessary to reach the public’s attention.77

INS officials claim that reports of abuse along the border are decreasing.78 However, like incidents of police abuse and misconduct, measuring actual abuse by number of complaints filed does not paint an accurate picture of the extent of the abuse along the border because many incidents of abuse go unreported.79 In fiscal

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72. See Murray supra note 53; Cate, supra note 56.
73. See Judges, supra note 54; Thomas et al., supra note 54.
74. Id.
75. Id.
76. Id.
77. Id.
78. Id.
79. In Murillo v. Musegades, 809 F.Supp. 487, 496 (W.D. Tex. 1992), the district court found in part that victims of abuse by the Border Patrol fail to report the abuse because they “have a sense of futility in filing grievances as victims are rarely, if ever, informed of the disposition of their complaints,” and “victims begrudgingly accept this type of abusive law enforcement action as a way of life.” Id. at 496. Additionally, the district court found that one reason victims of abuse by the Border Patrol fail to report the abuse is because they “believe the complaints will neither be rigorously investigated nor officers duly disciplined.” Id. at 496.
year 1995, 536 complaints were made against Border Patrol agents around the country, including 149 allegations of physical abuse, 43 of assault, and 3 of murder. However, these figures conflict with those reported by the Mexican Foreign Ministry which “[D]ocumented 72,864 incidents of abuse of Mexican illegal border crossers at the hands of U.S. officials in 1995.”

It is necessary to examine the number of physical abuses directed at illegal entrants by Border Patrol agents to determine the threshold necessary for society to overcome the desensitization process. According to official INS brutality statistics, incidents of abuse along the border directed at illegal entrants by Border Patrol agents occur at a rate of approximately one out of every thirty thousand apprehensions. Conversely, the Mexican Foreign Ministry figures (which include incidents of verbal abuse) suggest that abuse of some kind occurs in five percent of apprehensions made. The critical issue is whether even if the Mexican Foreign Ministry figures are deemed valid, the five percent rate of abuse is outrageous enough to overcome the desensitization process.

The rates of abuse directed at illegal entrants by Border Patrol agents is numerically less than the abuses reported since the inception of the community policing program in New York City. Drawing an analogy between border violence and abuses from a community policing program is appropriate in understanding the numeric threshold by which societal desensitization is overcome because both entail the use of public authority within the law enforcement context, significant allegations of abuse based on racial bias, and potential societal desensitization to the incidents of abuse.

Community policing is a law enforcement strategy that, among other things, provides discretion to individual police officers to enforce violations of anti-loitering laws, conduct warrantless building searches, and focus on “quality of life” issues. Several political commentators have suggested that the program’s implementation in New York City has caused numerous civil rights deprivations motivated primarily by racial bias. One poll has indicated that nine percent of minority citizens have been


82. Figure based on 1.5 million apprehensions made by INS and official INS brutality statistics.

83. Figure based on 1.5 million apprehensions made by INS and Mexican Foreign Ministry abuse statistics.


85. However, in New York City, it appears that the sheer numbers of incidents of reported abuse, and the widespread reporting in the aftermath of the Louima and Diallo incidents is focusing public attention on police brutality. According to 59 percent of city voters New York City is a safer place to live than it was five years ago, 84 percent of voters say police brutality is a “very serious” or “somewhat serious” problem, according to a Quinnipiac College Poll. A total of 14 percent of New
victimized by police brutality. Additionally, a recent study has indicated that excessive physical force occurs in approximately 15 percent of detentions of African American males between the ages of sixteen and twenty-five. When improper stop and frisk searches are added into the calculation abuse figures rise substantially. While individual incidents such as the Amadou Diallo and Abner Louima cases have overcome the desensitization process due to the severity of injuries inflicted, an incident abuse rate of fifteen percent is not enough to overcome societal desensitization. This conclusion is appropriate based on the lack of community awareness of the rates of incidents of abuse and the absence of community demands for systemic change and the failure of the government to curtail future abuse.

The comparison of rates of abuse between the New York City community policing program and violence directed at illegal entrants by Border Patrol agents suggests that the rate of abuse along the border has not reached the numeric threshold to overcome the desensitization process. The Mexican Foreign Ministry abuse rate of five percent is, at maximum, one third of the rate of improper police actions in New York City against African American males. Since desensitization to

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88. Id.

89. This is based on the rates of abuse. If the rate of abuse directed at illegal entrants along the border is less than the rate of police brutality, a comparison of rates alone would suggest that the lesser rate of abuse will not be able to overcome societal desensitization or unawareness. Wayne Barret, Mayor, Media Ignore Conyers Hearing on Police Brutality, VILLAGE VOICE (N.Y.), Dec. 2, 1997, at 24 (commenting on the absence of media attention given to hearing on police brutality conducted by Congressman John Conyers); see also Alexa P. Freeman, Unscheduled Departures: The Circumvention of Just Sentencing For Police Brutality, 47 HASTINGS L.J. 677, 752 (1996) (describing how the Rodney King incident in Los Angeles “brought for the first time to many in this country an awareness of the problem of police brutality and its role in fomenting enormous racial tension.”) Only the outrageousness of the Rodney King incident (the type of incident based on severity and position of authority – see infra) and not the rate of abuse alone was the pivotal component to overcoming societal unawareness or desensitization. Obviously, the is in the context of general societal awareness. Members of minority communities, as the predominant victims of police brutality have a greater awareness of violence directed against them. Polling data has also suggested that a large majority (61 percent) believe that police brutality does not exist in areas where they live (versus 39 percent who believe brutality took place). See Gallup Poll, August 1991. (on file with the author) (this poll was conducted in the aftermath of the Rodney King incident. Thus, awareness of police brutality was likely to be at its greatest level).

90. Id.

91. Figure based on 1.5 million apprehensions with the statistics reported by the Mexican Foreign Ministry.
community policing abuses have not been overcome, it is unlikely that a lesser rate of abuse of border violence will escape society's filter as well. Therefore, societal desensitization to border violence can only be overcome by the outrageousness of the type of violence and not the current rate of violence alone.

C. Sympathy Towards Undocumented Entrants

The second step involved in overcoming the desensitization process involves the victim's ability to arouse public sympathy. The victim's status within society is often determinative of the degree to which other members of society can identify with the victim. When a violent act is so outrageous, any problems of status are overcome by the public outrage engendered by the action. However, in incidences of repeated low-level violence, the victim's lower social status can be determinative to the degree of sympathy generated.

For instance, both Abner Louima and Amadou Diallo were immigrants from ethnic minority groups. Both were in the United States legally and not considered to have engaged in illegal conduct. The prevailing view is that Louima and Diallo were "innocent" victims of police aggression and, therefore, could arouse public sympathy. Conversely, individuals with dubious status within society have a difficult time overcoming desensitization barriers.

The role status plays within the immigration framework can be seen in the extensive examination of American public opinion on immigration issues conducted by Thomas Espenshade and Maryann Belanger. Their research centered on an analysis of surveys conducted by twenty different organizations over a thirty year period, examining the nexus between legal and illegal immigration, and the impact that one's legal status has on public opinion regarding immigration policy.

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92. See Murray, supra note 53.

93. See Murray, supra note 53; Judges, supra note 54; Thomas et al., supra note 54.

94. Id.

95. Id.


97. Id.

98. Id.

99. See Murray, supra note 53; Judges, supra note 54; Thomas et al., supra note 54.

100. SUAREZ-OROZCO, supra note 12, at 29.

101. Id. at 29-32.
Espenshade and Belanger state that in the 1990's, there has been "growing anxiety over the presence of immigrants within the United States." Over sixty percent of those individuals surveyed wanted decreased immigration. Additionally, over forty percent wished to enact an "immigration time-out," in which immigration was either curtailed or sharply reduced for a five-year period.

While public hostility towards immigration is often viewed in terms of general immigration policy concerns, it is fairly easy to pierce the veil of these statements to understand the racial component and its impact on immigrant's status level. As Marcelo M. Suarez-Orozco noted in his analysis of the Espenshade and Belanger study, the racial component cannot be fully divested from public hostility towards immigration policies. Suarez-Orozco stated that "Mexicans, along with other Latin Americans and Caribbeans, rank among the least favored immigrants in public opinion." They are perceived by many as less likely to work hard and more likely to use welfare than other immigrants such as Asians or Europeans. Interestingly, Suarez-Orozco's analysis lies within the context of legal immigration of Latin Americans, and public hostility based on racial stereotypes. Alone, such public perceptions can result in reduced a status level for the legal entrant, which can impact his/her interaction within society. In other words, status not only impacts the desensitization process but, also, a host of other social interactions as well (not limited to employment, residence issues, public policy issues, etc.). However, when the stigmatization of an illegal entry is added to the already reduced status level of a Latin American entrant, it is easy to see how the connection between individual status and public perceptions can manifest themselves into desensitization to the concerns of illegal entrants.

The Espenshade and Belanger study demonstrates that the stigmatization of illegal entry is related to the desensitization process. The study clearly suggested that the American electorate attaches significant importance to the issue of illegal

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102. *Id.* at 29.
103. *Id* at 30.
104. *Id.* at 29-89.
105. See *LAMM* supra note 11, (which espouses an overall viewpoint of the negative implications of immigration. It often raises issues of race, ethnicity, and religious differences between immigrants of the late 20th century and immigrants of the late 19th and early to mid 20th centuries).
107. *Id.* at 29.
108. *Id.*
110. *Id.*
111. SUAREZ-OROZCO, *supra* note 12, at 29.
immigration. In a 1980 study, 91 percent of those polled believed that the government should make an “all out effort” to control illegal immigration. In 1993, 85 percent “thought that illegal immigration would become a ‘more serious problem’ in the future.” In 1994, 20 percent identified illegal immigration as the single most important policy concern facing the United States. Additionally, the 1994 study revealed that sixty-five percent of those polled “were willing to spend more federal tax money to tighten the borders” in order to stem the flow of illegal immigration. This data demonstrates that there is much hostility directed towards illegal entry. This hostility results in illegal entrants possessing a substantially reduced status within society.

One reason for the hostility towards illegal entrants is the belief that illegal entrants displace workers and cause a depression of wages within the host country. Indeed, a 1996 NPG/Roper poll demonstrated that illegal immigration was considered to be one of the leading causes of unemployment in America.

Another reason articulated for hostility towards undocumented immigrants is the adverse cultural impact that undocumented immigrants allegedly have upon communities in which they settle. Undocumented immigrants are assumed to be on the low end of the socio-economic scale, and are therefore presumed to be more likely to engage in criminal activity. Consideration of cultural deviations include such traits as limited English proficiency, ethnicity, race, religious, and other general cultural distinctions. The linkage between culture and societal detriments appears to be based on stereotypical assumptions of individuality and groupings.

Lastly, it is widely believed by the United States electorate that undocumented immigrants are not contributing to society as a whole because they receive government services (including indirect services through roads, crime

112. Id.

113. KENNETH LEE, HUDDLED MASSES, MUDDLED LAWS 29 (1998) [hereinafter LEE].

114. Id.

115. Id.

116. Id.

117. Id.

118. NPG/Roper Poll, American Attitudes Toward Immigration, 1996 (on file with the author).

119. LAMM supra note 11 at 81-101.

120. Id.

121. Id.

122. The seminal example of this benefits-oriented hostility centers on the providing of educational benefits to the children of undocumented immigrants. Until their 18th birthdays, illegal immigrants may attend public school. See Plyler v. Doe, 457 U.S. 202 (1982). See also LEE supra note 113 at 66-68 for discussion of hostility to illegal entrants receiving public benefits.
control, etc.) which make wage earning within the host country viable, and are not contributing monetarily (via taxation) to enable such services. This erroneous belief has been documented by numerous public opinion polls and asserted by several "mainstream" politicians despite highly acclaimed studies which demonstrate that the presence of illegal entrants within the labor force provides at net benefit to the United States economy.

Public perception of illegal immigrants furthers the process of desensitization because they are viewed as possessing a lower status within American society. This low status level of illegal entrants makes the desensitization process difficult to overcome absent shocking acts of violence. Because the degree to which society has regard for the victim of civil rights deprivations impacts the societal desire to bring about systemic change to end future violations, the very low status of illegal entrants makes such systemic changes extremely difficult to achieve.

D. Remoteness

Remoteness from violent incidents plays a significant role in the desensitization process. Issues that are not considered to be close to home are often given significantly less weight absent compelling circumstances. While there are numerous US population centers along the United States/Mexican Border which certainly view incidents at the border as issues of local concern, the very word "border" connotes some distant, far away place, which is outside the rubric of everyday societal interests for the overwhelming majority of the American electorate. This perception of remoteness is within society in general. Furthermore, since control of the border is a vestige of federal sovereignty, the issue of border violence, and the responsibility for making systemic change is dispersed throughout the polity regardless of geography. Often, acts of violence that occur in venues considered too distant from society often have difficulty overcoming the desensitization process.

123. Id.

124. Louis Freedberg, Labor Shortage is Turning the Anti-Immigration Tide, S.F. CHRON., March 12, 2000 at 2Z1 (highlighting Patrick J. Buchanan's, a former Republican, now potential Reform Party nominee, views on both legal and illegal immigration.) Louis Uchitelle, Illegal Workers Breathe Easy, AUSTIN-AM STATESMAN, March 9, 2000 at A1 (detailing Congressman Lamar Smith, chairman of the House Sub-Committee on Immigration, desire to clamp down on illegal immigration); see generally MICHAEL C. LEMAY, THE GATEKEEPERS: COMPARATIVE IMMIGRATION POLICY (Michael C. Lemay ed.) (1989) (discussing data that illegal immigration provides substantive benefits to the United States economy. These benefits are provided to both employers and consumers. Lower labor costs enable businesses to be more competitive, earn higher profits, and pass along some of those benefits to the consumer in the form of lower prices).

125. See Cate, supra note 56.

126. See LAMM, supra note 11, at 2 - 32.

127. See U.S. Const. art. I, § 8, cl. 4.
While media coverage can make border violence less remote, such coverage is generally directed at events in which the population manifests an interest. The public's interest in the news event often drives the coverage. As one national news editor put it, "If we didn't think people would read it, we wouldn't publish it." Thus, a lack of public interest in border violence issues may preclude media coverage of incidents of abuse that are not shocking. Furthermore, as described earlier, even if the incidents of abuse do obtain news coverage, the public may still be either desensitized to or simply unaware of the border violence, and therefore only outrageous incidents can typically overcome the remoteness factor.

While Border Patrol agents are public agents who have positions of trust and confidence, they are not neighborhood police. Most Americans have never met a Border Patrol agent or seen one in action. The remoteness of the incidents of violence, the status of the victims, and the nature of the violence all merge to prevent the desensitization process from being overcome absent a shocking and outrageous incident. Since the majority of the public is either unaware or been desensitized to Border Patrol violence directed at illegal entrants, it is unlikely that systemic change will be enabled at the border to limit abuses in the near future absent judicial intervention.

III.

A. Hostility of Border Patrol Agents Directed at Undocumented Immigrants

Border Patrol agents are subject to numerous workplace generated factors which increase their propensity to engage in abusive tactics directed at illegal entrants. Border Patrol agents consider themselves to be the front-line defense of a nation that is being over run by undocumented immigrants. Such a belief,

128. Richard Sorian & Judith Feder, Why We Need A Patient's Bill of Rights, 24 J. HEALTH POL. POL'Y & L. 1137, 1139 (1999). The large number of media reports on health care provides one example of this phenomenon.

129. Id.

130. Id.

131. PERKINS, supra note 2, at 4-12.

132. Enforcement function is to preserve United States borders, not perform local police functions. Id. at 1-3.

133. See Murray, supra note 53; Judges, supra note 54; Thomas et al., supra note 54; Cate, supra note 56.

134. See Amnesty Report, supra note 17.

coupled with mass migration over the borders, creates a sense of hostility, and anger that easily metamorphosizes into violence directed at undocumented immigrants.\(^{136}\)

On the other hand, violence directed at Border Patrol agents has also increased sharply over the past several years.\(^{137}\) Since the inception of the United States Border Patrol in 1924, seventy-nine agents have been killed in the line of duty.\(^{138}\) The Tucson Sector (AZ) experienced a 400 percent increase in assaults on agents in 1996 — 76 assaults in 1996; compared to 19 in 1995; The El Centro Sector (CA) reported seven assaults in 1996 versus two in 1995 — a 250 percent increase; The El Paso Sector (TX) reported a 50 percent increase, from fourteen in 1995 to twenty-one in 1996.\(^{139}\) Such violence can create a siege like mentality that consciously and subconsciously increases abusive tendencies.

Furthermore, inadequate training,\(^{140}\) cultural insensitivity, language barriers, racism, and other forms of prejudice cause violence on the border at the hands of the Border Patrol.\(^{141}\) For example, Spanish is the only language of the vast majority of undocumented immigrants. While some INS Border Patrol agents speak native Spanish, many others do not. Furthermore, few have taken any courses in the language beyond the 19-week training course at the Border Patrol Academy.\(^{142}\) Ironically, the credo of the Border Patrol is: "The business of the United States Border Patrol is "people" ... How these people are treated will leave a lasting impression of, not only the Border Patrol, but the United States in general."\(^{143}\) It would seem impossible for such a mission statement to be effectuated by the inability of agents to communicate. Such difficulties lead to increased tensions which can turn violent.

Furthermore, Border Patrol abuses are not readily ascertainable due to inadequate civilian and governmental oversight over border patrol operations.\(^{144}\)

\(^{136}\) *Amnesty Report, supra* note 17, at 7 – 8.

\(^{137}\) *GENERAL ACCOUNTING OFFICE REPORT, supra* note 5, at 30.

\(^{138}\) *Id.*

\(^{139}\) *Id.*

\(^{140}\) *Americas Watch Report, supra* note 135, at 1–2 (discussing the inadequacy of training of border patrol agents – such as deficiencies in cultural sensitivity and language skills.) The Border Patrol is expanding its force strength by 1,000 new agents each year. However, the INS has acknowledged that its current training programs can only effectively and safely train 700 new agents per year. *See* Bill Ong Hing, *Border Patrol Abuse: Evaluating Complaint Procedures Available to Victims*, 9 GEO. IMMIGR. L.J. 757, 796 (1995) (discussing the problems associated with training new border patrol agents in professionalism).

\(^{141}\) *Amnesty Report, supra* note 17, at 7–12.


\(^{143}\) *Americas Watch Report, supra* note 135, at 1.

\(^{144}\) *Americas Watch Report* 1999, available at http://www.igc.org/hrw/worldreport99/usa (detailing how the mandate of the citizens advisory panel created to provide some oversight functions has expired).
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." 4

Given this recent history, incidents of abuse are likely to rise dramatically over the next several years as criminalization of the border increases and the Border Patrol expands in force strength. 146 Criminalization of the border, which can be traced to professional smuggling activities, 147 narcotics trafficking, 148 and the development of other criminal enterprises with border operations, 149 creates added impetus for the enlargement of the Border Patrol. This impetus to increase the size of the Border Patrol may result in the addition of new agents unprepared to handle interactions with illegal entrants. Daniel W. Sutherland argues against increasing the number of "rookies" within the Border Patrol, noting that inexperienced agents tend to cause border abuses and increase the likelihood of violent confrontations." 150 Likewise, the Los Angeles Times reported that, "Critics [of the Congressional legislation to increase the size of the Border Patrol] said they fear that such an aggressive hiring effort will fill the Border Patrol with inexperienced rookies and result in a dramatic increase in abuses at the border—a recurrent problem with past hiring pushes by the Border Patrol and other law enforcement agencies." 151 Therefore, it appears that border violence directed at undocumented immigrants will continue as the Border Patrol expands to cope with increases in mass migration.

IV.

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." 152

145. Trevino, supra note 81 at 93.

146. August Gribbin, Border Patrol To Small To Do Job Now, WASH. TIMES (D.C.), June 7, 1999 at A1 (detailing Border Patrol plans to increase force strength).

147. The smuggling of undocumented immigrants into the United States has become a "multi-faceted operation." This has caused criminalization of the border to increase as costs associated with smuggling operations have gone up. Additionally, increased competition between smuggling rings has lead to turf battles amongst smugglers on the border resulting in assaults, batteries, and even murders. Combating Illegal Immigration, supra note 9.


149. One example of this is the number of auto - theft rings operating in Mexico who steal cars in the United States.


tort, the remedy sought is designed to compensate for the civil wrong that caused the
plaintiff injury. The framework designed by the Supreme Court in Bivens v. Six
Unknown Federal Narcotics Agents provides one of the most effective means to
attach tort liability to Border Patrol agents for civil rights deprivations directed at
illegal entrants. The attachment of personal liability to deprivations of civil rights
provides an effective means to curb violence by officials in a society desensitized to
violence, creating the systemic change necessary to prevent future abuses.

To date, no illegal entrant has utilized a Bivens remedy in a court of law.
However, this is not due to the inadequacy of the remedy, but rather the practical
realities of representing illegal entrants. These realities include: (1) undocumented
immigrants are generally not knowledgeable of their legal rights; (2) undocumented
immigrants tend to believe that if they bring an action for damages, they will be
deported; (3) most undocumented immigrants do not have access to legal
representation, nor the economic resources to pursue such claims; and (4)
undocumented immigrants are generally migratory, and attorney’s are unable to
maintain the client contact required to successfully enable litigation. The
combination of these factors makes Bivens claims difficult to pursue.

A. Bivens Claims

Bivens provides a damages remedy for individuals deprived of
constitutionally protected rights. This remedy is a court-created prophylactic
measure designed to create adherence by federal governmental agents to
constitutional requirements. The measure is grounded on the rubric of precluding
constitutional violations by attaching personal liability to individuals who execute


154. See infra discussion of Bivens.

155. Lori Nessel, Migrant Farmworkers, Homeless and Runaway Youth: Challenging the
Barriers to Inclusion, 13 LAW & INEQ. 99, 139 (1994) (discussing the problems associated with legal
delivery to migratory workers); Leyva v. Buley, 125 F.R.D. 512, 515 (E.D. Wash. 1989) (joinder of 50
individual migrant workers in a class action lawsuit was impracticable in light of their alleged lack of
sophistication, limited knowledge of the American legal system, limited or nonexistent English skills, and
geographic dispersion); Kimberlee K. Kovach, The Lawyer as Teacher, 4 CLINICAL L. REV. 359, 371
(discussing the lack of knowledge of legal rights by most of society); Jenny Schulz, Grappling With a
Meaty Issue: IIRIRA’s Effect on Immigrants in the Meat Packing Industry, 2 J. GENDER RACE & JUSTICE
137, 153 - 54 (1998) (discussing that even legal immigrants often will not make legal challenges due to
language barriers, the fear of deportation (even with legal status), or the fear of drawing attention to
family members who are not here legally.) Harvard Law Review Association, The Rights of
process because they fear that any assertion of rights will lead to deportation).

156. Id.


158. Id.
constitutional deprivations. Thus, a *Bivens* claim can be analyzed as a personal injury action for infringements of constitutional rights.

In *Bivens*, federal law enforcement agents conducted an illegal search of the plaintiff's premises. Mr. Bivens alleged that federal narcotics agents entered his apartment without a warrant, threatened to arrest his entire family, took him to a federal courthouse, and strip-searched him. Significantly, Mr. Bivens asserted that the unlawful search deprived him of his Fourth Amendment rights to be "secure against unreasonable searches and seizures," and asserted damages of fifteen thousand dollars against each agent for the embarrassment and humiliation resulting from the violation of the Constitutional provision. In considering the creation of a judicial remedy for a federal constitutional infringement, the Supreme Court noted that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

The Supreme Court recognized the limitations of the Federal Civil Rights Acts in remedying many constitutional deprivations caused by federal officials. The *Bivens* decision filled the statutory gap that enabled federal agents to escape the imposition of personal liability for certain types unconstitutional conduct under federal civil rights statutes.

Section 1981 is inapplicable to remedy many types of constitutional deprivations engaged in by federal officials. While Section 1981 provides all persons the right to make and enforce contacts, to sue, to be parties, and to give evidence on equal footing, it does not provide a remedy for tortuous conduct

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159. *Id.*

160. *Id.*


162. *Id.*

163. *Id.*

164. *Id.* at 392 (quoting from Bell v. Hood, 327 U.S. 684, 688 (1946)).

165. *Id.* at 396 -97; see also Joan Steinman, *Backing Off Bivens and the Ramifications of this Retreat for the Vindication of First Amendment Rights*, 83 MICh. L. REV. 269, 281 - 85 (1984) (discussing the inadequacies of alternative remedies).


167. Section 1981 provides that: "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." 42 U.S.C. § 1981(a) (1994).
typically associated with a violation of the Fourth, Fifth, and Eighth Amendments. Indeed, the overwhelming majority of Section 1981 actions brought today are employment discrimination suits. In *Bivens*, the Supreme Court recognized that Section 1981 would not provide a remedy for the type of unconstitutional conduct that Mr. Bivens experienced.

Like Section 1981, Section 1983, is often inapplicable to constitutional deprivations performed by federal officials. Section 1983 provides a right of action for money damages against any person who, operating under "color of state law" (emphasis added) deprives another person of constitutional or statutory rights, privileges, or immunities. Since federal agents typically operate under color of federal law and not state law, Section 1983 cannot be applied to federal officials in most contexts. Because of this distinction, the Supreme Court determined that Section 1983 could not provide a remedy for the constitutional deprivation that took place in *Bivens*.

Section 1985(3) is also inapplicable to many types of constitutional deprivations engaged in by federal officials. Section 1985 requires that a plaintiff must prove that the defendants engaged in a conspiracy to interfere with the plaintiff's civil rights. Additionally, in order to prevail under section 1985, the plaintiff is required to prove that the conduct was motivated by "racial, or perhaps otherwise, class based, invidiously discriminatory animus."

The critical distinction between a Section 1985 and 1983 action is that Section 1985 does not require that the plaintiff prove that the defendant was

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168. This is especially true with a violation of the Fifth Amendment that is based on an inappropriate usage of physical violence.

169. *Bivens*, 403 U.S. at 391-92. Bivens could not sue under § 1981 because the defendants misconduct was not a violation of the statute.

170. *Id.* Bivens could not sue the defendants under § 1983 because it applies only to constitutional deprivations under color of state law. See 42 U.S.C. § 1983 (Supp. III 1997).

171. 42 U.S.C. § 1983 provides that "(e)very person who, under color of any (state law) subjects, or causes to be subjected, any (person) to the deprivation of any (constitutional rights) shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."


173. § 1985 (3) specifies that "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ...." 42 U.S.C. § 1985 (3) (1994).

174. A conspiracy is defined as: a combination or confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act, or some act which is lawful in itself, but becomes unlawful when done by the concerted action of the conspirators, or for the purpose of using criminal or unlawful means to the commission of an act not in itself unlawful. *BLACK'S LAW DICTIONARY* (1994).

operating under "color of state law." A Section 1985 action can be sustained against a federal official. However, the conspiracy and racial animus component of the claim can prove difficult to overcome in many fact scenarios. Note that in *Bivens*, the plaintiff brought an action against more than one federal agent, but did not allege a conspiracy. Because the plaintiff did not allege the existence of a conspiracy, the Supreme Court could not use Section 1985 to furnish a remedy for the type of constitutional deprivation that occurred in *Bivens*.176

Section 1986 is also inapplicable to many types of constitutional violations carried out by federal officials.178 While Section 1986 establishes liability for failing to prevent wrongs conspired to be done, a viable claim is precluded by exclusion of Section 1985.179 In and of itself, Section 1986, does not provide a remedy for a constitutional deprivation.180

Like Section 1986, Section 1988, standing alone does not provide a plaintiff with the tools to initiate an action against a federal officer for a constitutional deprivation.181 Section 1988 only comes into play when the plaintiff is a "prevailing party" in an action brought under Sections 1981, 1983, 1985, and/or 1986.182 The Section 1988 remedy is primarily used to extract attorney's fees from the defendant in an effort to compensate a private attorney representing the plaintiff.183 However, absent a cognizable claim under one of the other Civil Rights statutes, Section 1988 provides no remedy for a constitutional deprivation.184


177. *Id.*

178. § 1986 provides in part that "Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused thereby, which such person by reasonable diligence could have prevented." 42 U.S.C. § 1986 (1994).

179. 42 U.S.C. § 1986 can only be effectuated when a violation of 42 U.S.C § 1985 occurs. The pertinent language in the statute requires that "Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 ..."

180. *Id.*


182. § 1988(b) states: "In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, title VI of the Civil Rights Act of 1964, or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction." 42 U.S.C. § 1988(b).

183. *Id.*

184. *Id.*
With the failure of federal civil rights statutes to remedy all types of constitutional deprivations, the Supreme Court next considered the viability of state tort law to provide adequate redress for a deprivation of federal constitutional rights.\textsuperscript{185} The Supreme Court determined that state tort law could not remedy adequately a federal constitutional deprivation.\textsuperscript{186} The Supreme Court’s opinion in \textit{Bivens} did not specify why state tort law could not be reconciled with a constitutional claim.\textsuperscript{187} However, Justice Harlan suggested in his concurrence that the conceptual nature of a federal constitutional claim should mandate the imposition of a judicial remedy distinct from state tort law.\textsuperscript{188} Justice Harlan surmised that, “[I]njuries inflicted by officials acting under color of law ... are substantially different in kind [from those inflicted by private parties].”\textsuperscript{189} Additionally, as Justice Brennan noted, “[a]n agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.”\textsuperscript{190} Both Justice Harlan and Brennan appeared to reason that the fundamental importance of federal constitutional protections should not depend upon the intricacies of state tort law.\textsuperscript{191} These complexities include a lack of procedural and substantive uniformity that exists between the fifty states.\textsuperscript{192} Since federal law, not state law, provides the source of liability for a claim alleging a deprivation of a federal constitutional right, only a federal remedy can provide adequate relief.\textsuperscript{193}

A \textit{Bivens} remedy may only be granted when “no special factors counseling hesitation” exist.\textsuperscript{194} The Court defined such limiting factors as: (1) When federal fiscal policy is implicated by the creation of a potentially enormous financial burden on the federal government; (2) When the procedural or substantive constitutional deprivation alleged is not compatible with the plenary power doctrine; or (3) When Congress has provided for a statutory remedy to supersede the availability of a

\begin{itemize}
  \item \textsuperscript{185} Bivens, 403 U.S. at 390 – 92.
  \item \textsuperscript{186} \textit{Id}.
  \item \textsuperscript{187} \textit{Id}.
  \item \textsuperscript{188} \textit{Id}. at 409.
  \item \textsuperscript{189} \textit{Id}.
  \item \textsuperscript{190} \textit{Id}. at 392.
  \item \textsuperscript{191} \textit{Id}. at 394 – 396, 409.
  \item \textsuperscript{192} \textit{Id}.
  \item \textsuperscript{193} A \textit{Bivens} action may not be enabled by a defendant’s violation of state or local law because it is a federal constitutional remedy. A violation of state or local law can already be remedied via 42 U.S.C. § 1983 (1994). Additionally, liability may not be attached under a \textit{Bivens} actions for “mere ultra vires action in excess of the [federal agents exercise] of lawful authority.” Therefore, a \textit{Bivens} action must be based on a tort of federal constitutional dimension.
  \item \textsuperscript{194} Bivens, 403 U.S. at 396.
\end{itemize}
judicially created one. If a Bivens claim encroaches upon any one of the delineated categories, it must be dismissed.

B. Fiscal Policy Exclusion

The fiscal policy exclusion requires a Bivens plaintiff to only assert a damages action against individual officers of the federal government and not the government itself. Fiscal consequences have been further eliminated by prohibiting vicarious liability to the federal government due to the doctrine of sovereign immunity, and limitations on the attachment of Bivens liability to supervisory officials via respondeat superior. While the federal government may

195. Id. at 396 - 397.

196. Id.

197. The principal case prohibiting the extension of Bivens liability to a federal agency is F.D.I.C. v. Meyer. F.D.I.C. v. Meyer, 510 U.S. 471 (1994). In Meyer, an employee at a savings and loan under the control of the Federal Savings and Loan Insurance Corporation (FSLIC) claimed a violation of his Fifth Amendment due process rights, asserting that his employment was terminated without cause. In dismissing the Bivens claim, the Court determined that "to recognize a direct action for damages against ... federal agencies would be creating a potentially enormous financial burden for the Federal Government." Id. at 486. The Court concluded that even if the attachment of liability to a federal agency was consistent with Bivens (which it determined it was not since the intent of a Bivens action is "to deter the officer" via the extension of personal liability) to attach liability to a federal agency, "decisions involving 'federal fiscal policy' are not ours to make." Id. at 482 - 86. Extension of a Bivens remedy to a federal agency requires Congressional action.

198. Vicarious liability is the imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two persons. Indirect or imputed legal responsibility for acts of another, for example, the liability of an employer for the acts of an employee, or, a principal for torts and contracts of an agent. BLACK'S LAW DICTIONARY (1998).

199. The doctrine of sovereign immunity, strictly defined, is comprised of two separate principles that traditionally have shielded states from litigation in their own courts. The first principle is that a state is immune from suit in its own courts without its consent. The second principle encompassed by sovereign immunity is that a state is immune from liability for torts committed by its officers, agents, and employees. BLACKS LAW DICTIONARY (1994). Bivens itself did not provide a waiver of the doctrine of sovereign immunity. This is evident because a Bivens action is a suit against individual agents and not the federal government. Furthermore, since the federal government has not expressly waived its sovereign immunity, liability cannot be attached vicariously to it through one of its agents.

200. The doctrine of respondeat superior rests on common law agency principles of vicarious liability. However, this doctrine is based upon the master/servant relationship, while vicarious liability may be employed even absent a master/servant relationship (e.g. joint enterprise and other tort liability theories). Burger Chef Systems, Inc v. Goveo, 407 F.2d 921, 925 (8th Cir. 1969). It can be argued that allowing liability to be extended up the chain of governmental officials via respondeat superior could impose such sweeping costs on governmental operations that consideration of the fiscal policy category in all Bivens claim would be warranted. However, the doctrine of respondeat superior is inapplicable in Bivens actions unless one of two elements are asserted. First, the supervisory official's personal involvement in the acts causing the constitutional deprivation creates liability. Second, a supervisory official may have liability attached if he implements a policy so deficient that the policy itself acts as a deprivation of constitutional rights. Thus, a supervisor can be held liable for the acts of a subordinate only by proof of his direct culpability in causing the injury either by directly authorizing it or by expressly or tacitly condoning by inaction a known pattern of comparable coworker conduct. Therefore, in certain instances, the extension of respondeat superior liability would be compatible with Bivens because it
assume the liability of a *Bivens* claim that has been attached to one of its agents in certain circumstances, this assumption of liability is discretionary.\(^{201}\) Thus, liability can be attached to the federal government only if it specifically chooses to waive its sovereign immunity.\(^{202}\)

C. *Plenary Power Exclusion*

The plenary power category of the *Bivens* framework establishes the threshold by which the Court will review the *Bivens* claimant’s deprivation of procedural and substantive constitutional rights.\(^{203}\) While plenary power\(^{204}\) provides broad and unqualified authority to Congress to legislate, it, “like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.”\(^{205}\) Plenary power doctrine does not bar judicial review over whether Congress “has chosen a constitutionally permissible means of implementing that power.”\(^{206}\)

It is well settled that control of immigration and naturalization falls within Congress' plenary power.\(^{207}\) However, undocumented immigrants within the United States...
territorial boundaries of the United States are entitled to limited procedural and substantive due process protections. While ostensibly the original act by the undocumented immigrant in attempting to obtain entry into the United States can be traceable to immigration admission and exclusion policy, the critical issue is whether the agent’s unconstitutional conduct is intrinsic or extrinsic to the admission or exclusion policies.

The determination of whether conduct is extrinsic or intrinsic depends on both the degree and the nature by which the undocumented immigrant’s procedural and substantive due process rights have been invaded. The more incompatible the invasion is with constitutional norms, the more likely the conduct is going to be

alien leaving the United States, he had “in his possession a certificate ... entitling him to return to the United States.” Id. at 582. However, by the time the alien had arrived at port in the United States, the statute had voided the re-entry certificates. The Supreme Court held that Congress had a sovereign power to regulate immigration, based on its plenary power, that could be executed to exclude aliens based on race, and was not subject to judicial review. Id. At 609. Justice Frankfurter has described Congress' plenary power with respect to immigration as follows: “[T]he underlying policies of what classes of aliens shall be allowed to enter and what classes of aliens shall be allowed to stay, are for Congress exclusively to determine even though such determinations may be deemed to offend American traditions and may, as has been the case, jeopardize peace.” Harisiades v. Shaughnessy, 342 U.S. 580, 597 (1952) (concurring opinion) (upholding the deportation of resident aliens who were past Communist Party members by the 1940 Alien Registration Act - despite the resident aliens termination of party membership before the Registration Act came into effect and made such past membership a deportable offense). Due to plenary powers being “inherent in sovereignty, necessary for maintaining normal international relations,” it is a power that is “to be exercised exclusively by the political branches of government.” Nishimura v. United States, 142 U.S. 651, 659 (1892).

In Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), the Supreme Court noted that “aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.” Id. at 212. An excludable alien, however, has no procedural due process rights regarding his admission or exclusion and thus “stands on different footing: ‘Whatever the procedure authorized by Congress is, it is due process as far as an aliened denied entry is concerned.’ Id. at 212 (quoting United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950)(upholding the exclusion of a war bride)). The concept of procedural due process guarantees each individual a fair decision-making process before the government takes any action which infringes upon the person's life, liberty, or property. In essence, the concept of procedural due process ensures procedural fairness.

In making a determination as to whether conduct is intrinsic or extrinsic, the focus is on the whether the agent's conduct, irrespective of plenary immigration power, fails to comport with constitutional requirements. This failure allows the judiciary to obtain jurisdiction over the matter. See Sale v. Haitian Center, 969 F.2d 1326, 1340 (2nd Cir. 1992) (citing Landon v. Plasencia, 459 U.S. 21 (1982) (“Notwithstanding the limited scope of judicial review in immigration and naturalization matters, the Supreme Court has indicated that a court may review the procedures employed by the government in an immigration setting to assure that the procedures appropriate under the circumstances comport with constitutional due process”).

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209. See Mathews v. Diaz, 426 U.S. 67, 77, (1976)(concluding that even undocumented immigrants enjoy the due process protections of the fifth amendment); see also Flores v. Meese, 942 F.2d 1352, 1359 (9th Cir. 1991) (“ It is now well established that under these cases 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, and freedom from invidious discrimination”).

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211. Id.
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deemed extrinsic to the INS' plenary authority.212 If the conduct is deemed intrinsic, the plenary power doctrine will preclude a Bivens remedy.213 Conversely, if the agent's conduct is extrinsic, it is likely that a Bivens claim is viable.214

The leading case in deeming a Congressional statute extrinsic to the plenary immigration power is Wong Wing v. United States.215 In Wong Wing, the Supreme Court applied the Fifth and Sixth Amendments to invalidate a law that imprisoning non-citizens without first affording them a trial by jury.216 There, the alien plaintiffs challenged a provision of the Chinese exclusion laws that authorized their imprisonment at hard labor without a trial prior to deportation.217 The Supreme Court rejected the applicability of the plenary power doctrine and determined that even though the statute was tied to the enforcement purposes of the Chinese Exclusion law, imprisonment before deportation was not an exercise of federal immigration power because it merely added to the provisions for exclusion or expulsion. In other words, "[I]t does not follow that, because the Government may expel aliens or exclude them from coming to this country, it can confine them at hard labor in a penitentiary before deportation, or subject them to any harsh and cruel punishment."218 Because the criminal penalty was outside of Congress' plenary authority over exclusion policy, the substantive due process rights of the alien prevailed. Wong Wing stands for the proposition that "although the immigration power is extraordinarily broad, it must nevertheless be exercised within its own domain.219 That domain governs matters of admission, exclusion, and deportation; beyond it, the alien inhabits the domain of territorially present persons where different and more protective rules against government apply.220 In the context of a potential Bivens suit, an action for an occurrence similar to Wong Wing's may be enabled as long as the qualified immunity or good faith defense is overcome.

One example of a substantive due process invasions intrinsic to the plenary authority of Congress are consular visa denials.221 Since the INA's enactment, courts

212. Id.
213. Bivens, 403 U.S. at 396-397.
214. Id.
215. Wong Wing v. United States, 163 U.S. 228 (1896).
216. Id. at 238.
217. Id. at 230.
218. Id. at 241 (Field, J., concurring in part and dissenting in part).
220. Id.
221. See Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (The Supreme Court upheld the visa denial on the basis that Congress' plenary power in the area of immigration meant the courts could not intervene.).
have consistently refused to exercise jurisdiction to review decisions of consular officers with respect to INA provisions and its implementing regulations.222 “Courts will not review the decisions of consular officers even where those decisions are based on action unauthorized by the INA, on procedural irregularities, or on errors of law.”223 For instance, decisions by governmental agents in the non-immigration context illegally based on race, gender, or ethnicity could be construed as a denial of due process that could, warrant a Bivens action.224 Conversely, since the granting of visas is intrinsic to plenary immigration power, no Bivens action can be enabled against consular officials, despite the violation of the INA, for making visa decisions based on race.225 Courts have refused to exercise jurisdiction over consular decisions due the Supreme Court determination that “over no conceivable subject is the legislative power of Congress more complete” than it is over the admission of aliens.226 Due to the intrinsic nature of admissions policy within the plenary power doctrine, the Supreme Court cannot deem conduct unconstitutional against an agent of the government where such conduct could not be construed as unconstitutional against the government itself.227

Case law suggests that the extrinsic and intrinsic policies are distinguished by the extent to which the privileges of admission and exclusion shift into a personal invasion of a liberty interest.228 Under Wing Wong, excludable aliens may not be


225. Consular officers have complete discretion over issuance and revocation of visas. See 8 U.S.C. §§ 1104(a), 1201(i); See Castaneda-Gonzalez v. INS, 564 F.2d 417, 428 n. 25 (D.C.Cir.1977); Chi Doan v. INS, 160 F.3d 508, 509 (8th Cir.1998); Centeno v. Shultz, 817 F.2d 1212, 1213 (5th Cir.1987) (per curiam); Li Hing of Hong Kong, Inc. v. Levin, 800 F.2d 970 (9th Cir.1986); Rivera de Gomez v. Kissinger, 534 F.2d 518, 518 (2d Cir.1976) (per curiam); Romero v. Consulate of the United States, Barranquilla, Colombia, 860 F.Supp. 319, 322-24 (E.D.Va.1994); Kummer v. Shultz, 578 F.Supp. 341, 342 (N.D.Tex.1984); Licea-Gomez v. Pilliod, 193 F.Supp. 577, 582 (N.D.Ill.1960).


227. Moreover, this doctrine of nonreviewability precludes judicial review of consular decisions of the citizenship or residency status of the plaintiff. Braude v. Wirtz, 350 F.2d 702 (9th Cir.1965); see also Burrafato v. United States Department of State, 523 F.2d 554 (2d Cir.1975) (court declines jurisdiction where plaintiff, a United States citizen, was alien's wife).

228. The leading Bivens action precluded by the plenary power doctrine was Chappell v. Wallace. Chappell v. Wallace, 462 U.S. 296 (1983). In Chappell, five naval servicemen brought a Bivens action against their superior officers for racial discrimination in contravention of their constitutional rights. The Supreme Court found two special factors that warranted dismissal of their Bivens claim. First, the Court determined that “The special nature of military life — the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted
punished at hard labor without due process of law.\textsuperscript{229} Additionally, "an alien who is within the territorial jurisdiction of this country, whether it be at the border or in the interior ... is entitled to those protections guaranteed by the Fifth Amendment in criminal proceeding which would include the Miranda warning."\textsuperscript{230} Furthermore, excludable aliens are entitled under the Fifth and Fourteenth Amendments to "be free of gross physical abuse at the hands of ... federal officials."\textsuperscript{231} For the constitutional deprivation to be deemed extrinsic, it must contain a substantial invasion of a personal liberty interest.\textsuperscript{232}

The Code of Federal Regulation outlines conduct that is prohibited by a border patrol agent.\textsuperscript{233} These regulations include limitations on the use of force and preclude the use of physical abuse, threats and coercion.\textsuperscript{234} Because a \textit{Bivens} claim is likely to entail assertions that the agent deviated from established protocol, it is likely that the agent's conduct will be considered extrinsic to standard INS admission and exclusion policies. Nevertheless, even if there were no prohibitions outlined by statute or the Code of Federal Regulation, the Constitution itself would limit such conduct because it is not within the confines of the constitutional due process framework.\textsuperscript{235} Due to these factors, the plenary power category is unlikely to preclude a \textit{Bivens} remedy in instances of unwarranted gross physical abuse.

\textbf{D. Statutory Remedial Measure Analysis}

The third prong of the \textit{Bivens} framework requires the Court to perform an analysis of current statutes to determine whether "there has been no explicit Congressional declaration limiting money damages or mandating adherence to another statutory remedy deemed equally effective in the view of Congress."\textsuperscript{236}

\begin{flushleft}
229. Wong Wing v. United States, 163 U.S. 228, 238 (1896).


231. Lynch v. Cannatella, 810 F.2d 1363, 1374 (5th Cir.1987).

232. \textit{Id} at 1375.

233. 8 C.F.R. § 287.8 (2000).

234. \textit{Id}.


236. \textit{Bivens}, 403 U.S. at 397.
\end{flushleft}
While the statutory remedy must be comprehensive and deliberately crafted, it need not provide full relief to the injured party. The Federal Tort Claims Act (FTCA) may not be used to preclude the usage of a Bivens remedy. In Carlson v Green, the Supreme Court considered the availability of a Bivens action to federal prisoners who could also institute claims against the United States Government under the FTCA. In Carlson:

The respondent brought suit under Bivens on behalf of the estate of her son, Joseph Jones, Jr., who died while incarcerated at the Federal Correction Center in Terre Haute, Indiana. The Estate alleged that the prison official defendants were deliberately indifferent to Jones’s medical needs and that their acts and omissions caused him to die from an asthmatic attack. The complaint alleged that the officials' indifference was partly attributable to racial prejudice.

While the Carlson Court determined that the plaintiff’s claim could also have been stated as a claim against the United States under the FTCA, the Court held that Congress did not intend the FTCA to preclude Bivens claims.

237. In Bush v. Lucas, 42 U.S. 367 (1983) the Supreme Court justified its refusal to create a Bivens remedy by determining that Congress was in a better position to weigh the potentially conflicting public policy concerns of “governmental efficiency and the rights of employees.” Id. at 389. In Bush, an employee of the National Aeronautics and Space Administration, who was fired after making critical public remarks about his employer, brought a Bivens action against his supervisor for depriving him of his First Amendment right of freedom of speech. There, the existence the Civil Service Reform Act of 1978 provided, in the Court’s view, a comprehensive statutory remedy. Id. at 387. Therefore, the Bivens action was dismissed because the presence of a deliberately crafted statutory remedial system prevented the fulfillment of the second prong of the Bivens framework. Id. at 389.

238. In Schweiker v. Chilicky, 487 U.S. 412 (1988), the Court refused to enable a Bivens action for persons who allegedly were denied their due process rights by federal officials who improperly administered Social Security disability benefits to them. Id. at 416 - 420. The Supreme Court determined that “Congress has failed to provide for ‘complete relief’: respondents have not been given a remedy in damages for emotional distress or for other hardships suffered because of delays in their receipt of Social Security benefits,” but nevertheless, explained that: When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional Bivens remedies. Id. at 426 -429. The Court reasoned that the administrative protocol Congress created provided adequate remedial safeguards and declined to recognize a Bivens remedy against the federal officials who administered the benefits program. Id. at 429.


240. Id.

241. Id. at 16.

242. Id. at 18 – 19.

243. Id. at 20.
The argument made in favor of precluding a *Bivens* action was based on a Congressional amendment to the FTCA which allowed individuals to bring actions directly against the United States Government for the intentional torts of law enforcement officials. 244 The Court reasoned that "the Congressional comments accompanying that amendment made it crystal clear that Congress view[ed] [the] FTCA and *Bivens* as parallel, complementary causes of action." 245 The Court quoted from the Senate Report:

> [I]nnocent individuals who are subjected to raids [like that in *Bivens*] will have a cause of action against the individual Federal agents and the Federal Government. Furthermore, this provision should be viewed as a counterpart to the *Bivens* case and its progeny [sic], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved). 246

The Supreme Court concluded that prisoners who were "victims of intentional wrongdoing ... shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed upon their constitutional rights." 247

In addition, the Court extrapolated four reasons as to why a *Bivens* remedy should be considered distinct from an FTCA claim. 248 The first factor recognized the deterrent power of a *Bivens* remedy:

Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States. It is almost axiomatic that the threat of damages has a deterrent effect, surely particularly so when the individual official faces personal financial liability. 249

Second, while the FTCA prohibits punitive damages, a successful *Bivens* claim does not. 250 Because punitive damages "are especially appropriate to redress the violation

244. *Id.* at 19 – 21.

245. *Id.* at 20.

246. *Id.*

247. *Id.*

248. *Id.* at 21 – 23.

249. *Id.* at 21.

250. *Id.* at 22.
by a Government official of a citizen's constitutional rights," the Court concluded that the FTCA is "that much less effective than a Bivens action as a deterrent to unconstitutional acts." The third factor recognized the procedural distinctions between a Bivens action and one brought under the FTCA. While the FTCA is an equity action, requiring a bench trial, a Bivens plaintiff retains the right to demand either or jury or bench trial. The fourth factor supporting the superiority of a Bivens action is its uniform applicability. Bivens is a federal judicial remedy available for federal constitutional deprivations, while the FTCA is only available if "the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward." This distinction led the Supreme Court to conclude that the "FTCA is not a sufficient protector of the citizens' constitutional rights," and refused to preclude a Bivens claim based on the existence of the FTCA.

E. Qualified Immunity Defense

The qualified immunity defense balances "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." Qualified immunity is an affirmative defense to a Bivens action. Such a defense protects government officials performing discretionary functions from civil liability if their conduct violates no "clearly established statutory or constitutional rights of which a reasonable person would have known." A two-prong test is used to determine whether qualified immunity may be asserted. The first prong requires the court to determine whether the plaintiff has alleged a constitutional violation. The second prong requires the court to perform a two-step inquiry: first, "whether the allegedly violated right was

251. Id.
252. Id.
253. Id. at 22 – 23.
254. Id. at 23.
255. Id.
256. Id.
257. Id. at 24.
259. Bivens, 403 U.S. at 397.
262. Id.
‘clearly established’ at the time of the incident; and, if so, [then] whether the defendant’s conduct was objectively unreasonable in light of the clearly established law.”

The first prong of the qualified immunity test is similar to the plenary power category of the “special factors counseling hesitation” analysis in that if the violation alleged is intrinsic to plenary power authority, the Bivens action must fail. This analytical framework enables a Bivens defendant to challenge the action either collaterally through the usage of the qualified immunity defense or facially through the “special factors” found in the Bivens framework.

In order to overcome the second prong of the qualified immunity defense, the claimant “must prove a deliberate abuse of governmental power rather than mere negligence.” This is an extremely high standard because the plaintiff bears the burden of proving intentional conduct. Additionally, in order to avoid dismissal, the plaintiff’s constitutional deprivation must be so extrinsic to the function of a border agent that it violates “clearly established” constitutional rights. Therefore, a Bivens claim that fails to allege a substantial enough constitutional deprivation faces dismissal via either qualified immunity or the plenary power category. In the context of an illegal entrant suffering unwarranted gross physical harm at the hands of border patrol agents, the defense of qualified immunity will fail.

F. Private Actor Liability Under Bivens

Privatization has turned numerous governmental functions over to private sector (e.g. prisons, detention of undocumented immigrants, etc.). Despite their status as private actors, those individuals who cause constitutional injuries can be held liable for damages under Bivens if their conduct is so related to the federal government that they can be deemed federal agents or actors. Because a Bivens suit in a border-crossing context may also include private actors who executed

263. Evans v. Ball, 1683 F.3d. 856, 860 (5th Cir. (Tex)).

264. Bivens, 403 U.S. at 396 (If the matter is intrinsic to plenary immigration power, the special factors analysis will preclude the extension of liability).

265. Siegert, 500 U.S. at 231; Bivens, 403 U.S. at 396.

266. Schweiker V. Chilicky, 487 U.S. 412, 447 (1988) (J. Brennan dissent). These requirements are designed to protect Government officials from liability for their “legitimate” actions; the prospect of liability for deliberate violations of known constitutional rights, therefore, will not dissuade well-intentioned civil servants either from accepting such employment or from carrying out the legitimate duties that employment imposes.


268. See Wong-Wing v. US 163 US 228, 238 (1896); US v. Henry, 604 F.2d 908, 914 (5th Cir. 1979); Lynch v. Cannatella, 810 F2d 1363, 1374 (5th Cir. 1987).

269. Rick Sarlat, Prison Privatization is Seen as an Alternative Method, PHILA. TRIB., Mar. 3, 1998 at 5A.

constitutional deprivations, it is important to understand the potential liability of private actors.

A private actor found liable under *Bivens*, unlike a public official, is not entitled to the qualified immunity defense. However, the private party defendant is entitled to the affirmative defense of good faith. 271 The good faith defense gives state actors a defense that depends on "their subjective state of mind, rather than the more demanding objective standard of reasonable belief that governs qualified immunity."

Thus, dependent on the factual analysis, the qualified immunity defense may be more easily overcome than the good faith defense that a private party may raise in a *Bivens* action. Again, in the context of an illegal entrant suffering unwarranted gross physical abuse at the hands of a government actor, the defense of good faith will fail.

**CONCLUSION**

Mass migration across the United States – Mexico border is unlikely to decline within the immediate future. With more aggressive tactics employed by the Border Patrol to stem the influx of illegal entrants, inadequate training protocols of new Border Patrol agents in the expanding force, and cultural insensitivity of Border Patrol agents, violence along the border will continue. Due to societal unawareness and/or desensitization, illegal entrants are likely to continue to face abuse absent judicial intervention. By attaching personal liability to agents who facilitate constitutional deprivations against illegal entrants, the *Bivens* action may provide the strongest remedy to curtail future abuses along the border.

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271. *Id.* The Sixth Circuit, in a *Bivens* action against private parties allegedly acting under color of federal law, denied the defendants the right to a qualified immunity defense but asserted that, at least in a *Bivens* action, such private defendants do have a right to the affirmative defense of good faith.