

# **BRUTALITY UNCHECKED**

**Human Rights Abuses Along  
The U.S. Border With Mexico**

**Human Rights Watch/Americas  
(formerly Americas Watch)**

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*Human Rights Watch/Americas (formerly Americas Watch)*

Human Rights Watch/Americas was established in 1981 to monitor human rights in Latin America and the Caribbean. Cynthia Arnson and Anne Manuel are acting executive directors; Ellen Lutz is California director; Sebastian Brett, Robin Kirk, Ben Penglase and Gretta Tovar Siebentritt are research associates; Stephen Crandall and Vanessa Jiménez are associates. Peter D. Bell is the chair of the advisory committee and Stephen L. Kass and Marina Pinto Kaufman are vice chairs.

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## PREFACE

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## I. INTRODUCTION

This report examines human rights abuses committed by the Immigration and Naturalization Service (INS) and its agents in the enforcement of U.S. immigration laws.<sup>86</sup> The study is limited to the four U.S. states that border Mexico: California, Arizona, New Mexico, and Texas. It also is limited to human rights abuses committed during the arrest and detention of undocumented immigrants. Due process abuses and bureaucratic obstruction during immigration proceedings are not covered.

Even with this limited focus, the findings are appalling. Beatings, rough physical treatment, and racially motivated verbal abuse are routine. Even more serious abuses, including unjustified shootings, torture, and sexual abuse, occur. When they do, investigations are almost invariably perfunctory, and the offending agents escape punishment. The human rights abuses reported here are similar in kind and severity to those about which we have reported in many other countries. Moreover, the response of the U.S. government is as defensive and unyielding as the responses of many of the most abusive governments.

The INS's high tolerance for human rights abuses makes a mockery of the materials that it purports to use to train its agents. According to the Officer Integrity Course for Border Patrol agents (the uniformed enforcement division of the INS):

The business of the United States Border Patrol is "people". These people come to the United States from all over the world. The Border Patrol Agent may very well be an alien's first and only contact with an "authority-figure" while in the United States, especially if he/she is apprehended shortly after entry. How these people are treated will leave a lasting impression of, not only the Border Patrol, but the United States in general.

Indeed, the INS leaves a lasting impression on many of the hundreds of thousands of undocumented migrants who are arrested by INS agents each year, not to mention the many U.S. citizens and others lawfully in the United States who happen to get caught in their widely cast nets. Unfortunately, the impression is one of mistreatment.

While there is no justification and often no apparent reason for INS abuse, there are discernable circumstances under which agents are more likely to go beyond apprehending undocumented migrants to "judging" and "punishing" them. Sometimes migrants are brutalized to coerce confessions or to deter them from exercising available legal rights or options. In other cases agents assault migrants when forced to chase them on foot or in vehicles. In detention centers, migrants who are uncooperative or protest poor conditions or the mistreatment of others become targets for abuse.

One reason INS misconduct is so pervasive is that the agency does not adequately train or supervise its agents. In a September 1991 report, the Office of the Inspector General of the Department of Justice lambasted the INS for the widespread failure of its agents to comply with firearms training and qualification requirements, and for the agency's failure to train agents adequately on the duty to report shootings and other uses of force.<sup>87</sup> Former INS Western Region Director Ben Davidian, in a document condemning an INS

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<sup>86</sup> The INS is a federal agency that operates under the U.S. Department of Justice. Its statutory purpose is to enforce and administer laws relating to the admission, exclusion, detention, deportation, and naturalization of aliens.

<sup>87</sup> Office of the Inspector General, U.S. Department of Justice, *Audit Report: Immigration and Naturalization Service Firearms Policy*, September 1991 (91-95). For a discussion of the findings of this report, see Chapter II.

reorganization plan, asserted that the training of INS supervisors is "terrible at best."<sup>88</sup>

Another explanation that goes hand in hand with poor agent training and supervision is low agent morale. According to a *Los Angeles Times* report:

In District offices and Border Patrol stations in the Western Region, rank-and-file staffers...talk of general malaise caused by overwork, meager resources and increasing responsibilities....The INS, they say, has lost its focus as it struggles to maintain order and purpose in the face of soaring illegal immigration, a flood of new regulations and increased drug smuggling along the border.<sup>89</sup>

Among Border Patrol agents, low morale also results from the perceived futility of enforcing U.S. immigration laws. The agents know that most of the undocumented migrants they arrest will be sent back to Mexico without charge or punishment and that many will attempt to reenter the United States without authorization another day. Agent frustration may explain some incidents of abuse documented in this report for which no other discernible motive is obvious.

Most outrageous is the INS's willingness to cover up or defend almost any form of egregious conduct by its agents. Among immigrants' rights activists, the prevailing view is that the INS "has a greater interest in the reputation of its officers than in the integrity of a process designed to protect the one-million-plus immigrants it comes into contact with each year."<sup>90</sup> In this report we document a series of abuses by one Border Patrol agent who, during a six- or seven-year period, was involved in a theft; two vehicular incidents, one of which resulted in the death of a migrant; two serious assaults on farm workers who were lawfully in the United States; and the violent homicide of an undocumented Mexican minor. Except for a 30-day suspension for the theft incident, the agent was not punished; he continues to serve in the Border Patrol.<sup>91</sup>

One way the INS and its parent, the Justice Department, cover up INS misconduct is by maintaining an unresponsive complaint process that is inadequate to the tasks of exposing and redressing abuses. Prior to 1989, complaints of INS misconduct were handled within the agency by its Office of Professional Responsibility (OPR). In April 1989, Congress established the Office of the Inspector General (OIG) within the Department of Justice, but outside the INS, to strengthen the internal audit and investigative activities of specified federal agencies and departments, including the INS. The OPR and the OIG offices now cooperate.

The establishment of the OIG has failed to yield more effective investigations of complaints. According to U.S. Representative Jim Bates, "overlapping jurisdiction [of the OPR and OIG] is used as the excuse for inaction."<sup>92</sup> Many INS personnel who formerly worked for the OPR became investigators with the OIG. In their new capacities they continue to review and investigate complaints of their former INS

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<sup>88</sup> Patrick McDonnell, "Scathing Report Condemns INS Chief," *Los Angeles Times*, June 20, 1991. The General Accounting Office has also pointed to serious mismanagement and morale problems in the INS. See, e.g., GAO, *Immigration Management: Strong Leadership and Management Reforms Needed to Address Serious Problems*, Washington, D.C., January 1991.

<sup>89</sup> Ashley Dunn, "Official's Exit Blamed on Turmoil in INS," *Los Angeles Times*, February 14, 1991.

<sup>90</sup> Louise Palmer, "Agents of Abuse: Who Is Monitoring the Border Patrol," *Texas Observer*, December 21, 1990.

<sup>91</sup> For the details of this case, see Chapter III.

<sup>92</sup> Louise Palmer, "Agents of Abuse."



colleagues' misconduct.<sup>93</sup>

Among the persistent problems with the complaint procedures are:

- o the lack of a complaint form.
- o the lack of a comprehensive and systematic procedure for informing the public of its right to complain.
- o a low ratio of investigators to total employees.
- o the failure to notify complainants of the status and disposition of their complaints.
- o the lack of an adequate appeals process.
- o incomplete complaint statistics and the failure to publish statistics on a regular basis.<sup>94</sup>

Another way that INS misconduct is covered up is through the filing of intimidating criminal misdemeanor or felony charges. It is a federal crime to enter the United States without authorization. If convicted, first offenders face fines of up to 2,000 dollars or six months' imprisonment. Convicted repeat offenders face fines and imprisonment of up to two years.<sup>95</sup> In fact, most undocumented migrants who are arrested by the Border Patrol are never charged under the criminal statutes. Most Mexicans are processed administratively, given "voluntary departure," and bussed to the border. Nationals of other countries who can demonstrate that they have the financial means to leave the country are similarly allowed to depart

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<sup>93</sup> *Ibid.*

<sup>94</sup> U.S. Commission on Civil Rights, *The Tarnished Golden Door: Civil Rights Issues in Immigration*, 1980; Immigration and Law Enforcement Monitoring Project, American Friends Service Committee, "Preliminary Comments on § 503(a)(5)(B) of the Immigration Act of 1990," 1991.

<sup>95</sup> 8 U.S.C. § 1325(a) provides: "Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense be fined not more than \$2,000 ... or imprisoned nor more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under Title 18, or imprisoned not more than 2 years, or both." When there is no evidence of prior illegal entry by the alien, violation of this section has been held to be a misdemeanor. *Gonzalez v. City of Peoria*, 722 F.2d 468 (9th Cir., 1983)

8 U.S.C. § 1326(a) provides: "any alien who (1) has been arrested and deported or excluded and deported, and thereafter (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under Title 18, or imprisoned not more than 2 years, or both." Violation of this section is a felony.

voluntarily. Repeat border crossers and persons seeking asylum in the United States are usually placed in administrative deportation or exclusion proceedings.<sup>96</sup>

Criminal charges for illegal entry are usually reserved for undocumented migrants who are known to be flagrant violators of immigration laws or who are suspected of committing more serious crimes such as alien smuggling or drug-related offenses. But they are also used, nefariously, against victims of INS abuse to conceal agent misconduct. This strategy, in which the victim becomes the accused, is common to police work, but appears particularly pervasive and effective in cases of INS misconduct. INS agents are aware that most abused migrants — because of their unprotected status; unfamiliarity with English, U.S. law, and culture; and fear of deportation — will not defend themselves against trumped up charges and will instead accept deportation or other offered plea bargains, rather than pursue complaints against abusive agents.

Another way that the INS covers up for its agents is by refusing to divulge the names of agents involved in shootings and other serious incidents.<sup>97</sup> As a result, it is difficult for victims of INS abuse to identify those who abused them when filing administrative complaints or civil lawsuits. The agency also takes no steps to remove from active duty officers who have been implicated in shootings or other abuses. By comparison, the policy of the San Diego Sheriff's Department is to place its officers on restrictive duty whenever a serious question of justification is raised about a violent incident. The purpose of the policy is to foster public trust in the department and to give the officer time to recover psychologically from the incident.

The impunity enjoyed by INS agents due to the INS's unwillingness to investigate and punish abuse is reinforced by prosecutors who rarely file criminal charges against abusive agents. Even when prosecutors are willing to file criminal charges, prosecutions of INS agents are difficult because physical evidence of abuse may heal, and because undocumented migrants' transience and fear of arrest impede investigations and the assembly of witnesses.

These same problems plague civil lawsuits against the INS and its agents, as do the cost of obtaining counsel and the slow progress of the proceedings. The INS often settles lawsuits that are brought against it without acknowledging any responsibility for wrongdoing or giving assurance that the offending agent will be disciplined.

In recent years, changes in U.S. law and policy have led to a climate along the border that is even more likely to contribute to serious abuses of human rights. The INS has been drafted to play a central role in Washington's response to drug trafficking. The number of Border Patrol agents doubled in 1986 with the passage of the Immigration Reform and Control Act, and the number of agents policing the border has increased steadily since then. On February 8, 1992, U.S. Attorney General William P. Barr announced that 300 additional Border Patrol agents would be hired in 1992 to patrol the U.S.-Mexico border. Among the reasons Barr gave for the expansion was to "strengthen enforcement against illegal immigration and violent crime by illegal aliens."<sup>98</sup> The Anti-Drug Abuse Act of 1986 and the Immigration Act of 1990 formally

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<sup>96</sup> These administrative proceedings are adjudicated by Immigration Judges employed by the Justice Department. Persons in deportation or exclusion proceedings who are denied or cannot post bond are detained in facilities operated by or under contract with the INS. For a discussion of the difference between deportation and exclusion proceedings and of conditions of detention for INS detainees, see Chapter VII.

<sup>97</sup> Many other law enforcement agencies, including the San Diego Police and the California Highway Patrol, disclose the names of their agents involved in shootings or other serious incidents, unless doing so would place these agents at personal risk.

<sup>98</sup> Ronald J. Ostrow, "U.S. to Add 300 Agents Along Mexican Border," *Los Angeles Times*, February 9, 1992; David Johnston, "Border Crossings Near Old Record; U.S. to Crack Down," *New York Times*, Feb. 9, 1992.

drew the Border Patrol into the national effort to interdict drugs and expanded Border Patrol agents' authority to make arrests.<sup>99</sup> To fulfill these new responsibilities, Border Patrol agents are now armed with high-powered weapons and provided with sophisticated surveillance and communication equipment and vehicles.

As a recent study on border abuse by the American Friends Service Committee (AFSC) emphasizes, the Border Patrol's involvement in drug interdiction in the administration's "war on drugs" has "injected a higher level of paramilitary readiness in immigration control at the border and [has confused] the Border Patrol's mandate."<sup>100</sup> Whereas before, protectionist and racist attitudes, and the cocky confidence of being above the law, were prevalent in the agency and among its officers, these attitudes have become intensified in the wartime "us vs. them" mentality that has overtaken the service.<sup>101</sup>

This mentality was apparent in the agency's response to the AFSC's well-documented report, which charges that during the last two years, it received credible reports of 1,200 cases of INS abuse ranging from racial taunts and abusive language to unwarranted strip searches, beatings, shootings and sexual assaults. Rather than acknowledging the AFSC's disturbing findings and making efforts to clean house, the INS responded defensively by attempting to discredit the messenger.<sup>102</sup>

INS abuses of the type described by the AFSC and in this report have long been a concern to Mexico. The 1,600-mile border between the United States and Mexico has the greatest concentration of agents of the U.S. Border Patrol, and approximately 90 percent of those apprehended along that border are Mexican. The Mexican government's concerns have been heightened by the increased militarization of the border zone. Between 1982 and 1990, Mexico filed at least 24 diplomatic notes of protest with the U.S. State Department on behalf of Mexicans who were killed or seriously injured by INS agents.<sup>103</sup> Even in his most conciliatory, pro-free-trade speeches to U.S. legislative and civic bodies, Mexican President Carlos Salinas de Gortari has

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<sup>99</sup> In addition to having the authority to make arrests for violations of U.S. immigration laws, INS agents now have the authority to make arrests for any offense against the United States, if the offense is committed in the officer's presence. 8 U.S.C. § 1357(a)(5)(B) also gives INS officers the authority to make arrests for any felony cognizable under the laws of the United States if the officer has reasonable grounds to believe that the person to be arrested has committed or is committing a felony, if the officer is performing duties relating to the enforcement of immigration laws at the time of the arrest and if there is a likelihood of the person escaping before an arrest warrant can be obtained. 8 U.S.C. § 1357(a)(5)(B) is to be effective only after the Attorney General publishes final regulations governing when INS agents may use force, including deadly force; establishing other standards related to INS enforcement activities; and creating an expedited, internal review process for violations of those standards. To date, no regulations have been promulgated.

<sup>100</sup> American Friends Service Committee, *Sealing Our Borders: The Human Toll* (Philadelphia; February 1992) p. 10.

<sup>101</sup> One demonstration of this attitude has been the arrogant disrespect of Mexico's sovereignty by U.S. Border Patrol agents who have crossed into Mexico to make arrests. Mexico protested six such incidents in the week of September 14, 1991 alone. Edward Cody, "Mexico Protests Alleged Border Aggression by U.S. Agents," *Washington Post*, October 4, 1991; Alberto Vega, "Mexico: US Increasingly Hostile to Latin American Migrants," *Inter Press Service*, October 10, 1991.

<sup>102</sup> Without substantiation, INS spokesperson Duke Austin said: "The American Friends Service Committee has a longstanding history of attacking every initiative to enforce our immigration laws. They have their own criteria as to what constitutes an abuse in their eyes, which is...neither based on fact, nor law." National Public Radio, Transcript of *All Things Considered*, February 25, 1992.

<sup>103</sup> Mexican Embassy to the United States, "Legal Defense and Legal Advice to Mexicans Abroad: Cases Addressed Through Diplomatic Notes," November 1, 1990.

pressed for an end to violations of the human rights of Mexican migrants to the U.S.<sup>104</sup> In recent years, Mexican consuls in border cities have actively monitored and publicized abuses that come to their attention.<sup>105</sup> And Mexico's National Human Rights Commission issued an in-depth study highlighting numerous egregious cases of human rights abuses against Mexicans by U.S. immigration officials.<sup>106</sup>

The Mexican government's outspokenness is appropriate. INS abuses of undocumented migrants violate U.S. treaty obligations and customary international law, as well as international standards governing the conduct of law enforcement officers and the treatment of detainees.<sup>107</sup> We call on the U.S. government to honor its legal obligation to ensure that the human rights of everyone in its territory, including those who enter without authorization, are protected from abuse by the INS.

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<sup>104</sup> See, e.g., Jeff Franks, "Mexican President Warns of Wave of Immigrants Into U.S.," Reuters, April 12, 1991; Speech by President Carlos Salinas de Gortari at the Nuevo Leon theater in Monterrey, as reprinted in *Foreign Broadcast Information Service Daily Report Latin America* [hereinafter *FBIS*], (Washington, D.C.: November 28, 1990).

<sup>105</sup> Tracy Wilkinson, "Mexico Consulate Speaks Out," *Los Angeles Times*, January 11, 1991.

<sup>106</sup> National Human Rights Commission, "Report on Human Rights Violations of Mexican Migratory Workers on Route to the Northern Border, Crossing the Border and Upon Entering the Southern United States Border Strip," October 1991 (translated into English, February 1992).

<sup>107</sup> International Covenant on Civil and Political Rights; G.A. Res. 220 (XXI), 21 UN GAOR, Supp. (No. 16) 52, UN Doc. A/6316; American Convention on Human Rights, adopted by the Organization of American States, San José, Costa Rica, Nov. 22, 1969; Standard Minimum Rules for the Treatment of Prisoners, adopted by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 30, 1955, ECOSOC Res. 663 C (XXIV), July 31, 1957, amended by ECOSOC Res. 2076(LVII), May 13, 1977; Draft Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, adopted by UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res. 5 C (XXXI), Sept. 13, 1978; UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, A/Conf. 144/27, p. 13; Code of Conduct for Law Enforcement Officials, G.A. Res. 34/169, Dec. 17, 1979.

## II. SHOOTINGS DURING THE APPREHENSION OF UNDOCUMENTED MIGRANTS

Since 1980, Border Patrol agents have shot dozens of people along the U.S.-Mexico border, killing at least 11 and permanently disabling at least ten.<sup>108</sup> In addition, the Border Crime Prevention Unit, a joint Border Patrol-San Diego Police task force in operation from 1984 to 1989, was involved in 26 shooting incidents in which 19 people were killed and 24 were wounded.<sup>109</sup>

Border Patrol agents are authorized to carry handguns on and off duty. In addition, approximately 25 percent of Border Patrol officers in the field are authorized to carry INS-approved, personally owned semiautomatic handguns while on and off duty. In some cases agents also are authorized to use shoulder weapons, including shotguns and M-16 automatic rifles, while on duty.<sup>110</sup> Agents are required to pass quarterly qualifying tests on each of the types of weapons they carry, although this qualification procedure is often breached.<sup>111</sup> At present, batons are the only nonlethal weapon issued to INS officers.

The INS's shooting policy sets limits on the use of firearms, and alerts agents that they face sanctions, including possible criminal prosecution, if they exceed these limits.

Service policy...permits the use of firearms only in self-defense, in defense of another officer, or in defense of an innocent third party.

Shots shall not be fired into the air or alongside an alien or other person who is attempting to escape. The firing of warning shots in any manner is prohibited. A misaimed bullet may mean manslaughter.

When firearms must be used, the officer's action must be legally justifiable and the gunfire directed only against the appropriate target. The mere fact an officer is on duty when he resorts to the use of firearms does not protect him from prosecution and/or civil suit should he mishandle his weapon.<sup>112</sup>

In fact, agents violate the INS's shooting policy, and corresponding state laws governing the use of lethal force, with impunity.<sup>113</sup> To our knowledge, no agent has been criminally prosecuted in connection

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<sup>108</sup> These statistics were compiled by the San Diego office of the U.S.-Mexico Border Program of the American Friends Service Committee. These figures represent only killings and woundings in the San Diego area.

<sup>109</sup> *Ibid.* The Border Crime Prevention Unit, an undercover unit, was established to apprehend bandits who were preying on undocumented immigrants crossing the border. The task force's tactics generated widespread controversy. It was finally disbanded following the January 4, 1989 shooting of two handcuffed men.

<sup>110</sup> Office of the Inspector General, U.S. Department of Justice, *Audit Report: Immigration and Naturalization Service Firearms Policy*, September 1991 (91-95).

<sup>111</sup> *Ibid.*

<sup>112</sup> U.S. Department of Justice, Immigration and Naturalization Service, *Border Patrol Handbook*, Chapter 24, p. 24.22.

<sup>113</sup> See Cal. Penal Code, Sections 196, 197(1), 197(4), 835a, 843 (West 1991); Tex. Penal Code Ann., Sections 9.51, 9.52 (Vernon 1991); Ariz. Rev. Stat. Ann., Sections 13-409 and 13-410 (1990).

with a shooting in recent years. Internal investigations are quick and perfunctory, often resulting in a transfer of the offending agent to another region. In some cases, civil lawsuits have provided shooting victims and their families with redress, but such lawsuits are time-consuming and costly. Even when a civil suit is successful, the offending agents usually escape prosecution and criminal punishment.

**Víctor Mandujano Navarro:** On September 8, 1990, an out-of-uniform Border Patrol agent shot and killed Víctor Mandujano Navarro, 17, at the border fence at "El Bordo," in Tijuana. Mandujano, his brother Higinio, and three others were part of a group that was being led across the border by a 16-year-old Tijuana youth. According to a press conference interview with Higinio, "We were barely 30 meters within the U.S. when a man in a commando-type jacket and blue jeans told us: 'Stop there. I'm from the *migra*.'"<sup>114</sup> The group scattered. Higinio stated that the agent caught up with Víctor as he attempted to climb the border cyclone fence. The agent knocked Víctor down, hit him twice, drew his revolver and, while Víctor was on the ground, shot him twice in the stomach. He then aimed his revolver threateningly at bystanders.<sup>115</sup>

Two other eyewitnesses, the 16-year-old who was leading the group and Joel Arrellano Cabrera, also 16, who watched the shooting from the Mexican side of the fence, reportedly gave sworn corroborative statements to Mexican authorities.<sup>116</sup> In his autopsy report, Deputy Medical Examiner Mark Super of the San Diego county coroner's office, confirmed that the fatal shot was fired point blank. The autopsy revealed that there were soot deposits and abrasions "consistent with a muzzle stamp" on the surface of the wound, and that one of the bullets exploded in the youth's heart.<sup>117</sup>

Despite the incriminating witness statements and medical evidence, the Border Patrol quickly determined that the agent had shot Mandujano in self-defense. While refusing to release the agent's name, Border Patrol officials presented the agent's version of events in statements to the press. The agent alleged that Mandujano had thrown a rock at him, hit him on the head with his fist while holding a rock, and tried to grab the agent's gun. He further alleged that in the ensuing struggle he twisted the gun around and shot twice, striking Mandujano in the chest. Despite the alleged violent struggle, the officer required no medical treatment.<sup>118</sup>

The Border Patrol first acknowledged that the agent was out of uniform only when pressed by reporters, who cited three witness statements to that effect. According to Border Patrol spokesperson Ted Swofford, the officer was doing desk work at the Imperial Beach Station, then went into the field to assist other agents. For an agent to be out of uniform was "unusual," Swofford admitted, although he noted that agents wear civilian clothes in certain other operations like airport checks. Swofford insisted that the agent clearly identified himself to the victim and rejected the remainder of the witnesses' claims.<sup>119</sup> Stating that it was standard agency procedure to put agents back in the field pending the outcome of police investigations, Swofford said that the agent had received a few hours of psychological counseling following the shooting

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<sup>114</sup> Aurelio Garibay, "Fue asesinado en la frontera un indocumentado," *La Jornada*, September 10, 1990.

<sup>115</sup> *Ibid.*

<sup>116</sup> Chet Barfield, "U.S. Border Agent Out of Uniform When Mexican Teen Shot," *San Diego Tribune*, November 8, 1990.

<sup>117</sup> *Ibid.*

<sup>118</sup> Chet Barfield, "Secrecy Shields Border Agents in Fatal Shootings," *San Diego Tribune*, September 20, 1990.

<sup>119</sup> Barfield, "U.S. Border Agent," p. 9.

and was returned to normal duty the following day.<sup>120</sup>

The FBI opened an investigation into the shooting, but neither the San Diego District Attorney nor the U.S. Attorney for the Southern District of California brought charges. A \$30 million wrongful death claim was filed on behalf of Mandujano's family against the INS.

**Eduardo Zamores:** On November 18, 1990, a Border Patrol agent shot 15-year-old Eduardo Zamores as the youth straddled the border fence near the international port of entry in Calexico, California. A 9 mm hollowpoint bullet hit Zamores in the lower left chest and severely damaged his liver, stomach, intestine, and left lung. The shooting, which Marco Antonio Tovar, the Mexican Consul in Calexico, called "the one drop that may overflow the glass,"<sup>121</sup> ignited angry protests on both sides of the border. Because the gunshot caused Zamores to fall into Mexico, the incident raised sensitive legal and jurisdictional issues, and produced a sharp diplomatic exchange between the two governments.

As in many previous cases, this shooting occurred before onlookers who were drawn to the fence by the commotion surrounding a Border Patrol arrest. Zamores, who worked on the Mexican side of the border carrying bags for shoppers returning from the U.S., told an AFSC investigator that a disturbance caused by an INS agent's attempt to arrest another teenager attracted his attention, and that he scaled the fence to watch. He claims that he was shot for no reason as he perched atop the fence.

INS officials have not publicly disclosed any information about the shooting. Calexico Police Chief Leslie Ginn investigated the case and his conclusion incorporated the shooting agent's version of events. According to the agent, Zamores and two other youths were observed climbing the fence and entering a parking lot on the U.S. side three times in about 90 minutes by agents watching remote, non-recording video monitors. Another agent who approached the boys the first time they entered alleged that he was "pelted by rocks."<sup>122</sup> The third time the boys entered the United States, the agent tried to detain one of them. Another boy already had retreated over the fence and Zamores was on top of the fence facing the U.S. side. The agent alleged that rocks were thrown over the fence, and Zamores had his arm raised as though to throw a rock. A police inspection of the parking lot revealed "rather small rocks" in the vicinity.<sup>123</sup>

Despite the fact that his findings relied heavily on the shooting agent's version of events, Chief Ginn announced at a November 29, 1990 press conference that he believed the shooting was unjustified. "During the investigation we conducted, I don't think it was sufficiently revealed that [the agent's] life was in danger."<sup>124</sup> Ginn suggested a range of possible criminal charges, among them assault with a deadly weapon and assault under color of authority, both felonies in California.<sup>125</sup>

Ginn's announcement was intended to reassure Mexican officials and to encourage Mexican police to share the physical evidence that they retained because of Zamores' fall into Mexico. Skeptical about U.S. willingness to prosecute the agent, Mexican police conducted their own investigation of the shooting, and

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<sup>120</sup> Barfield, "Secrecy Shields Border Agent."

<sup>121</sup> Julie Brossy, "Agent Could Be Charged in Shooting," *San Diego Tribune*, December 1, 1990.

<sup>122</sup> Ernesto Portillo, Jr., "Calexico Chief Calls Agent's Shooting of Boy 'Unjustified,'" *San Diego Union*, December 1, 1990.

<sup>123</sup> *Ibid.*

<sup>124</sup> Julie Brossy, "Agent Could Be Charged," p. 14.

<sup>125</sup> *Ibid.*

the Mexican government threatened to seek extradition of the agent to stand trial in Mexico. Ginn contended that the refusal of Mexican authorities to turn over physical evidence — including Zamores' clothes and tennis shoes, and the bullet fragments — thwarted his investigation and hampered him from recommending prosecution. Mexican police countered that they had allowed Calexico police to examine all the evidence in Mexico, but would not allow it to leave the country. On December 11, 1990, Calexico police arrested two employees of the Mexican Consulate on bribery charges. It was alleged that they had offered money to a Calexico police employee to learn the shooting agent's name to include in a request for extradition.<sup>126</sup> Charges were dropped because the agents were entitled to diplomatic immunity.

It is unclear what action, if any, will be taken against the agent. The Mexican government's extradition proceedings are stalled, and while Calexico police have recommended prosecution, the Calexico district attorney has yet to take any action. The results of a separate investigation by the FBI have not been released, although there is no indication that the U.S. government is considering prosecution. The INS, while defending the agent's actions, says that he has been reassigned to desk duties pending the results of federal, state, and local investigations.

**Francisco Ricardo Carbajal and Rosa Lillian Pineda:** On May 25, 1990, a Border Patrol agent fired three shots into the rear of a van transporting at least ten undocumented immigrants on California Interstate 5, about six miles north of the border. Two of the passengers in the van, a 24-year-old Salvadoran woman and a 16-year-old Mexican boy were wounded in the shooting. The boy, Francisco Ricardo Carbajal, was shot once in the neck, and the woman, Rosa Lillian Pineda, was hit in the arm.

According to the account that the INS gave to investigators from the Chula Vista Police Department, the van pulled over after a failed attempt to elude a pursuing Border Patrol vehicle. The Border Patrol vehicle stopped a few feet behind the van on the right shoulder, and an agent got out on the passenger side. As the agent approached the van on foot, the van accelerated forward. Chula Vista Police Lieutenant Dean Girdner reported that at the same time that the van's engine was revved, the agent fired the three shots into the rear of the vehicle.<sup>127</sup> One bullet entered the right-hand tail light and the other two penetrated the van higher on that same side.

Six days after the shooting, Lieutenant Girdner announced that his department had found no proof that the agent had been directly threatened. Investigators found no weapons in the van, and no evidence that the driver was threatening to back the van into the agent.<sup>128</sup> Like the Border Patrol's regulations, federal and California laws permit law enforcement officials to use deadly force only if they have probable cause to believe the suspect poses a significant threat of death or serious injury to the officer or others.<sup>129</sup> Agents are prohibited from shooting solely to stop non-dangerous suspects from fleeing. But despite statements by investigators that his use of deadly force was unwarranted, the agent was not arrested or charged in the shooting. Lieutenant Girdner told reporters, "He's in uniform, he's performing his job...and he got into a

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<sup>126</sup> Patrick McDonnell, "Mexican Officials Held in Calexico Bribery Case," *Los Angeles Times*, December 12, 1990.

<sup>127</sup> Patrick McDonnell, "Questions Remain in Border Agent's Shooting at Van," *Los Angeles Times*, May 31, 1990.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985); Cal. Penal Code, § 835a, (West 1991); *People v. Ceballos*, 116 Cal. Rptr. 233, 526 P.2d 241, 12 Cal. 3d 470 (1974); *Kortum v. Alkire*, 69 Cal. App. 3d 325, 138 Cal. Rptr. 26 (1977). This same standard is mirrored in international norms relating to the use of force by police, such as the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, A/Conf. 144/27, 1990.



situation where he thought it was necessary to fire his gun. I don't see any criminal complaint; there may be some procedural problems."<sup>130</sup>

The FBI also investigated the shooting. The results of its inquiry into whether the passengers' civil rights had been violated were forwarded to the Justice Department, along with the report of the Chula Vista Police. Six months later, Obern Rainey, a spokesperson for the civil rights division of the Justice Department, said that the shooting was still "an open matter."<sup>131</sup> In February 1991, however, the U.S. Attorney chose not to file federal charges, and returned the case to the INS for internal investigation.<sup>132</sup>

According to press accounts, the agent was placed on paid administrative leave following the shooting, pending the outcome of the investigation by the Justice Department's Office of the Inspector General.<sup>133</sup> The move was a significant departure from earlier cases in which agents involved in shootings were allowed to remain in the field or assigned to desk duty. The agency subsequently acknowledged that the agent had violated Border Patrol shooting guidelines;<sup>134</sup> he was suspended without pay for 30 days.<sup>135</sup>

Americas Watch welcomes the news that a Border Patrol agent who used lethal force without justification was disciplined, but regards the 30-day suspension as inappropriately lenient. The light penalty, combined with the absence of a criminal prosecution, does little to deter Border Patrol agents from committing future unjustified shootings. Furthermore, the more common lack of any disciplinary action, as in the Mandujano and Zamores shootings, only encourages the unlawful use of force.

### Impunity for Shootings

Indeed, impunity has been the norm when it comes to the use of force by INS agents, as the following cases illustrate.

**Humberto Carrillo Estrada:** On April 18, 1985, Border Patrol Agent Edward Cole shot 12-year-old Humberto Carrillo Estrada, who was in Mexico when he was shot. Shortly before the shooting, Humberto's 15-year-old brother, Eduardo, climbed the border fence and entered the United States. When he was discovered by three Border Patrol agents, Eduardo retreated. The agents pursued the youth, dragged him from the fence, and hit him with a baton. Humberto, attempting to come to his brother's aid, approached the fence on the Mexican side. According to press accounts and the boy's attorney, Cole fired three shots through the fence, one of which struck Humberto in the back, high on the left shoulder.<sup>136</sup> The bullet careened off a rib and lodged near the right shoulder blade.

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<sup>130</sup> Patrick McDonnell, "Questions Remain," p. 19.

<sup>131</sup> Patrick McDonnell, "FBI Investigates Border Patrol Agent's Shooting of Boy," *Los Angeles Times*, November 22, 1990.

<sup>132</sup> Patrick McDonnell, "Border Patrol Urges Action Against Agent Who Fired Into Van," *Los Angeles Times*, February 25, 1991.

<sup>133</sup> McDonnell, "Mexican Officials Held."

<sup>134</sup> McDonnell, "Border Patrol Urges Action." For a discussion of the INS' firearms policy, see p. 13.

<sup>135</sup> Patrick McDonnell, "Rights Group Claims 149 Cases of Immigrant Abuse," *Los Angeles Times*, June 8, 1991.

<sup>136</sup> Martin Hill, "Border Violence: Has the INS Crossed the Thin Line?" *San Diego Magazine*, June 1986.

The decision whether to prosecute Cole fell to San Diego District Attorney Edwin Miller, who has consistently refused to prosecute Border Patrol agents for violent abuse. Miller relied heavily on statements made by Cole and the two other agents that a crowd of bystanders had been throwing rocks at the time of the shooting. He rejected witness statements and photographs that contradicted the officers' assertion. Indeed, the photographs corroborated witness accounts that the crowd gathered and began throwing rocks only after the shooting.<sup>137</sup> On May 1, 1985, Miller announced:

In the process of making a lawful arrest, these agents were assaulted by a group of persons and were fearful of great bodily injury or death as expressed by Agent Cole. It is well settled in California law that an assault by rocks can constitute assault with a deadly weapon....<sup>138</sup> Indeed, even had the incident been tragic and the victim had died as a result of the officer's shot, California law would present him with a complete defense. Consequently, we decline to prosecute."<sup>139</sup>

Meanwhile, Cole, who had previously come under investigation in 1982 for firing one shot toward a crowd after being struck by a rock,<sup>140</sup> was cleared of all wrongdoing by the INS in the shooting of Humberto Carrillo. From the start, the agency contended that Cole was merely carrying out his duty. After District Attorney Miller announced that he would not prosecute Cole, an INS spokesperson suggested that its Office of Professional Responsibility would investigate the case, but no action was taken. Cole was placed on office duty after the shooting, but was back in the field within a month. The following year, the Mexican government filed a diplomatic note accusing Cole of assaulting and battering another Mexican, Ramón Pérez Morález.<sup>141</sup>

Both the District Attorney's and the INS's willingness to ignore accounts of events that contradicted those of INS officers demonstrates an investigative bias in favor of INS agents. But a subsequent incident during civil proceedings brought by Carrillo against Agent Cole suggests that there was a more active attempt to cover up wrongdoing during the INS's internal investigation.

Cole contended that there was a large hole in the fence near where he was struggling with Carrillo's brother, through which Carrillo was preparing to throw rocks. In preparing the civil suit against Cole and the INS, Marco López, Carrillo's attorney, requested all recorded and written interviews that internal investigators had conducted since the shooting. He received only written transcripts of statements

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<sup>137</sup> *Ibid.*, Interview with Marco López in San Diego, California, February 1, 1991.

<sup>138</sup> Under the California Penal Code § 245, assault by rocks could constitute assault with a deadly weapon if the rocks were thrown in a manner that was likely to produce death or great bodily harm. But to justify the use of deadly force in self-defense, the person using it must have an honest and reasonable belief that bodily injury is about to be inflicted on him or her. *People v. Goins*, 279 Cal. Rptr. 42, 228 Cal. App. 3d 511 (5th App. Dist. 1991).

<sup>139</sup> Letter to San Diego Chief of Police William Kolender, quoted by Maria L. LaGanga, "Officer Not Charged in Shooting at Border," *Los Angeles Times*, May 2, 1985.

<sup>140</sup> *Ibid.* No one was hit in this incident. The complaint in the civil action alleged that Cole was allowed to remain on duty while receiving psychiatric care for "violent and psychotic tendencies" stemming from this incident.

<sup>141</sup> Mexican Embassy to the United States, "Legal Defense and Legal Advice to Mexicans Abroad. Cases Addressed Through Diplomatic Notes," (Washington, D.C.: Nov. 1, 1990).

supporting Cole's claim that there was a hole in the fence. As the case was coming to trial, López received an anonymous call informing him of a taped interview conducted shortly after the shooting by an Office of Professional Responsibility investigator. A subsequent subpoena produced the taped interview, during which Cole made no mention of a hole in the fence. Cole did not testify at the trial.<sup>142</sup> On July 31, 1987, U.S. District Judge Judith Keep awarded Humberto Carrillo \$574,000 for past and future suffering from his back wound.

**Francisco Ruíz Chávez and Evelyn Casteñeda Serna:** Another case in which abusive actions by a Border Patrol agent during an arrest led to a shooting involved Francisco Ruíz Chávez. On March 28, 1989, Evelyn Guadalupe Casteñeda Serna, Ruíz's wife, crossed the levee of the Tijuana River channel west of the San Ysidro, California Port of Entry. Casteñeda, a Salvadoran national, was seven months pregnant.

Tony Vallodolid, Ruíz's attorney, gave Americas Watch the following account: As Casteñeda climbed out of the levee on the U.S. side, she was spotted by Border Patrol Agent Walter Mark Davenport. Davenport caught up with her, jumped from his vehicle, and pulled her to the ground by her hair. Ruíz watched his wife's progress from the Tijuana side of the levee. Concerned for her safety, he crossed the levee toward her and the officer. Davenport again slammed her head against the ground by her hair. As Ruíz approached, Davenport placed his boot on her neck. Ruíz, now about ten feet away from Davenport, reached for a rock. As he did so, he shouted to Davenport to arrest his wife if he wanted to, but not to abuse her. Davenport then moved his boot onto Casteñeda's pregnant abdomen. When Ruíz raised his arm to throw the rock, Davenport fired. Medical evidence revealed that the first bullet, fired at a distance of about seven feet, struck Ruíz in the stomach; the second, fired from about twenty feet, entered in the left buttock.

The FBI investigated the shooting. Ruíz was interviewed at the University of California at San Diego Medical Center. His wife was interviewed in the Metropolitan Correctional Center in San Diego, where she served a 60-day sentence for misdemeanor illegal entry before being given voluntary departure. Although they were separated immediately afterwards, they gave investigators almost exactly the same description of Davenport's actions before and during the shooting. Davenport's mistreatment of Casteñeda was further corroborated by two witnesses. FBI officials told Ruíz's attorneys they were considering recommending that Davenport be prosecuted, but no federal charges were filed.

Instead, the U.S. Attorney's office for the Southern District of California charged Francisco Ruíz Chávez with assaulting Davenport. When the trial began, government prosecutors offered to drop the assault charges if Ruíz would plead guilty to a lesser charge of illegal entry and accept punishment of time served.<sup>143</sup>

Ruíz refused. During the three-day federal trial, Davenport testified that Ruíz threw a rock that struck him above the right eye, causing him to lose consciousness, but that as he was falling he fired toward Ruíz. He then hit the ground and blacked out, and afterwards suffered amnesia. Evidence presented during the trial contradicted Davenport's story, and the jury acquitted Ruíz of assault in less than two hours. Following Ruíz's acquittal, the U.S. Attorney's office made no move to prosecute Davenport for the shooting or for the use of excessive force against Casteñeda. San Diego County District Attorney Ed Miller similarly declined to open an investigation into possible illegal actions by Davenport. Such an investigation would appear to be "squarely within the purview of the federal government," a spokesperson for Miller told the

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<sup>142</sup> Interview with Marco López, in San Diego, California, February 1, 1991.

<sup>143</sup> Arthur Golden, "Mexican, Shot Twice by Officer at Border, Will Seek \$9 Million," *San Diego Union*, July 22, 1989.

press.<sup>144</sup>

Although evidence presented at Ruíz's trial suggested the likelihood that Davenport had violated agency guidelines that permit the use of physical force only in self-defense, in defense of another person or when absolutely necessary to make an arrest or prevent an escape,<sup>145</sup> the INS continued to defend Davenport. Agency spokesperson Michael Gregg commented to one reporter, "[the INS] saw no reason to believe that agent Davenport was acting beyond his authority. What we're forgetting here is that the agent was not the guy on trial."<sup>146</sup> According to a *San Diego Union* report, Border Patrol spokeswoman Martha Holloway affirmed that Davenport remained on active duty and would not be transferred.<sup>147</sup>

On December 7, 1990, INS Commissioner Gene McNary announced that the agency would review its procedures and guidelines on the use of lethal force. Noting that "[e]scalating violence on the southern border has resulted in injuries and even deaths," McNary's statement said the review "will begin immediately to determine what steps the INS can take to eliminate or dramatically reduce these incidents." The announcement appears to have been spurred, at least in part, by the rising wave of protests against Border Patrol shootings that have occurred on both sides of the border. Regrettably, McNary's announcement avoided any mention of the involvement of INS agents in wrongful shootings. He traced the rise in border violence to "bandits, armed smugglers of drugs and people, and rock-throwing gangs," and made no mention of possible violations of existing firearms or excessive force guidelines by Border Patrol agents.<sup>148</sup>

In September 1991, the Office of the Inspector General of the Department of Justice issued a report on INS firearms policy. According to the report, 112 INS personnel were involved in 90 shooting incidents during 1990 in which five civilians were killed, six civilians were wounded, and two agents were wounded.<sup>149</sup> The report cited serious deficiencies in compliance with INS firearms policy, the failure of the INS Firearms Review Board to direct Shooting Incident Investigation Teams to review shooting incidents independently of local officials,<sup>150</sup> the lack of a uniform policy for administering disciplinary actions in cases in which INS firearms policy was violated, and the lack of uniform procedures for reassigning an officer after a serious shooting incident.

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<sup>144</sup> *Ibid.*

<sup>145</sup> See Chapter IV.

<sup>146</sup> Julie Brossy, "Mexican Shot by Agent to Seek \$9 Million," *San Diego Tribune*, July 22, 1989.

<sup>147</sup> Golden, "Mexican Shot Twice."

<sup>148</sup> Patrick McDonnell, "INS Chief Orders Review of Lethal Force by Border Patrol," *Los Angeles Times*, December 7, 1990.

<sup>149</sup> Office of the Inspector General, *Audit Report*.

<sup>150</sup> The INS Administrative Manual section (AM) 4210 establishes that the INS shall establish a Firearms Review Board. That Board is composed of representatives from each of the INS Central Office programs, one from the INS General Counsel's office, and one from each of the regions. According to subsection 8B, when a shooting incident occurs, the Deputy Commissioner will direct the Firearms Review Board to determine whether to assign a Shooting Incident Investigation Team (SIIT), composed of trained investigators, or to refer the investigation back to the region for investigation. None of the shootings in 1990 was investigated by a SIIT team; instead, the practice was for sectors or districts to coordinate or conduct shooting investigations, if necessary in cooperation with local police. *Ibid.*

Among the report's recommendations were:

- o To require all officers to qualify quarterly on all authorized weapons available for issue or carried.
- o To require the Firearms Review Board to appoint Shooting Incident Investigation Teams for those cases involving serious shootings or controversial incidents.
- o To provide training for Shooting Incident Investigation Team members.
- o To ensure that sectors and districts comply with the requirements of Administrative Manual 4210 to establish and maintain separate shooting incident case files including information on the status of the case and the final action taken, and to submit a copy of the completed investigative report to the Firearms Review Board.
- o To ensure that sectors and districts comply with the requirements of Administrative Manual 4210 to report all shooting incidents within established time frames to the Firearms Review Board.
- o To revise Administrative Manual 4210 to include a policy on appropriate disciplinary action for firearms violations.
- o To conduct a study of the feasibility of using nonlethal devices such as stun guns, gas guns, nonlethal projectiles, and vehicle stopping devices, and to develop related policies and officer training based on the appropriateness of employing nonlethal techniques.
- o To amend Administrative Manual 4210 to include internal reporting requirements for all INS employees involved in a shooting.
- o To establish criteria for referring shooting incidents to external organizations, [i.e., the OIG, the FBI, the Civil Rights Division of the U.S. Department of Justice, and local police departments].
- o To establish and implement a policy on when to assign an officer involved in a shooting incident to administrative duty or paid administrative leave.
- o To establish criteria on when psychological counseling should be required for officers involved in serious shooting or traumatic incidents.

These are important recommendations that should be immediately implemented. Doing so could contribute significantly to a reduction in shooting incidents and to greater accountability for those incidents that do occur.

### III. OTHER LETHAL FORCE USED DURING THE APPREHENSION OF UNDOCUMENTED MIGRANTS

Border Patrol agents have also killed unarmed victims during arrests without the use of firearms. Like the shooting incidents, agents involved in these incidents have enjoyed virtual impunity for their misconduct.

**Armando Valenzuela:** On June 8, 1987, his brother, and two others crossed the Rio Grande by pulling themselves along a rope that had been suspended from bank to bank on makeshift inner tube rafts. The men, though undocumented, were employed as sheet metal workers in El Paso, and made the crossing daily from their homes in Ciudad Juárez. Shortly after landing on the U.S. side, the group spotted two Border Patrol agents, fled to the rafts, and started pulling themselves back toward Mexico. The agents, Glynnis Major and Ramón Vargas, pursued the group to the river bank. They cut the rope and began wiggling it and pulling it taut. The raft capsized. Three of the four men managed to swim to safety, but Valenzuela drowned.<sup>151</sup>

Several bystanders witnessed these events. They claim attempts were made to alert Agents Major and Vargas that Valenzuela's life was in danger. A woman on the Mexican side of the Rio Grande shouted to the agents to drop the rope,<sup>152</sup> and Valenzuela communicated to them that he could not swim and pleaded with them to stop pulling the rope. But Vargas persisted, until the raft overturned.<sup>153</sup>

Unlike many Border Patrol shootings in which agents allege that they were physically threatened when they fired, Agents Major and Vargas were completely out of danger when Vargas capsized the raft; they were not threatened by the bystanders, and the victims were defenseless. Texas law prohibits a law enforcement officer from using lethal force to stop a suspect fleeing arrest for illegal entry unless the officer reasonably believes there is a substantial risk that the person to be arrested will cause death or serious bodily injury to the officer or another if the arrest is delayed.<sup>154</sup> As noted, Border Patrol policy includes similar limits on the use of such force. Consequently, a criminal indictment and internal disciplinary action were warranted. But shortly after the incident, Gus de la Viña, then deputy chief of the Border Patrol in El Paso, announced "there is no evidence that merits their suspension or disciplinary action."<sup>155</sup> The agents continued in their duties. El Paso police investigated the case, and a major FBI investigation was reported in the press on both sides of the border.<sup>156</sup> The Mexican Consulate cooperated in securing witness statements.<sup>157</sup> But

<sup>151</sup> Leticia Zamarripa, "Police Look into Drowning," *El Paso Herald-Post*, June 10, 1987, p. 1-A.

<sup>152</sup> "Government Ordered to Pay \$210,000 to Kin of Man Drowned in Rio Grande," *Houston Chronicle*, February 6, 1991, p. 18A.

<sup>153</sup> Leticia Zamarripa, "Police Look into Drowning," p. 1-A.

<sup>154</sup> See V.T.C.A. Penal Code § 9.51. All other states along the U.S.-Mexico border have similar or stricter prohibitions against the use of deadly force during an arrest.

<sup>155</sup> Ramón Bracamontes, "LULAC to Congress: Investigate Incidents," *El Paso Herald-Post*, June 17, 1987.

<sup>156</sup> "En una Semana Dictaminarán en W.C. el Caso del Abogado por la 'Migra'," *El Fronterizo*, June 30, 1987; "Al Congreso de EU la Muerte del Ilegal," *El Fronterizo*, June 20, 1987.

<sup>157</sup> Leticia Zamarripa, "Witnesses State Agents Tipped Raft," *El Paso Herald-Post*, June 25, 1987.

neither the state nor the federal government filed charges against the agent.

A civil suit was brought under the Federal Tort Claims Act. U.S. District Judge Harry Lee Hudspeth found that the agents should have known that the raft would flip and were told Valenzuela could not swim. He therefore held that the agents wrongfully caused Valenzuela's death, and awarded damages of \$210,000 to Valenzuela's father, brothers, and sisters.<sup>158</sup> The U.S. government paid the damages award; in effect the agents escaped any sanctions for their acts.

**Ismael Ramírez:** On February 26, 1988, 17-year-old Ismael Ramírez died from injuries he sustained when Border Patrol Agent Michael Lewis threw him to the pavement during an arrest in Madera, California. On February 15, 1988, Lewis and his partner, Everett Thomas, were conducting a neighborhood sweep in Madera. They drove their van through residential streets and stopped Latino residents to question them about their immigration status. Having already detained four other people, the agents spotted Ramírez leaving his home. They pulled their van into a yard in front of him to question him. Thomas, the van's driver, stepped out and asked Ramírez whether he had papers to prove that he had legal status or had applied for amnesty. Ramírez ran, and Lewis, who had stepped out of the passenger door of the van, pursued him on foot. Several passersby and residents saw Lewis chasing Ramírez. At one point, as he reached out to grab Ramírez, Lewis stumbled and nearly fell. When Lewis, who stands over six feet tall, caught up to the approximately five-foot, one-hundred-pound youth, he seized him by the collar and one leg. Lifting him horizontally to shoulder height, he threw Ramírez to the pavement.<sup>159</sup>

Ramírez landed on the back of his head and neck. Lewis turned him face down, put his foot on Ramírez's back, and handcuffed him. He then picked Ramírez up and pushed him into the van.<sup>160</sup> A short time later, Ramírez began to vomit. Thomas stopped the van and Lewis checked his eyes, but the officers drove the van to Fresno and dropped off the four other detainees to be processed before taking Ramírez to the Valley Medical Center in Fresno for treatment. The agents told emergency room personnel that Ramírez had fallen, thus misleading them about the possible severity of his injuries. Ramírez lapsed into a coma and died of a skull fracture and brain hemorrhage.<sup>161</sup>

Even before the death of Ramírez, Lewis's tenure with the Border Patrol had been plagued by allegations of misconduct. In the early 1980s, when he was stationed in Calexico, Lewis received a 30-day unpaid suspension for a taking a bicycle and throwing it into the river while on duty. Then, in 1983, he was involved in two incidents in which the vehicle he was driving struck pedestrians; the second incident resulted in the death of the migrant. In the first incident, which occurred on February 2, 1983, Lewis was driving an INS vehicle carrying four undocumented migrants he had already arrested when he struck a Mexican man. The man, after being treated for his injuries in Calexico, was immediately deported, as were the passengers in the van. The deportations made it impossible for the Mexican consulate in Calexico to investigate whether to issue a diplomatic protest, since it was unable to locate the victim or witnesses.<sup>162</sup> On March 7, 1983, a vehicle Lewis was driving struck a Mexican man, this time killing him instantly. As in the first incident, according to INS representatives, Lewis claimed the victim had been running and suddenly

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<sup>158</sup> "Government Ordered to Pay," p. 18A.

<sup>159</sup> Deposition of Juan Silva Sánchez in *Pedro Ramirez Chavez v. INS*, (CV-F-90-100 EDP), August 30, 1990.

<sup>160</sup> *Ibid.*; Deposition of Tomás Peña in *Pedro Ramirez Chavez v. INS*, (CV-F-90-100 EDP), August 24, 1990.

<sup>161</sup> Complaint, *Pedro Ramirez Chavez v. INS*, (CV-F-90-100 EDP), filed February 15, 1990.

<sup>162</sup> Danilo Hurtado Campoy, "Cuidado Paisanos," *La Voz de la Frontera*, March 1983.

bolted — at a 45-degree angle — into the vehicle's path. The California Highway Patrol's investigation of the death noted that Lewis had been speeding. It found probable cause to believe that Lewis had committed misdemeanor vehicular manslaughter.<sup>163</sup>

Calexico district attorney Tom Storey rejected the CHP's conclusion, and refused to prosecute Lewis. Acknowledging that the death would not have happened had Lewis not been speeding, Storey dismissed the incident, saying the mistake was "not criminal in nature."<sup>164</sup> The Border Patrol defended Lewis's conduct, explaining that he had been responding to a call from a fellow officer.<sup>165</sup> Border Patrol Chief Bill King announced that Lewis, who reportedly had been sent to the hospital following the incident and treated for shock, was "still shaken but back at work."<sup>166</sup> Shortly thereafter, Lewis was promoted to a position teaching vehicle handling to junior agents. In June of 1983, he was transferred from Calexico to Fresno.

In Fresno, Lewis's record was also problematic. According to a civil complaint filed in December 1985, he and other agents physically assaulted Norma Casárez; a month later, he and others brutalized Antonio Hernández.<sup>167</sup> Both victims, Fresno county farmworkers who were in the U.S. legally, complained in lawsuits against the agents and the INS that the agents had used excessive force, kidnapped, falsely imprisoned, assaulted, and battered them.<sup>168</sup> These lawsuits were settled in February of 1990; the federal

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<sup>163</sup> Virginia Horn, "No Charges in Border Patrol Car Fatality," *Imperial Valley Press*, March 14, 1983.

<sup>164</sup> *Ibid.*

<sup>165</sup> It is important to note, however, that the call was a request for assistance from an officer who had seen a group of people illegally entering the U.S., and not for urgent support for a life-threatening situation.

<sup>166</sup> Virginia Horn, "No Charges," p. 8.

<sup>167</sup> *Casarez v. Riedinger*, First Amended Complaint for Declaratory Relief and Damages, C-87-20267-RPA, Northern District of California.

<sup>168</sup> In that case, plaintiff Norma Casarez, a U.S. citizen, alleged that Lewis arrested her during a December 17, 1985 raid in an onion field near Selma, California where she was working as a farm worker. She claims Lewis and another agent, Carey James, pushed and shoved her, handcuffed her to another worker, then deliberately tried to pull the two apart, inflicting great pain on her wrists and arms.

Another plaintiff, Antonio Hernández, a lawful permanent resident, alleged that he was arrested by Lewis and another agent, Ronnie G. Dunkin, in a plum orchard where he was working on December 27, 1986. According to the complaint, the agents approached Hernández and asked him for proof of his right to be in the U.S. Hernández said his papers were in his car. Lewis responded, "Ok, Let's go get them." As Hernández got out of his car, Lewis physically grabbed him by the arm and pushed him into the INS van. They then drove away, giving Hernández no opportunity to show his papers. Lewis ordered Hernández to sit and called him "*pendejo*", a pejorative word in Spanish. Later, when Hernández protested that he was a permanent resident, Lewis pushed him with such force that he fell. When Hernández asked Lewis why he was pushing him, Lewis responded by violently striking Hernández's face with his open hand. He told Hernández to "shut up," then jumped on top of him and hit him in the face with his fist. He then grabbed Hernández's left arm and twisted it behind his back. All the while Dunkin was present and did nothing to prevent Lewis's assault on Hernández.

Later, at the Border Patrol station, where Hernández was held for seven hours (during the first three of which he was not permitted to make a phone call), Lewis strip-searched Hernández. Throughout the detention, Hernández was not given food or water, nor was he offered medical assistance for his eye, which had become inflamed after Lewis hit



government agreed to pay \$18,000 in damages to the victims without admitting wrongdoing.<sup>169</sup>

The Border Patrol's handling of Lewis after the Ramírez killing shows its outright refusal to punish agents. In public comments after Ramírez's death, Border Patrol officials reiterated Lewis's insistence that Ramírez fell and hit his head while being chased. As witness statements to the contrary surfaced and public protests grew, an INS official would only comment: "The Madera incident is an extremely regrettable and unfortunate accident. We are extremely remorseful that the incident occurred, but unfortunately during law enforcement activities accidents do happen."<sup>170</sup> Public pressure mounted, and in January 1989, the Border Patrol transferred Lewis to Florida, a move that involved a promotion to the rank of Senior Border Patrol Agent.<sup>171</sup> He has since held a number of supervisory and training positions, and according to Ramírez's attorneys, has worked along the U.S.-Mexico border and in Florida.

Although local law enforcement officials, the FBI and the OIG all investigated the Ramírez killing, Lewis was not indicted. Three days before the second anniversary of the killing, the Justice Department announced in a letter to the Mexican consulate in Fresno that its investigation had been completed and that: "We have concluded that there is insufficient evidence to prove a violation of criminal civil rights statutes beyond a reasonable doubt. Accordingly, we intend to take no further action."<sup>172</sup>

A few days later, attorneys for Ismael Ramírez's family filed a \$30 million lawsuit against Agent Michael Lewis, his partner Everett Thomas, several of their superior officers, the INS and the U.S. government. That lawsuit was settled in the spring of 1992, although the terms of the settlement have not yet been made public.

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him.

<sup>169</sup> *Casarez v. U.S.*, Stipulation and Order Approving Compromise Settlement, C-87-20267-RFP), Feb. 23, 1990; Alex Pulaski, "\$30 Million Suit Filed Against US in Alien's Death," *The Fresno Bee*, February 27, 1990.

<sup>170</sup> John Kendell, "Probe Into Death of Youth Seized in INS Raid Urged," *Los Angeles Times*, March 3, 1988.

<sup>171</sup> *Pedro Ramirez Chavez v. INS*, (CV-F-90-100 EDP), February 15, 1990.

<sup>172</sup> Letter from James P. Turner, Acting Assistant Attorney General of the Civil Rights Division, and Linda K. Davis, Chief of the Criminal Section, to Diane Muñoz, Mexican Consul in Fresno, California, February 27, 1990.

## IV. PHYSICAL ABUSE DURING THE APPREHENSION OF UNDOCUMENTED MIGRANTS

### Beatings and Other Excessive Physical Force

That some Border Patrol agents from time to time beat those they arrest is no secret. The INS does not deny it, but claims it receives on average only one complaint for every 17,000 arrests.<sup>173</sup> Since the INS makes approximately 1,200 arrests a day,<sup>174</sup> this would suggest an average of approximately 26 complaints per year. The AFSC's Immigration and Law Enforcement Monitoring Project (ILEMP), on the other hand, reported that it had investigated a considerably higher total of 285 complaints of physical abuse during immigration law enforcement procedures along the border between May 5, 1989, to May 4, 1991, or about 142 complaints per year.<sup>175</sup>

While it is difficult to gauge how widespread the use of excessive physical force is, it is common enough that some agents regard it as a joke. *The Nation* magazine reported in 1989 that during the discovery process for *Pearl Meadows Mushroom Farms v. Nelson*,<sup>176</sup> lawyers discovered memoranda in which agents referred to people as "tonks."

The attorneys asked one agent after another what the word meant, but no one would answer. Finally, in December of 1987, Agent Larry Moy, after testifying that it was a derogatory term used by some I.N.S. agents for "illegal aliens," said, "I don't know the origin of it. I've asked other people how that term came about, so I can only repeat what other people have said to me. That's why I said I don't know the origin of it." Pressed by the lawyer, Moy said, "They told me that it's the sound of a flashlight hitting somebody's head: tonk."<sup>177</sup>

Some beatings by Border Patrol agents are unprovoked; in some cases these may reflect agents' frustration that most persons who enter the United States illegally and get caught face no greater punishment than being returned home. Other beatings seem to be motivated by the desire to punish a migrant on-the-spot for not cooperating with INS officers, or to coerce a migrant to confess to doing or witnessing a criminal act. Beatings for any purpose violates explicit Border Patrol regulations:

The use of physical force or violence in handling detained aliens or other persons with whom official business is being conducted is permissible only in self-defense, in defense of

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<sup>173</sup> National Public Radio, "All Things Considered," February 25, 1992.

<sup>174</sup> Statement of Steven García at the hearing on Allegations of Violence Along the United States-Mexico Border, Subcommittee on Human Rights and International Organizations of the Committee on Foreign Affairs, United States House of Representatives, April 18, 1990.

<sup>175</sup> Interview with Jorge Hinojosa, January 1992.

<sup>176</sup> See Chapter VI for a discussion of this case.

<sup>177</sup> Earl Shorris, "Raids Racism and the I.N.S.," *The Nation*, May 8, 1989.

another person, or to such an extent as is absolutely necessary to make an arrest or prevent an escape. The use of "third degree" methods to obtain information or confessions is not tolerated. Abuse of aliens in any manner is not permitted.<sup>178</sup>

It is difficult to know what percentage of those who are routinely processed and deported are subjected to abusive treatment by the INS. Mexican officials claim, based on interviews with deported youths, that many of the 230 juveniles returned, on average, to Tijuana by the INS each month suffered some form of physical, verbal, or psychological abuse, or judicial mistreatment. Luís Vizcarra Vizcarra, the head of population policy for Mexico's *Secretaría de Gobernación* (Interior Ministry), announced in 1990 that a high percentage of deported juveniles had told of having been subjected to humiliations, insults, threats, and shoving by INS officers.<sup>179</sup>

**Augustine Pérez Flores:** On March 11, 1990, Augustine Pérez Flores was assaulted by a Border Patrol agent during an arrest of a group of people who had crossed the border near San Ysidro, California. When three Border Patrol agents spotted the group, Pérez and four others split off and attempted to hide. When they were discovered, one of the agents approached them and ordered Pérez to kneel. While Pérez was on his knees, the agent hit Pérez on the head with his flashlight. Pérez told an AFSC investigator that the agent asked him if he wanted to file a complaint. But the agent warned him that there would be no witnesses to support his claim, since the others in the group were to be deported to Mexico that night. Another agent threatened potential witnesses with five-year jail terms if they testified against the abusive agent.<sup>180</sup> Pérez abandoned his complaint and accepted voluntary departure. He reported the case only after he reentered the United States. The AFSC forwarded the case to the Office of the Inspector General for investigation.

**Seventeen-year-old Youth:** In September 1990, a 17-year-old youth was similarly battered by his arresting officer near San Ysidro. The youth and another person ran when they were illuminated by a Border Patrol vehicle's lights. Two agents pursued them, first on motorcycles and then on foot. The boy twisted an ankle running down a hill and slowed down. The agent chasing him fell on top of him, grabbed him around the neck and began to choke him, then put him face down in the dirt and hit him with a flashlight on the back of the head. The boy was led to a Border Patrol vehicle, where agents examined the wound on his head. The abuse continued; agents pulled his ears, and seized his personal effects and threw them into the bushes. Agents then transported him to the Chula Vista Border Patrol station, and then to a hospital in National City, California.

After being treated, the youth was held in the INS detention center in El Centro. Representatives of Esperanza Para Los Niños, an immigrants rights group that monitors the treatment of minors, told Americas Watch that they learned of the abuse when they visited him in detention. Before they could complete their investigation, the boy was released and could no longer be located.<sup>181</sup>

The majority of Border Patrol arrests occur at night in remote border areas, and are witnessed only by other undocumented immigrants who are themselves vulnerable to threats of legal action. On the rare

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<sup>178</sup> U.S. Department of Justice, *Border Patrol Handbook*, Chapter 3, p. 3-9.

<sup>179</sup> EFE, "Ejerce el SIN maltrato verbal y psicológico contra menores mexicanos," *El Universal*, April 15, 1990.

<sup>180</sup> Documentation provided by the San Diego office of the U.S.-Mexico Border Program of the AFSC.

<sup>181</sup> Interview with Diane Paulsell, Esperanza Para Los Niños, San Diego, February 1, 1991.

occasions when abuse happens in the presence of a U.S. citizen, it is often the citizen who files the complaint.

**Beating Reported by Cheryl Williams:** On July 18, 1989, at about 12:20 P.M., Cheryl Williams of Stockton, California, heard "a crying sound" coming from outside her apartment. From her balcony she saw a Border Patrol agent kicking a Mexican male who was handcuffed and lying face down on the ground. Williams shouted to the agent to stop abusing the man, but the agent ignored her. When he tried to pick the man up by the handcuffs and the man stumbled, the agent hit him with his fist. Williams again told the agent to stop beating the man. The agent allegedly responded, "Mind your own fucking business, lady, and go back into your house."<sup>182</sup>

When the agent led the man away, Williams left her apartment and followed them up the street. While they waited for a Border Patrol van to arrive, the agent continued to abuse the man. Williams repeatedly requested the agent's name, but the agent refused to identify himself. Williams described the abusive officer as a white male in his mid-thirties, around six feet tall, with a medium build, short brown hair, and a thick mustache. He wore a Border Patrol uniform, sunglasses, and a baseball cap.<sup>183</sup> Despite repeated requests by California Rural Legal Assistance, the INS never disclosed the results of their investigation into Williams' allegations or the name of the Border Patrol agent involved.<sup>184</sup>

**Beating Reported by Basilio González and Ramond Zapata:** On February 4, 1991, two other Stockton residents, Basilio González and Raymond Zapata, both U.S. citizens, witnessed another Border Patrol beating. At about 7:15 A.M., González saw a Border Patrol agent chase and tackle a man near the corner of Sutter Street and Charter Way in Stockton. The agent knelt with one knee on the man's back and handcuffed him. Both González and Zapata then witnessed the agent beat the man. Though the man offered no resistance, the agent punched him several times in the kidneys. The agent ordered the man to stand, then pushed him back to the ground. Because he was handcuffed, he was unable to break his fall. The agent then stood the man up, slammed him into a nearby wall, and kicked him in the legs.<sup>185</sup>

González approached and requested the names and badge numbers of the agent and his partner, who had remained in the Border Patrol van throughout the beating. Both agents refused to identify themselves. González copied down the van's license plate number. According to González, the abusive agent was a white male, approximately five feet nine inches tall, with a slender build.<sup>186</sup>

González went to the Border Patrol station at Rough and Ready Island to report the beating and file a complaint against the agent. Agents at the station were unwilling to take his complaint. One agent told him that no forms existed for filing complaints, and that he would have to wait until the station's senior officer returned four days later. González insisted on making a statement. Although the agent appeared to take

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<sup>182</sup> Letter from Cheryl Williams to Robert Logazino, Chief Border Patrol Officer, Livermore Sector, and Robert Moschorak, Western Regional Director, INS, July 24, 1989.

<sup>183</sup> *Ibid.*

<sup>184</sup> Interview with Arturo Ocampo, California Rural Legal Assistance, May 18, 1992.

<sup>185</sup> Declaration of Basilio González, February 8, 1991, Administrative Complaint for Violation of Civil Rights, submitted to U.S. Department of Justice, Office of the Inspector General, on behalf of Central Valley Equal Rights Congress, et al.

<sup>186</sup> *Ibid.*

down the information, when González demanded to review what he had written, he found it bore little resemblance to his statement, and omitted key information and allegations. Another agent approached González and urged him not to mention his complaint outside the station.<sup>187</sup>

González and Zapata subsequently reported the beating to California Rural Legal Assistance, which filed an administrative complaint for violation of civil rights with the OIG. More than one year after the incident, attorneys for González were notified that the Justice Department was just beginning its investigation into the incident.<sup>188</sup>

**Beating Captured by News Photographer:** On January 22, 1990, another routine beating that might otherwise have gone unrecorded was captured by a news photographer at El Bordo in Tijuana. Two Mexican nationals trying to enter the United States illegally were apprehended by Border Patrol agents who, apparently without provocation, began clubbing them. According to the photographer, the two men were placed face down at the scene of the arrest and the agents dealt blows to the right and left sides of the back, head, and arms. When the agents spotted the photographer they demanded, "what do you want, you fucking swine?"<sup>189</sup>

Physical abuse by agents is reported the length of the border. Many of these cases illustrate how physical and due process abuses go hand-in-hand. Agents manipulate the legal process to discourage potential complaints from victims of physical abuse, or use force as part of "third-degree" interrogations to coerce victims.

The El Paso based League for Immigration and Border Rights Education (LIBRE) documented the case of a woman who, while crossing from Ciudad Juárez to El Paso in a group of undocumented immigrants on May 16, 1987, was chased by Border Patrol agents and beaten with a billy club by the agent who caught her. The woman, who was identified as Maria C., immediately complained about her treatment. Although the rest of the group was taken to a processing center to complete voluntary departure procedures, the woman and her sister were denied voluntary departure. The woman reported that an officer told her: "We are keeping you because it wouldn't be good for the INS if this got into the press." Instead, she was charged with misdemeanor illegal entry and transferred to El Paso County Jail, where she was held for two days. After phone calls from LIBRE and a local priest, the woman was granted voluntary departure and released on May 18. Despite her desire to press a complaint, she was never interviewed in detention by the Office of Professional Responsibility, nor was she brought before a U.S. magistrate or INS judge. Since no effort was made to prosecute her, the whole process seems to have been devised to terrorize the woman into remaining silent about the initial beating.<sup>190</sup>

In eastern Texas, Proyecto Libertad, the Border Association for Refugees from Central America (BARCA), ILEMP and other rights groups frequently receive reports of physical abuse. Frequently, these cases concern beatings at a Border Patrol substation on Rayer Road in Harlingen, Texas, where, according to Proyecto Libertad, regular beatings have occurred since 1984. As in many of the cases cited above, physical abuse is often coupled with due process abuses meant to terrorize victims of brutality.

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<sup>187</sup> *Ibid.*

<sup>188</sup> Interview with Arturo Ocampo, California Rural Legal Assistance, May 18, 1992.

<sup>189</sup> Ramón Hurtado, Jose Luis Camarillo, "Que quieres, pinche mugroso?" *Baja California*, January 23, 1990.

<sup>190</sup> LIBRE, Reports of allegations of abuse of citizens' legal rights and/or dignity by U.S. Customs, Border Patrol, INS and local law enforcement agents, May 19, 1987.

**Beating of a 15-year-old Honduran Youth:** In a September 1986 case, a 15-year-old Honduran boy reported that he was told to sign a voluntary departure agreement, although agents did not explain to him what he was signing. The youth was then placed in a van with a group of undocumented people who were being transported back to Mexico. When he protested that he was Honduran, not Mexican, he was returned to the substation where an agent hit him several times in the chest and stomach, and asked him whether he would rather go to Mexico or to jail. The youth was not allowed to make a telephone call to relatives in the United States, nor was he advised of his right to file an asylum claim, despite his repeated statements to agents that he feared returning to Honduras.

**Beating of a Nicaraguan in Transit:** In 1990, a Nicaraguan citizen whose asylum case was pending was arrested by two plainclothes INS agents in the Harlingen airport during a stopover between domestic flights, and taken to an INS office. In a sworn statement to Proyecto Libertad, the man declared that approximately eight agents were in the office during his interrogation. He said an agent questioned him aggressively and used abusive language throughout the interview. When he protested, the interrogating agent ordered another agent to hit him. That agent punched him in the face and knocked him to the floor, kicked him in the back, stepped on his head, and ordered him not to speak.

The Federal Defenders in San Diego documented 331 cases of severe beatings at the time of arrest by Border Patrol and Customs officials between 1985 and January 1991. Many more victims reported having been hit once or twice, and Federal Defenders investigators reported seeing others with cut lips and abrasions from handcuffs. In many instances, the beatings or other abuses were meted out after the suspect was arrested, handcuffed, and subdued. By charging beating victims with assault on a federal officer and other felony charges, the agents sought to conceal their own misdeeds.

The strategy has proven effective. The arrested person, held in San Diego's Metropolitan Correctional Center on felony charges, faces several years in jail if convicted.<sup>191</sup> Their complaint of abuse is reduced to a bargaining chip when a plea bargain is negotiated with prosecutors. Such negotiations are readily entered into by persons who are eager to get the process over with and return home, and who are aware that in a trial, a jury of U.S. citizens will decide between their credibility and that of a law enforcement officer. Often plea bargains are accepted in which more serious charges are reduced to lesser charges, the judge assesses a jail term equivalent to the time already served, and the detainee is released to the custody of the INS for deportation. The arresting agent's misconduct is forgotten in the process.

Federal Defenders are not permitted to file civil lawsuits alleging abuse. The most they can do is refer those who have been abused to organizations or private attorneys who can assist them to do so. Few undocumented migrants who remain in the United States avail themselves of such remedies. The reasons are

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<sup>191</sup> A Federal Defenders investigator told Human Rights Watch that detainees who were beaten by Border Patrol and Customs officers frequently are held the maximum allowable 72 weekday hours (which in fact can be extended to five days if a weekend is involved) before being granted access to Federal Defenders. The delay prevents Federal Defenders from seeing physical evidence of the abuse because, during that period, victims' superficial injuries have time to heal. To obtain photographs, investigators must request permission from victims and return for a second visit. Even so, the investigators' photographs are startling: black and bloody eyes, bruised and swollen faces and lips, bruises on torsos, backs and thighs, deep lesions or cuts from handcuffs, cuts, scrapes, and occasionally broken teeth are shown.

In some cases, the abused migrants were forthcoming about the beatings and showed their wounds to the Federal Defenders investigator. But often the interviewers noticed evidence of a beating and pressed the victim for information. Many migrants, already brutalized, denied legal assistance for three days, and in federal custody on criminal charges, are understandably reluctant to complain.

many and include distrust of the judicial process, unwillingness or inability to spend the time and money needed to pursue such claims, fear that bringing such claims will increase the likelihood of deportation, or simply a desire to put the incident behind them.

Beatings and manipulation of the legal system also have been used to coerce witnesses to support agents' versions of events. Often these witnesses are detained until the accused migrant's trial is over. Mexican government officials have protested these tactics, charging that key witnesses in criminal cases against smugglers of undocumented migrants (*coyotes*) are consistently denied bond, and sometimes denied access to legal counsel.<sup>192</sup> In some cases, then-Mexican Consul General Enrique Buj Flores complained, witnesses were kept in custody even though those they were to testify against had been freed on bond.<sup>193</sup>

In a few cases, Border Patrol agents have been convicted of civil rights violations for beating undocumented immigrants. One of these, a 1979 case in which several Border Patrol officers repeatedly beat victims over a two-day period, illustrates the legal difficulties in holding agents accountable for beatings.

On July 3 and July 4, 1979, Border Patrol agents Jeffrey Otherson and Bruce Brown beat several undocumented immigrants, slapping and kicking one and clubbing two others with their nightsticks. A Border Patrol agent testified at their trial that he overheard a conversation between Brown, Otherson, and a third agent, in which one of the agents asked "who's the designated hitter?" Witnesses further reported overhearing a radio conversation between Brown and Otherson in which Otherson asked, "Are you Delta Henry?" (the phonetic alphabet code for "DH," designated hitter) and Brown replied "affirm." Otherson explained to a trainee agent that "we find it necessary to do things like this because the criminal justice system doesn't do anything to these assholes."<sup>194</sup>

A federal district court convicted Brown and Otherson of depriving the undocumented migrants of federal rights and of conspiring to effect such a deprivation. But getting a conviction was not easy, and the energetic efforts of Assistant U.S. Attorney Michael Walsh must be credited with the success. A first attempt to prosecute ended in a mistrial when the jury deadlocked 11-1 for conviction of Brown and Otherson on the conspiracy charge, and 10-2 for conviction of the agents on the charge of violating the migrants' civil rights.

The mistrial illustrates the difficulty of prosecuting law enforcement figures, particularly in areas where a majority of residents more readily sympathize with them than with their victims. In his closing argument, the agents' defense attorney deftly exploited the bias in favor of law enforcement officers and against undocumented migrants by emphasizing the problems INS agents face in enforcing U.S. immigration laws at the border and accusing the government of "hypocrisy and fraud" in seeking a conviction. Citing testimony that 357,000 undocumented migrants were crossing the border area near San Ysidro every year, Attorney Nelson Brav announced, "Ladies and gentlemen, 357,000 illegals are enough to fill San Diego

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<sup>192</sup> Federal law sets stringent requirements for when a witness can be detained and provides: "No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can be adequately secured by deposition, and if further detention is not necessary to prevent a failure of justice." 18 U.S.C. § 1344. Undocumented migrants who are witnesses to crimes can only be detained pursuant to court order and only if the person may flee or pose a danger to any other person or the community. 18 U.S.C. § 1342(d). The INS frequently gets around these requirements by charging undocumented migrants who they allege are witnesses to crimes with illegal entry. See, e.g., case of Francisco Ruíz Chávez and Evelyn Casteñeda Serna, Chapter II.

<sup>193</sup> Teresa Kramer, "Aliens Denied Bond Official Says: U.S. counters charges that witnesses' rights not observed," *El Paso Herald-Post*, August 24, 1987.

<sup>194</sup> *U.S. v. Otherson*, 637 F. 2d 1276, 1278 (9th Cir. 1980).

Stadium seven times and then some.... This great nation of ours has put a man on the moon, crossed oceans underwater, and this joke of a fence patrolled by a few Border Patrol agents is the best system we can come up with to deal with a problem that affects us all?"<sup>195</sup> A juror interviewed after the mistrial was declared admitted: "We didn't like the case to start with. It's difficult when you have any kind of a law officer involved."<sup>196</sup>

In announcing his intention to retry the case, Walsh noted that prosecution of the case had "dramatic and beneficial effects in terms of reducing reports or claims of brutality at the border. Last spring and summer we were getting three to four complaints a week through the Office of Professional Responsibility. Now we're getting a couple a month, if that."<sup>197</sup>

But isolated prosecutions are insufficient to deter INS misconduct toward undocumented migrants in the long run. By 1982, two years after the trial of Brown and Otherson, the number of complaints of Border Patrol abuses received by the INS's internal affairs apparatus, the Office of Professional Responsibility, had skyrocketed to 467 nationwide; in the first four months of 1985, the San Diego office of the OPR alone had received 110 complaints.<sup>198</sup>

### **Torture and Sexual Abuse**

Although reported less frequently than other types of abuse, Americas Watch is particularly alarmed by recent allegations of torture and sexual assault by INS agents.

Americas Watch currently represents two Guatemalan men who allege they were tortured by Border Patrol agents at the Falfurrias, Texas, Border Patrol Station. **Luís Fernando Quezada Cabrera** and **José Hilbarido Valdez Ortega** were arrested on March 10, 1991, handcuffed, and taken to a Border Patrol trailer for questioning. Valdez Ortega reports that, while he was handcuffed, an officer beat him on the chest for approximately five minutes. Shortly thereafter he was thrown to the ground, dragged behind a wall, choked, and beaten again. He was then taken inside the trailer and told to remove his pants. The officer held an instrument that was approximately 18 inches long, narrow at one end, and wide at the other. It buzzed when it was turned on.

According to Valdez Ortega:

The officer told me he was going to fuck me and did I want it with or without vaseline. He told me he was not going to put his dick in my asshole because it was too filthy. I am going to use this instead and he indicated he was going to use the instrument that was in his hand. There were other officers in the room and they all began to laugh.

The one officer took me to a room alone and he told me to bend over and he pulled my pants down and grabbed my head and while holding it pushed me down. He touched me

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<sup>195</sup> William Polk, "Border Agents' Trial Called 'Hypocrisy,'" *San Diego Tribune*, December 1, 1979.

<sup>196</sup> Bill Ott, "Mistrial Declared in Alien Abuse Case Against 3 Border Patrolmen," *San Diego Union*, December 11, 1979.

<sup>197</sup> *Ibid.*

<sup>198</sup> "Internal Investigations: Lip Service, or an Earnest Attempt to Clean House?" *San Diego Magazine*, July 1986.



with the apparatus on my buttocks and it shocked me. He put the apparatus then against my neck and it kept shocking me.

He then took me outside and forced me to sign a document.<sup>199</sup>

Although Quezada Cabrera does not allege that he endured electric shock torture, he asserts that he was beaten and that he witnessed the officers threaten Valdez Ortega with the electric shock device. Both men were charged with and confessed to illegal entry, a misdemeanor. Margaret Burkhart, a lawyer with Texas Rural Legal Aid, is challenging their convictions on the grounds that their confessions were coerced.<sup>200</sup>

Human rights groups monitoring the border unhesitatingly state that sexual abuse is rampant.<sup>201</sup> In a handful of cases, INS agents have been prosecuted for rape of undocumented migrant women,<sup>202</sup> but more frequently it is not reported. Undocumented female rape victims are doubly vulnerable: not only must they endure the humiliation of being raped, but they also risk deportation or retaliatory criminal charges if they complain. Thus, even when cases of sexual assault come to the attention of human rights groups, the women involved commonly refuse legal assistance or any form of publicity regarding what happened to them.

One reported case involved a 19-year-old who alleged that she was sexually molested during a Border Patrol raid at a camp for immigrant laborers where she was living. She asserted that during the September 12, 1990 raid, an officer took her off alone, told her he was conducting body searches for drugs, ordered her to lift her blouse, and inserted a finger between her breasts. He then told her to pull down her pants and inserted a finger in her vagina, where he kept it for approximately five minutes. Assisted by the AFSC in San Diego, the woman filed a complaint with the OIG which referred the matter to the FBI. She reached a sealed settlement with the INS for money damages; according to the AFSC, the agent involved was never disciplined.

### **Abuses Involving the Use of Aircraft or Vehicles**

Border Patrol vehicles and aircraft are used to intimidate border crossers. In Southern California, where agents contend with a flow of immigrants estimated between 500 and 2,000 a day, motorcycles, four-wheel-drive vehicles, surveillance planes, helicopters, and horses comb the border in a constant show of force. Unable to arrest every individual who attempts to cross, agents in vehicles sometimes pursue fleeing suspects or herd groups back across the border. Vehicle pursuit is dangerous to both the pursuer and the pursued, and occasionally tragic. Between 1985 and 1989, Border Patrol vehicles ran over and killed at least six immigrants along the California-Mexico border.<sup>203</sup>

On August 20, 1989, 14-year-old **Luís Eduardo Hernández Hernández** was struck and killed by a Border Patrol vehicle at El Bordo. According to the Border Patrol, Luís and about 100 others had just

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<sup>199</sup> Declaration of José Gilbardo Valdez Ortega, December 23, 1991.

<sup>200</sup> Burkhart is also representing the two men in their immigration proceedings and in a federal civil action against the individual Border Patrol agents. Americas Watch is counsel for the men in Federal Tort Claims Act proceedings.

<sup>201</sup> Interview with Roberto Martínez, AFSC, Mexico-U.S. Border Program, March 20, 1992.

<sup>202</sup> See e.g., Michael Connelly, "INS Officer Acquitted of Rapes, Kidnaping," *Los Angeles Times*, February 28, 1992.

<sup>203</sup> Patrick McDonnell, "Police Absolve Border Agents in Boy's Death," *Los Angeles Times*, October 17, 1989.

entered the United States and were gathered atop the levee about twenty yards north of the fence. At about 2 A.M., an agent in a Chevy Blazer posted nearby entered the levee and attempted to deter the group's progress into the United States. Seeing the vehicle approaching, the group retreated toward the fence. Luis, trailing the group, was scrambling down the levee when he stumbled and fell directly into the vehicle's path. Border Patrol spokesmen insisted the vehicle had been traveling at a safe speed, between ten and fifteen miles per hour, and that the agent had no time to react.<sup>204</sup>

The driver, Agent George Brunner, and his partner, Agent Oscar Lomeli, were quickly cleared of wrongdoing by both the Border Patrol and San Diego Police, and the U.S. Attorneys office did not dispute their findings. The testimony of Luis's brother, Angel, who was also in the group, challenged the official speed estimates. The Mexican Government vigorously protested the death, calling it a homicide. Attorneys for the Hernández family filed a wrongful death lawsuit alleging that the driver "negligently, carelessly and recklessly" caused the boy's death; the INS settled with the family for \$50,000.

The circumstances prevailing at El Bordo around the time of Luis's death give cause to doubt the agents' version of events. In the preceding weeks, the Mexican Consulate in San Diego received complaints from residents of Zona Norte, the Tijuana neighborhood adjacent to the levee, regarding the amount of dust being generated by Border Patrol vehicles patrolling the area. The Consulate informed U.S. officials of dangers caused by the drifting clouds of dust, which made it difficult to see those crossing the border and obscured visibility for motorists on a heavily traveled Mexican highway nearby. Mexicans who frequent the border area, who were interviewed after the tragedy, indicated that in the previous three or four months Border Patrol vehicles seemed to have adopted a practice of harassing crossers. They reported that the vehicles sped along the levee and did "doughnuts" (tight spirals) near the fence that showered onlookers with dust. "They do it on purpose," one migrant told a reporter. "It's fun for them."<sup>205</sup> Journalists in the area confirmed that they had observed Border Patrol vehicles, traveling at speeds of over 30 miles per hour, passing close to crossing migrants.<sup>206</sup>

Witnesses have reported similar tactics by helicopter pilots chasing migrants back toward the border. In an interview with Americas Watch, migrant workers who frequently crossed the border at Otay Mesa described night pursuits by helicopters that they claimed were intended to harass and even cause minor injuries. While pursuing people down steep hillsides toward Mexico, pilots would switch their searchlights on and off, temporarily blinding those who were already retreating and causing them to stumble and slide down the hill. Others complained of helicopters that flew unnecessarily low, with the apparent object of kicking up blinding clouds of dust. While it is within the realm of acceptable law enforcement to pursue illegal border crossers until they reach the border, these accounts suggest deliberate harassment. Employing such tactics against those who are obviously retreating suggests some combination of an attempt to inflict extrajudicial punishment on the crossers and a cruel sport. Insofar as such tactics exceed what is necessary to accomplish the object of turning back an illegal entry, they must be condemned.

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<sup>204</sup> Patrick McDonnell, "Border Patrol Vehicle Kills Boy, 14," *Los Angeles Times*, August 22, 1989.

<sup>205</sup> Chet Barfield, "Migrants Tell Different Story of Boy's Death Near Border," *San Diego Tribune*, August 24, 1989.

<sup>206</sup> Patrick McDonnell, "Agent Is Accused of Recklessness in Boy's Border Death," *Los Angeles Times*, August 23, 1989.

## V. RACIALLY DISCRIMINATORY CONDUCT BY INS AGENTS

Racially discriminatory attitudes, though officially prohibited, pervade the Border Patrol and often become flagrant as agents along the southern border attempt to enforce immigration laws against Hispanics. These attitudes are shared by many local law enforcement officials and persons lawfully residing in cities and towns near the border, who xenophobically fear that an influx of Hispanic migrants will undermine their employment opportunities or have an otherwise negative impact on the quality of their lives.<sup>207</sup> Because the INS, local police, community leaders, and ordinary citizens turn a blind eye to racially discriminatory conduct by Border Patrol officers, it becomes even more pervasive. Many Hispanics living near the border resign themselves to it as a fact of life.

This chapter reviews two types of racially discriminatory conduct: verbal abuse and car stops. But racial discrimination is also central to understanding INS behavior during large scale pre-planned raids and some of the problems associated with INS detention — topics that are covered in subsequent chapters.

### Verbal Abuse

INS standards forbid disrespectful conduct and insulting, abusive, or obscene language. The Officer's Handbook warns:

No remarks of a sarcastic or "kidding" nature should ever be made to an alien about his/her name, nationality, race, religion, economic condition, dress, etc. Such remarks may result in disciplinary action against the officer involved.<sup>208</sup>

Despite this prohibition, verbal abuse by INS border agents, directed at both persons the agents seek to question or apprehend, and at witnesses, is common. Obscenities, frequently coupled with threats and racist or sexist insults, seem to be aimed at either humiliating the targets or provoking a violent response. Verbal abuse is also insidious in that by dehumanizing the target it makes it easier for the agent to commit physical

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<sup>207</sup> Civilian harassment of undocumented migrants, ranging from protests like San Diego's "Light up the Border" campaign to hate crimes that result in injury or death, is commonplace along the border. Unless serious injury or death occurs as a result, such conduct is usually overlooked. The following incident illustrates the acceptance of such conduct by both the INS and local officials:

In January [1990], the proprietor of a Carlsbad [California] general store and his brother, tired of migrants looking for work loitering in front of their establishment, tied up a young Mexican with duct tape, handcuffed him to the back porch of the store, put a paper bag with no holes in it over his head and wrote on the bag, *No mas aqui* ("no more here"). Candido Galloso Sálas was trapped there for at least two hours, during which time several customers and employees and at least one border patrolman saw him and did nothing. Even more disturbing was the reaction of a local police officer to the incident. "They [the two brothers] were frustrated, pure and simple, but I don't think this thing has any racist overtones... A businessman loses thousands of dollars a year to shoplifters, people scaring away his good customers."

Miriam Davidson, "The Mexican Border War," *The Nation*, November 12, 1990.

<sup>208</sup> U.S. Department of Justice, *INS Officer's Handbook (M-68)*, p. 7.

and due process abuses. Racist references also betray deep bigotries on the part of agents that may influence their actions.

In the mid-1980s it was reported that racial slurs like "wetback" were used at the Border Patrol's training center in Glynco, Georgia.<sup>209</sup> More recently, AFSC representatives who met privately with INS Commissioner Gene McNary described how, while denying allegations of racism within the agency, another INS official present during the meeting repeatedly referred to undocumented migrants as "wets". These reports raise the specter that such language is woven into the everyday vernacular of the Border Patrol. Whether or not racist language is commonplace, other forms of aggressive language and verbal abuse are routine in the field.

A particularly flagrant episode occurred on August 29, 1989, at El Bordo in Tijuana. For over an hour, a Border Patrol agent broadcast insults and racial slurs laced with sexual innuendoes to a crowd gathered on the Mexican side of the levee waiting to cross. A *Los Angeles Times* correspondent, who was in the area researching the death of Luís Hernández Hernández one week before,<sup>210</sup> witnessed the episode. At one point the agent announced to the crowd, "Your mothers are all whores," laughed, and continued, "All Mexicans are whores." As the reporter watched, "the agent elaborated with a series of crude and sexually explicit characterizations."<sup>211</sup> The agent, who the reporter noted spoke "crude border Spanish with a Texas Chicano accent," identified himself to the crowd as a *tejano* (someone from Texas) and declared, "Texans are the only Mexicans who are worth anything." He then played "norteño" music over the loudspeaker and proclaimed that the music was for the "whore Mexicans."<sup>212</sup>

The crowd told reporters that such broadcasts are common in the levee area. The broadcast ran intermittently from 9:15 P.M. until at least 10:45 P.M., when the reporters left the area. El Bordo is one of the most heavily patrolled sections of the border, and typically there are several vehicles in the area at any one time. It thus seems doubtful that such a public exhibition could have gone unnoticed by other field agents and supervisors. But no one moved to stop the agent's misconduct.

In fact, there are indications that other agents in the area were engaged simultaneously in abusive activities. At 9:30 that evening, while the broadcast was occurring, reporters witnessed "a firecracker-type device flying from the driver's side of a Border Patrol vehicle cruising along the elevated southern levee." As they watched, "the device exploded in flame, causing the waiting migrants to flee."<sup>213</sup> Bystanders alleged that agents occasionally had used such devices in the past.

Two hours later, 15-year-old **Pedro García Hernández** was shot in the stomach by a Border Patrol agent in the same general area of El Bordo. Although it is not known whether the youth had heard the earlier taunting, the shooting occurred in an atmosphere of tension and confrontation provoked by the broadcast.

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<sup>209</sup> Martin Hill, "Border Violence: Has the INS Crossed the Thin Line?" *San Diego Magazine*, June, 1985.

<sup>210</sup> See Chapter IV.

<sup>211</sup> Patrick McDonnell, "Border Patrol Agent Broadcasts Taunts, Obscenity at Mexicans," *Los Angeles Times*, August 29, 1989.

<sup>212</sup> The Border Patrol, which frequently counters charges of racism by pointing to the high percentage of Latino agents on its force, has stationed many Texas-born Mexican-Americans in the San Diego area. As these incidents indicate, the ethnicity of these agents does not preclude racist sentiments. Indeed, the apparent prevalence of racist attitudes within the INS may make Mexican-Americans particularly eager to distinguish themselves from undocumented migrants.

<sup>213</sup> Patrick McDonnell, "Border Patrol Agent Broadcasts."

During the broadcast, a crowd gathered on the south levee and shouted insults back at the agent.<sup>214</sup> According to the Border Patrol, just before the shooting Agent Frederick Vetter was involved in a physical struggle with a suspected undocumented border-crosser. García Hernández approached and threatened to throw a rock at the agent. The Border Patrol alleges that Agent Terry Manning ordered García Hernández to drop the rock, but the youth refused. As he advanced, Manning shot him.<sup>215</sup> García denied that he had thrown or ever held a rock. He insisted that he had only motioned toward Agent Vetter, who was beating the other man.<sup>216</sup>

The presence of reporters who witnessed the abusive broadcast by the Border Patrol agent, and the publicity that followed reports of the broadcast, forced an investigation of the incident. Supervisory Patrol Agent Michael Gregg proclaimed, "[the incident] is being investigated, and if there is foundation to it, we will deal with that agent appropriately."<sup>217</sup> The broadcast of racial slurs and obscenities, he confirmed, would violate Border Patrol guidelines prohibiting verbal abuse and restricting the use of vehicle intercoms, which are to be used only for safety purposes. Gregg denied that explosive devices of the type described by the reporter were issued to agents, and noted that they are not authorized. The INS later announced that the agent who taunted the crowd had been disciplined, but the type of discipline was not publicly disclosed.

### Car Stops

Anti-Hispanic discriminatory attitudes also are apparent in Border Patrol car stops of motorists who "look Mexican." In some predominantly Hispanic areas, especially south Texas, immigrants rights groups report that such stops, sometimes referred to as "hot stops," are routine, even when Border Patrol agents have no other articulable basis for suspecting the person is in the United States illegally. While we did not have the opportunity to investigate this particular practice, it is reported frequently enough that it bears mention.

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<sup>214</sup> *Ibid.*

<sup>215</sup> Patrick McDonnell, "Boy, 15, Shot by Border Patrol Is Expected to Recover," *Los Angeles Times*, August 29, 1989.

<sup>216</sup> Patrick McDonnell, "Boy Says He Didn't Throw Rock at Agents," *Los Angeles Times*, August 29, 1989.

García was interviewed in a hospital room at the University of California at San Diego Medical Center by his attorney, Marco López. López told reporters that after the shooting, Border Patrol agents threw García to the ground and put a knee on his chest, and that "three or four agents were screaming at him, telling him he was going to die."

Both García Hernández and Arturo Beltran García, the eighteen-year-old García Hernández alleged was being beaten, were charged with assaulting a federal officer. García entered a not guilty plea, and a U.S. Magistrate ordered him released without bail when his condition allowed. Beltran, meanwhile, was convicted of illegal entry and sentenced to ninety days in prison two days after the shooting.

Six days after the shooting, during the Labor Day weekend, García was released from the hospital, given five dollars in spending money, and sent back to Tijuana by taxi. According to López, the INS violated a judge's order forbidding his release without notification of his attorney. Interview with Marco López, February 1, 1991.

A homeless orphan, García slept the first night in an abandoned house before requesting help from a local church. (Nancy Cleeland, "Shot teen treated, left at border with \$5," *San Diego Union*, September 20, 1989.

<sup>217</sup> Patrick McDonnell, "Border Patrol Agent Broadcasts."

The INS is bound by the prohibition of unreasonable searches and seizures contained in the Fourth Amendment to the U.S. Constitution. Stops by INS agents of persons traveling in vehicles, regardless of the purpose or brevity of the detention, constitute a "seizure" under the Fourth Amendment.<sup>218</sup> Individualized suspicion is not required for routine vehicle stops at fixed checkpoints near the Mexican border.<sup>219</sup> Other than at fixed checkpoints, however, INS roving patrols may make temporary investigative stops of automobiles only when they are based upon specific articulable facts which, together with rational inferences drawn from those facts, reasonably warrant suspicion that the vehicles contain undocumented immigrants who may be illegally in the country.<sup>220</sup> Under the reasonable suspicion test applied by the U.S. Supreme Court, a roving patrol may not stop a vehicle near the border to question its occupants about their immigration status when the only ground for suspicion is that the occupants appear to be of Mexican descent.<sup>221</sup>

Despite these and subsequent appellate rulings,<sup>222</sup> Border Patrol "hot stops" of vehicles driven by Hispanics to check the immigration status of those in the car reportedly continue. These stops interfere with the lives of U.S. citizens and those lawfully in the United States as well as undocumented immigrants.

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<sup>218</sup> *Delaware v. Prouse*, 440 U.S. 648, 653 (1979), accord, *United States v. Cortez*, 449 U.S. 411, 417 (1979). Under the constitutional test laid down in *Terry v. Ohio*, 392 U.S. 1, 16-19, (1968), a temporary investigative stop is proper only if it is based upon reasonable suspicion that the person stopped is or is about to be engaged in criminal activity.

<sup>219</sup> *United States v. Martinez-Fuerte*, 438 U.S. 543, 566-67 (1976).

<sup>220</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

<sup>221</sup> *Ibid.* The Court suggested the following factors that border officials might consider in determining whether reasonable suspicion exists to stop a vehicle: (1) the characteristics of the area in which they encounter a vehicle; (2) its proximity to the border; (3) any information about earlier illegal border crossings; (4) the usual patterns of traffic on the particular road; (5) previous experience with alien traffic; (6) information about recent illegal border crossings in the area; (7) the driver's suspicious behavior; (8) the make of the vehicle (e.g., certain station wagons with large compartments are often used for transporting concealed aliens); (9) whether the vehicle appears to be heavily loaded; (10) whether the vehicle contains an extraordinary number of passengers; and (11) whether the officers observe persons trying to hide. 422 U.S. at 884-85.

<sup>222</sup> See, e.g., *United States v. Rocha-Lopez*, 527 F. 2d 476 (9th Cir. 1976), cert. denied, 425 U.S. 977 (1976) ("Articulable facts" forming the basis of a reasonable suspicion are "measured against an objective reasonable man standard, not by the subjective impressions of a particular officer"); *Nicacio v. United States INS*, 797 F.2d 700 (9th Cir. 1985) (INS officers did not have a "particularized reasonable suspicion based on specific articulable facts" when they engaged in a pattern of investigative car stops on Washington highways in order to interrogate Hispanic-looking riders. The Court refused to weigh in the balance the officers' claim that they also considered other facts besides ethnicity such as a "hungry look," a "dirty, unkempt appearance," or the fact that a person wore a "bumper cap"); *United States v. Ortega-Serrano*, 788 F. 2d 299 (5th Cir. 1986) (Reasonable suspicion was found to be lacking when the defendant's car was stopped 300 to 400 miles from the border notwithstanding the presence of an uneven, home-made paint job; the erratic evasive manner of the defendant's driving; the dirty appearance of the defendant and his passengers; the nervous demeanor of the passengers riding in the back seat; and the occupant's Mexican appearance.)

## VI. INS RAIDS

Large-scale, centrally planned raids, often conducted without warrants and in an intimidating and aggressive manner, have been a staple of INS operations throughout the past decade. Workplace and farm raids, raids in public places like street corners, restaurants and bus stations, as well as neighborhood and residential raids, all seek to net undocumented immigrants who have entered the United States undetected. Raids often employ many agents to make relatively few arrests. But their symbolic value is clear: through an impressive show of force, involving the use of vehicles, manpower, and weaponry, they remind undocumented migrants that they are subject to arrest and deportation at any moment.

Centrally planned raids conducted with meticulous attention to individual rights may be an acceptable method of law enforcement. But INS raids have repeatedly been conducted in ways that have resulted in injury and death due to the agency's failure to minimize risks to migrants and agents. In addition, by casting an overly wide net, INS raids often have violated the constitutionally protected rights of citizens and others lawfully in the United States as well as undocumented migrants.

The INS has redirected its raid tactics since the 1986 passage of the Immigration Reform and Control Act (IRCA). That statute criminalized the hiring of undocumented migrants, and made employers who do so liable for substantial fines and other penalties.<sup>223</sup> It also prohibited INS agents from entering onto the premises of outdoor agricultural operations without the consent of the owner of the property or a warrant to interrogate persons believed to be aliens about their right to remain in the United States.<sup>224</sup>

Prior to 1986, workplace raids were common; after the passage of IRCA, reports of agricultural and other workplace raids dropped off markedly. With IRCA, workplace raids became trickier since employers, who risk criminal sanctions if undocumented migrants are found in their place of employment, have been less likely to consent to a raid. In addition, since employer sanctions went into effect in May 1988,<sup>225</sup> employers have become an added target of INS immigration enforcement activity.<sup>226</sup>

On the other hand, raids of business districts, day labor pick-up points, and residential areas have continued unabated, sometimes in cooperation with police or other state or local officials, and often with little regard for individual rights.

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<sup>223</sup> 8 U.S.C. § 1324a.

<sup>224</sup> 8 U.S.C. § 1357e.

<sup>225</sup> Under 8 U.S.C. § 1324a(i)(1) and (2), employer sanctions were suspended during the first six months following the passage of the act; during the next twelve months, employers were subject to citation but not other penalties.

<sup>226</sup> Between the months of April and August 1991, the INS reported imposing 529 fines totalling \$3.2 million against employers, and collecting \$940,000 of that amount. Robert Pear, "Wide Attack on Hiring of Illegal Aliens," *New York Times*, August 7, 1991.

## Workplace Raids

During the week of April 26, 1982, the INS conducted approximately 50 workplace raids in Northern California. Those raids, which were part of a national effort to round up undocumented migrants known as "Project Jobs" or "Operation Jobs," resulted in the arrest of 467 persons in the San Francisco Bay area.<sup>227</sup>

A typical Project Jobs raid occurred at the commercial premises of Neve Roses, a nursery, on April 26, 1982. According to pleadings filed in a federal lawsuit, at 10:00 A.M., six INS and Border Patrol vehicles drove up the private driveway and adjacent private roads at a high rate of speed. Without warrants, the agents proceeded onto Neve's property and began entering its greenhouses. None of the twelve agents who participated in the sweep identified himself to the management or sought consent. That same morning, INS and Border Patrol agents raided the neighboring premises of Petaluma Mushroom. Again the entry was warrantless and consentless. The agents opened doors to individual growing rooms, seized, frisked, and handcuffed workers, and searched the entire business operation.<sup>228</sup>

These raids, and the many others like them, violated the search and seizure clause of the Fourth Amendment to the U.S. Constitution. To enter private property for the purpose of questioning, searching for, or arresting undocumented aliens, the INS must acquire either a warrant or the valid consent of the owner, even if persons the INS suspects are undocumented migrants are visible from outside the premises. Yet, the owner of one small business raided reported that the agent in charge of the local INS office told him, "We can enter a property without a warrant if we see Mexicans in plain view from the street."<sup>229</sup>

In depositions taken during litigation concerning the legality of the raids, several INS agents conceded that they almost never sought or obtained warrants for entry onto commercial property or for the arrest of suspects.<sup>230</sup> Even in raids in which warrants were used, evidence submitted to the Court showed INS agents frequently made no effort to apprehend the suspects named in the warrants. Instead, they questioned or detained workers solely on the basis of information or observations gained after entry.<sup>231</sup>

U.S. courts have held that warrantless searches conducted pursuant to valid consent are constitutionally permissible. But they require that when agents ask for consent, they must not conduct themselves in a manner that would leave the person asked with the reasonable belief that he or she has no choice. In issuing a preliminary injunction limiting INS conduct during workplace raids, the Federal District Court for the Northern District of California found:

It is evident that the agents at times make an abrupt and intimidating appearance, often in force, and do not inform the employers of their right not to consent. There is evidence of threats of retaliation, and it is clear that at least some employers believe they have little

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<sup>227</sup> See *Pearl Meadows Mushroom Farm v. Nelson*, 723 F. Supp. 432 (N.D. Cal. 1989).

<sup>228</sup> Plaintiff's Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, *International Molders' and Allied Workers' Local Union No. 164 v. Nelson*, (No. C-82-1896-RPA).

<sup>229</sup> Earl Shorris, "Raids, Racism and the I.N.S.," *The Nation*, May 8, 1989.

<sup>230</sup> Deposition of Agent Santiago Olivárez, p. 16, taken in *International Molders' v. Nelson*, 643 F. Supp. 884 (1986), remanded with modifications, 799 F.2d 547 (9th Cir. 1986).

<sup>231</sup> Preliminary Injunction, *International Molders' and Allied Workers' Local Union No. 164 v. Nelson*, (No. C-82-1896-RPA), filed March 7, 1984.



choice but to consent. The INS is well aware of alternative means of obtaining consent, and the means for obtaining a warrant. Finally, it is apparent that the agents expect workers to flee upon their arrival.<sup>232</sup>

The INS claimed that raids conducted without a warrant or consent were based on "exigent circumstances." They argued that whenever persons on the premises ran at the sight of INS agents, immediate entry was justified. While under U.S. law, exigent circumstances such as the pursuit of a fleeing suspect provide a legitimate exception to the warrant requirement, courts have held that if the fear that a suspect will escape is "created by the law enforcement officers, it will not support a warrantless search."<sup>233</sup> INS officers involved in raids can reasonably foresee that their presence will provoke fearful migrants to flee. Courts have refused to condone such flight as a permanent exception to the warrant requirement.

In both the Neve Roses and Petaluma Mushroom raids, the INS contended that it entered the premises only after observing fleeing workers. But management at both businesses stated that all the workers were inside greenhouses or closed rooms when the raids occurred and were not visible from outside.

The court concluded that when agents have sufficient time and information to secure a warrant in advance, they cannot rely on exigent circumstances as the basis for the raid. Moreover, even when exigent circumstances justify the warrantless pursuit of one or more suspects, the INS cannot rely on exigent circumstances as an excuse to interrogate an entire workforce.<sup>234</sup>

The court further held that while an INS agent may stop a person if he or she has a reasonable suspicion, based on articulable facts, that the person is illegally in the United States, agents may not question suspects in such a manner that the suspect believes he or she is not free to leave.<sup>235</sup> For instance, at the Petaluma Mushroom raid, INS agents blocked entrances to the mushroom growing rooms where the pickers were working, handcuffed the workers inside, and lined them up against a wall to frisk them without asking the workers any questions, requesting any papers, or permitting them to volunteer information about their immigration status.

A settlement was reached in these lawsuits that required warrants, articulable and documented bases for detention, and the establishment of a rapid administrative complaint procedure should the settlement be violated.<sup>236</sup> The settlement underscores the fundamental norm that INS agents cannot conduct warrantless, uninvited raids of premises and detain people solely because they look Hispanic.

Unfortunately, the settlement applies only in northern California. In our view, the INS should

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<sup>232</sup> Consent is not valid if it is "coerced by explicit or implicit means, by implied threat or covert force." *Schneckloth v. Bustamonte*, 412 U.S. 218, 228, (1973).

<sup>233</sup> *Ibid.*, quoting *United States v. Calhoun*, 542 F. 2d 1094, 1102-03 (9th Cr. 1976), *cert. denied* 429 U.S. 1064 (1977).

<sup>234</sup> *Ibid.* The Court cited *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) which held: "A warrantless search must be strictly circumscribed by the exigencies that justify its initiation...."

<sup>235</sup> The U.S. Supreme Court has held that a suspect's Hispanic appearance or ancestry, by itself, does not provide a basis for a reasonable suspicion that a person is an undocumented alien. *U.S. v. Brignoni-Ponce*, 422 U.S. 873 (1974).

<sup>236</sup> *Pearl Meadows Mushroom Farm, Inc., et al. v. Nelson*, No. C-82-1896 JW, Settlement Agreement and Order, and Declaratory Judgment, March 6, 1992.

unilaterally adopt the settlement terms nationwide. Doing so would demonstrate that the agency is committed to upholding established legal principles designed to protect human rights even when those principles impede rounding up and deporting undocumented migrants.

### **Aqueduct Drownings During Raids on Farms**

Fifteen migrant farmworkers are known to have drowned in irrigation canals in California's central valley during INS raids between 1974 and 1986.<sup>237</sup> Many of the canals carry frigid, fast-moving water and can be difficult to see from the ground. Farmworkers often are not aware that a canal lies at the end of a field. The deadly central valley raids typically involved the surprise appearance of two or more Border Patrol vehicles in a field where migrants were working, supported by hovering aircraft. The vehicles entered the field at one end, and drove forward so as to flank the workers and prevent their escape into adjacent fields. Agents in the aircraft tracked the operation and provided radio direction to agents on the ground. The operations were designed to limit possible escape routes and allow agents to apprehend the workers *en masse*.

The farm raids began attracting public scrutiny in 1982, following the death of **Margarito Lupercio**, a 17-year-old Mexican youth, the fourth farmworker to drown that year. A number of advocate groups, led by the Central Valley's Equal Rights Congress, the League of United Latin American Citizens (LULAC), and California Rural Legal Assistance, publicly questioned these "accidental" drownings and suggested that Border Patrol agents deliberately herded workers toward irrigation canals, which they used as barriers. INS officials maintained that they had no such policy, and were not using irrigation canals to prevent flight. But as the debate grew, it became known that Border Patrol vehicles carried no lifesaving equipment, a failure which, after eleven such drownings, suggested callousness, if not criminal neglect. The Equal Rights Congress launched a campaign to require lifesaving equipment and training for agents, and, following the January 23, 1984 drowning of Pedro Jiménez Valencia, public pressure mounted for the change in policy.<sup>238</sup> On May 1, 1984, Harold Ezell, then Western Regional Commissioner, announced that the Border Patrol would require its agents to carry lifesaving equipment when working near rivers and canals.<sup>239</sup>

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<sup>237</sup> For further elaboration of these cases and the response of immigrants rights activists, see Rosenbaum, Stephen A., "Pro Bono Publico Meets Droits de l'Homme: Speaking a New Legal Language," 13 *Loyola International & Comparative Law Journal* 499 (Feb. 1991).

<sup>238</sup> The policy endangered not only farmworkers, but agents as well. In numerous instances field agents attempted and succeeded in rescuing those who had entered the canals, without the benefit of lifesaving equipment and at great personal risk.

<sup>239</sup> Earlier comments by Ezell revealed a stubborn resistance to a policy change to require lifesaving training and equipment. At a February 9, 1984 press conference, he deflected criticism of the Border Patrol's conduct during the raids, and blamed those who drowned instead. The workers, he stated, were in the wrong since they were in the country illegally. He argued that equipping INS agents with lifesaving equipment would only encourage more workers to try to escape across waterways. The decision to reverse the policy, made at the national level, was pragmatic: it followed a year-long "impact study" in which Border Patrol officials examined the potential effect the policy change would have on enforcement and INS attorneys assessed the agency's potential legal responsibilities. Even this limited and largely self-protective study was undertaken reluctantly. INS spokesman Duke Austin admitted that the Border Patrol agreed to it after considerable pressure from "special interest" groups and members of Congress. Mike Castro, "Border Patrol Agents to Carry Lifesaving Equipment," *The Modesto Bee*, May 1, 1984.

Between the May 1 announcement and the initiation of the training program in June, another undocumented worker drowned, 17-year-old **Felipe Fuentes Onate**. The official Border Patrol version commended two agents involved in the raid for doing "everything humanly possible" to save Fuentes, including diving into the creek after an attempt to throw him a flotation device failed. According to the Border Patrol, Fuentes "refused" the lifesaving equipment.<sup>240</sup>

Eyewitnesses contested the INS version. In past cases, the Border Patrol had been criticized for deporting witnesses before they could be interviewed, but this time activists moved quickly to post bond and obtain their statements. The witnesses agreed that the lifesaving equipment had been thrown too late, and landed too far away for the youth to reach.

The fifteenth victim, **Ramiro Vargas Ríos**, a 15-year-old Mexican field worker, drowned two years later on August 6, 1986. Vargas Ríos, whose body was not found until three days later, was in a group of about 30 workers who tried to cross an irrigation canal to escape capture by raiding agents. Although agents pulled four people from the canal, and there seems to have been a particularly notable effort by one Border Patrolman to help other struggling workers from the water, an immigrants' rights group reported that the agents used no lifesaving equipment and, contrary to INS policy, were evidently carrying none at the time.<sup>241</sup>

### Cooperation Between the INS and Police During Raids

It is not uncommon for the INS to cooperate with police or other local officials in conducting raids on neighborhoods and residences. Such raids typically are characterized by physical abuse, unlawful detention, and racial discrimination.

Joint INS-police raids were the subject of a class action lawsuit filed by immigrants' rights groups against the INS in northern California. The lawsuit alleged intentional discrimination against Hispanics on the basis of race, national origin and language, and against non-Hispanics on the basis of their association with Hispanics.<sup>242</sup> The facts alleged in three of the raids at issue illustrate the range and seriousness of the abuses.

On the night of April 6, 1984, armed INS agents and local police equipped with helicopters, bullet-proof vests, and police dogs sealed off a two-block area of the predominantly Hispanic town of Parlier, California. They entered eight establishments, positioned themselves at all exits and segregated patrons according to language spoken. They interrogated patrons about their immigration status, and forbade anyone from leaving — including those who had demonstrated that they were lawfully in the U.S. — until every patron had been questioned. Interrogations lasted approximately two hours; persons suspected of violating immigration laws were ordered onto waiting INS buses.<sup>243</sup>

Another night raid occurred in Sanger, California, on September 8, 1984. Armed INS agents and local police employed helicopters, floodlights, and barricades to seal off an Hispanic business district. The

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<sup>240</sup> Mike Castro, "Border Patrol Agents Begin Training in Lifesaving Methods," *Sacramento Bee*, June 12, 1984.

<sup>241</sup> Press Release and Report on Findings of Independent Investigation into the drowning death of Ramiro Vargas Ríos, Equal Rights Congress, Merced, California, October 12, 1986.

<sup>242</sup> *Velasquez v. Senko*, No. C84 20723 RPA, First Amended Complaint For Declaratory Judgment Injunctive Relief and Damages; *Velasquez v. Senko*, 643 F.Supp. 1172 (N.D. Cal. 1986). The acts alleged in *Velasquez* violated 42 U.S.C. § 1981 and the Equal Protection Clause of the Fifth Amendment.

<sup>243</sup> *Ibid.*

agents entered sixteen establishments and ordered the arrest of all patrons, including U.S. citizens and lawful permanent residents. Each patron was searched and interrogated; agents prohibited unauthorized movement, including the use of the bathrooms. Some patrons were ordered to stand against the wall; others were required to sit on the floor with their legs spread so that another person could sit between their legs, and to place their hands on the shoulders of the person in front of them. The interrogations lasted approximately two hours at each establishment.<sup>244</sup>

On July 10, 1984, INS agents and local police secured with roadblocks a two-block Hispanic residential area of Menlo Park, California. All automobiles entering or leaving the area were stopped. Hispanic males were removed from passing automobiles and ordered into an alley to be interrogated about their immigration status. Other agents targeted an apartment complex where Hispanics reside. The agents systematically approached Hispanic households in that complex; they forced Hispanic men out into an alley where an INS agent questioned them about their immigration status and arrested those who could not demonstrate that they were lawfully in the United States.<sup>245</sup>

The lawsuit was settled in January 1992. Under the settlement, INS raids and joint operations with state or local law enforcement agencies are to be curtailed. Absent a warrant or valid exigent circumstances, the INS is prohibited from: detaining persons to determine their immigration status without reasonable, articulable, and individualized suspicion of illegal alienage; detaining persons based solely on their ethnic characteristics; or blocking doors or otherwise preventing ingress or egress to or from the area of a business open to the public unless the agents have reason to believe that everyone inside is undocumented.<sup>246</sup> Like the *Pearl Meadows* settlement, the *Velásquez* settlement is limited to northern California.

In June 1991, INS agents cooperating with local police blockaded the downtown business district of Pomona, in southern California, late on a Friday afternoon. They stopped and interrogated anyone who appeared Hispanic, and demanded proof of immigration status. Approximately 100 persons who were unable to prove that they were lawfully in the United States were detained overnight, then transported to Tijuana, Mexico. Both INS and Pomona police officials subsequently denied to the press that anything unusual had occurred; eyewitnesses, on the other hand, claimed that it was the largest community raid they had ever witnessed.<sup>247</sup>

At times, the INS conducts raids in complicity with local enforcement agencies other than, or in addition to, police. Prior to September 18, 1991, Border Patrol agents met with City of Orange police and city code enforcement officials to discuss a joint operation targeting an apartment complex. Although the INS claims that it refused to participate in the joint venture, it offered to serve as Spanish interpreters for code enforcement officers should the need arise. On September 18, code enforcement officials conducted a pre-dawn raid on the apartment complex — to investigate specific complaints of unsanitary conditions inside particular apartment units. INS agents, accompanied by police for "traffic control," conducted a simultaneous raid of a day-labor pick-up point just outside the apartment complex. According to an internal INS report,

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<sup>244</sup> *Ibid.*

<sup>245</sup> *Ibid.*

<sup>246</sup> *Velasquez v. Ackerman*, Settlement Agreement and Declaratory Judgement, Civ. No. C-84-20723-JW (Jan. 24, 1992).

<sup>247</sup> Maribel Hastings, "INS niega haber realizado redadas masivas en Pomona," *La Opinión*, June 25, 1991. Local immigrants rights activists were doubly outraged by the raid because it took place just a year after the city of Pomona passed a resolution prohibiting Pomona police from collaborating with the INS in the enforcement of immigration laws.

when day-laborers ran toward the complex, the Border Patrol agents followed them and coincidentally encountered the code enforcers.

Accounts of what happened next differ. Representatives of persons living in the apartment complex claim that Border Patrol agents stuck their guns through mailslots and broke windows to gain entry into apartments and forcibly arrest residents, many of whom were not yet dressed or still groggy with sleep.<sup>248</sup> The INS admits that agents entered some apartments but claims that they did so with the consent of residents or in hot pursuit of persons fleeing from the day-labor pick-up point. The agency also concedes that in one case Border Patrol agents relied, mistakenly, on the consent of the code enforcement officials to enter a private residence; in that case, the agents broke down a bedroom door to arrest a person who had fled into the bedroom and locked the door.<sup>249</sup>

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<sup>248</sup> Interview with Maryellen Martinette of Hermandad Mexicana, March 12, 1992.

<sup>249</sup> INS Internal Memorandum from Gustavo de la Viña, Chief Patrol Officer in the San Diego Sector, to Commissioner (COBOR) in Washington, D.C., "Orange County Incident on 9/18/91," September 19, 1991.

INS conduct in entering apartments without warrants fell below legal standards.<sup>250</sup> In an internal memorandum, Gustavo de la Viña, Chief Border Patrol Officer in the San Diego sector, defended the INS's conduct at the apartment complex. "At no time did we target this apartment complex, nor did we contact the Code Enforcement officers as a ruse or subterfuge for our agents to enter the complex. Accordingly, there do not appear to be policy violations in this regard." Given the facts surrounding the raid, this assertion is simply implausible. Because the INS clearly intended to arrest undocumented migrants inside apartments in the complex that morning, the failure to obtain warrants in advance is inexcusable.<sup>251</sup>

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<sup>250</sup> *LaDuke v. Nelson*, 560 F. Supp. 158, 163 (E.D. Wash. 1982), aff'd 762 F.2d 309 (9th Cir. 1985), modified, 796 F.2d 309 (1986). In *LaDuke* the court found that warrantless raids on farm labor housing were not justified, even on the basis of consent. It listed the following factors to support its finding: the failure of the agents to advise the occupants of the right to refuse, the inherent fear that the residents of the camp had of uniformed officers because of their past experiences in Mexico, the limited English and educational background of the housing occupants, and the occupants' knowledge of the power that the INS had in dealing with them as opposed to the average citizen. The circumstances are further aggravated when surprise searches are conducted in darkness or at sunrise when most residents are awakened by the agents.

<sup>251</sup> In a follow-up internal memorandum on the incident, Gustavo de la Viña bragged that "the operations in Orange County on September 18 resulted in the arrests of 216 aliens illegally in the United States. Only a small percentage (approximately 25) of these arrests were made at or near the complex, and our agents were at the complex for only approximately one-half hour." "Final Analysis regarding Orange Country Operation on September 18, 1991," from Gustavo de la Viña to Commissioner (COBOR), October 30, 1991. Twenty-five persons may be a small percentage of 216 but those 25 people were entitled to have their rights respected; such an off-hand dismissal demonstrates the extent to which INS officials have lost sight of their obligation to respect the rights of those they are charged with arresting.

## VII. INS DETENTION

During the 1980s, the number of people in deportation and exclusion proceedings who were detained by the INS steadily increased. The increase corresponded with, and was largely a reaction to, a major influx of Cubans, Haitians, and Central Americans into the United States. Many of those detained pose no risk to the safety or property of others and are not flight risks. They are detained because the INS believes — though has not demonstrated — that detaining undocumented migrants facing immigration proceedings deters others from entering the country unlawfully.

Conditions in detention facilities used by the INS are dreary and often abusive. Due process and other legal rights often are ignored. Guards and administrators who are responsible for abusing a detainee or otherwise interfering with the exercise of his or her legal rights invariably escape punishment. Under these conditions, the INS's expanded use of detention as a means to discourage immigration raises serious human rights concerns.

### Legal Basis for INS Detention

Undocumented aliens arrested by the INS may be placed in either exclusion or deportation proceedings. Exclusion proceedings are reserved for those aliens who have not yet "entered" the United States. Undocumented aliens who are physically present at a point of entry, such as a U.S. airport terminal or an INS inspection center, but have not been admitted formally are excludable. But undocumented aliens who enter without passing through an INS inspection point and are then arrested in the United States are deportable.

Substantially greater procedural rights are available to persons in deportation proceedings than to those in exclusion proceedings. Courts require that deportation proceedings comport with constitutional due process guarantees, but have held that persons in exclusion proceedings are not entitled to such extensive protections.<sup>252</sup>

Detention became routine for persons in exclusion proceedings in 1981 in response to the influx of Haitians in south Florida.<sup>253</sup> Before that, the INS "paroled" applicants in exclusion proceedings into the United States, unless they were likely to abscond.<sup>254</sup> The parole policy made it possible for aliens whose right to enter the United States had been challenged to proceed to their intended residences pending a hearing. Under that policy, an estimated 95 percent of aliens whose admissibility was questioned, totaling

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<sup>252</sup> *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950); *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206 (1953). The Supreme Court has held, however, that a longtime permanent resident, even in exclusion proceedings, is entitled to due process protections. *Landon v. Plasencia*, 459 U.S. 21 (1982). The denial of due process protections to persons in exclusion proceedings has been roundly criticized by commentators.

<sup>253</sup> Exclusion proceedings may be brought under 8 U.S.C. § 1226 when the INS challenges the admission of an alien seeking to enter the United States. 8 U.S.C. § 1225(b) authorizes "detention for further inquiry" of all aliens whose right to admission is questioned.

<sup>254</sup> "Parole" refers to the practice of releasing an applicant into the United States under the legal fiction that the applicant has not yet made an "entry" into the country. The statute authorizing parole gives the Attorney General discretion to release on parole any alien applying for admission for emergency reasons or in the public interest. 8 U.S.C. § 1182(d)(5).

hundreds of thousands of people, were not detained.<sup>255</sup> In considering whether to adopt the detention policy the Attorney General noted:

Detention could deter continuing illegal immigration reducing adverse community impact...  
But detention risks camp overflowing because of procedural delays.... Detention could  
create an appearance of "concentration camps" filled largely by blacks.<sup>256</sup>

The detention policy nonetheless was implemented.

In 1982, a federal district court held that the new detention policy violated the Administrative Procedure Act because the INS had failed to publish the proposed rule in the Federal Register and solicit comments.<sup>257</sup> The INS then published a new rule authorizing detention of applicants in exclusion proceedings in all but the most limited circumstances.<sup>258</sup> In May 1990, the INS undertook a small experimental program in which 200 asylum applicants in exclusion proceedings were released on parole.<sup>259</sup> Since the conclusion of that program, persons in exclusion proceedings are sometimes released after being detained for a few months where detention space is limited, but the determination whether to release a person is made on a case by case basis and the decisions often seem arbitrary.

Under present law, the INS may arrest and detain persons suspected of being deportable.<sup>260</sup> In deportation proceedings the government must establish that the person is deportable by "clear and convincing" evidence.<sup>261</sup> Persons in deportation proceedings may apply for discretionary relief to avoid deportation.

The INS has the authority to detain a person pending the determination of deportability or to release the person on a bond of at least \$500 or on his or her own recognizance.<sup>262</sup> One of the main purposes of INS

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<sup>255</sup> *Louis v. Nelson*, 544 F.Supp. 973, 980 n. 18 (S.D.Fla. 1982).

<sup>256</sup> *Ibid.*, at n. 19.

<sup>257</sup> *Ibid.*, at 1002-1003.

<sup>258</sup> Under 8 C.F.R. § 235.3(b), the INS is required to detain aliens who seek admission without documents or with documents that appear false on their face. Under 8 C.F.R. § 212.5, parole is described as an exception to detention. It is to be applied in cases in which an applicant has a serious medical condition, is pregnant, a juvenile, an infant, the beneficiary of an immigrant visa petition by a close relative, or a witness in a judicial or other proceeding. In such cases, the applicant must establish that he or she is not a security risk and is not likely to abscond. In practice, virtually all persons in exclusion proceedings are held in detention, without the possibility of release on bond.

<sup>259</sup> The "pilot project" allowed the INS district director in five urban districts to consider release of an excludable asylum seeker on a \$500 to \$2,500 bond, provided he or she: (1) has shown a reasonable basis for eligibility for refugee status; (2) is represented by an attorney or legal representative; (3) has a place to live and employment or other means of support.

<sup>260</sup> There are numerous grounds for deportation, including entry into the United States without inspection, entry with invalid or fraudulent documentation, violating non-immigrant visa status, being deportable at the time of entry, having committed a crime, and constituting a threat to the national security. See 8 U.S.C. § 1251.

<sup>261</sup> *Woodby v. INS*, 385 U.S. 276 (1966).

<sup>262</sup> 8 U.S.C. § 1252(a).



detention in deportation proceedings is to ensure that the arrested person appears at subsequent deportation hearings.<sup>263</sup> But INS officials recognize that detention discourages persons in deportation proceedings from pursuing defenses that they may have to deportation. They also believe that the threat of detention will discourage persons from illegally entering the United States. As then INS Commissioner Alan Nelson stated in announcing a new, tougher detention policy in south Texas, detention is "a deterrent in itself to illegal immigration."<sup>264</sup> Thus, although the statute provides that deportable aliens may be released on bond or on their own recognizance, in practice bonds often are set so high that they preclude release.

### **Types of Detention Facilities Used by the INS**

The INS uses several types of facilities for adult detention. The INS directly operates detention centers, called "Service Processing Centers, (SPCs)." These include facilities at El Centro and Terminal Island, California; Florence, Arizona; El Paso, Texas; and Port Isabel, Texas.<sup>265</sup> Detainees are also held on a short-term basis at other INS offices, such as Border Patrol stations and the Chula Vista Staging Facility south of San Diego, California.

In addition, the INS contracts with private for-profit companies to detain aliens in INS custody. These include facilities operated by Corrections Corporation of America in Laredo and Houston, Texas, and Eclectic Communications, Inc. in Imperial, California (for the detention of minors). The INS also regularly uses city and county jails and reimburses the local government for this service.<sup>266</sup>

Finally, the INS contracts with nonprofit organizations to provide "soft" detention for families. The conditions of detention at these facilities vary considerably and include the Salvation Army center at Tucson, Arizona, and Red Cross shelters in Texas.

### **Physical Abuse of INS Detainees**

Reports of abuse at detention facilities run by the INS follow a common pattern. Most cases involve excesses apparently meant as discipline, punishment, or warnings to detainees. In some cases, excessive force has been used to prevent or suppress detainee protests directed at the conditions in detention centers. At times, detention officers have acted as though there were no limits to their power over detainees.

The El Centro Asylum Project and the Southwest Refugee Rights Project have documented over a dozen cases in which adults testified that they were beaten by INS officers during their detention at the El Centro SPC in 1990.<sup>267</sup> These incidents reveal a common pattern. In practically every case, a detention

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<sup>263</sup> In *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976), the Board of Immigration Appeals stated that an alien in deportation proceedings "generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security [citation omitted] or that he is a poor bail risk."

<sup>264</sup> INS press release, February 20, 1989.

<sup>265</sup> Other facilities are located in Miami, Florida; New York, New York; and Boston, Massachusetts.

<sup>266</sup> The INS also houses detainees arrested in the border states at the facility operated by the Bureau of Prisons at Oakdale, Louisiana. This facility is the largest detention facility used by INS.

<sup>267</sup> Ten of the detainees who were subsequently released or deported filed a lawsuit in federal district court on July 25,

officer singled out a detainee for beating because he disliked his "attitude" or for some other pretext. The detainee was then locked in the shower room at the Processing building and hit by the officer in the stomach, chest, and sometimes other parts of the body. In several cases, other officers watched passively. According to many detainees, verbal abuse is widespread at El Centro, and guards routinely use profanity in insulting detainees.

In early March 1990, the INS brought a large team of officers in riot gear into the Port Isabel, Texas facility, allegedly to prevent a protest by detainees over conditions. Detainee Jorge Salvador Guzmán reported that on March 5, 1990:

About 28 or 30 guards entered into my barracks, 34A, dressed in riot gear. The guards called out my name and began to round up the people on their list. They grabbed me from behind the head by my hair, they pushed me to the floor, they kicked their knees into my back to tie my hands behind me tightly. There were three guards working me over at that time. They got me up and pushed me against the door so that my chest banged against the door to open it. We spent the whole night in a bus and they untied us about two or three hours later.<sup>268</sup>

According to Guzmán, in the morning the detainees on the bus were accused of planning a hunger strike and lacking respect for the guards. They were then held incommunicado in another barracks.

Sebastián Rivas Linares similarly reported that he and about 34 other detainees "were roughly and forcibly removed from the barracks, some in various stages of dress, and placed with our hands tied tightly together behind our backs." He suffered bruises on his knee and an abrasion on his ankle.<sup>269</sup> Eliceo Montufas reported:

I was in the shower at the time they entered and they came into the shower. They called me out and I asked that they wait until I dressed; they didn't allow me to put on my clothes and one hit me in the stomach, the ribs. Then one official threw me to the floor and another tied by hands behind my back, and they took me out only in underwear.<sup>270</sup>

Alvaro Ernesto Galdámez Orellana, another detainee, gave a similar account.<sup>271</sup>

Adeolu Alabintan, also detained at Port Isabel, was not taken to the bus that night, but was punished the following day:

On Tuesday, March 6, 1990, in the morning I was told by a security guard to make my bed. I made my bed and asked the guard that he talk to me in a respectful manner. A few minutes later when I exited my barracks to go to breakfast, I was pointed out by the same security guard to two INS guards dressed in anti-riot gear. The two guards came up to me,

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1991, against the INS and the individual detention officers alleged to have beaten them.

<sup>268</sup> Interview with Proyecto Libertad.

<sup>269</sup> *Ibid.*

<sup>270</sup> *Ibid.*

<sup>271</sup> *Ibid.*

grabbed me and threw me to the ground. The INS guards dressed in anti-riot gear then began to stomp on my neck. Next, my hands were tied behind my back with plastic handcuffs and I was placed on a bus with approximately 35 other men.<sup>272</sup>

As with reports of abuse by Border Patrol agents, these incidents demonstrate the complete inadequacy of INS internal complaint procedures. Although detainees complained to the INS about several of these incidents, the INS did not investigate. Instead there is evidence that it covered up abuses.<sup>273</sup>

For example, in June 1990, Guatemalan detainee César Morán Zuñiga stated at his deportation hearing at Florence, Arizona, that he had been beaten while detained in El Centro by two INS officers whom he named. The immigration judge at that proceeding directed Zuñiga to report the matter to the Assistant Officer in Charge (OIC) of the Florence detention center. The Florence Assistant OIC called the OIC at El Centro, who told him that the matter was "taken care of." No report was made to the Office of the Inspector General (OIG). Moreover, there is no indication that the officers involved in the beating were disciplined.<sup>274</sup>

Even when complaints reach the OIG, thorough investigations are rare. On August 4, 1990, detainee Luna Molina presented a letter to INS officials at El Centro in which he alleged that he had been beaten by a named officer and that, as a result, his shoulder had been dislocated. Even though his medical records confirmed the injury, the OIG concluded a preliminary investigation on August 10 without interviewing Luna Molina; it determined that a full-blown investigation of his complaint was not warranted.<sup>275</sup>

A common problem at many city and county jails used by the INS is that detainees in immigration proceedings who have no criminal background or criminal charges pending against them are held with prisoners accused or convicted of violent crimes. As a result, many INS detainees, including refugees and those unfamiliar with U.S. culture or the U.S. criminal justice system, are victimized by hardened criminals.

According to a Sri Lankan who was detained at the Santa Cruz County Jail in Nogales, Arizona, in the summer of 1989:

Many of the other prisoners were there because of criminal charges. However, myself and five men from Central America were being held because of immigration problems.

While in the Santa Cruz County Jail, both the Central American men and I were subjected to verbal and physical abuse by the other prisoners. They ordered us to do menial tasks for them. If we refused, they punished us.

At one point during my stay at the jail, I witnessed an unprovoked attack on one of the Central American detainees by several other prisoners. He was beaten until he fell to the floor bleeding. I tried to get medical attention for him, but my request was denied. Another time, I fell and seriously injured my knee. I was in pain and made a written request for

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<sup>272</sup> *Ibid.*

<sup>273</sup> Under El Centro's Detainee Grievance Procedures, staff and detainees are encouraged to reach an informal resolution of any complaint. If this cannot be achieved, a detainee may file a complaint with the Chief Detention Enforcement Officer on a written complaint form. If the problem is still not resolved, the procedures permit an appeal to the (OIC).

<sup>274</sup> Information provided by Southwest Refugee Rights Project.

<sup>275</sup> *Ibid.*

medical attention, but I did not receive any. I also requested a transfer to another cell after the Central American was beaten. This request was also denied.

One thing the other prisoners did to torment us was to prevent us from going to sleep. They would throw things at us. On occasion, they would put paper between my toes and light it on fire when I was trying to sleep.<sup>276</sup>

A Honduran, detained at the same jail three months later, described similar conduct by inmates. He added:

Another thing the criminal inmates do is burn toilet paper to heat coffee. When the jail officials catch them doing this, we are all punished. One form of punishment is being subjected to very cold temperatures. They turn on the air conditioning and blast cold air into the room for one or two days. The last time this happened was yesterday and the day before.<sup>277</sup>

These sorts of problems tend to occur at smaller jails that do not have the capacity to segregate INS detainees from convicted criminals.

The use of strip searches at a number of facilities, both INS and contract, has generated controversy. On March 7, 1988, the U.S. District Court for the Central District of California enjoined the INS Western Region from subjecting detained minors to routine strip searches upon admission to INS facilities, after visits with persons other than attorneys (the policy of strip-searching minors after attorney visits had been abolished previously), or at any other time absent demonstrable reasonable cause.<sup>278</sup>

Strip searches are still routinely conducted on admission to many facilities, and use of the practice at other times continues to be a problem. Nigerian detainee Mark Phillip Oduah reported that he was repeatedly subjected to strip searches between May and September 1990 at El Centro. Several searches included visual body cavity inspection, and on one occasion he was left standing naked for five minutes. Once, when he asked why he and another detainee were being searched, an officer told him that it was because the INS had received an anonymous tip that the two were "preparing a petition."

### **Conditions of Detention in INS Service Processing Centers**

Most of the INS Service Processing Centers along the southern border are similar in design and operation. They were built to be short-term detention facilities, not to hold detainees for long periods. But the increasing detention of asylum applicants during the 1980s, combined with increases in bond amounts, has resulted in detainees being held there for months, and sometimes even years.<sup>279</sup> During the 1980s, INS

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<sup>276</sup> Declaration of Roger Cecil Van Rooyen, October 26, 1989.

<sup>277</sup> Declaration of Juan Manuel Mejía-Nolasco, December 20, 1989.

<sup>278</sup> *Flores v. Meese*, 681 F. Supp. 665 (C.D.Cal. 1988).

<sup>279</sup> The one notable exception is the Service Processing Center at Florence, Arizona, which has been newly expanded and renovated as a modern facility.

officials showed an appalling lack of concern for the suffering of long-term detainees, and only slowly, and in response to litigation, were improvements made in detention conditions.

For example, the El Centro SPC is located in the Imperial Valley, where temperatures in the summer routinely exceed 110 degrees Fahrenheit. In 1981, the capacity of the facility was 330 detainees, though the population often exceeded 500.<sup>280</sup> Although detainees slept in air-conditioned barracks, they were not permitted inside the barracks from 6:00 A.M. until nightfall. During this time the entire population was held in an outdoor, fenced-in "recreation area," where the only shade was provided by a "shade structure," consisting of a roof suspended over a slab of concrete. INS eventually erected additional shade structures, but for over a year it was not possible for all detainees to fit in the shaded area.<sup>281</sup> A doctor who visited the center in 1981 found that scabies, a highly contagious skin condition caused by parasitic mites and readily treated with over-the-counter medicine, was prevalent among detainees.<sup>282</sup> Only two telephones were available to the entire detained population, and detainees waited in line for hours to contact attorneys or relatives. Detainees were not permitted to receive any written materials except the New Testament. The INS sought to justify this policy to a federal district court by arguing that detainees could use written materials to clog toilets.

In March 1982, a class action lawsuit was filed on behalf of all Salvadorans detained by the INS challenging conditions at El Centro. The suit alleged that conditions there denied detainees adequate access to legal representation. In April 1982, the district court issued a preliminary injunction that required the INS to install more telephones at El Centro, expand visiting hours for attorneys and allow them for paralegals, and allow detainees to receive written materials.<sup>283</sup> Yet even when faced with litigation, the INS failed to move quickly to improve detention conditions.

For example, the practice of detaining inmates outside in the daytime did not stop until detainees engaged in a hunger strike in the summer of 1985.<sup>284</sup> That hunger strike was organized to protest outdoor daytime confinement, the lack of medical care, the lack of adequate and clean toilets, and regular verbal and physical abuse by guards. Initially some 180 detainees protested by refusing to leave the recreation area. After three days their number had diminished to about 80, and the INS mobilized extra guards in riot gear to remove them. Detainees testified that although they had kneeled and offered no resistance, INS guards kicked, beat, and dragged them from the recreation area, and afterwards left them lying for hours with their hands tied behind their backs. A video made by the INS at the time supports their testimony.

Until a library was established in late 1985, the only reading materials available to detainees were newspapers and the Bible.<sup>285</sup> Even after a library was established, the detainees' access was restricted until

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<sup>280</sup> Deposition of Harry F. Malone, then Officer-in-Charge of facility, 1983.

<sup>281</sup> Memorandum of Harry F. Malone, 1981.

<sup>282</sup> Deposition of Dr. Davida Coady, May 21, 1984, taken in preparation for the *Orantes* litigation.

<sup>283</sup> *Orantes-Hernandez v. Smith*, 541 F.Supp. 351 (C.D.Cal. 1982).

<sup>284</sup> Following the hunger strike, the INS began allowing detainees to go to the barracks in the afternoon. The officer in charge who established this policy has testified that he was able to do so because the INS hired additional staff under contract with a security agency -- but that only one or two additional staff were needed to carry out this change.

<sup>285</sup> Depositions taken in the context of the *Orantes* litigation of DeLeon (September 19, 1986), Carcamo Marroquín (February 24, 1983), Gómez Murillo (December 3-4, 1985), Linares Landaverde (January 16-17, 1986), and Reyes Palacios (February 6, 1986).

late 1986.<sup>286</sup> Even now, the only legal material in Spanish in the library is a paperback published by the ACLU before the passage of the 1980 Refugee Act.

The conditions at El Centro are duplicated at other SPCs along the border. Several facilities in extremely hot climates hold detainees outdoors during most of the day. At the El Paso SPC, detainees are held from daybreak until after dinner in a fenced-in gravel and cement area with two shade structures and a recreation building without air conditioning that is too small for all detainees to be inside at once. At the Port Isabel, Texas SPC, male detainees are held from early morning until after dinner in a fenced-in recreation area that contains several shade structures and a small room without air conditioning that is used as a library. At both facilities detainees are kept in the barracks during "inclement" weather. Hot days, however, are not considered "inclement."

Detainees at El Paso and El Centro have complained that they are not provided with shoes. Walking on the cement in the hot weather thus is difficult. At El Paso, detainees also have complained repeatedly that they are not provided with socks, underwear, or shampoo.

There is severe overcrowding at the Port Isabel SPC, where INS launched a "detention" policy in 1989. Pursuant to this policy, the number of beds in the facility was increased from 425 in January 1989 to 5,000 the following month. This was done by double bunking existing beds, adding more beds in the barracks, and erecting large tents throughout the SPC. The detainee population hit a peak of over 2,400 at the end of March 1989.<sup>287</sup> The resultant overcrowding made it impossible for the SPC to provide for detainees' basic needs. Women held in some of the tents were denied access to telephones and showers for over one week and to clean uniforms for over two weeks.

After detainees filed a contempt action against the INS for violating provisions of a permanent injunction, the agency began lowering bonds which, consequently, lowered the detainee population.<sup>288</sup> The tents were removed or used for storage. The barracks, however, continue to house a population that is more than double the previous maximum capacity of the SPC.<sup>289</sup> Although there is a small "recreation area" in the barracks, most detainees are effectively confined to their bunks due to limited space.

Adequate living space is also a serious problem at other SPCs. At El Centro, each barracks consists of two dormitories, connected by a bathroom. Each dormitory houses approximately 100 detainees in bunk beds; there is only one table and few chairs.<sup>290</sup> At El Paso, each barracks houses 124 detainees in double bunks. There are no tables in the barracks.

Another recurrent complaint is inadequate medical care. Detention center infirmaries are staffed by medical personnel from the Public Health Service who care for patients only on weekdays. Their job is to provide routine care and to refer those needing urgent or specialized care to outside hospitals or clinics.

Individuals with medical problems requiring special attention — such as diabetes, asthma, or heart conditions — have complained that they do not receive adequate care. The fact that health professionals are not available 24 hours a day, and the lack of bed space at detention center infirmaries, also pose a hardship for those who require close monitoring or medical segregation.

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<sup>286</sup> *Ibid.*, DeLeon deposition, p. 36.

<sup>287</sup> The increase in population was principally the result of a dramatic increase in the number of arrests by Border Patrol agents, and a new policy of not releasing anyone on their own recognizance.

<sup>288</sup> *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990).

<sup>289</sup> For example, Barracks 34, which in 1988 held a maximum of 50 detainees per floor, can now hold 138 per floor.

<sup>290</sup> This was reduced from 120 detainees per dormitory a few years ago.

A diabetic detainee at the El Paso detention center reported that during six weeks of incarceration his insulin supply ran out on a weekend, when no medical personnel were on duty, and he had to do without his regular dosage of insulin and endure a throbbing headache until the next day; on one occasion, his supply of syringes ran out in the late afternoon, after medical personnel had gone home, and he had to re-inject himself with a used syringe; and the institution failed to provide him with a special diet and, as a result, he suffered from migraine headaches and uncontrollable shaking.<sup>291</sup>

In January 1991, another El Centro detainee with a known heart problem was placed in solitary confinement for his condition, rather than being given special treatment. When he experienced extreme chest pain and heart palpitations, no ambulance was called for two hours, allegedly because the guards waited for the nurses to return from lunch, and the nurses then waited for the doctor.<sup>292</sup>

An asthmatic held at the El Paso detention center reported missing four doses of medication because he was not called to the infirmary, even though he had signed up for sick call. As a result he suffered pain and severe breathing difficulty.<sup>293</sup>

In some of the Service Processing Centers, detainees requiring monitoring or segregation for medical purposes are placed in cells used for disciplinary confinement. The stark conditions in these cells — which contain nothing but a bed, sink, and urinal — can be demoralizing to an ill person. In addition, their isolation makes them inappropriate for individuals who require close monitoring.

At most facilities, dental and psychiatric care are not provided. Although some centers send detainees to outside hospitals for psychiatric care, others simply warehouse them in segregation.

### **Conditions of Detention in INS Holding Facilities**

Some of the worst detention conditions are found at the many facilities used by the INS for short periods before detainees are moved to Service Processing Centers or other locations. These facilities include holding cells in Border Patrol stations, and INS Staging Facilities in Chula Vista and Los Angeles, California.

At Border Patrol stations, detainees usually are kept in holding cells until they are transferred to more permanent facilities. Typically there is no telephone in the holding cell, although in some circumstances the Border Patrol is required to make a telephone available at the request of a detainee.<sup>294</sup>

The INS Staging Facility at Chula Vista is intended to be a temporary detention site until transportation can be arranged to a Service Processing Center or contract facility. Nonetheless, it is common for detainees to be held there for several days. The facility has no library, and the only recreational facilities are in small caged areas.

The INS Staging Facility in Los Angeles is designed to be a holding area for detainees who have hearings in the Immigration Court in Los Angeles. They are not supposed to be held there overnight. But it is not uncommon for detainees to be brought there daily for several days in a row because their court dates are not certain. This causes detainees significant hardship. The staging facility either offers no food or

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<sup>291</sup> Information provided by Southwest Refugee Rights Project, Tuscon, Arizona.

<sup>292</sup> Information furnished by Central American Refugee Center, Los Angeles, California.

<sup>293</sup> Information provided by Southwest Refugee Rights Project, Tuscon, Arizona.

<sup>294</sup> The *Orantes* injunction requires that class members (detained Salvadorans) be allowed access to telephones at locations where they are processed. In addition, the *Perez-Funez* injunction requires that the INS allow detained unaccompanied minors access to telephones to communicate with legal services organizations and relatives.

provides only a hamburger or burrito. Detainees are confined to a cell and have no recreational opportunities or no reading or writing materials. The difficulties experienced by detainees in these temporary facilities are exacerbated by transfer from one such facility to another. The cumulative effect is to discourage detainees from exercising their right to contest deportation at a hearing. For example, **Mauricio Colocho Recinos** testified that after his arrest by the INS in southern Arizona in 1986 he was placed in a cell at a Border Patrol office where he was held for 12 to 14 hours without access to a telephone or food. He was then put on a bus with two other detainees and taken to Tucson. He was not given food at any time during the trip.

[T]he officer got out to get some food for himself. And then we found a cigarette butt on the bus and we lit it up and all three of us smoked. When he came back, he said, "Who's been smoking?" and the three of us said all three. He opened the door of the bus and he went in and he said, "Okay, come forward." And we walked towards the front. And my friend, a Salvadoran, he was more towards the front and he approached him. He said, "You know what, you're not going to play with me. I'm going to beat you up and I'm going to start with you ..." [H]e got out his gun at the same time and he put the revolver to the temple of my friend.<sup>295</sup>

On arrival at Tucson, Colocho Recinos was placed in a small cell, four meters by four meters. The number of other detainees in the cell fluctuated between 16 to 36. He was held in this cell for four days. There were no beds in the cell, only benches and three mattresses that the INS placed on the floor at night. The only food they were given was one hamburger at each meal; Colocho Recinos testified that he was extremely hungry. When a friend complained because of the lack of food and showers, he was taken out of the cell "by his collar" and then put back in with handcuffs on his wrists and a chain around his waist. When Colocho Recinos asked to use the telephone, he was told "there was no phone for us." Colocho Recinos stated that, after four days in this jail, "I was desperate. I had already lost faith and hope in what they had told me about political asylum being a possibility."<sup>296</sup>

From the jail, Colocho Recinos was taken to a facility run by the Salvation Army in Tucson, where there was no phone available for his use, and from there to the INS detention center at El Centro, California. Although El Centro was the first location where a telephone was available to him, Colocho Recinos was not able to contact his friend in the United States because his wallet with his friend's address was held with his other belongings when he was placed in the facility. Although he repeatedly told the officers that he needed to get a phone number from his belongings, he was not allowed access to his wallet during the 12-15 days he was at El Centro. Having no other address, he wrote to his mother and wife in El Salvador. Despite the preliminary injunction in *Orantes*, he was not given a list of legal services on arrival at El Centro.

From El Centro, Colocho Recinos was handcuffed, chained by the waist, put on a bus, and taken to an airport. He was put on an airplane, still in chains, and flown for about six hours to Oakdale, Louisiana. He was not told where he was going, or even whether he was being transferred or deported. Because of his transfer to Oakdale, he did not receive a reply from his letter to his mother requesting the telephone number of his brother in the United States.

Colocho Recinos' experiences illustrate not only the difficult conditions faced by INS detainees, but also the profoundly discouraging impact those conditions have on the ability of detainees to assert their legal

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<sup>295</sup> Testimony of Colocho Recinos during the *Orantes* trial, July 18, 1986.

<sup>296</sup> *Ibid.*



rights while they are held in custody. All of the facilities where he was held are still in use, and at the Arizona facilities the physical conditions are virtually unchanged. The permanent injunction in *Orantes*, which was issued in 1988, prohibits transfer of Salvadorans from the district of arrest for one week to allow them time to find a lawyer. For all other nationalities, however, transfer shortly following arrest is common.

### **Conditions of Detention in City and County Jails**

The INS uses hundreds of city and county jails throughout the country for temporary detention of persons in its custody. At some of these jails INS detainees predominate. Conditions vary widely; the cases reported here illustrate typical problems.

A common problem at jails is that the INS contracts orally for the use of space and makes few or no special provisions regarding the treatment of INS detainees. Many jails take pride that INS detainees are treated just like other prisoners. They make no provision for the special needs of INS detainees, such as Spanish language materials, information regarding U.S. immigration laws and procedures, lists of organizations that provide free or low-cost legal representation in immigration proceedings, and access to telephones during the evening.

At many of these facilities, conditions are physically harsher than at Service Processing Centers. For example, at the Euless and North Richland Hills jails near Dallas, Texas, INS detainees are held in cells with bunks but without any regular recreation. They are taken out of their cells only for a few minutes once a day to have a shower. At the North Richland Hills jail as many as nine men may be held in a cell that is 12 feet by 15 feet for the entire day.<sup>297</sup> INS detainees do not have access to a library, written materials or private telephones.

Similar problems have existed at jails used by the INS in Arizona. Probably the worst facility there was the Cochise County jail in Sierra Vista, which the INS finally stopped using after receiving complaints from Southern Arizona Legal Aid, Inc. in May 1990. At this facility INS detainees were held for as long as seven weeks without exercising or seeing the light of day. Detainees spent their days in a small cell with no access to writing or legal materials. The INS has taken steps to limit such abuses in Arizona. In addition to no longer using the Sierra Vista facility, it has limited the length of time that detainees may be kept in other local jails.

Legal challenges to harsh conditions of detention at local jails have, by and large, not been successful. In one lawsuit brought by persons who were held in INS custody at the Lubbock city jail in the late 1970s, the court found that the cells and showers were filled with trash; detainees were not given soap or towels; and they were forced to sleep on cardboard boxes or sheet metal because there were no mattresses or blankets. The court found that while the INS was negligent in failing to inspect the jails regularly, that negligence was not enough to establish liability.<sup>298</sup>

### **Conditions of Detention in Contract Facilities**

Conditions at contract facilities vary widely. In Laredo, Texas, the Corrections Corporation of America operates a facility for INS detainees, state criminal detainees, and juvenile offenders. Each group is housed separately; INS detainees are held in one dormitory for women and three for men. The dormitories

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<sup>297</sup> Declaration of Margarito Rivera Ochoa, September 10, 1988, in context of monitoring the *Orantes* injunction.

<sup>298</sup> *Ortega v. Rowe*, 796 F.2d 765 (5th Cir. 1986).

contain from 25 to 50 beds. Each dormitory contains one to three telephones, bathrooms, a television, and some tables. The facility has a library, but the only materials in Spanish are comic books and a copy of the New Testament. There is an outside recreation area where detainees spend an hour and a half each day, but as with the Service Processing Centers, there is inadequate shade for the extremely hot and dry climate. There is gym equipment, a basketball court, and a small soccer field, but only a small tin roof over a cement floor to offer any shade.

## **Due Process Abuses of INS Detainees**

### **Access to Telephones, Information about Free or Low-Cost Counsel, and Private Communications with Counsel**

The INS's failure to advise arrested persons of their legal rights has led to lawsuits, and ultimately injunctions requiring them to do so.<sup>299</sup> Despite these injunctions, the practice continues. In 1988, the Federal District Court for the Central District of California issued a nationwide permanent injunction against the INS, finding, among other things, that the INS had failed to provide detainees adequate access to legal representation.<sup>300</sup> The permanent injunction requires the INS to allow attorneys and paralegals reasonable access to detainees between 9:00 A.M. and 9:30 P.M. except for such limitations as are required by reasonable security measures; to provide private telephone facilities to detainees, and at least one telephone for every 25 detainees; to make available to detainees updated lists of available free and low cost legal services, both during processing and on arrival at detention centers; to allow detainees to receive any written materials, except when the security of the facility would be endangered; to provide detainees with writing materials including pens, pencils, paper and typewriters; and to make available legal and self-help materials.

Despite these provisions, serious difficulties with access to counsel continue at INS Service Processing Centers. At several, access to telephones is still a major problem. The most striking telephone problem arose during the implementation of the "detention" policy in south Texas. When the number of detainees held in the Port Isabel detention center increased by nearly 2,000 in March 1989, the INS made no corresponding increase in the number of telephones. As a result, detainees held in tents were kept incommunicado for periods of over one week. The difficulties with telephone use have been ameliorated by a reduction in the detainee population after contempt proceedings were brought against the INS, as well as by an increase in the number of phones. But few of the telephones in the detention center are coin phones; on most, only collect calls within the United States may be made. As a result, detainees have great difficulty calling relatives in their home countries, or calling attorneys or anyone else who does not accept collect phone calls.

Similarly at El Paso, Florence, and El Centro, nearly all of the telephones available to detainees permit only collect calls. At El Paso, up until late 1990, there were no telephones in the barracks, and all of the telephones were collect-call phones kept in a fenced-in area to which detainees had to request access. Detainees often had no access to telephones in the evening because the INS failed to escort them to this area. As a result, many detainees were unable to reach relatives who worked during the day.

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<sup>299</sup> *Orantes-Hernandez v. Meese*, 541 F. Supp. 1488 (C.D. Cal. 1988); *Perez-Funez v. District Director*, 619 F. Supp. 656 (C.D. Cal. 1985); *Vallejo v. INS*, C.D. Cal. No. 78-1912-WMB.

<sup>300</sup> *Orantes-Hernandez v. Meese*, 685 F.Supp. 1488 (C.D.Cal. 1988), *aff'd sub nom Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990).

Lack of privacy for communication with attorneys is a major problem at several facilities. At the El Paso SPC, the INS addressed this problem only in late 1990. Before then attorney visits were held in a large, dimly lit room. A plexiglass divider separated the detainee area from the attorney area. The lighting made it difficult for the attorney to see his or her client, and the plexiglass barrier made it necessary to speak loudly in order to be heard. Conversations throughout the room could be overheard by other detainees and attorneys and by the INS guards who frequently were present. The INS has recently constructed barriers to separate visitors from each other, but has yet to soundproof the room. The lack of privacy discourages detainees from speaking about sensitive or personal matters, which often are relevant to political asylum claims. Similar problems exist at the Port Isabel SPC, where some attorney-client meetings take place in a similar area.

At the INS Service Processing Center in San Pedro, California, which opened in the late summer of 1991, attorneys and legal representatives often experience delays of two to three hours between the time that they request to see a client and the time that the client is produced. Many attorney visits, especially in cases in which an attorney seeks to visit more than one detainee, are limited to fifteen minutes. The visiting area is poorly lit and does not allow for any exchange of documents. The collect-call-only telephones in the facility are not equipped to handle calls to "800" telephone numbers, although many of the immigrants rights law offices in the Los Angeles area have such numbers. In addition, detainees' access to telephones and to writing materials is restricted without explanation.

Probably the greatest impediment to detainee communication with attorneys is the lack of free or low-cost attorneys in the areas where detainees are held.<sup>301</sup> The detention centers at Florence and El Centro, though located in small cities, are long distances from any major metropolitan area with an established immigration bar. The detention center at Port Isabel is a 45-minute drive from the Brownsville-Harlingen-McAllen metropolitan area. As a result, *pro bono* attorneys are rarely available to assist detainees.<sup>302</sup>

This problem is exacerbated by the INS' failure to provide detainees with accurate information about available free and low-cost legal services. Although INS regulations require that a list of available free and low-cost legal services be provided to every person placed in deportation proceedings,<sup>303</sup> federal courts have repeatedly found that the INS violated this provision, either by not providing any list, or by providing outdated lists.<sup>304</sup> In *Orantes-Hernandez v. Meese*, the court found that despite two injunctions, as well as applicable INS regulations, the INS had acted in bad faith by failing to provide lists of available legal services to detained Salvadorans.<sup>305</sup>

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<sup>301</sup> The Oakdale, Louisiana facility is located a substantial distance from any sizeable city, much less any major metropolitan area with an immigration bar.

<sup>302</sup> Nonprofit organizations, many of which do not have attorneys on staff, have struggled to fill this void by providing legal assistance to a small percentage of detainees. These include, Proyecto Libertad in Harlingen, Texas; Las Americas Refugee Project in El Paso, Texas; Ecumenical Immigration Services in Oakdale, Louisiana; El Centro Asylum Project and Centro de Asuntos Migratorios in El Centro, California; and the Florence Asylum Project. In addition, the American Bar Association has established a project to bring *pro bono* attorneys from other parts of the country to represent detainees at Port Isabel. Also, a project at Florence places detainee cases with *pro bono* attorneys in Tucson and Phoenix. In both cases, only a small portion of the detainee population can be assisted.

<sup>303</sup> 8 C.F.R. § 242.1 (c).

<sup>304</sup> *Louis v. Nelson*, 544 F. Supp. 973 (S.D. Fla. 1982); *Perez-Funez v. District Director*, 619 F.Supp. 656 (C.D. Cal. 1985); *Orantes-Hernandez v. Meese*, 685 F.Supp. 1488 (C.D. Cal. 1988).

<sup>305</sup> 685 F. Supp. at 1498.

All of the SPCs along the border now have at least some kind of library, although at most facilities this is only a small collection of books in English. At most SPCs the only book in Spanish is the New Testament, which often is available in massive quantities.

## **Bonds**

Across the country there are drastic differences in the amount of bond required to obtain release from INS detention. For example, a Guatemalan who recently entered the United States for the first time might be released on his or her own recognizance in southern California, yet if arrested near El Paso, would likely be held on \$7,500 bond. Certain areas of the country, such as El Paso and Laredo, have a history of requiring high bonds. As a result, many detainees languish in detention centers with no realistic possibility of release pending resolution of their claims for asylum or other challenges to exclusion or deportation.

There is often a direct relationship between the amount of bond and the availability of detention space. Even in the same location, bond amounts in similar cases may vary considerably depending on whether space is available. For example, in March 1991, Honduran Roque Reconco Blanco, who had recently entered the country, was detained in New Mexico and brought to El Paso, where he was released on his own recognizance with instructions to report periodically to the local INS office. When he reported to the INS, he was taken into custody. A bond of \$7,500 was imposed because detention space had become available.<sup>306</sup>

The possibility of being taken into custody or being required to pay a high bond discourages persons in deportation proceedings who were released on their own recognizance from fulfilling the reporting conditions of their release. High bonds also cause many detainees with valid political asylum claims to despair, and ultimately risk their safety by returning to their countries rather than remain in indefinite, long-term detention.

## **Solitary Confinement**

In *Orantes*, the court found that the INS's policy of punishing detainees for alleged disciplinary breaches by placing them in solitary confinement without notice of the charges against them and without disciplinary hearings resulted in unjustified punishment. The court ordered the INS to refrain from imposing solitary confinement for more than 24 hours unless written notice of the grounds for the punishment, and a hearing, are provided. In 1988, responding to the INS's use of "administrative segregation" to circumvent the court's prior order, the court ordered the INS to provide notice and a hearing even when solitary confinement is deemed "administrative" rather than punitive.<sup>307</sup>

Despite these court orders, there have been reports of misuse of solitary confinement at the El Centro SPC. Officers are provided with a long list of punishable acts, but the list is not made available to detainees. The acts deemed punishable are wide-reaching, and include the peaceful assertion of legal rights. Signing a petition, for example, is a prohibited act that is punishable by up to 30 days' solitary confinement.

Solitary confinement is also used to punish inmates who complain that they were beaten by officers. Most of these detainees who made such allegations during 1990 were subsequently placed in solitary

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<sup>306</sup> Information provided by Las Americas Refugee Project.

<sup>307</sup> Preliminary Injunction, *Orantes-Hernandez v. Smith*, 541 F. Supp. at 385.

confinement without a hearing for as long as two weeks.

This chapter has highlighted a range of abuses commonly faced by persons in INS custody. As a matter of policy, the INS should stop detaining undocumented migrants who pose no risk to the safety or property of others and who are not flight risks. In addition, at all confinement facilities, administrators and guards must be trained to regard everyone in their custody as human beings whose basic needs must be adequately met. All detainees are entitled to be treated with decency and respect. Their due process and all other legal rights must be respected absolutely. Anyone found abusing a detainee or otherwise interfering with a detainee's exercise of his or her rights should face swift and certain punishment.

## VIII. DETENTION OF UNDOCUMENTED MIGRANT CHILDREN

Adults are not the only ones subjected to cruel treatment in detention and due process violations. In a federal lawsuit begun in 1985, *Flores v. Meese*, the plaintiffs charged that the INS was subjecting children to harsh detention conditions that failed to meet their basic needs. They further charged that an INS policy requiring children to be released only to parents or legal guardians was overly restrictive and exploited children by using them as "bait" to compel undocumented parents to turn themselves in to the INS to obtain the release of their children. The children's plight was described by federal appellate judge Betty Fletcher:

The facts of this case are among the most disturbing I have confronted in my years on the court. Children are being held in detention by the INS for as long as two years in highly inappropriate conditions out of a professed concern for their welfare. When the case first came before the district court, the only requirement for institutionalizing a child was a determination by an INS agent — not a judge — that there was prima facie evidence of the child's deportability. Upon such a slender showing, children were put into "detention centers" for indeterminate periods of time, deprived of education, recreation, and visitation, commingled with adults of both sexes and subjected to strip searches with no showing of cause. In the INS's Western Region, a child could escape such confinement only if a parent or legal guardian, or "in unusual and extraordinary cases, a responsible adult, came forward to seek release." The rationale for this regulation was to assure the "minor's welfare and safety" and to protect the agency from legal liability.<sup>308</sup>

Despite improvements made during the course of the *Flores* litigation, serious flaws remain in the way the INS deals with the thousands of children it apprehends annually. The INS fails to employ child welfare and federal standards applicable to children in the juvenile justice system. Such standards presume that detention is adverse to a child's interest, and therefore require pretrial release to a parent, guardian, custodian, "or other responsible party."<sup>309</sup> They distinguish between delinquent and non-delinquent children, requiring that the former not be placed in secure facilities.<sup>310</sup> They also encourage the creation of "community-based alternatives to confinement in secure detention facilities"<sup>311</sup> and require placement of juveniles in such facilities or in foster homes whenever possible.<sup>312</sup>

Rather than incorporate these standards, which display solicitude for the rights of minors, the INS

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<sup>308</sup> *Flores by Galvez-Maldonado v. Meese*, 934 F.2d 991, 1014 (9th Cir. 1990) *vacated en banc* 942 F.2d 1352 (9th Cir. 1991), *cert. granted sub nom Barr v. Flores*, (Dec. 7, 1991) (No. 91-905).

<sup>309</sup> 18 U.S.C. § 5034.

<sup>310</sup> 42 U.S.C. § 5633(a)(13); Institute of Judicial Administration/American Bar Association Joint Commission on Juvenile Justice Standards, "Standards Relating to Interim Status: The Release, Control, and Detention of Accused Juvenile Offenders Between Arrest and Deposition," Standard 10.4.B., 1980.

<sup>311</sup> 42 U.S.C. § 5633(a)(10).

<sup>312</sup> 18 U.S.C. § 5039.

engages in practices that fail to ensure that all minors in detention understand and are able to exercise their rights, unnecessarily restricts release from detention, confines many minors under substandard conditions with inadequate care, and fails to protect adequately the well being of minors in its custody.

### Understanding and Exercising Legal Rights

In 1985, a federal district court issued a permanent order enjoining the INS from obtaining voluntary departure agreements from detained children unaccompanied by parents or legal guardians. The court reasoned:

In the instant case, unaccompanied children of tender years encounter a stressful situation in which they are forced to make critical decisions. Their interrogators are foreign and authoritarian. The environment is new and the culture completely different.... In short, it is obvious to the Court that the situation faced by unaccompanied minor aliens is inherently coercive....<sup>313</sup>

The court concluded that "unaccompanied minors do not understand their rights when confronted with the voluntary departure form."<sup>314</sup>

Among the cases considered by the court was that of a Mexican boy who had resided in the United States for over seven years. His length of residence made him eligible for suspension of deportation, which can lead to lawful permanent resident status. Yet, after his arrest he was compelled to accept voluntary departure to Mexico. No one explained to him that by doing so he lost his eligibility for suspension of deportation.

In the permanent injunction, the court required the INS to place detained unaccompanied minors in telephonic communication with relatives or legal assistance agencies,<sup>315</sup> and to advise them of their rights in a way that they can understand them before offering voluntary departure.

Yet the INS has not always honored the permanent injunction. One 15-year-old Guatemalan girl apprehended near Yuma, Arizona in May 1990 was told by the Border Patrol that, because she had no family in the United States, she would have to be deported. The agent presented her with and had her sign the voluntary departure form, although she is illiterate and had no idea what she was signing. The agent did not advise her of her rights, nor did he ensure that she made contact with a legal organization prior to waiving her right to a hearing, as required by the injunction.<sup>316</sup>

Similarly, a 15-year-old was told by an INS agent in December 1990 to sign a paper: He said, 'put your name right here.' He did not explain what the paper said, and he did not read it to me. I did not know that I was signing to be deported. I do not wish to be deported

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<sup>313</sup> *Perez-Funez v. District Director, I.N.S.*, 619 Supp. 656, 662 (C.D. Calif. 1985).

<sup>314</sup> *Ibid.*, at 661.

<sup>315</sup> A Mexican or Canadian minor need only be informed of the *option* of placing a call.

<sup>316</sup> Declaration of Johana, a Guatemalan minor, June 15, 1990, taken by Esperanza Para los Niños.

to Guatemala. I came to the United States to seek refuge from persecution in my country.<sup>317</sup>

While Border Patrol agents and INS officers in Arizona have often contacted a legal agency in Tucson on behalf of recently apprehended minors, on several occasions since 1989, agents in Arizona and California obtained voluntary departure agreements from Central American youths before the youths contacted a third party.<sup>318</sup> In at least four cases, the Tucson agency that later spoke with and assisted the youths only discovered that they had signed for voluntary departure after the INS had taken them to Las Vegas to be flown back to Guatemala. The agency made the discovery too late to revoke the voluntary departure agreement of one Guatemalan boy who, like the others, had signed the form before contacting any third party.

Frequently, a Border Patrol agent hands a minor a list of legal service providers and informs the child that he or she may place a call, but then fails to ensure that the child actually makes contact with one of the agencies on the list. Some children, traumatized by the experience of being apprehended and interrogated by a uniformed government officer, and fearful that they may be deported immediately, fail to understand the purpose of the lists they are handed. In addition, the lists are often outdated and inaccurate, and can be frustrating or confusing to use.

The experience of one 14-year-old Guatemalan detained at the Chula Vista Border Patrol station in southern California, who tried calling various numbers on the list he was given, is typical. One agency he reached gave him another number to call for help, but he had no pencil to record the number, and an agent was not on hand at the time.<sup>319</sup> These and other examples indicate continuing problems that appear to be the result of the INS' failure to take the steps necessary to comply with and safeguard the rights of detained children.

INS agents ignore the special legal rights of children in other contexts as well. For example, even though INS regulations provide substantially more protection to minors in deportation hearings,<sup>320</sup> INS agents routinely interrogate and obtain admissions from detained minors before the hearings. This practice leads to the incongruous result that admissions made by an unaccompanied minor in the context of a formal hearing are deemed insufficiently trustworthy to be used against him or her, while admissions made in the inherently coercive setting of custodial interrogation without relatives or representatives present may be used against the child in immigration court.

Furthermore, the INS typically detains minors in remote locations where there are few, if any, attorneys available to assist them. In cases in which minors are unable to secure legal assistance, they are left to fend for themselves in court, while an INS trial attorney functions as the child's adversary. Children who have represented themselves in court report experiencing extreme anxiety and confusion during their

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<sup>317</sup> Declaration of Edgar, a Guatemalan minor, December 24, 1990, taken by Esperanza Para Los Niños.

<sup>318</sup> Letter from Valerie Hink, attorney for the Tucson Ecumenical Council Legal Assistance (TECLA), to the Office of the Immigration Judge, January 23, 1990 (re: female Guatemalan minor); letter from Charles Wheeler, an attorney for the plaintiffs in *Perez-Funez*, to Ben Davidian, Western Regional Commissioner, May 22, 1990 (complaining of several violations of the injunction); conversation with Margarita Jauregui, Tucson Ecumenical Council Legal Assistance, May 14, 1991 (regarding two Honduran minors who signed voluntary departure agreements before contacting TECLA in April 1991).

<sup>319</sup> Americas Watch interview with Luís, a Guatemalan minor, March 28, 1990.

<sup>320</sup> See 8 C.F.R. § 242.16(b) (an immigration judge may not accept an admission of deportability from a minor under age 16 unless he or she is represented by an attorney, parent, or guardian).



hearings. Many have accepted deportation when they actually desired political asylum. Others have failed to set forth adequately the bases of their claims.<sup>321</sup> Thus, although the INS purports to act in the best interest of each child it detains, neither its practices nor its regulations serve to ensure the special due process protections that detained minors need to understand and exercise their rights.

### **Restrictions on Release from Detention**

In the course of the *Flores* litigation, the INS promulgated a regulation authorizing the release of minors to adult relatives or legal guardians but limiting release to other adults to "unusual and compelling circumstances."<sup>322</sup> The INS has applied the strict criteria of release to continue to detain children with no adult relatives in the United States. It has even failed to find "unusual and compelling circumstances" in the case of orphans. And, while it often releases family units, the INS has sometimes declined to exercise its discretion to release minors apprehended in the company of adult relatives. Instead, it often opts to detain both the child and the adult in separate facilities, isolated from one another.

The regulation restricting release to unrelated, responsible adults was struck down by the Ninth Circuit Court of Appeals in 1991 as a violation of the children's constitutional right to be free from undue governmental restraint. As a result, minors in California and Arizona are being released to church shelters, licensed group homes, adult cousins, and others deemed to be responsible adults. But the *Flores* ruling applies only to the Ninth Circuit, which includes California, Arizona, and other western states. In Texas, where the majority of minors currently in INS custody are held, the INS is not required to release minors even when a responsible but unrelated adult (or a related adult not set forth in the regulation, such as a cousin) is willing and able to care for the child and to ensure his or her attendance at a deportation hearing. Meanwhile, the Supreme Court has agreed to hear an INS petition calling for *Flores* to be overturned. And, although the INS liberalized its release policy in late 1991, agreeing to release a child when a responsible adult is designated by the parent in an affidavit,<sup>323</sup> this policy does not help orphans and children unable to locate or communicate with their parents. These children continue to be detained for months, or in a few cases, years.

In addition to the policy restricting the right of release to nonrelatives, the major stumbling block to the release of unaccompanied minors is the lack of suitable placements. While the INS pays \$50 to \$100 per day to detain each child, the agency funds relatively few foster care placements, and has consistently refused to make funding available for community-based group homes. The INS does release unaccompanied minors to one such home in Los Angeles which is privately funded, and these youths live relatively normal lives while they await their hearings or attempt to locate relatives. But there are only six spaces at the shelter, and

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<sup>321</sup> Declaration of José, a Honduran minor, June 29, 1989; declaration of Remberto, a Salvadoran minor, July 6, 1989; declaration of Francisco, a Guatemalan minor, July 13, 1989; declaration of Orlando, a Guatemalan minor, July 19, 1989. These declarations were taken by staff members at Casa de Proyecto Libertad in Harlingen, Texas.

<sup>322</sup> 8 C.F.R. § 242.24(b)(1988). The regulation does permit release to a person designated by a parent or legal guardian living abroad in a sworn affidavit executed before an immigration or consular officer, but the procedure is extremely difficult for a great number of parents in poor, war-torn countries. Stanford University Center for Latin American Studies, Working Group on Children in INS Detention, "A Preliminary Report on the Conditions of Children in INS Detention in South Texas," 1991, p. 3.

<sup>323</sup> Memorandum from INS Commissioner Gene McNary to various INS personnel, "National Policy Regarding Detention and Release of Unaccompanied Alien Minors," December 13, 1991.

many youths linger in detention awaiting an opening.

### **Substandard Detention Conditions**

In its detention of minors, the INS has not only ignored federal juvenile-justice standards requiring the release of minors, but has failed to adhere to standards it agreed to in a partial settlement reached in the *Flores* case in 1987. The settlement is concerned with conditions of confinement in INS facilities but does not address conditions under which minors may be released. The settlement requires the use of only licensed shelter-care facilities and includes specific requirements for family reunification efforts, educational and recreational programming, psychological counseling, and medical care. While the INS claims that it abides by the terms of the settlement agreement nationwide, and has made some efforts to do so, it has never informed some entities with which it contracts to detain minors that the agreement exists. The result has been discrepancies and deficiencies in the quality of care and services that minors receive.

The most blatant violation of the settlement agreement has been the ongoing detention of undocumented minors in juvenile-justice facilities, which are not licensed for "shelter care." In these facilities youths detained by the INS are grouped together with youths accused of crimes. In recent years, the INS has detained hundreds of youths at such facilities, though usually only a few at any one time. At the Yuma County Juvenile Court Center in Arizona, minors in INS custody are required to wear uniforms and sit quietly at a table most of the day. They are under constant surveillance by a guard. The facility employs no caseworkers, has no family reunification program, and has no meaningful recreational or educational activity. As Armando Ortíz-Pérez, a Guatemalan boy who spent over three weeks at the facility in 1989, told *Americas Watch*, "It is hard being a prisoner. It is so boring and depressing."

The director of a similar facility in Los Lunas, New Mexico told a reporter, apparently in response to questions about programming, "We are a detaining facility and that is it."<sup>324</sup> The INS ceased using the facility in May 1989 after it came under intense community criticism for overcrowding, inadequate food, and limited access to counseling, legal advice, medical attention, and recreational activities.

Juvenile justice facilities typically ignore not only the *Flores* settlement agreement, but court orders setting forth the rights of individuals in INS custody. For example, one 15-year-old Guatemalan boy told an *Americas Watch* investigator that in April 1992, he was taken by the Border Patrol to spend the night at the Santa Cruz County Juvenile Detention Center in Nogales, Arizona. There, despite the court order in *Flores* barring such action, the staff required him to remove all of his clothes and subjected him to a full body cavity search. The Yuma County Juvenile Court Center also continued to routinely strip-search undocumented minors long after the federal court decision.<sup>325</sup> In addition, an *Americas Watch* investigator found that staff at the Imperial County Juvenile Hall in El Centro, California routinely violate the *Orantes* permanent injunction by restricting access to telephones, failing to make provisions for private telephone calls, prohibiting minors from retaining legal documents in their possession, and failing to make available legal materials regarding immigration matters.

A policy memorandum issued in December 1991 allows commingling of minors in INS custody with accused juvenile offenders in juvenile halls for up to three days. Exceptions to the three-day limit permit longer detention under certain circumstances. In addition, it remains to be seen whether the INS will abide by the policy; under the *Flores* agreement, the three-day limit was to have been in effect in western states since

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<sup>324</sup> Arley Sánchez, "Jailing of Juveniles for INS Criticized," *The Albuquerque Journal*, May 10, 1989.

<sup>325</sup> Ruben Hernandez, "For Salvador's Kids, Yuma is Hell," *Tucson Citizen*, November 17, 1989.

June 1988.

At the juvenile justice facilities used by the INS, education is either severely limited or nonexistent. Even at facilities licensed by the state for shelter care, educational programs often fail to meet the terms of the *Flores* agreement. For example, at a privately run facility used by the INS near El Centro, California, there have been periods when classes were taught by an uncertified teacher, were held fewer than three hours per day, or were not held at all.<sup>326</sup> In addition, the schools at INS facilities do not offer the full range of subjects specified in the *Flores* agreement. None of the companies or agencies with which INS contracts allows children in their care to attend public schools.

A majority of the Central American minors detained by the INS have experienced potentially traumatic events, such as rape, physical assault, forcible removal from an area, or forcible recruitment into a combatant group.<sup>327</sup> A study of Central American minors detained in Texas determined that over 18 percent suffer from Post-traumatic Stress Disorder (PTSD) and a higher number experience symptoms of the disorder, such as flashbacks and emotional numbness.<sup>328</sup> Although federal standards for the juvenile justice system and the terms of the *Flores* agreement require psychological care and counseling, personnel at facilities used by the INS are unequipped to handle these types of problems.

In some cases, the INS has sent children displaying symptoms of PTSD to juvenile halls, where they receive little or no psychological care. In the case of Jesús, a 15-year-old Guatemalan who exhibited bizarre and sometimes disruptive behavior, the INS reacted by transferring him from one facility to another, including to juvenile halls hundreds of miles from his attorney, and to an adult detention center, where he was shackled to his bed.<sup>329</sup>

### **Physical and Emotional Abuse of Minors in Detention**

Other instances of children abused by guards, custodians, or delinquent youths detained with them also have been reported. Agencies assisting the children complain that such problems put pressure on children to accept deportation rather than pursue their legal claims.

At the Yuma County Juvenile Court Center, several children in INS custody have reported assaults by local youths held for probation violations or juvenile delinquency. One, a Guatemalan boy, was attacked on May 4, 1990, by four youths who hit him in the face and stomach. He received cuts on his face and a swollen lip and nose, and had to be taken to the hospital for x-rays. At the same facility, reports of threats and intimidation by local youths are even more common.<sup>330</sup>

There have also been reports of abusive punishments used by inadequately trained personnel to

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<sup>326</sup> Americas Watch interviews with Diane Paulsell, Esperanza Para Los Niños, January 30, 1991 and February 13, 1992.

<sup>327</sup> Nestor Rodríguez and Ximena Urrutia-Rojas, "Undocumented and Unaccompanied: A Mental-Health Study of Unaccompanied, Immigrant Children from Central America," University of Houston, Institute for Higher Education Law and Governance, Monograph 90-3, 1990.

<sup>328</sup> *Ibid.*, pp. 55, 58-59.

<sup>329</sup> Letter from Edward J. Flynn, attorney, to Omer Sewell, INS district director, dated July 12, 1989; Rebecca Thatcher, "Teen aliens reported shackled to beds," *The Brownsville Herald*, July 23, 1989.

<sup>330</sup> Declaration of José Antonio, a Guatemalan minor, May 17, 1990, taken by Esperanza Para Los Niños.

maintain discipline at juvenile detention centers. In the spring of 1990, two local nonprofit agencies documented numerous instances in which apparently excessive discipline was used against minors detained at the facility run by Eclectic Communications, Inc. (ECI). Punishments included forcing children to walk in shackles, run laps around the facility in slippers, clean bathrooms, or stay in a punishment room for several days for minor infractions. A typical account was given by 15-year-old Efraín in April 1990:

There is a punishment room into which I have been placed several times (about five), usually for periods of seven days .... I was just going to look for a mop, but I was punished for leaving the building unaccompanied by being put in the punishment room for seven days. One time I wanted to exchange pants with another detainee, but it turned out that was not allowed and I got another seven days in the punishment room. Another time I was made to stand with my face to the wall for a half an hour because, during a video time, I protested the choice of a movie in English.<sup>331</sup>

Children in Texas detention centers used by the INS have also reported mistreatment. Several reported being grabbed, pushed, shoved to the ground, verbally abused, and threatened with deportation by staff members.<sup>332</sup>

In addition to abuses by employees at the detention centers, there have been reports of abuse of minors by INS officers. In 1989, an INS detention officer pleaded guilty to assaulting two 16-year old boys held at an INS detention center. The boys alleged that they had been taken to the guard's living compound and sexually molested.<sup>333</sup> In another case, William Alejandro García Ramos and Jorge Iván Ortega Linares, who were detained as minors at ECI, have filed suit against the INS and individual agents.<sup>334</sup> An FBI investigation into their allegations is pending.

García and Ortega allege that on July 5, 1990, García and two other boys were taken from a classroom at the facility to a room where two INS detention officers were waiting. The guards interrogated them about supposed plans to escape from the facility. During questioning, an agent grabbed García by the hair and slammed his head against the wall. An agent slapped García in the face several times, cursed at him, and twisted his arm behind his back. He was made to hug another youth and to walk to another room while continuing to hug him. One officer referred to them in Spanish as homosexuals and struck both youths several times on the head with his hand. They were then made to apologize to an ECI staff member.

The suit also concerns a separate incident that allegedly took place on August 2, 1990. García was placed in the "punishment room" for speaking disrespectfully to an ECI staff worker. Ortega was placed in another punishment room for pretending to urinate in his room after being denied permission to use the bathroom. An ECI staff member then called the INS, which sent over two detention officers. When the officers arrived, one grabbed Ortega by the hair, pulled him off the bed, and dragged him out of the building. He hit him in the stomach until he fell, then kicked him in the ribcage. The other officer threatened

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<sup>331</sup> Declaration of Efraín, a Salvadoran minor, April 24, 1990. This declaration was taken by the now-defunct El Centro Asylum Project as part of a joint effort with Esperanza Para Los Niños to document the mistreatment of detained minors at Eclectic Communications, Inc. detention facility in Imperial, California.

<sup>332</sup> Stanford University Center for Latin American Studies Working Group on Children in INS Detention, "A Preliminary Report on the Conditions of Children in INS Detention in South Texas," 1991, p. 5.

<sup>333</sup> Lisa Baker, "INS Guard Pleads Guilty to Molesting Two Teen-agers," *The Brownsville Herald*, Aug. 31, 1989.

<sup>334</sup> *Garcia v. United States*, CV 91-0908 GT (LSP) (S.D. Cal., filed July 3, 1990).

to "cut his balls off." Ortega was made to stand and face the wall, while García was brought out and subjected to similar abuse. Then, while the two youths were facing the wall, they heard the officers threatening and interrogating two other youths behind them. The officers then placed handcuffs on the wrists and ankles of Ortega and García and made them walk back inside and apologize to the staff for their behavior. Unsatisfied with Ortega's apology, an officer took him back outside, and again hit him in the stomach. He apologized again, but the abuse continued; an officer grabbed him by the neck with both hands and lifted him off the ground. Ortega thought he would die of strangulation.

When a local agency reported the two incidents at ECI to INS officials, they informed the Office of the Inspector General. No interim action was taken against the officers and the OIG never contacted Garcia and Ortega, who by then had been released. The OIG referred the matter back to an internal investigations branch of the INS, which sent a uniformed Border Patrol officer to interview the only youth involved who was still detained.

Following these incidents, and in response to complaints, ECI agreed not to call the INS as a means of disciplining minors. The company also eventually relaxed its disciplinary policies, but only after it was forced to make changes to obtain a state license.

## IX. RECOMMENDATIONS

Many of the problems documented in this report can be remedied by policy and attitudinal changes on the part of the INS and its agents. Others require regulatory and, in a few cases, statutory changes. Yet remedies are imperative if the basic human rights of undocumented migrants are to be respected. Americas Watch calls upon the INS and the U.S. government to implement immediately the following recommendations:

I. Undocumented migrants who enter or are living in the United States may be deportable or excludable, but their immigration status does not lessen their entitlement to respect for their basic human rights. As an institution, the INS needs to redirect its mission to emphasize the promotion and protection of human rights in the fulfillment of its responsibility to enforce U.S. immigration laws. This policy must be conveyed, through example and training, to all INS personnel. The INS must make clear to its personnel that failure to respect the legally protected human rights of any person will be punished.

II. INS agents should, as far as possible, apply non-violent means before resorting to the use of force or firearms. Whenever the lawful use of force or firearms is unavoidable, INS officers should:

- A. Employ force only as necessary to attain a legitimate objective and only in proportion to the importance of that objective.
- B. Minimize damage and injury, and respect and preserve human life.
- C. Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment.
- D. Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.

III. Firearms should be reserved only for the protection of agents or third persons from imminent threat of death.

- A. Agents should not brandish their firearms in the course of everyday enforcement.
- B. Agents should never shoot a fleeing suspect or a moving vehicle, unless absolutely necessary to preserve the life of others.
- C. Agents should never fire warning shots.
- D. The INS should comply with the recommendations of the U.S. Department of Justice Audit Report on INS Firearms Policy (See Chapter II).

IV. Nonlethal devices (i.e., stun guns, gas guns, nonlethal projectiles, and vehicle stopping devices) should be used in preference to firearms and other lethal weapons.

V. All equipment carried by INS agents should be used only for its intended purposes (e.g., flashlights should not be used as weapons).

VI. When injury or death is caused by the use of force or firearms, INS officers should report the incident immediately to their superiors.

VII. INS agents should never use force or threats of force as a form of extrajudicial punishment.

VIII. The INS should ensure that officers do not use vehicles or aircraft in a manner that creates a risk of injury or death.

- A. Headlights and searchlights should not be switched off and on in a manner that causes temporary blindness or disorientation to would-be border crossers.
- B. Automobiles and helicopters should not be operated in such a manner as to kick up blinding clouds of dust.

IX. A fully empowered and funded independent Board of Review should be established to investigate all shootings and other incidents in which a serious question is raised about whether the use of force was justified.

- A. Board of Review staff should be experienced in investigating police misconduct. Staff should not be drawn from the ranks of INS personnel.
- B. All shootings and controversial incidents involving the use of force (i.e., those in which there is any allegation of misconduct) should be reported immediately to the independent Board of Review; failure to make a report should be a sanctionable offense.
- C. The Board of Review should make public the names of all agents alleged to have been involved in shootings or other incidents involving the use of force that resulted in death or serious injury, unless there is specific evidence to show that doing so would jeopardize the safety of the agents involved or hinder the investigation. If these special circumstances are temporary, the names should be released when the circumstances no longer prevail.
- D. Officers involved in shootings or other incidents that result in death or serious injury should be assigned to restrictive duty or leave until the circumstances are clarified and the Board of Review completes its investigation; no officer involved in such an incident should be reinstated without first receiving stress counseling.
- E. All cases in which the Board of Review finds that an agent engaged in unjustified homicide, assault, criminal civil rights abuse, or any other felony should be turned over to appropriate police or prosecutors with a recommendation that the agent be criminally prosecuted.
- F. All cases in which the Board of Review finds that an agent violated INS regulations should be turned over to appropriate supervisory INS personnel with a recommendation for sanctions. Board of Review recommendations for sanctions should be given deference by supervisory personnel.

Supervisory personnel should be required to justify in writing any decision not to follow the recommendations of the Board of Review.

X. Procedures must be established to enable undocumented migrants to file complaints against INS agents without fear of reprisal.

- A. The public should be effectively informed of its right to file complaints against INS abuse. All INS personnel should be fully familiar with the complaint process. Easy-to-understand complaint forms should be supplied and an explanation of the complaint procedure, in the immigrants' languages, should be displayed prominently in all INS offices to which arrested undocumented migrants are taken and in all detention facilities used by the INS.
- B. All persons who file complaints should be informed when their complaint is received, given periodic status reports, and provided access to an appeal process that is not overly burdensome.
- C. Under no circumstances should reprisals be taken against an undocumented migrant who files a complaint; cases in which reprisals are alleged should be deemed controversial incidents and referred to the independent Board of Review.

XI. No remarks of a sarcastic or "kidding" nature should ever be made to an undocumented migrant about his or her name, nationality, race, religion, economic condition, dress, etc. Such remarks should result in disciplinary action against the officer involved.

XII. All INS agents involved in the arrest or detention of undocumented migrants should be in uniform and clearly identifiable by name and badge number.

XIII. INS raids should always be conducted in a manner designed to minimize risk to migrants and agents.

- A. INS agents should first acquire a warrant or the valid consent of the owner before conducting a workplace raid.
- B. When questioning a person about his or her immigration status, INS agents should conduct themselves in a manner that would leave the person asked with the reasonable belief that he or she has a choice about answering.
- C. When agents have sufficient time and information to secure a warrant in advance, they should not rely on exigent circumstances as the basis for a raid. Even when exigent circumstances justify the warrantless pursuit of one or more suspects, the INS should not use the exigent circumstances as an excuse to interrogate an entire workforce.

XIV. INS detention should be used only for the purposes of preventing serious risk of injury to persons or property or to ensure that a person will appear at immigration hearings. It should never be used to deter undocumented migrants from pursuing legal defenses to deportation.

XV. Conditions at all facilities in which the INS detains persons in its custody should be humane



and conform to the United Nations Standard Minimum Rules for the Treatment of Prisoners.

- A. All guards and administrators at detention facilities used by the INS should be adequately trained and supervised. All allegations of physical or psychological abuse by guards or administrators should be referred to the independent Board of Review. Particular care should be taken to ensure that retaliatory punishment, including solitary confinement, is not meted out to persons who engage in protests.
- B. All facilities used by the INS to detain undocumented migrants should have medical personnel on the premises or on call 24 hours a day. In addition, detainees should be provided with psychiatric and dental care if needed.
- C. Uniform standards for telephone access for all INS detainees should be devised. These should include access to telephones at various hours throughout the day and evening; an ability to call 800 numbers; and coin phones or other means to make international calls and calls to persons or agencies that cannot accept collect calls.
- D. The INS should ensure that all detainees in its custody can communicate in private with their attorneys both over the telephone and in person.
- E. All INS detainees should be given easy-to-understand information, in their native languages, describing U.S. immigration laws and procedures and an updated list of free or low-cost legal services available to assist them.

XVI. The INS should stop using city or country jails to detain persons in detention pending the outcome of exclusion or deportation hearings when no non-immigration criminal charges are pending, unless it receives assurances that the INS detainees will not be comingled with criminal suspects or persons convicted of crimes.

XVII. The INS should eliminate all strip and body cavity searches unless there is probable cause to suspect that a particular person possesses contraband.

XVIII. INS detainees should not be indiscriminately transferred from one location to another. When transfers are necessary, they should be conducted humanely and transferees should be provided with food and adequate opportunities for the use of sanitary facilities. Every effort should be made to ensure that detainees' belongings are transferred with them; that they have access to telephone numbers of attorneys and family members; and that they have adequate opportunity to telephone those concerned about their whereabouts.

XIX. The INS should develop a nationwide bond policy. All bonds should be set only in amounts needed to ensure appearance at an immigration hearing.

XX. Special care should be taken to ensure that the special needs of children and youth who are arrested or detained by the INS are met.

- A. INS agents should be instructed to place telephone calls on behalf of apprehended minors, and to ensure that all minors make contact with adult relatives or legal agencies.
- B. Attorneys should be appointed for detained indigent minors who are

unable to secure counsel. Children should not be expected to navigate through the legal system on their own.

- C. Federal and child-welfare standards regarding the treatment of nondelinquent youths should be applied to minors in INS custody.
- D. No child should be kept in detention solely because an available, responsible adult is not related by blood or marriage. The INS should divert funds currently used for detention to provide screening for responsible adults willing to care for minors and ensure their appearance in court.
- E. The INS should stop detaining undocumented migrant youths in juvenile justice facilities, unless it receives assurances that they will not be comingled with youths suspected of committing crimes or found to be delinquent.
- F. Funding should be made available for the creation of alternatives to detention, including community-based housing in which minors can attend public schools and participate in community events.
- G. Regardless of where minors in INS custody are housed, they should be provided with adequate education, recreational opportunities, medical and psychiatric care, and family reunification services. All legal obligations regarding such programming should be set forth in any contracts for the care of minors into which the INS enters, and such contracts should be enforced.
- H. Minors should be provided with and informed of an easy and non-threatening method of reporting abuses by INS agents and detention staff to the independent Board of Review.