A Note to the Reader – Outline as of 17 February:

This paper remains a rough draft for a conference entitled “Representing Citizenship” that I will be presenting in late March. I wanted to field test some of my ideas to you at LEGS, and I’m not as far along on the process as I hoped to be at this point (though it’s not due until early March) There are pieces that are still missing (most notably the precedents to support my alternative legal framework for adjudicating suspension of deportation cases). Substantive and organizational comments are welcome and would be appreciated! Thanks and see you Monday.

The outline of my project, as I envision it, is as follows.

I. Motive:

The adjudication process for challenging “removal” or deportation from the United States has been guided since its inception by four premises.

i. First, it has always treated a long-term unauthorized settler’s continued presence in the US as a “privilege” to be granted at the discretion of a bureaucrat, and not a potential enforceable claim-right where set procedures need to be followed in order to justify removing someone from the country.

ii. Second, this “privilege” can be taken away, or modified, at any time at the discretion or will of the community of citizens, as represented by legislators in Congress.

iii. Third, this “privilege” does not necessarily differentiate between a migrant who arrived in the United States yesterday, and what I (and anthropologists/sociologists) describe as a settler with fixed interests in the United States, and attachments to her adopted community including (in order of significance) family ties to US citizens, community affiliations, steady employment, real property, and who has a built a life here.

iv. Finally, this “privilege” treats the community of citizens as “passive parties” threatened by an “invasion” of unauthorized immigrants who did nothing to bring this unwanted, unsought of population in their midst, and we are extending them mercy that they do not deserve to pardon their initial crime of unlawful entry. I contend that the community of citizens is complicit in unauthorized immigration, both directly by employing and depending on unauthorized workers in key sectors of the economy, somewhat indirectly by benefitting from lower prices/taxes paid/not having to do low-skill work, and indirectly through past and present foreign/trade/economic policies that tie the Latin American economy to the US economy, without allowing for free movement of labor.

II. Thesis:

The adjudication process for appealing the detention and deportation of unauthorized immigrants must account for the role that the state/US citizens have played in facilitating and encouraging unauthorized migration and settlement, and the reciprocal relationships
that have developed over time, first between Latin America and the US, and then through face-to-face interaction in society between settlers, who I conceptualize as de facto members of American society, and existing citizens in the community.

III. Description: I want to present a clear picture of the kind of people I’m talking about, and why their circumstances matter.

1. What is the difference between a migrant and a settler, and why does this matter?

2. What “informal rights” and representation do settlers have in the community, and why does this fall short?

3. Why does “informal representation,” which some political theorists and sociologists like to focus on as a cause for hope “we’re all transnationalists now,” falls short in the real world when unauthorized settlers are faced with the power of the state.

4. What legal representation is available right now to fight deportation, and why this representation is insufficient?

IV. Normative Account:

1. Briefly, what are the normative premises underlying current legal remedies for “cancellation of removal”? What features of the political conversation are they being guided by?

2. What normative premises ought to be reflected in an ideal legal remedy for “cancellation of removal” or “suspension of deportation” (the reality of reciprocal rights and obligations that develop over time between citizens and settlers)

   a. Before they leave the country
   b. As they settle in the United States.
   c. Through their interactions and relationships in society.
   d. Through their attachments to the community.
   e. Is there a normative role that time, itself, may play in fixing expectations – especially for young children who have no other home but the US?
   f. Is there a normative requirement that the law reflect social facts and market forces (i.e. Frederich Hayek’s spontaneous order of society) in order for it to be legitimate? The social fact of uncontrolled immigration as a justification for this view.

V. Building a New Legal Framework for Adjudicating Deportation Appeals – Based on the Normative Account in IV and Backed by Constitutional Precedent.

• This section remains to be completed. The cases I will use to back my argument that unauthorized settlers ought to have greater protection, including the protection from deportation, through the passage of time and development of connections to the country, irrespective of their unlawful status, are listed at the end of this paper.
Unauthorized Immigrants, Social Realities, and the Rule(s) of Law:

Unauthorized immigrants who have settled in the United States are caught in the tension between several conflicting legal imperatives. On the one hand, unauthorized migrants are often castigated as “illegal aliens” in the American media and popular discourse.¹ US immigration law treats migrants who entered without inspection as “illegal” and subject to deportation and detention at any time. In international law, they are regarded as de jure citizens of their country of origin, and as “aliens” within the United States.² On the other hand, unauthorized settlers bear many of the same legal rights and responsibilities as their citizen-neighbors by virtue of remaining subject to the territorial jurisdiction and control of the United States over time.³ In the course of settling in the United States, migrants develop US-based interests and connections as de facto members of their communities. Collectively, unauthorized settlers have the basis of a compelling claim to remain in the United States that should be weighed against the interests of the community as a whole to exclude them for failing to secure permission to enter and reside in the United States in the first place. A deportation order would make this claim actionable, in theory. In practice, the tension between the extra-legal social realities of unauthorized settlement, the status of unauthorized immigrants as legal persons with constitutional

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² Fong Yue Ting v. United States, 149 U.S. 698. But note the possibilities in Justice Brewer’s dissenting opinion: “Whatever rights a resident alien might have in any other nation; here he is within the express protection of the Constitution, especially in respect to those guarantees which are declared in the original amendments. [The majority’s] doctrine of powers inherent in sovereignty is one both indefinite and dangerous.”

³ Yick Wo v. Hopkins, 118 U.S. 356, 374, Plyler v. Doe, 457 U.S. 202, 211-216. But see US v. Verdugo-Urquidez, 494 U.S. 259, 271: “These cases, however, establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.”
protections, and imperatives of immigration law enforcement complicate any efforts to represent this claim in a court of law. A remedy is needed in order to overcome this impasse.

US immigration law has occasionally provided unauthorized settlers facing deportation with the opportunity to petition for a “suspension of deportation” and subsequent adjustment to lawful permanent resident status. Before 1996, unauthorized immigrants could petition an immigration judge to grant them a “suspension of deportation” on the basis of their length of residence, community ties, and acts of exemplary citizenship. For this reason, scholars of unauthorized immigration (Ngai, 2004), (Chavez, 2007) have contended that just as immigration restriction and deportation can “make” illegal aliens, administrative discretion can “unmake” illegal aliens.4 The shortcoming of this remedy is that it treats an unauthorized settler’s continued presence in the United States as a privilege, to be handed out at the discretion of an administrative officer without further legal recourse. The remedy itself is a privilege extended by Congress that can be revoked at any time, which is what occurred with the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.5 Today, unauthorized immigrants are only allowed to petition to remain in the United States if they have a US citizen dependent that would experience “exceptional and extremely unusual hardship” as a result of the deportation.

The principle underlying “suspension of deportation” and other equitable remedies needs to be placed on a more secure normative and legal foundation in order to facilitate the legal representation of liberty and property interests that migrants acquire over time as they settle in the United States.6 Sustained relationships between unauthorized settlers and the community of citizens should give rise to a legal relationship entailing reciprocal rights and obligations that cannot be easily broken by either party. Stated differently, deploying the language of a doctrine of the “genuine link” in international law in a new context, if a settler is able to demonstrate that he has “a social fact of attachment” to his community . . . together with the existence of reciprocal rights and duties between the community and

6 Chief among these is the “right of abode,” or to remain in the US with their citizen family members. Property interests are implicated less often, in cases where home ownership is at stake (although see Ayelet Shachar’s argument in her forthcoming book The Birthright Lottery: Citizenship and Global Inequality (Cambridge, MA: Harvard University Press, 2009), which describes membership rights as forms of property.
the individual,” he should be recognized as having a claim to remain in his adopted community.\footnote{This formulation deploys the Nottebohm doctrine (I.C.J, Second Phase, 1955), 23 used for adjudicating dual nationality claims in customary international law to a new but related context. In its original context, the Nottebohm tribunal used an extended view of the formulation stated above (invoking shared experiences, interests and sympathies as a third criterion of attachment) to determine the country in which the locus of an individual’s interests can be found. Here, I am invoking the Nottebohm criteria as a prominent example of how social facts accumulated over time are translated into legal relationships in juridical discourse in the absence of, or despite the existence of an explicit act of consent between the state and the individual.} The social fact of attachment between unauthorized settlers and their adopted communities can be demonstrated by describing the process by which migrants become settlers, taken from the accounts of anthropologists and sociologists who study unauthorized immigration. The existence of reciprocal rights and duties can also be gleaned from this literature. However, I will make a further normative case for why the political community and its unauthorized settlers ought to accept reciprocal rights and obligations to one another. I will end by placing this normative discussion in the context of existing doctrines in US constitutional law that can be cited to recognize and protect the rights of unauthorized immigrants on the basis of their “sufficient connections” to the United States.

I. From Migrants to Settlers: The Development of “Social Facts of Attachment” to the Community:

The vast majority of unskilled workers who have jobs waiting for them if they can only enter and remain in the United States are ineligible to migrate to the United States through safe, orderly and lawful channels. The same is often true of individuals who want permission to enter and remain in the United States to reunite with close family members. Even if an individual is fortunate enough to have immediate family members in the United States who are in a position to sponsor them for lawful permanent residence status, they currently have to wait anywhere from five to twenty years to receive a visa to lawfully enter the US as an intending immigrant.\footnote{U.S. State Department, “Visa Bulletin for February, 2009,” Volume 9, Number 5. Available Online: \url{http://travel.state.gov/visa/frvi/bulletin/bulletin_4417.html} Last Accessed 15 January 2009. For instance, a U.S. citizen parent who is seeking to sponsor his or her adult son or daughter of Mexican nationality to join him in the United States faces a sixteen year wait (i.e. As of 1 February 2009, immigrant numbers are available to Mexicans in the 1st category who applied before 8 October 1992).} Meanwhile, whole sectors of the US economy are dependent on the labor of undocumented workers on an ongoing basis, and many of the positions that must be filled offer long-term employment.\footnote{Douglas S. Massey, New Faces in New Places (New York: Russell Sage Foundation, 2008).} These individuals have spouses and children who either unable or unwilling to remain apart from their families for years, as they either wait for a visa to become available, or if they are ineligible, for the return of their migrant family members who are
staying for increasingly longer periods in the United States.10 As a result of these factors, roughly half of the non-citizens who are resident in the United States are present without authorization.11

The prospect of remaining in the United States without authorization for years on end is fraught with danger and uncertainty. Nevertheless, an increasing number of formerly transient migrants from Mexico and Central America have become permanent settlers in the United States since the inception of strict border controls by the US in the early 1990s that increased the opportunity costs of seasonal or circular migration patterns.12 Workers with families back home who find favorable conditions in their adopted communities are now far more likely to arrange for spouses and children to follow them through the same channels that they arrived in the first place.13 But since they initially entered the country and remained without authorization,14 there are no legal points of delineation akin to the conferral of permanent residence and eligibility for naturalization that we can refer to as formal markers of their integration into their adopted country of residence. Nevertheless, there is a key social distinction to needs to be made from the outset between a migrant and a settler that applies regardless of his formal status in immigration law or his authorization to enter in the United States in the first place.15

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12 See note 7 above.

13 Ibid.

14 Here, we make a necessary distinction between “unauthorized” immigrants who initially lawfully entered the United States but then overstayed their visa (which accounts for most “unauthorized” immigrants from overseas countries of origin) and “undocumented” immigrants who entered without inspection (EWI) and remained without being able to obtain an adjustment of status (which accounts for most of the undocumented immigrants who entered by land from Mexico and Central America, unless they initially crossed the border with a temporary crossing card). Since 1996, this distinction has become important for lawyers representing the class of people that I call “undocumented settlers,” as EWI’s are no longer eligible for the same procedural protections in immigration court as those who were lawfully admitted in the first place, regardless of their length of stay or similarity of condition. See, for instance, Linda Bosniak, “A Basic Territorial Distinction,” Georgetown Immigration Law Review 16 (2001-2002): 407-412.

At one end of the continuum, we find an individual who recently arrived in the country, whether on a temporary visa or by surreptitious entry. She has left the place that she still regards as “home” with the intent of working for a short period of time and then returning to her family, friends, or the aggregate nexus of his interests. All that she has to lose if she is removed from her temporary residence is the income that she would have earned during the remainder of her stay. At the other end of continuum, we find migrants who initially entered the country alone and then sent for their families, or who married and gave birth to US-citizen children since their arrival. As migrants become settlers, the nexus of their interests’ shifts from their country of origin to their adopted communities, where they work, worship, conduct their affairs and reside openly alongside US citizen neighbors. They still have ties to their country of origin, but these “transnational” links become attenuated with time as family members join them in their adopted communities. The formation of US-based families by migrants who send for spouses and children in their country of origin, or who establish long-term relationships and marriages with other migrants and then bear native-born US-citizen children is the most important factor in the transition process by which transient migrants become settlers. Migrants also assume the posture of settlers by taking part in US-based ethnic community organizations and the civic affairs of the broader community. In some cases, former migrants solidify their settled position in their adopted country by acquiring real property interests in the United States.

In the course of laying down roots and settling into their adopted communities over time, migrants in the process of becoming undocumented settlers obtain access to multiple sites of informal representation. At the outset, the interests of migrants are often represented and protected in practice by transnational networks. For instance, most migrants do not leave their country of origin without obtaining information about employment availability from family or community networks that span

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20 Chavez, 158-161.
across borders. As migrants obtain steady employment and are able to settle into their adopted communities, their interests often begin to shift from their country of origin to the community in which they live. Once they arrive at their destination, they can draw upon the accumulated social capital of longer-term settlers from their communities of origin to find a place to live and to begin to lay down roots. Because they are unauthorized to be in the United States and ineligible to obtain authentic documentation, undocumented settlers are limited in their capacity to fully incorporate themselves into their communities. Nevertheless, many businesses allow them to open a bank account and obtain credit without a social security number. Some communities provide undocumented settlers with local identification and the assurance that they have access to the same police protection and access to social services as any other resident. In the workplace, labor organizations are increasingly reaching out to and connecting with long-term undocumented workers in the service and hospitality sectors. In the broader community, churches and other faith-based organizations are actively reaching out to newcomers. They provide migrants with a place of spiritual solace, community, and basic social services. Faith-based organizations often serve to mediate between an established community of US citizens and permanent residents, and new undocumented parishioners. These institutions complement secular community-based initiatives that provide counseling, language instruction, and legal assistance as

22 Hiroshi Motomura, Americans in Waiting (New York: Oxford University Press, 2006), 88-90. Motomura describes this view of migrant incorporation as “immigration as affiliation” and contrasts it with processes that are controlled primarily by citizens (immigration as contract where the community of citizens have unequal bargaining power) and immigration as transition. His description of the development of these ties as a “natural phenomenon” is in keeping with the view of law and society that I will later develop to account for undocumented settlers as participants in the common legal order of their adopted nation.
23 See for instance, the results in Philip Granberry and Enrico Marcielli’s study, “In The Hood And On The Job”: Social Capital Accumulation Among Legal and Unauthorized Mexican Immigrants,” Sociological Perspectives 50:4 (Winter, 2007): 579-595, 592: “Somewhat surprisingly, we find no evidence that unauthorized residency status hindered social capital accumulation among foreign-born Mexican adults.”
migrants adapt to their new communities. There are multiple institutions in civil society and in some cases, government initiatives that are extended to all residents regardless of status, that provide informal representation for migrants if they choose to make the transition to long-term settlement in their adopted communities. A gradual shift in representation from transnational to community-based networks develops if and when migrants make the transition from seeing themselves as temporary sojourners to long-term settlers.

The Shortcomings of Informal Representation for Individuals Vulnerable to State Coercion:

Institutions in civil society provide helpful assistance, and in some cases, serve to represent the interests of undocumented workers, residents of the community, and family members in a variety of contexts that should not be overlooked. The scholarship on sites of transnational, informal civic, social and political engagement is a useful starting point for considering how an estimated seven percent of the US population is represented in their communities on a day-to-day basis. But in the midst of this optimism concerning the potential of informal representation, we must not lose sight of the reality that undocumented immigrants are always vulnerable to detection, detention and deportation by Immigration and Customs Enforcement (ICE) officials and local law enforcement officers who are deputized to enforce immigration laws in the course of their ordinary duties. The small-scale capacity for institutions in civil society to provide informal day-to-day representation of the interests of settlers can do little to mitigate the vulnerability of undocumented immigrants in the face of their constant vulnerability to large-scale enforcement of immigration laws by the state.

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29 The practice of “collateral arrests,” in which ICE agents under orders to fill an “arrest quota” enter a community and target everyone they see who looks as though they might be unauthorized to be in the United States without a warrant has greatly increased the chances that an unauthorized immigrant will be apprehended and detained without due process. Shoba Sivaprasad Wadhia, “Under Arrest: Immigrants’ Rights and the Rule of Law,” University of Memphis Law Review 38 (2007-2008): 853-892, 870.

30 Collectively, institutions in civil society are able to advocate for the interests of undocumented immigrants in the political process. This strategy has been most effective at the municipal level whereby immigrant advocates have pressed local law enforcement officials not to check the immigration status of individuals involved in small-scale offences (such as routine traffic violations). The failure of lobbying efforts by large-scale national advocates of immigrant rights such as the AFL-CIO (labor), the ACLU (civil rights) and the Catholic Church (faith-based communities) underscores the fact that while undocumented immigrants as a bloc may have an indirect influence in political society through their US-based allies and networks, this incipient form of political representation is no match for the harsh reality of undocumented immigrants’ vulnerability in the face of immigration law enforcement. A legal issue demands a legal answer.
Settlers who have laid down roots in the United States still run the day-to-day risk of being discovered even if they have eluded detection for years and become *de facto* citizens of their localities. Immigration and Customs Enforcement (ICE) raids of workplaces have grown in scale and frequency since the implementation of a new “Interior Enforcement Strategy” began in April, 2006. In rural areas of the US Midwest and South that are unaccustomed to large inflows of immigrants, municipalities are responding by having local law enforcement officials deputized to enforce federal immigration law. Without warning, immigrants who have been in the United States for years, or even decades but have not been unable to adjust their status are being uprooted from their communities, separated in many cases from their immediate family, and forced to return to countries where their only ties are to distant relatives. For settlers who were brought to the United States from their country of birth as small children, the experience of leaving the only country they ever knew is tantamount to exile. Parents of US-born citizen children have to make a decision on the spot whether to separate their children from their country or their family. Other US citizen family members may be deprived of a breadwinner, not to mention all the US citizens who depend upon or are connected to the settler who is being deported.

The liberty and property interests of settled undocumented residents who face detention and deportation are so significant that immigrants only accede to voluntary departure when they do not have access to legal representation or the knowledge that they can appeal. “Transnational networks” can do little more in this all too common case than to help the settler to pick up the pieces of her life when she returns home, if she has remaining social networks there to begin with. US-based family members and institutions in civil society cannot truly “represent” the individual in question outside formal channels. But they can point her to legal aid providers who will represent her for free if they

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determine she has a compelling case to be made. In the end, an individual who is confronted with the power of the state to detain and deport unauthorized immigrants and legal immigrants who are convicted of a criminal offense requires competent legal representation.

The Limits of Legal Representation for Unauthorized Settlers Using Current US Immigration Law:

The internal complexity of US immigration law coupled with uncertainty as to when ordinary constitutional law can be cited to challenge a decision by an immigration tribunal makes legal representation indispensable for unauthorized settlers who are face detention and deportation. But from the outset, unauthorized immigrants are faced with obstacles to obtaining legal counsel. Since a removal proceeding is deemed to be a civil action rather than a criminal proceeding, unauthorized immigrants do not have a Sixth Amendment right to counsel. This has continued to be the case even though ICE is increasingly charging ordinary status violators with felony counts for using a false identity to circumvent immigration restrictions on hiring unauthorized immigrants. In January, 2009, outgoing Attorney General Michael Mukasey recently overruled twenty years of precedent in an opinion that denied that unauthorized immigrants have a Fifth Amendment right to effective assistance of counsel in removal proceedings. The steady erosion of an unauthorized immigrant’s due process rights in a detention or deportation hearing, coupled with a degree of criminalization in immigration law that belies the legal fiction that “deportation is not a punishment,” makes the acquisition of effective legal representation all the more necessary. In this case, an unauthorized migrant who has settled in her community and acquired social capital is at an advantage. She is more likely to be aware of her legal

39 In 2006, the “Border Protection, Antiterrorism and Illegal Immigration Control Act of 2005,” H.R. 4437, which would have made unauthorized immigration a criminal felony rather than a civil violation was defeated in the US Senate in the wake of mass protests. Since then, however, Immigration and Customs Enforcement has accomplished the same objective by adopting a strategy crafted by anti-immigration law professor Kris W. Kobach to lay criminal charges against unauthorized immigrants caught in workplace raids for using false work authorization documents. Kris W. Kobach, “Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration,” Georgetown Law Review 22 (Spring, 2008): 459-483, 477. As a result, the lines between the legal fiction of deportation as a “civil violation” that is “not a punishment,” and the increasing reality of detention and deportation as “criminal felonies” have been blurred. See: Juliet P. Stumpf, “States of Confusion: The Rise of State and Local Power Over Immigration,” North Carolina Law Review 86:6 (2008): 1557-1618, 1588. Even though apprehended immigrants are now facing criminal charges, they are still being denied Sixth Amendment rights to an attorney that ordinarily apply in criminal cases. Matter of Compean (A.G, 2009), 24 I & N Dec. 710, 714.
rights, to have an immigration attorney on retainer or access to family and friends who can secure legal counsel, and to be part of a community that has developed a “safety plan” for its members in the event of an immigration raid at their workplace. An immigrant who is represented by a community that is able to secure effective legal representation on his behalf has the best chance of obtaining relief from removal and the opportunity to remain in the United States.

Even with effective legal counsel, unauthorized settlers that want to petition to remain in the United States after they are detained have very limited options. The act that abolished “suspension of deportation,” among other equitable remedies for relief provided for a replacement in “cancellation of removal proceedings.” In order to qualify for this remedy, an unauthorized migrant must have resided in the US for at least 10 years prior to her deportation and have a US citizen or lawful permanent resident dependent that would suffer “exceptional and extremely unusual hardship” if she were to be deported. An unauthorized immigrant can no longer base her petition on the hardship that she would experience if she were returned to her country of origin. In practice, cancellation of removal is best suited to the claims of unauthorized parents in a mixed-status family with US citizen children. Critics of jus soli birthright citizenship point to provisions of this nature and argue that they act as an incentive for unauthorized immigrants to have children in the United States in order to secure the right to remain. In practice, the courts almost always allow for the “constructive deportation” of US citizen-children with their parents, or the separation of children from their parents, on the pretense that both options provide the parents a right to choose their children’s future, and the children a right to choose to come back to the United States as an adult. Furthermore, the Board of Immigration Appeals has interpreted the exceptional and extremely unusual hardship hurdle so stringently that it has only been cleared in a


very narrow range of cases, the precedent-setting decision for a successful case under the new standard being *In Re Recinas* (BIA, 2002). Here, the tribunal weighed its conclusion heavily on the existence of a substantial number of affected citizen and lawful resident parties. Six children, including four US citizens, were entirely dependent upon the non-citizen petitioner for their support. Her entire extended family had lawful permanent resident status in the United States, but owing to the decades-long delay for family reunification visas to the US for Mexican nationals, they were unable to effectively sponsor her to remain lawfully.

In short, unauthorized immigrants who cannot claim refugee or asylum status have very few legal options at their disposal under the current statutory framework for appealing deportation/removal orders. An unauthorized settler who has managed to make a home for himself in the United States, started a family and gave birth to U.S. citizen children, acquired property, and developed extensive community ties and sites of informal representation is just as prone to detention and deportation as a migrant who walked across the border yesterday.

**The Construction of Illegality in American Politics and Society:**

Meanwhile, the political community through its representatives in Congress has not managed to stop the continued migration and settlement of unauthorized immigrants in their communities. Instead, the political community has succeeded in reinforcing the illegality and subsequent vulnerability of unauthorized immigrants to the state or US citizen private interests who know that they can exploit their powerlessness for profit with little fear of legal consequences. Since World War I, business interests, primarily in agriculture, have relied on unauthorized immigrants to make a profit while supporting the policies of nationalist conservative politicians who take a hard line on illegal immigration. This “don’t ask, don’t tell” approach to unauthorized labor by business interests, their

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48 *In Re Recinas*, 23 I&N Dec. 467, 472. The backlog in family preference visas is a fact that is not taken into consideration in the political debate over “chain migration.” Critics of the family reunification visa program claim that an indefinite stream of migrants follows every lawful immigrant as a result of the policy. In practice, backlogs of 5-20 years depending on the country impede even immediate family members over the age of 21 from entering the United States lawfully under this program.


political allies, and immigration enforcement has served to undermine labor rights in the agricultural industry. It has subjected vulnerable employees who have no political rights and who have no access to legal representation to violations of labor rights that would not be tolerated by the general public.\textsuperscript{51} It impedes the upward mobility of agricultural workers by denying them access to other employment options. It has obscured the moral vision of citizens who have been normalized into viewing the unauthorized settlers who live in their midst simply as “illegals,” without any regard for their contributions to society or the citizenry’s role in bringing them here to the point that they will not protest when they are privately exploited and publicly detained and deported.\textsuperscript{52}

From this perspective, the “illegalization” of unauthorized workers is a cynical ploy (whether they are conscious of it or not) by a community of citizens to enjoy the economic benefits of low-cost labor without incurring the social obligations that come with acknowledging that unauthorized immigrants are co-participants in society.\textsuperscript{53} The “cynical ploy” contention is among the best arguments that can be made for the view that the “illegality” of unauthorized immigrants is a social and political construction, rather than a true violation of a fundamental juridical principle or an infringement on the sovereignty of the American people. To echo Michael Walzer’s vision of what democratic justice requires in a like situation, “citizens have a choice: if they want to bring in new workers, they must be prepared to enlarge their own membership; if they are unwilling to accept new members, they must find ways within the limits of the domestic labor market to get socially necessary work done.”\textsuperscript{54} Business interests and private citizens who acknowledge their dependence on unauthorized workers and engage in the political process to fight for changes in immigration laws are not implicated in this critique insofar as they represent the interests of their workers and bear the social and political burdens of integrating them into society.\textsuperscript{55}


\textsuperscript{52} Kathleen Arnold, “Enemy Invaders: Mexican Immigrants and US Wars Against Them,” \textit{Borderlands} 6:3 (2007), 3, citing Giorgio Agamben, \textit{Homo Sacer: Sovereign Power and Bare Life} (Stanford: Stanford University Press, 1998), 8-9. “[The notion of bare life] captures the power dynamics of these 'wars' that are waged domestically against individuals who are criminalized due to their status rather than conduct.”


\textsuperscript{54} ibid., 61.

This society must examine the degree to which it is complicit or even dependent on the behavior that it criminalizes, casting individuals that it deems undesirable but who do socially necessary work outside the protection of the law whenever it is convenient and thereby abusing the high standing that “the rule of law” and “legality” enjoys in our society. A nation that is constitutionally committed to the anti-caste ideal that all of its members should be treated as equals under the protection of the law cannot persist indefinitely in treating de facto participants in society as outlaws and subjects. An arrangement in which some participants in society bear only burdens while others enjoy only benefits violates the norm of reciprocity between members. All these factors need to be taken into consideration by representatives of the community of citizens in evaluating a claim by unauthorized settlers to remain in the community where they reside.

II. Beyond “Privileges” - Does the Community Owe Anything to Unauthorized Settlers?

The most generous framework that US immigration law has had to offer when long-term unauthorized settlers appealed a deportation order treated their continued presence in the United States as a privilege, to be handed out at the discretion of an administrative officer without any further legal recourse. By this account, the community of citizens is extending mercy to unauthorized settlers by suspending their deportation, even though they are owed nothing and deserve punishment on account of their unlawful acts of entry and residence in the United States. Likewise, political discourse concerning how the community of citizens should react to the presence of unauthorized settlers in their midst begins with the presumption of their culpability for their “original sin” of unlawful entry. As

2009. The caveat here is that insofar as business interests persist in employing unauthorized workers in the absence of a political settlement, they may be infringing on the will of fellow citizens.


Gerald Neuman, “Discretionary Deportation,” Georgetown Immigration Law Review 20 (2005-2006): 611-656, 635. Although the Supreme Court has repudiated the distinction between “rights” and “privileges” in its procedural due process analysis as a general matter over the past half century, the Court continues to view the fairness of procedure as a “privilege” in immigration appeals, consigned to the discretion of bureaucrats with minimal judicial scrutiny by Article III courts.

Matter of Marin, 16 I&N Dec. 581 (BIA, 1978): An application for discretionary relief . . . necessitates a balancing of the adverse factors of record evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of relief is in the best interest of this country. . . . The alien bears the burden of demonstrating that his application merits favorable consideration.
individuals, unauthorized settlers may come to be viewed as de facto members of their adopted communities, interconnected through relationships that develop through the myriad of interactions that occur between existing citizens and new settlers in their day-to-day lives. But collectively, as “unauthorized” immigrants, neither the passage of time nor their contributions and connections to their adopted communities can erase their indelible taint of unlawfulness in the eyes of the polity. Their very presence in the United States stands as a symbolic reminder that the “sovereign” community of citizens is at the mercy of forces which leave it unable to fully control its borders or the composition of its membership. In this respect, whether they have just arrived in the United States or resided here for many decades, they continue to stand at an internal border outside the personal jurisdiction of the community of citizens. A small minority of moral cosmopolitans and economic libertarians that command far more influence in the academic circles than in American political discourse is untroubled by the prospect of “open borders,” whether they be cast in terms of territorial or personal jurisdiction.


60 Tomas F. Summers, “Disobedient Bodies: Racialization, Resistance, and the Mass (Re)Articulation of the Mexican Immigrant Body,” American Behavioral Scientist 52:4 (December, 2008): 580-597, 591: “A fixation on the act of illegal border crossing obscures the complexities of the immigration process (and the debate itself) because it inherently erases the historical context described earlier. In the myopia of the traditional articulation of the framework of disobedience, the illegal immigrant is the product of behavior, beginning when a particular body crossed from one side of a border to another. This view atomizes the immigrant, disconnecting the individual from the larger context.”


62 But compare the opinion of the court in U.S. v. Atienzo, (D.Utah, 2005), F.Supp.2d, 2005, 1, 3: “That statement is only equivocally correct, however: although illegal aliens’ presence in the country is no crime, their entry into the country is.” For most participants in the debate, the question is not whether the “illegal alien” committed a crime in entering the country, this is a given fact. The question is whether she ought to able to make recompense for her initial misdeed, through the development of connections in the community, exemplary citizenship, or other actions and behaviors that mitigate her initial “criminality” over time.

63 Joseph A. Carens, “Aliens and Citizens: The Case for Open Borders,” Review of Politics 49:2 (Spring, 1987): 251-273; Walter Block, “A Libertarian Case for Free Immigration,” Journal of Libertarian Studies 13:2 (Summer, 1998): 167-186. Robert Nozick’s Anarchy, State and Utopia (Basic Books: New York, 1998), 307-309 comes close to suggesting that borders should not impede the free movement of people, arguing that individuals should be able to choose from a diverse range of communities to find one that suits their needs best. Similarly, Frederich J. Hayek’s Law, Legislation and Liberty (London: Routledge, 1973), 90-115 suggests that the boundaries between jurisdictions representing organic societies ordered by common rules are more salient than borders between sovereign states. I will return to Hayek’s description of the connection between social facts, evolving social orders, and the rule of law in more detail, as it is congenial to the incorporation of new members in society...
Yet the vast majority of the participants in the political debate over immigration reform, whether they are advocates for the legalization of long-term unauthorized settlers or proponents of increased immigration restriction, can at least agree that some measure of “border enforcement” is necessary in order to safeguard the collective security of all individuals who have decided to act as contributing members of American society, under the jurisdiction of a common legal order.64

Transition to the next paragraph by describing the role of time and subsequent events in mitigating “the original sin” of unlawful entry – i.e. the language of statute of limitations, adverse possession, subsequent acts of “good citizenship.”

Finally, transition to a paragraph on shared responsibility and reciprocity (i.e. immigrants stand at the border in the view of immigration regulations and political discourse, but business interests and other community leaders that work with immigrants know full well they are interdependent, integrated members).

Conversely, those who advocate the eventual removal of all unauthorized immigrants from the United States characterize the community of citizens’ role in passive terms as unwitting victims of an “invasion of illegal aliens” who undermine “the rule of law” by their very presence.65 Until recently, prominent US citizen-employers that facilitate and profit from unauthorized immigration have escaped public and legal scrutiny.66 In 2006, the National Council of Agricultural Employers voluntarily acknowledged to the Department of Homeland Security that over 76 percent of agricultural workers are

(i.e. unauthorized immigrants) through market forces into a legal order rather than the consent or planning of sovereign states.

64 This view is perhaps best articulated in the Roman Catholic social justice movement, which has long been a key faith-based participant in providing social and legal aid to immigrants, while adhering to a view of social justice that recognizes the importance of borders for the “common good of society.” See, for instance, Terry Coonan, “There Are No Strangers Among Us: Catholic Social Teachings and US Immigration Policy,” Catholic Lawyer 40:2 (2000-2001):105-164, 134, quoting Pope John Paul II, The Church and Illegal Immigrants. For an alternative view from the perspective of Catholic social justice teaching on unauthorized immigration and the common good, see: John Finnis, “Nationality, Alienage and Constitutional Principle,” Law Quarterly Review 123 (July, 2007): 417-445, 442-445.


not authorized to work in the United States. In the face of increased enforcement of employment authorization regulations in 2007, labor unions and business groups successfully sued the Department of Homeland Security and received a reprieve absolving businesses from criminal and civil liability for hiring workers with an invalid Social Security number. Even now, businesses that employ unauthorized workers enjoy protection from generally applicable labor laws. In 2002, the US Supreme Court ruled in *Hoffman Plastic Compounds Inc.* that the National Labor Relations Board could not apply generally applicable labor laws to govern the treatment of unauthorized workers, lest it “condone and encourage future violations of federal immigration law.”

In more general terms, scholars of unauthorized immigration including Douglas Massey and Cristina Rodriguez point to a more complicated relationship between the United States and its unauthorized workforce arising from choices that the political community has made “through our trade, immigration, and foreign policies, as well as our economic preferences,” which have resulted in our “dependence on immigrants from Mexico and Latin America in particular.” Market forces and demographic changes are only increasing the United States’ dependence on unauthorized Latin American labor, irrespective of whether the political community makes the political choice to formally legitimate their presence. Hence, at a systemic level, the United States and its citizens have entered into a relationship or a pattern of interactions with its Latin American workforce that creates tacit expectations that the entry and settlement of unauthorized workers is sanctioned, even if it is formally prohibited by law. By setting in motion the forces that draw unauthorized workers to the United States and profiting as a community from their presence, the United States and her citizens have initiated a

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67 Department of Homeland Security, “Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Final Regulatory Flexibility Analysis,” 28 October 2008, 73 FR 63843-63867, at 63845. Other revealing features of the National Council of Agricultural Employers’ testimony that the Department of Homeland Security refused to consider in its report included the prospect that no suitable “legal” workers could be found in the United States if agribusinesses were forced to replace their unauthorized workforce, thereby forcing US companies to move to Mexico, compromising US tax revenues and managerial level jobs held by US-citizen employees.


relationship with their Latin American workforce that ought to be characterized by reciprocal rights and responsibilities for both parties.\textsuperscript{73}

\textbf{A Relationship Characterized by Reciprocal Rights and Obligations Ought to Arise Through Interactions of Interdependence Between Settlers and Citizens Living Together Over Time:}

The scope of the community of citizens’ obligations for indirectly setting into motion the preconditions of unauthorized migration flows to the United States is augmented once these migrants arrive in the United States and begin to settle in their adopted communities. At this point, irrespective of whether the political community chooses to formally recognize them as such, they are in the process of becoming \textit{de facto} members of our society. As soon as they arrive in the United States, they are subject to local laws like any other participant in society, without any immunities or special treatment given on account of their \textit{de jure} nationality of origin, whose consular protection is limited and often inaccessible in far-flung settlements where migrants are now settling. Once they settle into their adopted communities and establish connections with existing members of the community at work, where they live, and in institutions of civil society, they become and are sometimes recognized in law as \textit{de facto} members of the broader society or even the “American people.” Through myriad economic, social and civic interactions over the course of their day-to-day lives, unauthorized settlers and existing citizens become interdependent on each other, which ought to give rise to relationships characterized by associative rights and obligations stemming from their co-existence as members and participants in the same communities.\textsuperscript{74} [EXPAND]

\textbf{From Transient Foreigners to Domestic Persons:}

As \textit{de facto} members of American society, long-term unauthorized settlers should, and in most cases are, held accountable to the same obligations as their fellow citizens without recourse to special immunities and privileges arising from their \textit{de jure} nationality of origin. [EXPAND – with the intent of

\begin{footnotesize}
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\item \textsuperscript{73} Advocates of legalization disagree among themselves about the community of citizen’s responsibility for the conditions that led to the settlement of a large unauthorized immigrant population in the United States. See, for instance, Joseph Carens, “In Defense of Amnesty for Irregular Migrants,” \textit{Boston Review}, 2009, 20: “To the extent that irregular migration flows are determined by structural factors beyond the state’s control, the state cannot be held responsible for failing to prevent the entry and settlement of the irregular migrants. It might still be possible to criticize state policies as ineffective or even counterproductive, but not as hypocritical.” This view fails to account for the intergenerational consequences of US immigration and foreign policy, and the continuity of the political community as a project whose decisions implicate current and future members of the polity.
\item \textsuperscript{74} The term “associative obligations” is from Dworkin, \textit{Law’s Empire}, but his discussion of the “ideal” associative obligation characterized by mutual and voluntary ties is more expansive than what I am intending here.
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\end{footnotesize}
demonstrating that as an individual’s locus of interests moves from his community of origin to his adopted community, there is a shift in allegiance that ought to be translated into a shift of protection. Cite empirical literature noting that “transnational networks” and “external diplomatic protection” are unavailable or ineffective for most migrants].

The Rights and Obligations That Arise from the Development of Ties of Interdependence over Time:

The passage of time and the sentiment of familiarity that arises from repeat interactions between the existing community of citizens and migrants settling into their adopted community should itself be regarded as a basis for the development of a relationship bearing rights and obligations between the two groups. In Americans in Waiting, immigration law scholar Hiroshi Motomura highlights the role that the passage of time plays in the creation of affiliations that outweigh the lack of “contractual” ties between citizens and unauthorized immigrants.75 (Add: Carens, Statute of Limitations, forthcoming). In theory, neither US immigration law nor the US Constitution makes formal distinctions between a migrant who has just crossed the border unlawfully and a settler who has resided in the United States for decades. The general principle treats an act of mutual consent between the community of citizens and its non-citizen subjects as the only basis for lawful relations between the two parties. In practice, US immigration law occasionally recognizes the duration of an unauthorized immigrant’s stay in the United States as a consideration in deciding whether to allow her to remain. The Supreme Court has regularly distinguished between the rights and obligations of individuals who have no voluntary ties to the United States, and long-term residents who have become a part of the American people, irrespective of whether they were admitted lawfully in the first place.76 In keeping with the non-consensual but egalitarian foundations of US citizenship in the Anglo-American common law, the jus soli provision of the Fourteenth Amendment guarantees that second generation immigrants born in the United States will be treated as full de jure members of the nation, regardless of their parents’ status.77

The moral intuition that underlies the recognition of a relationship of rights and obligations between long-term unauthorized residents of the United States and the community of citizens can be found in the anti-caste commitment of the Fourteenth Amendment. Irrespective of how the community feels

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77 Wong Kim Ark v. United States (1898), 169 US 649, 693-694.
about unauthorized immigrants surreptitiously entering its borders and settling in its presence without its intentional, explicit consent, the fact remains that it is all but impossible to remove 12 million individuals who have become interwoven in the fabric of society and not readily distinguishable from lawful permanent residents and citizens of the same ethnic origin. The persistent presence of a permanent minority caste of subjects over time, who are ineligible for citizenship and ruled by the will of the community of citizens, betrays the commitments of a liberal and democratic polity that aspires to extend a role in self-governance to all who are governed by the state.78 The social fact of unauthorized settlers’ attachment to society, and their shared existence, interests and sentiments with the community ought to give rise to reciprocal rights and obligations between unauthorized members and citizens.

While US immigration and nationality law sometimes takes note of the passage of time as the basis for the development of a relationship of reciprocal rights and obligations between unauthorized immigrants and the community of citizens, it still leaves many long-term settlers subject to removal from their communities. The most glaring instance of this problem occurs when unauthorized settlers who arrived with their parents as young children, with no memory of their country of birth, are unable to acquire lawful status in the only country that they ever knew as “home.” They are in a similar position as their younger brothers and sisters who were born in the United States and who acquire citizenship at birth, in recognition of the fact that they are likely to remain in the United States the rest of their lives.

[Expand, citing Plyler v. Doe, the DREAM Act, and the similarity of circumstances between jus soli citizens and infant/child immigrants – with the view of making the point that time is especially significant when it involves an individual’s formative years/experiences].

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[Tentative Conclusion for Section II – What Normative Premises Ought to Underlie the Procedure for Adjudication of Cancellation of Removal Cases (i.e. historical relationships, reciprocity, interdependence, living together in society, and how can these premises be translated into juridical language)].

At the point in which a long-term unauthorized settler is arrested and detained, she ought to be able to ask for more than just mercy from the community of citizens. The community has a right to expect an unauthorized settler to provide an account as to why she should not be penalized for her acts of unlawful entry and residence in the United States. The unauthorized settler, in turn, may be owed reasons by the representatives of the political community as to why she is not entitled to remain, when the community has benefitted from her labor and entered into a pattern of interaction with her over time in which she acted as a fellow participant in society.

III. Constitutional Arguments Why The Community Should Treat Settlers Differently than Migrants:

a. Justice Brewer’s dissent in *Fong Yue Ting v. United States* (1892) 149 US 698, 737: Those who have become domiciled in a country are entitled to a more distinct and larger measure of protection than those who are simply passing through, or temporarily in it. Whatever rights a resident alien may have in any other nation; here he is within the express protection of the Constitution, especially in respect to those guarantees which are declared in the original amendments.

b. Justice Jackson’s opinion in *Johnson v. Eisentrager* (1950), 339 US 763, 770-771: The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. . . . In extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien’s presence within its territorial jurisdiction that gave the Judiciary power to act. In *The Japanese Immigrant Case*, the Court held its processes available to ‘an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here.’

c. Justice Stewart’s opinion in *Woodby v. Immigration and Naturalization Service* (1966), 375 US 276, 285: To be sure, a deportation proceeding is not a criminal prosecution. But it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case. This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification. In words apposite to the question before us, we have spoken of ‘the solidity of proof that is required for a judgment entailing the consequences of deportation, particularly in the case of an old man who has lived in this country for forty years.

d. Justice Brennan’s opinion in *Plyler v. Doe* (1982) 457 US 202, 219-220: Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial “shadow population” of illegal migrants-numbering in the millions-within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality
under law. . . . The children who are plaintiffs in these cases are special members of this underclass. Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor children of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated . . . the children who are plaintiffs in these cases “can affect neither their parents' conduct nor their own status.” Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice. . . . In any event, the record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States. It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries.

e. Justice Rehnquist’s opinion in United States v. Verdugo-Urquidez (1990) 494 US 259, 271-272: The Fourth Amendment phrase “the people” seems to be a term of art used in select parts of the Constitution and contrasts with the words “person” and “accused” used in Articles of the Fifth and Sixth Amendments regulating criminal procedures. This suggests that “the people” refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. . . . Verdugo-Urquidez also relies on a series of cases in which we have held that aliens enjoy certain constitutional rights. . . . These cases, however, establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country. . . . The Court of Appeals found some support for its holding in our decision in INS v. Lopez-Mendoza, where a majority of Justices assumed that the Fourth Amendment applied to illegal aliens in the United States. . . . The illegal aliens in Lopez-Mendoza were in the United States voluntarily and presumably had accepted some societal obligations; but respondent had no voluntary connection with this country that might place him among “the people” of the United States.

f. District Judge Cassell, U.S. v. Esparaza-Mendoza, (D.Utah, 2003) 265 F. Supp. 2d 1254, 1273: In sum, the court cannot conclude that policy considerations should lead it to construe the Fourth Amendment as extending to previously removed alien felons. Therefore, the court agrees with the position of the United States and holds that Esparza-Mendoza-as a previously deported felon-lacks sufficient connection to this country to assert a Fourth Amendment suppression claim. In reaching this conclusion, the court is not determining whether illegal aliens who have not been deported likewise lack of a sufficient connection. The case law appears to recognize an ascending scale of rights for aliens. Whether illegal aliens who have not previously been deported are distinguishable from alien felons who have been deported is a question that can await another day.

g. Exception for Enemy Illegal Aliens, contrasted with Illegal Aliens Generally: Hamdan v. Rumsfeld (D.D.C, 2006) 464 F.Supp.2d 9, 17: In American habeas actions, alien petitioners have had access to the writ largely because they resided, lawfully or unlawfully, on American soil. See, e.g., The Japanese Immigrant Case (alien, while alleged to have entered the country unlawfully, nevertheless had made himself "a part of its population"). He has lived nearly all of that time within the plenary
and exclusive jurisdiction of the United States, but he has not become a part of the population enough to separate himself from the common law tradition generally barring non-resident enemy aliens from accessing courts in wartime. His detention in Guantanamo, in other words, has not meaningfully "increase[d] his identity with our society."

h. Judge Munley’s opinion in Lozano v. City of Hazelton (M.D. PA, 2007), 496 F.Supp 2d 477, 499: Fundamental to the American legal tradition is the notion that those accused of and convicted of crimes possess fundamental rights which are not abrogated simply because of such person’s alleged behavior. A person accused of a crime is entitled, among other rights, to be free of unreasonable search and seizure; to the presumption of innocence; to the proof of her guilt beyond a reasonable doubt; to minimally competent legal representation; to access to any potentially exculpatory evidence; to be free of cruel and unusual punishment; and to seek a writ of habeas corpus. We note, however, that an alien subjected to a deportation hearing “whether for crime or for other reasons, [is] protected only by the procedural requirements of the Due Process Clause. The contemporary concern with and opprobrium towards undocumented aliens does not lead us to the conclusion that those who violate the laws to enter the United States can be subject without protest to any procedure or legislation, no matter how violative of the rights to which those persons would normally be entitled as persons in the United States. Our legal system is designed to provide rights and exact justice simultaneously.

Other International Legal Precedents:

A Guideline for Judging What State Has the Most Significant Relationship With an Individual, with the right and duty to protect an individual as its member in International Law (Nottebohm, Second Phase, I.C.J. 1955): 23, 26: According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. . . . Does Nottebohm appear to have been more closely attached by his tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future to [his state of de jure nationality] than to any other State? The facts clearly establish, on the one hand, the absence of any bond of attachment between Nottebohm and [his de jure nationality and, on the other hand, the existence of a long-standing and close connection between him and [his de facto nationality, Guatemala], a link which naturalization in no way weakened.