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## Elusive Justice: Legal Redress for Killings by U.S. Border Agents

Roxanna Altholz

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# ELUSIVE JUSTICE: LEGAL REDRESS FOR KILLINGS BY U.S. BORDER AGENTS

Roxanna Altholz\*

## ABSTRACT

*Since the 1990s, U.S. Customs and Border Protection (CBP) agents have killed approximately fifty Mexican and U.S. nationals along the U.S.-Mexico border. Many of the victims, including several teenagers, were unarmed and shot in the back. The vast majority of CBP agents have faced no criminal, civil, or disciplinary action for their conduct. This Article identifies U.S. legal doctrines, defenses, and procedures that make justice elusive for the relatives of victims. The Article argues that there is mounting legal and political pressure to hold CBP agents accountable for violence at the border and suggests that reformists look to international standards to help guide efforts to address systemic barriers to redress.*

*To date, no civil plaintiff has prevailed at trial in a case involving a CBP killing. Courts have dismissed most federal civil claims for lack of jurisdiction or after finding the U.S. government or CBP agent has immunity. Federal legislation, specifically the Westfall Act, effectively bars state-law tort claims in this context. As for criminal charges, federal prosecutors have declined to bring charges in all cases but one and the few state prosecutions have rarely resulted in a guilty verdict.*

*There is, however, mounting legal and political pressure to hold CBP agents accountable for border killings. In 2017, the U.S. Supreme Court is expected to decide whether the U.S. Constitution protects foreign nationals killed in foreign territory by CBP agents.<sup>1</sup> The U.S. Department of Justice recently brought criminal charges against a CBP agent for a border killing for the first time in the CBP's nearly 100-year history. The Mexican government is also investigating multiple deaths and issued an arrest warrant for a CBP agent who killed an unarmed Mexican teenager. In addition, international human rights bodies have denounced the United States for use of excessive force and the failure to track or adequately investigate border deaths.*

*This Article discusses doctrines and defenses such as sovereign and qualified immunity, extraterritoriality, and the Westfall Act that have led to the dismissal of civil suits and the closing of criminal investigations without pursuing charges. But legal doctrines do not alone explain the lack of accountability—institutional policies and practices also play a critical role. This Article argues that international human rights standards reveal how far U.S. law enforcement has strayed from global standards in preventing the excessive use of force and serves as a guide to identify and address the systemic barriers to redress faced by victims' families.*

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1. *Hernandez v. Mesa*, 137 S. Ct. 291 (2016) (granting certiorari).

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## INTRODUCTION

On a hot summer day in 2010, fifteen-year-old Sergio Adrián Hernández Güereca was playing a game with three friends near the wall that divides El Paso, Texas and Juárez, Mexico.<sup>2</sup> The children dared each other to run up a steep concrete incline, touch the U.S. border fence, and run back.<sup>3</sup> The game stopped when a U.S. Customs and Border Protection (CBP) agent approached one of the boys. Cellphone footage shows that Sergio retreated toward a pillar beneath a bridge on the Mexican side of the border.<sup>4</sup> Moments later, the CBP agent drew his firearm and shot Sergio in the face, next to his eye.<sup>5</sup> The agent was standing in the United States sixty feet away from where Sergio died in Mexico.<sup>6</sup>

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2. Complaint ¶ 24, *Hernandez v. United States*, 802 F. Supp. 2d 834 (W.D. Tex. 2011) (No. 3:11-cv-00027), 2011 WL 333184.

3. *Hernandez v. United States*, 757 F.3d 249, 255 (5th Cir. 2014).

4. Petition for Writ of Certiorari at 4–6, *Hernandez v. Mesa*, 137 S. Ct. 291 (2016) (No. 15-118), 2015 WL 4537883.

5. *Id.* at 4–5.

6. *Id.* at 5.

Sergio's mother sued CBP agent Juan Mesa, Jr. in federal court for violating her son's rights under the Fourth and Fifth Amendments of the U.S. Constitution.<sup>7</sup> Agent Mesa moved to dismiss the claims, arguing that Sergio did not have constitutional rights because he was a Mexican citizen standing in Mexico when he died.<sup>8</sup> The district court agreed and dismissed the claims two days later.<sup>9</sup> A divided three-judge panel of the United States Court of Appeals for the Fifth Circuit reversed, concluding that the protections of the Fifth Amendment extended to Sergio in light of the "obvious wrongfulness" of Agent Mesa's actions.<sup>10</sup> On rehearing en banc, the Fifth Circuit vacated the panel decision in a ruling with five separate concurrences.<sup>11</sup> The Fifth Circuit held that Sergio lacked sufficient voluntary contacts with the United States to be protected by the Fourth Amendment, and that "no case law in 2010, when this episode occurred, reasonably warned Agent Mesa that his conduct violated the Fifth Amendment."<sup>12</sup>

Three months later, Sergio's family successfully petitioned the U.S. Supreme Court for review.<sup>13</sup> "The en banc Fifth Circuit in this case concluded that the Constitution affords no protection to an unarmed teenager in a confined area of exclusive U.S. control who was shot to death at close range, without justification, by a U.S. Border Patrol agent standing on U.S. soil[.]" the petition stated. "If left standing," the petition argued, "the Fifth Circuit's decision will create a unique no-man's land—a law-free zone in which U.S. agents can kill innocent civilians with impunity."<sup>14</sup> In practice, one already exists.

Since the 1990s, CBP agents have killed approximately fifty people along the U.S.-Mexico border.<sup>15</sup> The killings involve one of three scenarios: (i) foreign nationals killed in Mexican territory (i.e., agents shoot across the border and kill a Mexican national); (ii) foreign nationals killed in U.S. territory; or (iii) U.S. citizens killed in U.S. territory.<sup>16</sup> The victims include unarmed teenagers shot in the back and head, U.S. citizens killed while riding in moving vehicles, and Mexican nationals who died after being beaten, shot with Taser guns, or repeatedly pepper sprayed by CBP agents.<sup>17</sup>

The CBP is the nation's largest law enforcement agency with more than 60,000 employees.<sup>18</sup> Since September 11, 2001, Congress has doubled the CBP's budget to \$13 billion and expanded the agency's access to surveillance equipment,

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7. Complaint, *supra* note 2.

8. Motion to Dismiss, *Hernandez*, 802 F. Supp. 2d 834 (No. 3:11-cv-00027), ECF No. 68.

9. *Hernandez*, 802 F. Supp. 2d at 838.

10. *Hernandez v. United States*, 757 F.3d 249, 255 (5th Cir. 2014).

11. *Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015).

12. *Id.* at 119–20.

13. *Hernandez v. Mesa*, 137 S. Ct. 291 (2016).

14. Petition for Writ of Certiorari, *supra* note 4, at 1.

15. See *Border Patrol Abuse Since 2010 (as of March 2016)*, S. BORDER COMMUNITIES COAL., <http://soboco.org/border-patrol-brutality-since-2010/> (last visited Dec. 16, 2016).

16. *Id.*

17. *Id.*

18. *Careers*, U.S. CUSTOMS & BORDER PATROL, <http://www.cbp.gov/careers> (last visited Dec. 16, 2016).

weaponry, and technology.<sup>19</sup> Twenty-thousand CBP agents monitor U.S. borders.<sup>20</sup> They have the authority to apprehend individuals they suspect of violating immigration laws within one hundred miles of the border.<sup>21</sup> Given this broad authority, the killings described in this Article occurred in diverse settings—ports of entry, suburbs of major U.S. cities like San Diego, and remote rural areas in U.S. and Mexican territory.

Federal regulations and CBP’s use-of-force policy establish the conditions under which CBP agents may use lethal force.<sup>22</sup> The policy requires that “deadly force may only be used if an agent has a reasonable belief, based on the totality of the circumstances, that the subject of such force poses an imminent danger of death or serious physical injury to the agent or another person.”<sup>23</sup> In most border killing cases, a CBP agent kills either an individual who allegedly threw a rock near the agent or an occupant of a moving vehicle.<sup>24</sup> Between 2010 and 2014, CBP agents responded to alleged rock-throwing incidents with lethal force forty-three times, resulting in at least ten deaths.<sup>25</sup>

Efforts to obtain redress for these killings have largely failed. No civil plaintiff in a border killing case has prevailed at trial, although a few cases have settled out of court. In one civil case resulting in a trial judgment, the court concluded that the CBP agent acted in self-defense.<sup>26</sup> In all cases but one, federal prosecutors declined to bring criminal charges against the offending agent(s), concluding that the agent’s actions constituted a “reasonable use of force or would constitute an act of self-defense.”<sup>27</sup> While the Mexican government has repeatedly condemned these killings and attempted to prosecute offending CBP agents, no CBP agent has faced legal consequences in Mexico because the United States has refused to extradite the accused.<sup>28</sup>

19. LAURA W. MURPHY & GEORGEANNA M. USOVA, ACLU, WRITTEN STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION FOR A HEARING ON THE BUDGET OF U.S. CUSTOMS AND BORDER PROTECTION SUBMITTED TO THE HOMELAND SECURITY SUBCOMMITTEE OF THE HOUSE OF APPROPRIATIONS COMMITTEE (Apr. 2, 2014), [https://www.aclu.org/sites/default/files/assets/aclu\\_statement\\_for\\_cbp\\_budget\\_hearing\\_house\\_appropriations\\_homeland\\_security\\_subcommittee\\_4\\_2\\_14\\_final.pdf](https://www.aclu.org/sites/default/files/assets/aclu_statement_for_cbp_budget_hearing_house_appropriations_homeland_security_subcommittee_4_2_14_final.pdf).

20. The majority of the remaining 40,000 CBP agents screen passengers and cargo at ports of entry.

21. 8 C.F.R. § 287.1(b) (2017).

22. 8 C.F.R. § 287.8(a)(2) (2017); *id.* § 287.8(a)(1)(iii); OFF. OF TRAINING & DEV., U.S. CUSTOMS & BORDER PROTECTION, HB 4500-01C, USE OF FORCE POLICY, GUIDELINES AND PROCEDURES HANDBOOK (May 2014) [hereinafter USE OF FORCE HANDBOOK], <https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf>.

23. Memorandum from Michael J. Fisher, Chief of U.S. Border Patrol, on Use of Safe Tactics and Techniques, to U.S. Customs and Border Protection Personnel at 1 (Mar. 7, 2014) [hereinafter Memorandum on Use of Safe Tactics and Techniques], <https://www.cbp.gov/sites/default/files/documents/Use%20of%20Safe%20Tactics%20and%20Techniques.pdf>.

24. POLICE EXEC. RES. F., U.S. CUSTOMS & BORDER PROTECTION - USE OF FORCE REVIEW: CASES AND POLICIES (2013), <http://www.cbp.gov/sites/default/files/documents/PERFReport.pdf>.

25. See Memorandum on Use of Safe Tactics and Techniques, *supra* note 23, at 1.

26. *Guerrero v. United States*, No. 4:12-cv-00370-JAS, 2015 WL 569875 (D. Ariz. Feb. 11, 2015) (order denying oral argument).

27. See, e.g., Press Release, Fed. Bureau of Investigation, Federal Officers Close Investigation into the Death of Sergio Hernandez-Guereca (Apr. 27, 2012), <https://www.fbi.gov/el Paso/press-releases/2012/federal-officers-close-investigation-into-the-death-of-sergio-hernandez-guereca>.

28. See Adam Liptak, *An Agent Shot a Boy Across the U.S. Border. Can His Parents Sue?*, N.Y.

But the tide may be turning as activists draw greater public attention to CBP killings and high-profile cases make their way through U.S. courts.<sup>29</sup> This Term, the U.S. Supreme Court is expected to determine whether the U.S. Constitution protects unarmed Mexican nationals killed in Mexico by CBP agents.<sup>30</sup> For the first time in the CBP's nearly 100-year history, a CBP agent is facing federal criminal charges for a border killing.<sup>31</sup> The Mexican government issued an arrest warrant for a CBP agent who killed an unarmed Mexican teenager, and is currently investigating other deaths.<sup>32</sup> And in March 2016, the family members of a father of five, who was beaten to death by a dozen CBP agents, filed a human rights complaint against the United States before the Inter-American Commission on Human Rights (IACHR).<sup>33</sup>

This Article examines the legal doctrines, defenses, and procedures, as well as institutional policies and practices, that have fostered the CBP's impunity for border killings.<sup>34</sup> The Article has two main goals. First, it identifies the legal remedies available for CBP killings in all contexts. CBP victims—whether U.S. or foreign nationals killed on U.S. or Mexico soil—have few legal options to pursue redress in U.S. courts due to legal barriers such as extraterritoriality, sovereign immunity, and the Westfall Act. While scholarship has focused on cross-border shootings,<sup>35</sup> this Article argues that all victims of border killings, regardless of the geographic location of the harm, lack effective access to a remedy. Second, the Article looks to international human rights law, specifically the case law within the Inter-American human rights system, to identify institutional policies and practices that contribute to the lack of redress. The Article argues that the standards developed by the Inter-American Commission and Court on Human Rights regarding use of force, criminal investigations, and the rights of victims' family members to reparations provide a way to gauge how far U.S. law enforcement has strayed from international standards, diagnose reasons for gaps in accountability, and identify the reforms necessary to address barriers to redress.

The Article is based in part on research and analysis published in a working paper, *Elusive Justice: Pursuing Legal Redress in the United States and Mexico for*

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TIMES (Oct. 17, 2016), [http://www.nytimes.com/2016/10/18/us/politics/an-agent-shot-a-boy-across-the-us-border-can-his-parents-sue.html?\\_r=0](http://www.nytimes.com/2016/10/18/us/politics/an-agent-shot-a-boy-across-the-us-border-can-his-parents-sue.html?_r=0).

29. See Mark Binelli, *10 Shots Across the Border: The Killing of a Mexican 16-year-old Raises Troubling Questions About the United States Border Patrol*, N.Y. TIMES MAG. (Mar. 3, 2016), <https://www.nytimes.com/2016/03/06/magazine/10-shots-across-the-border.html>.

30. *Hernandez v. Mesa*, 137 S. Ct. 291 (2016).

31. *United States v. Swartz*, No. 15-cr-1723 (D. Ariz. Sept. 23, 2015).

32. Lorena Figueroa, *Heartbroken Mother of Juarez Teen Fatally Shot by Border Agent Seeks Justice*, EL PASO TIMES (May 10, 2015), <http://www.elpasotimes.com/story/news/local/2015/05/10/mother-teenager-shot-by-border-agent-heartbroken-seeking/31262511/>.

33. The author represents the family of Anastasio Hernández Rojas in the litigation against the United States before the Inter-American Commission on Human Rights. See Complaint, Family Members of Anastasio Hernández Rojas v. United States (Inter-Am. Comm'n H.R. Mar. 30, 2016) [hereinafter *Hernández Rojas Complaint*], <http://southernborder.org/wp-content/uploads/2016/03/Anastasio-Complaint-FINAL-160329.pdf>.

34. The Article does not address the formidable practical barriers to justice—litigation is expensive, time-consuming, emotionally taxing, and in some cases, exposes victims' relatives who are residing in the United States without documents to the risk of deportation.

35. See, e.g., Eva Bitran, *Boumediene at the Border? The Constitution and Foreign Nationals on the U.S.-Mexico Border*, 49 HARV. C.R.-C.L. L. REV. 229 (2014); Guinevere E. Moore & Robert T. Moore, *The Extraterritorial Application of the Fifth Amendment: A Need for Expanded Constitutional Protections*, 46 ST. MARY'S L.J. 1 (2014).

*Killings by U.S. Border Agents*, released in 2015 by Berkeley Law's International Human Rights Law Clinic.<sup>36</sup> The author uses civil and criminal court records; legal scholarship; and reports by government agencies, news media, and advocacy groups to provide an up-to-date and comprehensive analysis of available legal remedies. The author also compiled a list of legal actions taken in response to known border killings from 1992 to 2016. Of the thirty-four deaths involving victims who were identified, the author found no evidence of a civil suit or criminal investigation in nearly half of them (fifteen cases).

The Article proceeds in four parts. Parts I and II describe the legal obstacles to civil and criminal lawsuits in the United States, respectively. Part III discusses the mounting of legal and political pressure to provide access to justice. Lastly, Part IV examines how applicable international standards may serve as a framework for measuring and addressing systemic barriers to redress for border killings.

## I. LEGAL OBSTACLES TO CIVIL REDRESS IN THE UNITED STATES

Victims of border killings and their relatives struggle to access justice in U.S. courts. The majority of civil claims are dismissed for one of three reasons. First, courts have held that U.S. law does not protect foreign nationals killed in Mexico by CBP agents.<sup>37</sup> Second, many courts have found that individual CBP agents were entitled to qualified immunity and are not civilly liable.<sup>38</sup> Third, most courts have concluded that sovereign immunity shields the federal government from most tort claims in this context, including those arising under international law.<sup>39</sup> In particular, the Westfall Act effectively bars state-law tort claims in this context.<sup>40</sup>

Due in large part to these legal obstacles, no civil plaintiff has prevailed at trial to date. However, a small number of plaintiffs have obtained monetary settlements prior to trial.<sup>41</sup> In addition, a small number of claims have survived motions to dismiss

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36. *Elusive Justice: Pursuing Legal Redress in the United States and Mexico for Killings by U.S. Border Agents*, (Int'l Human Rights Law Clinic, Working Paper Series No. 3, Aug. 2015), <https://www.law.berkeley.edu/wp-content/uploads/2015/09/Working-Paper-Elusive-Justice-LARGE-FINAL.pdf>.

37. *Compare* *Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015) (dismissing claims involving unarmed Mexican teenager fatally shot in Mexico because teenager was standing in Mexico when shot), *with* *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025 (D. Ariz. 2015) (upholding claims involving unarmed Mexican teenager fatally shot in Mexico).

38. *Estate of Alvarado v. Shavatt*, No. 15-55699, 2017 WL 203552 (9th Cir. 2017); *Mendez v. Poitevent*, 823 F.3d 326, 334 (5th Cir. 2016); *Hernandez*, 785 F.3d 117.

39. *See, e.g.*, *Hernandez v. United States*, 757 F.3d 249, 259 (5th Cir. 2014); *Nino v. United States*, No. 3:13-cv-0469-WQH-BGS, 2015 WL 1003617 (S.D. Cal. Mar. 6, 2015).

40. *See, e.g.*, *Hernandez v. United States*, 802 F. Supp. 2d 834, 840, 846 (W.D. Tex. 2011). Courts have also dismissed civil suits brought by victims' relatives for lack of standing. *See, e.g.*, *Mena v. United States*, No. EP-10-CV-282-KC, 2012 WL 6047039, at \*1 (W.D. Tex. Dec. 5, 2012) (dismissing claims by domestic partner and children of José Alejandro Ortiz Castillo, a twenty-three-year-old Mexican national killed by a CBP agent after he allegedly picked up a rock near the agent, because the plaintiff was unable to prove that she was married to the victim or that the victim was the biological father of her children); *Nino*, 2015 WL 1003617, at \*4 (S.D. Cal. Mar. 6, 2015) (dismissing claims by domestic partner of Jesús Alfredo Yañez Reyes—a father of two killed by a CBP agent—because the plaintiff failed to prove that she and the victim “believed in good faith” that their marriage was valid under Cal. Civ. Proc. Code § 377.60(b) (2005)).

41. *Rob O' Dell, Family of Man Killed by Border Agents in 2010 to Receive \$1 Million*, ARIZ. REPUBLIC (Feb. 24, 2017), <http://www.azcentral.com/story/news/politics/border-issues/2017/02/24/family->

or motions for summary judgment.<sup>42</sup> Several cases remain pending.<sup>43</sup>

This Part examines the four types of civil claims available in border killing cases and the legal obstacles faced by plaintiffs seeking relief. It begins with a brief description of each claim, followed by an analysis of legal obstacles.

### A. *Relevant Civil Claims*

Relatives of border victims have asserted four types of civil claims under: (i) *Bivens*; (ii) the Federal Tort Claims Act; (iii) the Alien Tort Statute; and (iv) state-law torts. Civil claims offer monetary damages and the possibility of obtaining information about the killing through discovery. However, a court may not order the CBP to suspend or change its policy as a remedy for successful claims.<sup>44</sup>

A *Bivens* action is a claim for damages against a federal officer for a violation of the U.S. Constitution.<sup>45</sup> The purpose of a *Bivens* action is to deter the unconstitutional conduct of federal officers.<sup>46</sup> In this context, most *Bivens* claims are based on the Fourth Amendment prohibition against unreasonable search and seizure

of-man-killed-by-border-agents-receives-million-dollars/98374444/; *Adorno v. United States*, No. 8:10-cv-00250-JVS-RNB (C.D. Cal. Mar. 2, 2010) (family members of Tomas Sanchez Orzuna, who died in 2008 after being pepper sprayed by CBP agents, settled a civil lawsuit for \$15,000); *Rodriguez v. United States*, No. 06CV02753(TJW), 2010 WL 3454114 (S.D. Cal. Apr. 21, 2010) (family members of Guillermo Martínez Rodríguez, who was fatally shot in the back by CBP Agent Faustino Campos in 2005, settled a civil lawsuit for \$40,000); Janet Rose Jackman, *\$850k Settlement for Family of Slain Illegal Immigrant*, TUCSON SENTINEL (Sept. 8, 2011), [http://www.tucsonsentinel.com/local/report/090811\\_slain\\_immigrant\\_settlement/850k-settlement-family-slain-illegal-immigrant/](http://www.tucsonsentinel.com/local/report/090811_slain_immigrant_settlement/850k-settlement-family-slain-illegal-immigrant/) (reporting that the family of Francisco Javier Dominguez Rivera, who was fatally shot by CBP agent Nicholas Corbett in 2007, reached a settlement in a civil lawsuit for \$850,000 with U.S. government); Miriam Davidson, *Settlement Sends Signal on Violence by Border Patrol*, CHRISTIAN SCI. MONITOR (June 6, 1995), <http://www.csmonitor.com/1995/0606/06032.html> (reporting that the family of Dario Miranda Valenzuela, who was fatally shot in the back by CBP agent Michael A. Elmer in 1992, reached a settlement in a civil lawsuit for \$612,000 with U.S. government and defendant's private insurer). See also cases involving border abuses that did not result in fatalities, for example, *Romo v. United States*, No. 4:12-CV-041-TUC-JAS, 2015 WL 12940759, at \*9 (D. Ariz. Feb. 6, 2015) (awarding approximately \$500,000 in damages to Mexican national who survived shooting in Arizona).

42. See, e.g., *Rodriguez*, 111 F. Supp. 3d 1025 (D. Ariz.) (denying in part motion to dismiss claims brought by family of Mexican teenager fatally shot in Mexico); *Guerrero v. United States*, No. CV-12-00370-TUC-JAS, 2015 WL 569875 (D. Ariz. Feb. 11, 2015) (permitting claims brought by family of U.S. citizen fatally shot in Arizona to proceed to trial); *Perez v. United States*, 103 F. Supp. 3d 1180 (S.D. Cal. 2015) (denying in part motion to dismiss claims brought by family of Mexican national killed by CBP agents); *Estate of Hernandez-Rojas ex rel. Hernandez v. United States*, 62 F. Supp. 3d 1169 (S.D. Cal. 2014) (denying in part motion to dismiss claims brought by family of Mexican national beaten to death by at least a dozen CBP agents in California).

43. See, e.g., *Hernandez v. Mesa*, 137 S. Ct. 291 (2016); *Estate of Ramirez-Galindo v. United States*, No. 3:15-cv-01694-W-NLS (S.D. Cal. July 30, 2015); *Rodriguez*, 111 F. Supp. 3d 1025; *Andrade v. United States*, No. 2:15-cv-00103 (S.D. Tex. Feb. 27, 2015); *Perez v. United States*, No. 13CV1417-WQH-BGS, 2014 WL 4385473 (S.D. Cal. Sept. 3, 2014); *Gallegos v. United States*, No. 5:14-cv-00136 (S.D. Tex. Aug. 27, 2014); *Estate of Alvarado v. Tackett*, No. 3:13-cv-01202-W-JMA (S.D. Cal. May 20, 2013).

44. *Davis v. Passman*, 442 U.S. 228, 230 (1979) (under *Bivens*, "it is damages or nothing"); see *Higazy v. Templeton*, 505 F.3d 161 (2d Cir. 2007). Prisoners' rights cases permitting injunctive relief against federal prisons are not *Bivens* actions, but rather suits under 28 U.S.C. § 1331, which courts have interpreted to permit injunctions against federal prisoners. The FTCA prohibits punitive damages and injunctive relief, even if permitted under state law. See 2 JAYSON & LONGSTRETH, *HANDLING FEDERAL TORT CLAIMS* § 9.02 (1996); *Moon v. Takisaki*, 501 F.2d 389 (9th Cir. 1974).

45. See *Bivens v. Six Unknown Names Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (creating *Bivens* cause of action); RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 733 (6th ed. 2009).

46. See *FDIC v. Meyer*, 510 U.S. 471, 476 (1994).

and Fifth Amendment due process rights. The proper defendant in a *Bivens* action is the individual federal officer, not the U.S. government.<sup>47</sup> Successful plaintiffs may recover compensatory damages, punitive damages, and attorneys' fees.<sup>48</sup> Plaintiffs may also recover punitive damages if they prove that the officer acted with malice.<sup>49</sup> The statute of limitations is typically two to three years.<sup>50</sup>

The Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), permits lawsuits against the federal government for personal injury or death caused by a federal employee while "acting within the scope of employment."<sup>51</sup> FTCA claims are federal claims based on common-law torts created by state law, such as negligence, battery, and wrongful death.<sup>52</sup> The proper defendant in an FTCA suit is the U.S. government; if a plaintiff brings an FTCA suit against an individual employee, the court must substitute the U.S. government as the defendant.<sup>53</sup> In contrast to *Bivens* claims, the FTCA permits only compensatory damages payable by the U.S. government<sup>54</sup> and limits attorneys' fees to twenty-five percent of any damages or settlement amount.<sup>55</sup> The FTCA statute of limitations is two years.<sup>56</sup>

The Alien Tort Statute (ATS), 28 U.S.C. § 1350, allows foreign nationals—but not U.S. citizens—to bring a civil action in federal court for specific torts that

47. Courts do not permit *Bivens* actions against the U.S. government. *Bivens* claims may be brought only against the federal officer in his or her individual capacity, which means the individual officer rather than the U.S. government will be responsible for paying damages. FALLON, JR. ET AL., *supra* note 45, at 995; *see FDIC*, 510 U.S. at 482 (the *Bivens* remedy is available only against the individual officer, not against the U.S. government). Accordingly, plaintiffs may face difficulty collecting their damages award if the officer has insufficient assets to pay the judgment.

48. Julie Hunter, *Breaking Legal Ground: A Bivens Action for Noncitizens for Trans-Border Constitutional Torts Against Border Patrol Agents*, 15 SAN DIEGO INT'L L.J. 163, 175 (2013); *see Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980).

49. Matthew P. Feeney, *Punitive Damages in Constitutional Tort Actions*, 57 NOTRE DAME L. REV. 530 (1982).

50. The *Bivens* statute of limitations is governed by the applicable personal injury limitations period in each state. *See, e.g., Van Strum v. Lawn*, 940 F.2d 406, 410 (9th Cir. 1991) (holding that the personal injury statute of limitations properly applies to *Bivens* claims).

51. 28 U.S.C. §§ 1346(b), 2671–2860 (2012).

52. 28 U.S.C. § 2679(b)(2)(A) (2012); *see BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U. S. COURTS* 284 (2d ed. 2008) [hereinafter STEPHENS]. FTCA cases require the application of both federal and state law. The FTCA makes the federal government liable to the same extent as a private party would be based on "the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1) (2012); *see Richards v. United States*, 369 U.S. 1, 9–10 (1962) (applying choice-of-law principles of the state where the negligence occurred to determine which state's substantive law on damages would govern). Federal courts adjudicating an FTCA claim must apply the law of the state where the harm occurred to determine which tort claims and damages are available. *See STEPHENS, supra* note 52, at 285. However, federal law will prevail over state law in some circumstances under the FTCA. For instance, the FTCA prohibits punitive damages and injunctive relief, even if permitted under state law. *See JAYSON & LONGSTRETH, supra* note 44; *Moon v. Takisaki*, 501 F.2d 389 (9th Cir. 1974).

53. 28 U.S.C. § 2679(d)(2). *See also Rodriguez v. United States*, No. 06-cv-2753-TJW (S.D. Cal. Mar. 8, 2007), ECF No. 6.

54. *Fitch v. United States*, 513 F.2d 1013 (6th Cir. 1975) (permitting compensatory damages under the FTCA); 28 U.S.C. § 2674 (2012) (the United States "shall not be liable . . . for punitive damages"). Successful FTCA plaintiffs collect damages directly from the U.S. Treasury rather than the individual employee. This feature generally makes collection of damages awards easier for plaintiffs in FTCA claims compared to *Bivens* claims.

55. 28 U.S.C. § 2678 (2012) (attorneys may not "charge, demand, receive, or collect for services rendered" more than twenty-percent of the amount of an administrative settlement or more than twenty-five-percent of a judgment or a settlement of suit in litigation).

56. 28 U.S.C. § 2401(b) (2012).

violate international law,<sup>57</sup> including extrajudicial killing.<sup>58</sup> While successful plaintiffs may obtain compensatory damages, punitive damages, and attorneys' fees,<sup>59</sup> the vast majority of successful ATS plaintiffs have been unable to collect their monetary awards. Most defendants either flee the United States or do not have sufficient assets in the United States to pay the court-ordered compensation.<sup>60</sup> The ATS does not specify a statute of limitations, but courts generally apply a ten-year limitations period.<sup>61</sup>

Victims of border abuses may, in theory, assert state-law tort claims against CBP agents. The particular torts and relief available vary by state but generally include assault, battery, negligence, intentional infliction of emotional distress, negligent infliction of emotional distress,<sup>62</sup> and wrongful death. The statute of limitations is generally two to three years.<sup>63</sup>

### B. Extraterritorial Jurisdiction

Certain civil claims may be unavailable based on the location of the killing and/or the victim's nationality. This limitation plays a significant role in the border killing context—of the thirty-four known victims killed by CBP agents between 1992 and 2016, five victims were shot while in Mexico.

#### 1. *Bivens* Claims

Until recently, courts had dismissed *Bivens* claims involving CBP killings in Mexico on the theory that the U.S. Constitution does not extend to Mexican nationals killed in Mexico.<sup>64</sup> U.S. Courts are now split over whether *Bivens* claims can be filed on the behalf of Mexican nationals killed in Mexico by CBP agents,<sup>65</sup> and the Supreme Court will decide the issue in *Hernandez v. Mesa*, a contested case that has drawn more than a dozen amicus briefs, including from the United States, Mexico, human

57. The ATS gives federal courts “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350 (2012). The ATS does not create a cause of action, but rather creates federal jurisdiction over certain well-established violations of international law. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 723 (2004). A similar statute, the Torture Victim Protection Act (TVPA) applies only to suits against foreign individuals and is therefore not a viable remedy in cases where the perpetrator is a U.S. federal agent.

58. *See, e.g., Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (permitting ATS claims based on extrajudicial killing).

59. Tracy Bishop Holton, *Cause of Action to Recover Civil Damages Pursuant to the Law of Nations and/or Customary International*, in 21 CAUSES OF ACTION 2D 327, §§ 49–50 (2014).

60. Roxanna Altholz, *Chronicle of a Death Foretold: The Future of U.S. Human Rights Litigation Post-Kiobel*, 102 CALIF. 1495, 1522 n.181 (listing cases).

61. Some courts have extended the statute of limitations under the doctrine of equitable tolling. *Jean v. Dorelien*, 431 F.3d 776, 780 (11th Cir. 2005).

62. Texas does not recognize a tort cause of action for negligent infliction of emotional distress. *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993).

63. *Chart: Statute of Limitations in All 50 States*, NOLO, <http://www.nolo.com/legal-encyclopedia/statute-of-limitations-state-laws-chart-29941.html> (last visited Aug. 11, 2015).

64. *Perez v. United States*, No. 3:13-cv-1417-WQH-BGS (S.D. Cal. Sept. 3, 2014) (order granting in part and denying in part motion to dismiss and/or strike) ECF No. 46; *Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015).

65. *Compare Hernandez*, 785 F.3d 117, with *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025 (D. Ariz. 2015).

rights organizations, and scholars.<sup>66</sup>

In *Hernandez v. United States*, the Fifth Circuit considered the extent to which the protections of the Fourth and Fifth Amendments extend to Mexican nationals killed in Mexico by CBP agents. On June 7, 2010, CBP agent Juan Mesa, Jr. fatally shot fifteen-year-old Sergio Adrián Hernández Güereca while the victim was standing in Mexico. Sergio's parents filed *Bivens* claims under the Fourth Amendment and Fifth Amendment. The Fifth Circuit held that Sergio was not protected under the Fourth Amendment because he lacked sufficient voluntary contacts. As to the Fifth Amendment, the Fifth Circuit held that there was no "clearly established" law confirming that the U.S. Constitution could apply to injuries suffered in Mexico.<sup>67</sup>

Within three months after the Fifth Circuit's en banc decision in *Hernandez*, *Bivens* claims filed before a district court in Arizona on behalf of a Mexican teenager killed in Mexico by a CBP agent survived a motion to dismiss.<sup>68</sup> In 2012, CBP agent Lonnie Swartz fired between fourteen and thirty shots at sixteen-year-old José Antonio Elena Rodríguez as the victim walked home alone along a street that runs parallel to the border fence.<sup>69</sup> Rodríguez was struck ten times, mostly from behind, and died at the scene.<sup>70</sup> The court ruled that the *Bivens* claims brought by the victim's mother could proceed because the U.S. Constitution applied to Rodríguez in Mexico and the CBP agent was not entitled to qualified immunity.<sup>71</sup> The court held that "at the time he shot [the victim], [CBP agent] Swartz was an American law enforcement officer standing on American soil and well-aware of the limits on the use of deadly force against U.S. citizens and non-citizens alike."<sup>72</sup>

## 2. FTCA and ATS Claims

Under the FTCA's foreign country exception, victims killed or injured in Mexico by CBP agents may not assert an FTCA claim. The foreign country exception bars lawsuits against the U.S. government based on *injuries* suffered or "arising in a foreign country," regardless of where the tortious act or omission occurred.<sup>73</sup> In *Hernandez*, for example, the Fifth Circuit dismissed FTCA claims based on assault and battery, negligence, excessive and deadly force, and negligent adoption of policies because the victim was standing in Mexico when fatally shot.<sup>74</sup>

U.S. courts may not extend their jurisdiction to resolve ATS claims involving injuries suffered on foreign soil absent exceptional circumstances. In *Kiobel v. Royal Dutch Petroleum Co.*, the U.S. Supreme Court held that the ATS does not provide

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66. *Hernandez v. Mesa*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/hernandez-v-mesa/> (last visited Jan. 14, 2017).

67. *Hernandez*, 785 F.3d at 121.

68. *Rodriguez*, 111 F. Supp. 3d 1025 (considering the victim's voluntary connections with the United States and the CBP's control over Mexican territory immediately adjacent to the international border fence in deciding that the U.S. Constitution granted the victim protection against arbitrary use of lethal force).

69. *Id.* at 1028.

70. *Id.* at 1040.

71. *Id.* at 1039–41.

72. *Id.* at 1040.

73. 28 U.S.C. § 2680(k) (2012); *Hernandez v. United States*, 757 F.3d 249, 258 (5th Cir. 2014); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 700 (2004).

74. *Hernandez*, 757 F. 3d at 255 n.2, 257–58; *see also* *Garcia v. United States*, 826 F.2d 806 (9th Cir. 1987) (dismissing state law claims brought by Mexican national as an FTCA action).

jurisdiction in cases where all relevant conduct occurs outside the United States.<sup>75</sup> The Court established that ATS claims must sufficiently “touch and concern” the United States to overcome the presumption that U.S. law does not extend to another country.<sup>76</sup> In a subsequent case, a district court found that ATS claims satisfied the “touch and concern” standard against a U.S. citizen defendant that conspired to persecute the LGBTI community in Uganda.<sup>77</sup> The court concluded that the defendant was a U.S. citizen residing in the United States and the acts at issue took place “to a substantial degree within the United States, over many years, with only infrequent actual visits to Uganda.”<sup>78</sup> Although no court has upheld an ATS claim in a border killing case, the killing of a foreign national in the United States or Mexico by a U.S. federal agent is likely to meet the “touch and concern” standard.<sup>79</sup>

### C. *Qualified Immunity*

Qualified immunity is a defense to *Bivens* claims that shields federal officials from civil liability so long as their conduct does not violate “clearly established” constitutional rights of which a reasonable person would have been aware under the circumstances (i.e., a reasonable officer would have believed that his actions were lawful at the time).<sup>80</sup> This defense balances the need to hold public officials accountable for irresponsible exercises of power and the need to shield officials from harassment, distraction, and liability for reasonable performance of their duties.<sup>81</sup> The doctrine seeks to ensure “that fear of liability will not ‘unduly inhibit officials in the discharge of their duties.’”<sup>82</sup> Qualified immunity analysis is a two-step process: courts must first determine whether a plaintiff alleges a constitutional violation, and second whether the right at issue was clearly established at the time of the alleged violation.<sup>83</sup>

This Term, the Supreme Court will decide whether constitutional protections extend to a foreign national killed in foreign territory by a federal officer. In *Hernandez v. United States*, the Fifth Circuit held that the CBP agent who killed the Mexican teenager had qualified immunity from the excessive force claim.<sup>84</sup> The circuit court reasoned that the victim’s Fifth Amendment right was not clearly established at the time of his death and the CBP agent could not reasonably have known that his conduct would have potentially violated the Constitution.<sup>85</sup> Before the Supreme Court, the U.S.

75. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013); *Mujica v. AirScan Inc.*, 771 F.3d 580 (9th Cir. 2014) (dismissing ATS claims by Colombian citizens injured in Colombia against two U.S. corporations because they failed to prove that their claims sufficiently “touch and concern” the United States).

76. *Kiobel*, 133 S. Ct. 1659 (2013).

77. *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 321 (D. Mass. 2013); *see also* *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 528–31 (4th Cir. 2014) (finding that Iraqi plaintiffs could sue U.S. companies for the actions committed in Abu Ghraib prison in Iraq).

78. *See Lively*, 960 F. Supp. 2d at 321.

79. Several justices indicated in *Kiobel* that an ATS claim against a defendant who is a U.S. national would “touch and concern” the United States. 133 S. Ct. 1659, 1669 (2013).

80. *Butz v. Economou*, 438 U.S. 478 (1978); *Wilson v. Layne*, 526 U.S. 603 (1999); *see* *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Gallegos v. United States*, 5:14-cv-00136 (S.D. Tex. Aug. 27, 2014); *Perez v. United States*, No. 3:13-cv-01417 (S.D. Cal. Nov. 19, 2014).

81. *Pearson*, 555 U.S. at 231.

82. *Camreta v. Greene*, 563 U.S. 692, 705 (2011) (citation omitted).

83. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

84. *Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015).

85. *Id.* at 120–21.

government urged the Supreme Court to uphold the Fifth Circuit's decision. The government argued that allowing a *Bivens* claim for injuries suffered by a foreign national in a foreign territory is "a significant and unprecedented expansion" that inserts courts into "sensitive matters of international diplomacy."<sup>86</sup>

In several cases involving foreign nationals killed in the United States, qualified immunity did not succeed as a defense.<sup>87</sup> In *Estate of Anastasio Hernandez-Rojas v. United States*, for example, a federal district court in California denied a motion to dismiss *Bivens* claims against CBP agents and their supervisors for beating a Mexican national to death at a U.S. detention facility.<sup>88</sup> In May 2010, CBP agents apprehended forty-two-year-old Anastasio Hernández Rojas and his brother near the border and sent the brothers to a border patrol detention facility in the United States.<sup>89</sup> Passersby filmed Hernández Rojas in handcuffs on the ground and surrounded by at least twelve CBP agents.<sup>90</sup> Cell phone footage showed a CBP agent shooting Hernández Rojas with a Taser gun multiple times while he pleaded for his life.<sup>91</sup> According to the complaint, he died as a result of being punched, kicked, hit with batons, and repeatedly Tased by CBP agents.<sup>92</sup>

Hernández Rojas's five children filed multiple *Bivens* claims against the CBP agents and their supervisors alleging violations of (i) the Fourth Amendment (excessive force); (ii) the Fifth Amendment (due process); (iii) the First Amendment (retaliation); and (iv) the Fourteenth Amendment (right of association).<sup>93</sup> The CBP agents filed individual motions for summary judgment based on qualified immunity.<sup>94</sup> The court denied every motion.<sup>95</sup> Defendants filed an interlocutory appeal.<sup>96</sup> However, the Ninth Circuit will not have the opportunity to decide the appeal. In March 2017, a judge tentatively approved an offer by the U.S. government to settle the case for \$1 million.<sup>97</sup>

In other cases, circuit courts have upheld district court decisions that CBP agents were entitled to qualified immunity because their actions did not violate the

86. Brief for the United States at 10–11, *Hernandez v. Mesa*, 137 S. Ct. 291 (2016) (No. 15-118), 2017 WL 104588.

87. *See, e.g.*, *Perez v. United States*, 103 F. Supp. 3d 1180 (S.D. Cal. 2015).

88. *Estate of Hernandez-Rojas v. United States*, 62 F. Supp. 3d 1169, 1172–73 (S.D. Cal. 2014) (denying summary judgment).

89. *Id.* at 1172.

90. *Id.*

91. Cristina Costantini & Elise Roley, *Anastasio Hernandez-Rojas Death: Border Patrol Tasing Incident Complicated by New Footage (VIDEO)*, HUFFINGTON POST, [http://www.huffingtonpost.com/2012/04/20/anastasio-hernandez-rojas-death-border-patrol-tasing-footage\\_n\\_1441124.html](http://www.huffingtonpost.com/2012/04/20/anastasio-hernandez-rojas-death-border-patrol-tasing-footage_n_1441124.html) (last updated Apr. 24, 2012, 12:40 PM).

92. *Estate of Hernandez-Rojas v. United States*, No. 3:11-CV-0522-L DHB, 2013 WL 5353822 (S.D. Cal. Sept. 24, 2013) (reconsideration denied); *Estate of Hernandez-Rojas v. United States*, No. 3:11-CV-0522-L DHB, 2014 WL 3699929 (S.D. Cal. July 24, 2014).

93. Third Amended Complaint, *Estate of Hernandez-Rojas v. United States*, No. 3:11-cv-522-L-DHB, 2014 WL 4829459, at \*1, 9, 14, 18 (S.D. Cal. Sept. 29, 2014), ECF No. 53.

94. Motions for Summary Judgment, *Estate of Hernandez-Rojas v. United States*, No. 3:11-cv-522-L-DHB, ECF Nos. 145, 146, 147, 151, 152, 153, 184, 185, 197, 201.

95. *Estate of Hernandez-Rojas v. United States*, 62 F. Supp. 3d 1169, 1172–73 (S.D. Cal. 2014) (denying summary judgment).

96. Notice of Appeal, *Estate of Hernandez-Rojas v. United States*, No. 3:11-cv-522-L-DHB, (S.D. Cal. Jan. 15, 2015), ECF No. 328.

97. Katrina Davis, *Judge Oks \$1-Million Settlement in Border Death Case*, L.A. TIMES (Mar. 4, 2017), <http://www.latimes.com/local/lanow/la-me-border-death-20170302-story.html>.

Constitution. In *Mendez v. Poitevent*, the Fifth Circuit affirmed the district court’s grant of qualified immunity for the shooting death of Juan Mendez, Jr., an eighteen-year-old U.S. citizen.<sup>98</sup> According to the court records, the border agent and Mendez had a physical struggle and “[a]s Mendez was running towards the fence, [the border agent] drew his service pistol and fired two shots, killing Mendez.”<sup>99</sup> The Fifth Circuit held that agent’s use of deadly force does not violate the Fourth Amendment because a reasonable officer in the border patrol agent’s situation could have believed that the suspect posed a serious threat of harm at the time the agent shot the suspect.<sup>100</sup>

The Ninth Circuit granted qualified immunity to a CBP supervisor who hired an agent despite an employment history that included incidents of unlawful searches.<sup>101</sup> The circuit court reversed a decision by a district court that held that the CBP supervisor acted with deliberate indifference in hiring the CBP agent and was not entitled to qualified immunity for the killing of a U.S. citizen.<sup>102</sup> The circuit court explained that the agent’s law enforcement record did not include “any incident or other conduct that made it ‘plainly obvious’ that it was ‘highly likely’ that, if hired, he would ‘inflict the particular injury’ that [the victim] suffered—seizure accomplished through firing a gun, causing her death.”<sup>103</sup>

#### D. Sovereign Immunity

The doctrine of sovereign immunity shields the U.S. government and its employees from being sued unless the government consents to suit.<sup>104</sup> Congress must waive the government’s immunity by statute, or the government must consent to be sued in an individual suit. Sovereign immunity severely limits FTCA claims, and effectively bars ATS and state-law claims.

##### 1. The FTCA

The FTCA permits plaintiffs to sue the federal government by setting aside the government’s sovereign immunity for certain torts committed by U.S. government employees while “acting within the scope of employment.”<sup>105</sup> The “discretionary function exception,” however, is an exception to the FTCA’s waiver of sovereign immunity and, when applicable, results in the dismissal of the suit. This exception preserves the sovereign immunity of the United States with respect to “[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”<sup>106</sup> A discretionary function is an act that involves “an element of judgment or choice”<sup>107</sup> and is

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98. *Mendez v. Poitevent*, 823 F.3d 326, 334 (5th Cir. 2016).

99. *Id.* at 330.

100. *Id.* at 334.

101. *Estate of Alvarado v. Shavatt*, No. 15-55699, 2017 WL 203552, at \*1 (9th Cir. 2017).

102. *Id.*

103. *Id.*

104. See FALLON, JR. ET AL., *supra* note 45, at 841; *U.S. v. Mitchell*, 463 U.S. 206, 212–13 (1983).

105. 28 U.S.C. §§ 1346(b), 2671–2860 (2012).

106. 28 U.S.C. § 2680(a) (2012).

107. *United States v. Gaubert*, 499 U.S. 315, 322 (1991).

unregulated by a federal statute, regulation, or policy.<sup>108</sup> The exception is designed to “prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.”<sup>109</sup> When the discretionary function applies, the FTCA claim must be dismissed for lack of subject matter jurisdiction.<sup>110</sup>

In *Estate of Hernandez-Rojas v. United States*, a district court in California permitted the FTCA claim against the U.S. government that alleged CBP agents had tortured and killed forty-two-year-old Anastasio Hernández Rojas.<sup>111</sup> Plaintiffs argued that the right to be free from torture had reached the status of the peremptory international norm known as *jus cogens*. The court agreed and applied the FTCA’s waiver of sovereign immunity “[b]ecause the *jus cogens* norm prohibiting torture is binding law within the state of California, [and] a private person would be liable for torture in accordance with that norm within California.”<sup>112</sup>

Courts have denied motions to dismiss FTCA claims based upon the discretionary function exception in some cases.<sup>113</sup> In *Estate of Valeria Tachiquin Alvarado v. Tackett*, for example, a district court in California upheld a plaintiff’s claim that the CBP had ignored the proper procedure established by federal code in screening and hiring the CBP agent who killed the victim.<sup>114</sup>

To date, however, the only successful FTCA lawsuit for CBP abuse at the border was brought by Jesús Castro Romo, a Mexican national shot and wounded by a CBP agent in Arizona.<sup>115</sup> In November 2010, a CBP agent intercepted Romo and a group of migrants trying to cross into the United States from Mexico.<sup>116</sup> After Romo surrendered, a CBP agent on horseback hit Romo repeatedly over the head with a lasso. When Romo tried to flee, the agent shot him in the back.<sup>117</sup> In February 2015, Romo prevailed on his FTCA claims and a federal district court in Arizona ordered the U.S. government to pay Romo nearly \$500,000 in damages.<sup>118</sup>

## 2. The Westfall Act

The Westfall Act, 28 U.S.C. § 2679, effectively bars state-law tort claims in this context. The Act reinforces the government’s sovereign immunity from tort claims through procedural rules. It protects federal employees from suit by requiring courts

108. *Id.*

109. *Id.* at 323 (citing *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984)).

110. *Sigman v. United States*, 217 F.3d 785, 793 (9th Cir. 2000).

111. *Estate of Hernandez-Rojas v. United States*, No. 3:11-CV-0522-L DHB, 2013 WL 5353822 (S.D. Cal. Sept. 24, 2013) (reconsideration denied); *Estate of Hernandez-Rojas v. United States*, No. 3:11-CV-0522-L DHB, 2014 WL 3699929 (S.D. Cal. July 24, 2014).

112. *Estate of Hernandez-Rojas v. United States*, No. 3:11-CV-0522-L DHB, 2013 WL 5353822, at \*5 (S.D. Cal. Sept. 24, 2013).

113. *Estate of Alvarado v. Tackett*, No. 3:13-01202-W-JMA (S.D. Cal. May 14, 2015); *Nino v. United States*, No. 13CV0469 WQH (BGS), 2016 WL 5405555 (S.D. Cal. Sept. 27, 2016).

114. *Estate of Alvarado v. Tackett*, No. 3:13-cv-01202-W-JMA (S.D. Cal. May 14, 2015).

115. Complaint, *Romo v. United States*, No. 4:12-cv-00041-JAS, 2012 WL 4803909 (D. Ariz. 2012), ECF No. 1.

116. *Id.*

117. *Id.*

118. Bob Ortega, *U.S. Ordered to Pay \$500,000 in Border Patrol Shooting*, USA TODAY (Feb. 11, 2015), <http://www.usatoday.com/story/news/nation/2015/02/11/border-patrol-shooting-unreasonable-lawsuit/23252269/>.

to convert all common-law tort claims (e.g., negligence, battery, wrongful death) against federal officers in their official capacity into FTCA claims. If the FTCA suit is dismissed, the FTCA bars the plaintiff from pursuing related state-law claims.<sup>119</sup>

In *Hernandez v. United States*, for example, the district court approved the substitution of the United States for the agent in accordance with the Westfall Act and then dismissed all tort claims against the U.S. government for lack of jurisdiction.<sup>120</sup> In practical terms, the Westfall Act makes it nearly impossible for the relatives of those killed by CBP agents to bring ordinary state-law tort claims against the CBP outside of the FTCA framework.<sup>121</sup>

Even if a plaintiff asserts state-law tort claims against officers in their individual capacity, a court may nevertheless find that the officers were acting in their official capacity when the killing occurred and, pursuant to the Westfall Act, convert the state-law tort claims into FTCA claims.<sup>122</sup>

### 3. The ATS

Courts have dismissed ATS claims after finding that the statute itself does not waive the government's sovereign immunity and that the FTCA's limited waiver of sovereign immunity does not apply to torts cases based on violations of international law.

In *Perez v. United States*, for example, a federal district court in California dismissed ATS claims against the U.S. government filed by the widow and children of a Mexican national fatally shot in Mexico by a CBP agent.<sup>123</sup> In June 2011, a CBP agent shot and killed forty-year-old Jesús Alfredo Yañez Reyes after the victim said he would film the agent beating another man.<sup>124</sup> Yañez's family argued that the killing constituted a violation of international law and brought an ATS claim against the U.S. government.<sup>125</sup> The court held that the "United States has not unequivocally expressed its consent to suit pursuant to the ATS" and dismissed the claim.<sup>126</sup> In *Hernandez v. United States*, the Fifth Circuit also dismissed an ATS claim against the U.S.

119. 28 U.S.C. § 2679 (2012). ("The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim."). The Westfall Act amended the Federal Tort Claims Act to permit courts to substitute the United States as a defendant in some cases where a federal employee who was acting within the scope of his or her employment is sued for civil damages. Carlos M. Vazquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509, 569 (2013), [http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1012&context=penn\\_law\\_review](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1012&context=penn_law_review).

120. *Hernandez v. United States*, 802 F. Supp. 2d 834, 840, 846 (W.D. Tex. 2011), *aff'd*, 757 F.3d 249 (5th Cir. 2014), *reh'g and reh'g en banc granted*, 771 F.3d 818 (5th Cir. 2014), *adhered to in part on reh'g en banc and aff'd*, 785 F.3d 117 (5th Cir. 2015).

121. *See, e.g., Hernandez*, 757 F.3d at 255; *Garcia v. United States*, 826 F.2d 806 (9th Cir. 1987).

122. Plaintiffs may not sue the U.S. government for violations of state law. The FTCA is the *exclusive* remedy for torts committed by federal officials acting in the course of their official duties. 28 U.S.C. § 2679(b), (d) (2012).

123. *Perez v. United States*, No. 3:13-cv-1417, 2014 WL 4385473 (S.D. Cal. Sept. 3, 2014).

124. *Id.* at \*2.

125. *Id.*

126. *Id.* at \*5. U.S. officers sued in their *individual* capacity are not entitled to sovereign immunity. *See, e.g., Jama v. U.S. INS*, 343 F. Supp. 2d 338 (D.N.J. 2004) (holding INS officials sued in individual capacity under ATS are not entitled to sovereign immunity); William R. Casto, *Notes on Official Immunity in ATS Litigation*, 80 FORDHAM L. REV. 573 (2011).

government. The Fifth Circuit similarly concluded that the plaintiffs failed to show that the U.S. government had consented to suit or that Congress intended to set aside the U.S. government's sovereign immunity when it passed the ATS.<sup>127</sup>

## II. LEGAL OBSTACLES TO CRIMINAL PROSECUTIONS IN THE UNITED STATES

Prosecutors rarely bring charges against police for the use of lethal force. According to one study of thousands of on-duty shootings by police from 2005 to 2014, a total of fifty-four officers—an average of five each year—were charged with murder or manslaughter.<sup>128</sup> The prosecution of CBP agents for lethal use of force is even rarer. During the border patrol's 100-year history, state prosecutors have pursued charges against CBP agents for the use of deadly force in only a handful of cases.<sup>129</sup> Federal authorities have closed all but one investigation of a border killing without pursuing criminal charges.<sup>130</sup> In 2015, a federal grand jury indicted CBP agent Lonnie Swartz for the second-degree murder of sixteen-year-old Elena Rodríguez. According to the indictment, CBP agent Lonnie Swartz unlawfully killed the teenager “with malice aforethought.”<sup>131</sup>

Prosecutorial discretion explains, in part, the rarity of criminal prosecutions against CBP agents for border killings. Under U.S. law, prosecutors exercise enormous discretion to decide whether to charge a defendant and what charges to bring.<sup>132</sup> While victims may file a complaint to initiate action by law enforcement, prosecutors have ultimate discretion to decide whether to bring criminal charges. Prosecutors' decisions are generally not subject to judicial review.<sup>133</sup> The charging decision often turns on “whether the offender confessed or made other incriminating statements, the believability of the victim, the presence of eyewitnesses, and the existence of physical evidence.”<sup>134</sup>

Border killings often occur in remote and isolated locations where the circumstances of the death are only witnessed by the agent and victim.<sup>135</sup> The politics of the border disfavor the victims. While the agents are viewed as heroes working under difficult and dangerous conditions to hold back illegal immigration and defeat drug cartels, government agencies and the media portray the victims as criminals.<sup>136</sup> For example, after fifteen-year-old Sergio Adrián Hernández Güereca was shot in the

127. *Id.* at 259.

128. Brandon Ellington Patterson, *Here Are All of the Cops Who Were Charged in 2015 for Shooting Suspects*, MOTHER JONES (Dec. 17, 2015), <http://www.motherjones.com/politics/2015/12/year-police-shootings>.

129. *See infra* Section II.A.

130. Assoc. Press, National Briefing, *Southwest, Arizona: Case Dropped in Death*, N.Y. TIMES (Dec. 12, 2008), <http://query.nytimes.com/gst/fullpage.html?res=9E0DE7DD1F38F931A25751C1A96E9C8B63>.

131. *Lonnie Swartz Indictment*, TUSCON.COM (Sept. 24, 2015), [http://tucson.com/news/lonnie-swartz-indictment/pdf\\_46eeae16-62e4-11e5-acd7-1b4c854b8914.html](http://tucson.com/news/lonnie-swartz-indictment/pdf_46eeae16-62e4-11e5-acd7-1b4c854b8914.html).

132. Erwin Chemerinsky, *CRIMINAL PROCEDURE: INVESTIGATION* 3 (2013).

133. *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973).

134. Craig Hemmens, David C. Brody & Cassia Spohn, *Prosecutors*, in *CRIMINAL COURTS: A CONTEMPORARY PERSPECTIVE* 145 (2010).

135. *Border Patrol Abuse Since 2010*, *supra* note 15.

136. *See, e.g., Lou Dobbs This Week: Special Report on the Conviction of Two Border Agents for Wounding a Mexican Drug Smuggler* (CNN television broadcast Mar. 31 2007).

face by a CBP agent as he played with friends under a bridge in downtown Juarez, a government source told the media that he was wanted for human smuggling.<sup>137</sup>

Studies indicate that prosecutors are less likely to bring charges “[i]f the victim is from a different racial, ethnic, or social background than most of the jurors are likely to be, while the offender is from a similar background as typical jurors.”<sup>138</sup> One of the few prosecutors who brought criminal charges against an agent involved in a border killing remarked that for the Department of Justice, “[the case] had everything to do with politics. Their entire position on the prosecution was governed by politics.”<sup>139</sup>

Although the significance of politics and social issues in these cases is undeniable, this section will focus on the legal doctrines that impede the prosecution and conviction of federal officers for border killings. This part begins with a description of the criminal offenses that have been pursued in border killing cases followed by a discussion of legal standards and doctrines that contribute to the lack of criminal accountability for killings by CBP agents.

#### A. *Relevant Criminal Offenses*

Successful criminal prosecutions provide the possibility of fines and/or imprisonment of the offending CBP agent, as well as public scrutiny and oversight by drawing public attention to the actions of CBP agents. State prosecutors have charged CBP agents with state common law crimes.<sup>140</sup> Federal authorities accused an agent of second-degree federal murder<sup>141</sup> and charged CBP agents who used non-lethal force against immigrants with federal assault and federal criminal civil rights violations.

#### 1. Homicide

Arizona is the only border state that has prosecuted CBP agents for homicide. In Arizona, homicide includes first-degree murder, second-degree murder, manslaughter, or negligent homicide.<sup>142</sup> According to Arizona law, Arizona courts

137. Roxanna Popescu, *Deadly Patrols: Political Climate, Trust and Evidence Contribute to Lack of Accountability*, KBPS, July 19, 2012, <http://www.kpbs.org/news/2012/jul/19/challenges-prosecution-political-climate-trust-and/>.

138. Hemmens, Brody & Spohn, *supra* note 134, at 144.

139. Popescu, *supra* note 137.

140. Under certain circumstances, federal prosecutors may have jurisdiction to investigate CBP agents who use deadly force against persons in Mexican territory for torture. Federal law criminalizes acts of torture committed outside the United States. The U.S. criminal code defines torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” 18 U.S.C. § 2340 (2012). For a torture prosecution to move forward, the defendant must be a U.S. national or, if the defendant is a foreign national, present in the United States during the prosecution. 18 U.S.C. § 2340A (2012). Federal prosecutors have brought only one federal prosecution for torture under the federal Torture Statute. In 2009, federal prosecutors indicted Charles McArthur Emmanuel, a paramilitary leader and son of former Liberian dictator Charles Taylor. In 2008, a U.S. court convicted and sentenced Emmanuel to ninety-seven years’ imprisonment for his role in the torture of Liberian civilians during the civil war in Liberia. Verdict, *United States v. Belfast*, No. 06-20758-CR-ALTONAGA (S.D. Fla. Oct. 30, 2008).

141. *United States v. Swartz*, No. 15-cr-1723 (D. Ariz. Sept. 23, 2015).

142. ARIZ. REV. STAT. ANN. § 13-1101 (2015) (“A person commits negligent homicide if with criminal negligence the person causes the death of another person, including an unborn child.”); *id.* § 13-1102 (“A person commits manslaughter by [r]ecklessly causing the death of another person.”); *id.* § 13-

have jurisdiction over a crime if any part of the crime or action to advance the crime occurred within the state.<sup>143</sup>

In 1994, Arizona prosecutors brought homicide charges in state court against CBP agent Michael Andrew Elmer.<sup>144</sup> Elmer shot Dario Miranda Valenzuela twice in the back with a high-powered rifle as the victim fled toward the border in 1992.<sup>145</sup> Elmer suspected the twenty-six-year-old Mexican national of smuggling drugs and, after shooting him, dragged him to a ravine to hide his body.<sup>146</sup> Elmer failed to call for medical assistance or report the event while Miranda Valenzuela bled to death.<sup>147</sup> Arizona prosecutors charged Elmer with first-degree murder, civil rights violations, aggravated assault, and obstruction of justice. The case was removed to federal court and a federal jury acquitted Elmer, who claimed he had acted in self-defense.<sup>148</sup>

Over a decade later, in 2007, Arizona prosecutors brought homicide charges in state court against CBP agent Nicholas Corbett for the shooting death of Francisco Javier Dominguez Rivera.<sup>149</sup> Dominguez Rivera was trying to cross into the United States from Mexico with his brother and two others when Corbett stopped the group. The victim's brother testified that the victim had started to kneel when Corbett hit his head from behind and shot him through the heart at close range.<sup>150</sup> Dominguez Rivera was a Mexican national and twenty-two years old. He had been living and working in New York City for five years. He died at the scene.<sup>151</sup> Corbett claimed he had acted in self-defense. Prosecutors charged Corbett with first-degree murder, second-degree murder, manslaughter, and negligent homicide under Arizona law.<sup>152</sup> Corbett faced a four to twenty-two-year sentence if convicted. The case was removed to federal court, where the trial proceeded on the state counts.<sup>153</sup> The case went to trial twice in federal court in Arizona, and both times ended in hung juries.<sup>154</sup>

Federal law criminalizes murder,<sup>155</sup> the murder of a U.S. national in a foreign

1103 ("A person commits second degree murder if without premeditation: The person intentionally causes the death of another person."); *id.* § 13-1104 ("A person commits first degree murder if: 1. Intending or knowing that the person's conduct will cause death, the person causes the death of another person."). There is no statute of limitation for homicide. *Id.* § 13-107.

143. *Id.* § 13-108(A)(1).

144. Arizona v. Elmer, No. 4:92-CR-456-JMR (D. Ariz. July 14, 1992).

145. Sebastian Rotella, *Ex-Border Patrol Agent Acquitted in 1992 Slaying*, L.A. TIMES (Feb. 4, 1994), [http://articles.latimes.com/1994-02-04/news/mn-19149\\_1\\_border-patrol-academy](http://articles.latimes.com/1994-02-04/news/mn-19149_1_border-patrol-academy).

146. *Id.*

147. Arizona v. Elmer, 21 F.3d 331, 333 (9th Cir. 1994).

148. *Id.*

149. Arizona v. Corbett, Cochise County Superior Court, No. S-0800-CR-200700536 (2007).

150. Arthur H. Rotstein, *Witness: Agent Shot Surrendering Migrant*, TUCSON CITIZEN (Feb. 28, 2008), <http://tucsoncitizen.com/morgue/2008/02/28/78175-witness-agent-shot-surrendering-migrant/>.

151. *Id.*

152. *See id.* The first-degree murder charge was dismissed following a preliminary hearing in Cochise County Justice Court shortly after the charges were brought. Notice of Removal at 2, Arizona v. Corbett, No. 4:07-cr-01508-DCB-BPV (D. Ariz. Aug. 23, 2007) ECF No. 1.

153. Gentry Braswell, *Removal to Federal Court Goes Unopposed*, DOUGLAS DISPATCH (Aug. 31, 2007), [http://www.douglasdispatch.com/news/removal-to-federal-court-unopposed/article\\_b41ba140-961a-511f-9fdc-78411b668acb.html](http://www.douglasdispatch.com/news/removal-to-federal-court-unopposed/article_b41ba140-961a-511f-9fdc-78411b668acb.html).

154. Arthur H. Rotstein, *No 3rd Trial of Agent in Immigrant's Death*, TUCSON CITIZEN (Dec. 12, 2008), <http://tucsoncitizen.com/morgue2/2008/12/12/108973-no-3rd-trial-of-agent-in-immigrant-s-death/>.

155. 18 U.S.C. § 1111 (2012). "Every murder perpetrated by . . . willful, deliberate, malicious, and premeditated killing . . . is murder in the first degree. Any other murder is murder in the second degree." *Id.* § 1111(a). Prosecutors may bring charges for murder or foreign murder of U.S. nationals at any time

country by a U.S. national,<sup>156</sup> manslaughter,<sup>157</sup> and attempted murder or manslaughter.<sup>158</sup> Federal law also provides the federal government with sole and exclusive jurisdiction over homicides under unique circumstances. According to the federal homicide statute, 18 USC § 1111, for example, the federal government has jurisdiction over homicides occurring “within the special maritime and territorial jurisdiction of the United States.” However, federal jurisdiction is not always clear and almost all homicides that occur in the United States are also criminalized by state law and prosecuted by state authorities.<sup>159</sup>

On September 23, 2016, a federal grand jury in Tucson, Arizona, indicted Lonnie Swartz with second degree murder for the shooting death of sixteen-year-old José Antonio Elena Rodríguez of Nogales, Mexico, “within the special maritime and territorial jurisdiction of the United States, and elsewhere.”<sup>160</sup> CBP agent Lonnie Swartz fired through a border fence and hit the teenager ten times in the back and head.<sup>161</sup> Swartz is the first CBP agent to be charged for murder by the Department of Justice in a border killing case.

There has been one prior federal prosecution of CBP agents for attempted murder. In 2005, two border patrol agents, José Compeán and Ignacio Ramos, cornered a van they suspected of smuggling drugs and shot the unarmed driver, Osvaldo Aldrete-Davila, when he exited the van and tried to surrender.<sup>162</sup> According to investigators, instead of arresting Aldrete-Davila, agent Compeán tried to hit him with the butt of his shotgun.<sup>163</sup> Aldrete-Davila fled and the CBP agents shot at him fifteen times, hitting the victim’s buttocks.<sup>164</sup> The injured victim continued to run and crossed the border into his home country. The agents did not report the shooting to their supervisors and attempted to conceal the incident by disposing of the spent shells.<sup>165</sup> After federal authorities launched a criminal investigation, the agents claimed they had acted in self-defense.<sup>166</sup> A federal grand jury indicted Ramos and Compeán on charges related to the shooting and cover-up, including attempted

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after the crime. CHARLES DOYLE, CONG. RESEARCH SERV., STATUTES OF LIMITATION IN FEDERAL CRIMINAL CASES: AN OVERVIEW (2012), <https://www.fas.org/sgp/crs/misc/RL31253.pdf> (prepared for members and committees of Congress). The punishment for murder is a prison sentence and possibly a life sentence or death. A person convicted of first degree murder “shall be punished by death or imprisonment for life” and a person convicted of second degree “shall be imprisoned for any term of years or for life.” 18 U.S.C. § 1111(b) (2012). Voluntary manslaughter requires a term of imprisonment of “not more than 15 years.” *Id.* § 1112(b).

156. *Id.* § 1119.

157. *Id.* § 1112 (“Manslaughter is the unlawful killing of a human being without malice.”).

158. *Id.* § 1113. The statute of limitations for manslaughter and attempted murder is five years.

DOYLE, *supra* note 155.

159. PHYLLIS J. NEWTON ET AL., INVESTIGATION AND PROSECUTION OF HOMICIDE CASES IN THE U.S.: THE PROCESS FOR FEDERAL INVOLVEMENT (2006), <http://www.ncjrs.gov/pdffiles1/nij/grants/214753.pdf>.

160. United States v. Swartz, No. 15-cr-1723 (D. Ariz. Sept. 23, 2015).

161. Binelli, *supra* note 29.

162. Pamela Colloff, *Badges of Dishonor*, TEX. MONTHLY (Sept. 2007), <http://www.texasmonthly.com/story/badges-dishonor?fullpage=1>. Border patrol later recovered almost 750 pounds of marijuana from the van. *Id.*

163. *Id.*

164. *Id.*

165. United States v. Ramos, 537 F.3d 439, 442 (5th Cir. 2008).

166. Colloff, *supra* note 162.

murder.<sup>167</sup> The agents were found guilty on all charges except attempted murder.<sup>168</sup> As discussed below, President George W. Bush later pardoned the agents who had become a *cause célèbre* for the conservative media.<sup>169</sup>

## 2. Assault

All four border states criminalize assault and some have prosecuted CBP agents for the crime.<sup>170</sup> In 2014, for example, Arizona prosecutors charged a CBP agent with aggravated assault for punching a fifteen-year-old teenager from Mexico in the stomach after catching him with a cellphone at a detention facility at the Nogales Border Patrol station.<sup>171</sup>

Federal law also criminalizes assault,<sup>172</sup> including assault with intent to commit murder<sup>173</sup> and assault with a dangerous weapon.<sup>174</sup> For most federal offenses, U.S. federal prosecutors have five years to charge the defendant.<sup>175</sup> The defendant may face up to twenty years in prison for assault, depending on the circumstances.<sup>176</sup>

Federal prosecutors have rarely brought charges against CBP agents for assaulting immigrants at the border. As mentioned above, CBP agents José Compeán and Ignacio Ramos were found guilty for charges, including assault with a dangerous weapon and assault with serious bodily injury, related to the shooting death of an unarmed Mexican national and attempt to conceal their crimes.<sup>177</sup> Ramos and Compeán were convicted in 2006, sentenced to more than eleven years in prison, and ordered to pay a \$2,000 fine.<sup>178</sup> The former agents began serving their sentences in 2007. President George W. Bush pardoned the agents in 2009 without an explanation.<sup>179</sup>

## 3. Civil Rights Violations

Federal law makes it a crime for a person acting under color of law to

167. *Ramos*, 537 F.3d at 442.

168. *Id.* at 446.

169. Eric Lichtblau, *Bush Commutes 2 Border Agents' Sentences*, N.Y. TIMES, Jan. 19, 2009, [http://www.nytimes.com/2009/01/20/washington/20sentence.html?\\_r=0](http://www.nytimes.com/2009/01/20/washington/20sentence.html?_r=0).

170. ARIZ. REV. STAT. ANN. §§ 13-1203–1204 (2015); CAL. PENAL CODE § 240 (2015); TEX. PENAL CODE ANN. § 22.01 (2015); N.M. STAT. ANN. § 30-3-1 (2015).

171. *Arizona v. Arteaga*, No. J-1201-CR-20140496 (Santa Cruz Cnty. Sup. Ct. 2015).

172. An assault is an attempt to hit another person or an act that causes another person to reasonably expect impending harm. *See generally* 18 U.S.C. § 111; Micah Schwartzbach, *Federal Assault Crimes*, CRIM. DEF. LAW., <http://www.criminaldefenselawyer.com/resources/federal-assault-crimes.htm> (last visited Apr. 9, 2017).

173. *Id.* § 113(a)(1).

174. *Id.* § 113(a)(3).

175. DOYLE, *supra* note 155, at 2 n.12.

176. 18 U.S.C. § 113(a)(6) (2012).

177. *United States v. Ramos*, 537 F.3d 439, 442, 446 (5th Cir. 2008). Prosecutors also charged the agents with and tampering with evidence and obstruction of an official proceeding; assault with a dangerous weapon and aiding and abetting; assault with serious bodily injury and aiding and abetting; discharge of a firearm in relation to a crime of violence; tampering with an official proceeding by obstructing and impeding a contemporaneous investigation surrounding the shooting; tampering with an official proceeding by failing to report the discharge of his firearm; and deprivation of rights under color of law. *Id.*

178. *Ramos v. United States*, No. EP-05-CR-856-KC-1, 2012 WL 10921, at \*12 (W.D. Tex. Jan. 3, 2012).

179. Lichtblau, *supra* note 169.

“willfully deprive” a person of a constitutional right.<sup>180</sup> Prosecutors must prove beyond a reasonable doubt that the defendant acted with deliberate and specific intent to willfully deprive an individual of a constitutional right. This high standard is not satisfied by acts of mere negligence or poor judgment.<sup>181</sup> “[S]pecific intent is the state of mind representing the greatest level of culpability [and] . . . the most difficult state of mind for a prosecutor to prove.”<sup>182</sup> A conviction may result in fines and/or imprisonment for up to one year. If bodily injury results or if the acts included the use of a dangerous weapon, a defendant faces up to ten years in prison. If death results from the acts, a defendant faces imprisonment for “any term of years or for life, or both, or may be sentenced to death.”<sup>183</sup>

A handful of CBP agents have been convicted of civil rights violations for assaulting Mexican nationals.<sup>184</sup> In 2010, for example, CBP agent Eduardo Moreno pleaded guilty to a federal criminal civil rights charge after admitting “he kicked [a Mexican National in detention], struck him in the stomach with a baton, threw him down to [the] ground, and punched him, all without any legitimate law enforcement reason to use force.”<sup>185</sup>

### B. Reasonableness Standard

U.S. law enforcement officials have long been given broad discretion by federal and state law to use the amount of force they determine is reasonable. Under the Supreme Court’s 1985 decision in *Tennessee v. Garner*, the use of deadly force by law enforcement is constitutionally permissible when an officer has “probable cause to believe that [a] suspect pose[s] a threat of serious physical harm, either to the officer or to others.”<sup>186</sup> In *Garner*, the Court balanced the individual’s interest in life and the government’s interest in enforcement of criminal laws to reach the conclusion that it is unconstitutional to kill a “nonviolent” suspect to prevent his escape.<sup>187</sup>

Four years after *Garner*, in *Graham v. Connor*, the Supreme Court

180. 18 U.S.C. § 242 (2012).

181. *Id.*

182. Georgina C. Yeomans, *When Cops Are Robbers: Reconciling the Whren Doctrine and 18 U.S.C. § 242*, 115 COLUM. L. REV. 701, 714–15 (2015) (citing *United States v. Bradford*, No. 98-2407, 2000 WL 1033022, at \*10 (6th Cir. July 18, 2000)).

183. 18 U.S.C. § 242 (2012).

184. For example, in 2011, a former Border Patrol agent was sentenced to more than fifteen years for raping a woman that he had pulled from a bus at an inland checkpoint. *Former Border Patrol Agent Convicted of Aggravated Sexual Assault Sentenced*, U.S. ATT’Y OFF., S.D. TEX (July 1, 2011), <http://www.justice.gov/archive/usao/txs/1News/Releases/2011%20July/110701%20Sullivan.htm>. In 2000, federal prosecutors charged Border Patrol Agent David Snipe with civil rights violations in 2000. Snipe allegedly struck José Guevara, a Mexican national, on the back of the head with a flashlight while arresting him. He was convicted by a federal jury in 2001 but was granted a new trial after it was discovered the prosecution had withheld exculpatory evidence. He was later acquitted and reinstated as a border agent. *David Snipe*, THE NATIONAL REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3640> (last visited Dec. 16, 2016). See also, *United States v. Brugman*, 364 F.3d 613 (5th Cir. 2004); *U.S. Customs and Border Officer Pleads Guilty in Miami to Civil Rights Violations for Sexual Assault of Three Women*, U.S. DEP’T OF JUST. (Jul. 24, 2012), <https://www.justice.gov/opa/pr/us-customs-and-border-protection-officer-pleads-guilty-miami-civil-rights-violations-sexual>.

185. *Border Patrol Agent Pleads Guilty to Civil Rights Violation*, U.S. DEP’T OF JUST. (June 3, 2010), <http://www.justice.gov/opa/pr/border-patrol-agent-pleads-guilty-civil-rights-violation>.

186. See *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

187. *Id.* at 11–12.

established criteria that courts should consider to assess constitutional violations in the use of force.<sup>188</sup> The Court instructed lower courts to balance the individual's interests against the government's interests by considering "the facts and circumstances of each particular case, including [(i)] the severity of the crime at issue, [(ii)] whether the suspect poses an immediate threat to the safety of the officers or others, and [(iii)] whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight."<sup>189</sup> The Court held that the officers' actions "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" and the Fourth Amendment prohibition of illegal search and seizure applies only to the officer's actions that are "objectively unreasonable."<sup>190</sup>

Almost twenty years after *Graham*, the Court took up the issue of use of force by law enforcement for a third time in *Scott v. Harris*.<sup>191</sup> Georgia police had pursued Harris for going seventy-three miles per hour in a fifty-five-miles-per-hour zone. A police officer rammed his car off the road to stop him from speeding away and Harris was paralyzed as a result of the injuries sustained from the crash. The Court's 2007 decision holds that the officer's actions were reasonable because "those who might have been harmed had [the officer] not taken the action he did were entirely innocent."<sup>192</sup>

Rachel Harmon, a legal scholar who focuses on legal regulation of the police, has argued that the Supreme Court's Fourth Amendment doctrine has opened the door to inconsistent, ill-considered, and prejudicial rulings by lower courts.<sup>193</sup>

*Graham* permits courts to consider any circumstance in determining whether force is reasonable without providing a standard for measuring relevance, it gives little instruction on how to weigh relevant factors, and it apparently requires courts to consider the severity of the underlying crime in all cases, a circumstance that is sometimes irrelevant and misleading in determining whether force is reasonable. Thus, *Graham* has largely left judges and juries to their intuitions, and what direction it does give sometimes steers them off course.<sup>194</sup>

Devon Carbado, a constitutional law scholar who writes about criminal procedure, warns that the indeterminacy of the reasonableness standard has allowed prosecutors, judges, and juries to translate police violence into justifiable force.<sup>195</sup> Paul Butler contends that through *Scott* and other cases the Supreme Court has "sanctioned racially unjust criminal justice practices" by "creating a system where racially unjust police conduct is both lawful and how the system is supposed to work."<sup>196</sup> By

188. *Graham v. Connor*, 490 U.S. 386 (1989).

189. *Id.* at 396.

190. *Id.*

191. *Scott v. Harris*, 127 S. Ct. 1769 (2007).

192. *Id.* at 1778–79.

193. See, e.g., Wesley M. Oliver, *Prohibition's Lingering Shadow: Under-Regulation of Official Uses of Force*, 80 MO. L. REV. 1037 (2015); Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119 (2008).

194. Harmon, *supra* note 193, at 1130.

195. Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1518 (2016).

196. Paul Butler, *The System is Working the Way It is Supposed to: The Limits of Criminal*

permitting the use of deadly force “simply to enforce a traffic law” in *Scott*, Butler argues that the Court removes any consideration of the seriousness of the underlying crime from the reasonableness test and provides law enforcement with the “super power to kill.”<sup>197</sup>

Law enforcement’s use of force policies and trainings mirror the Supreme Court’s Fourth Amendment doctrine. Federal regulations permit the use of deadly force by CBP agents if the agent has “reasonable grounds to believe that such force is necessary to protect [himself or herself] or other persons from the imminent danger of death or serious physical injury.”<sup>198</sup> Similarly, CBP policy authorizes agents to use lethal force if an agent has a “reasonable belief” that the subject poses imminent danger of death or serious physical injury to the agent or another person.<sup>199</sup> Prior to 2014, for example, the CBP condoned the use of deadly force in response to rock throwers and allowed CBP agents to put themselves intentionally in the path of moving vehicles.<sup>200</sup> These policies resulted in the death of numerous undocumented migrants.<sup>201</sup> A 2013 review by law enforcement experts commissioned by the CBP found that “too many [CBP shooting cases] do not appear to meet the test of objective reasonableness with regard to the use of deadly force.”<sup>202</sup> According to an investigation by the Arizona Republic, “Border Patrol agents who use deadly force face few, if any, public repercussions, even in cases in which the justification for the shooting seems dubious.”<sup>203</sup>

U.S. prosecutors have concluded that CBP agents’ use of force in border killing cases were reasonable with one exception.<sup>204</sup> When DOJ closed its investigation of the death of fifteen-year-old Sergio Adrián Hernández Güereca, for example, prosecutors concluded that

the agent’s actions constituted a reasonable use of force or would constitute an act of self-defense in response to the threat created by a group of smugglers hurling rocks at the agent and his detainee. The investigation also revealed that, on these particular facts, the agent did not act inconsistently with CBP policy or training regarding use of force.<sup>205</sup>

Federal prosecutors reached the same conclusion in the case of Anastasio

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*Justice Reform*, 104 GEO. L.J. 1419, 1426 (2016).

197. *Id.* at 1452–53.

198. 8 C.F.R. § 287.8(a)(2) (2017).

199. Memorandum on Use of Safe Tactics and Techniques, *supra* note 23.

200. USE OF FORCE REVIEW, *supra* note 24, at 6–7 (recommending that the CBP’s policy should explicitly prohibit the use of lethal force in response to rock throwers and subjects in moving vehicles). The CBP’s revised 2014 Use of Force Policy, Guidelines, and Procedures Handbook mandates training in the use of safe tactics, requires that officers carry less lethal devices, and provides guidance on responding to thrown projectiles. *See generally* USE OF FORCE HANDBOOK, *supra* note 22.

201. USE OF FORCE REVIEW, *supra* note 24, at 8–9.

202. *Id.*

203. Bob Ortega & Rob O’Dell, *Deadly Border Agent Incidents Cloaked in Silence*, ARIZ. REPUBLIC (Dec. 16, 2013), <http://archive.azcentral.com/news/politics/articles/20131212arizona-border-patrol-deadly-force-investigation.html>.

204. *Border Patrol Abuse Since 2010*, *supra* note 15.

205. *Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca*, U.S. DEP’T OF JUST. (Apr. 27, 2012), <https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca>.

Hernández Rojas. The long-time resident of San Diego and father of five died after being punched, kicked, dragged, hogtied, and Tased multiple times by CBP agents. Despite video and audio evidence of the beating, prosecutors closed the criminal investigation without pursuing any criminal charges against the agents. According to the prosecutors, the federal government could not disprove “the agents’ claim that they used reasonable force in an attempt to subdue and restrain a combative detainee.”<sup>206</sup> Prosecutors determined that “the federal agents’ restraint and deployment of the taser [sic] against Hernández-Rojas when he was non-compliant and physically assaultive was not unlawful and, based on the evidence gathered relating to the federal agents’ use of force training, the federal agents’ action [sic] were not done without due caution and circumspection.”<sup>207</sup>

### C. Extraterritorial Jurisdiction

With limited exceptions, U.S. criminal law does not apply to offenses committed outside the United States. There are a few crimes, including homicide, for which Congress has given federal courts extraterritorial jurisdiction. Although the Constitution does not prohibit states from enacting laws that apply outside the United States, it vests the federal government with the authority to manage foreign affairs.<sup>208</sup> It is less likely for states to have laws that extend extraterritorially.

Criminal prosecutions of federal agents whose victims died in Mexico have been exceedingly rare although at least five deaths of known victims caused by CBP agents occurred in Mexico.<sup>209</sup> Until recently, there have been no federal prosecutions for killings in Mexico. In 2016, however, federal prosecutors indicted a CBP agent for murder “within the special maritime and territorial jurisdiction of the United States.”<sup>210</sup> Additionally, there are statutes that define state extraterritorial jurisdiction to include crimes where some of the elements of the offense were committed within the state’s borders. For example, Arizona law provides jurisdiction over homicide if “conduct constituting any element of the offense or a result of such conduct occurs within this state.”<sup>211</sup>

### D. Federal Immunity

When a state may criminally prosecute a federal officer in the course of discharging their duties is a matter of considerable debate.<sup>212</sup> The U.S. Constitution grants immunity to federal officers acting in discharge of their official duties from criminal prosecutions brought by state and local prosecutors.<sup>213</sup> Federal law permits

206. *Federal Officials Close Investigation into the Death of Anastasio Hernandez-Rojas*, U.S. DEP’T OF JUST. (Nov. 6, 2015), <https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-anastasio-hernandez-rojas>.

207. *Id.*

208. *See, e.g.*, U.S. CONST. art. II, § 2, cl. 1–2; U.S. CONST. art. I, § 8, cl. 3, 11–14.

209. *See Border Patrol Abuse Since 2010*, *supra* note 15.

210. *United States v. Swartz*, No. 15-cr-1723 (D. Ariz. Sept. 23, 2015).

211. ARIZ. REV. STAT. ANN. § 13-108 (2015); *see also* TEX. PENAL CODE § 1.04(a)–(b) (2015).

212. Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2197 (2003).

213. U.S. CONST. art. VI, cl. 2; *In re Neagle*, 135 U.S. 1, 75 (1890) (holding that a federal agent who shot a man in the performance of his official duties was immune from state murder prosecution); *Whitehead v. Senkowski*, 943 F.2d 230, 233–34 (2d Cir. 1991) (holding that a state court has no jurisdiction

federal agents facing criminal charges in state court to remove their state prosecutions to federal courts if the alleged criminal act was committed *while the officer was carrying out her federal duties*.<sup>214</sup> The Supreme Court has held that the right of removal applies only when the federal officer raises a colorable defense, such as federal immunity, to the state prosecution.<sup>215</sup> This defense has been used in state prosecutions against CBP agents. In 2007, when Arizona state prosecutors brought criminal charges against CBP agent Nicholas Corbett,<sup>216</sup> Corbett asserted that he was immune from state prosecution and the case should be removed to federal court.<sup>217</sup> Although Corbett was successful in removing the prosecution to federal court, the court rejected Corbett's effort to dismiss the case.<sup>218</sup>

### III. THE PUSH FOR LEGAL ACCOUNTABILITY

The Supreme Court's decision to hear *Mesa v. Hernandez* has brought increased attention to legal doctrine that leads to a lack of accountability for killings by CBP agents along the U.S.-Mexico border.<sup>219</sup> The Supreme Court case, however, addresses a narrow legal issue that affects the claims of a small fraction of plaintiffs—only five of the killings by CBP in the last ten years occurred in Mexico. The cases pending before lower courts involve foreign nationals killed in Mexico,<sup>220</sup> and foreign nationals<sup>221</sup> and U.S. citizens<sup>222</sup> killed by CBP agents in the United States. These cases

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if the federal agent was performing an act which he was authorized to do by the law of the United States, and in performing the authorized act, the federal agent did no more than what was necessary and proper for him to do); *Clifton v. Cox*, 549 F.2d 722, 730 (9th Cir. 1977).

214. 28 U.S.C. § 1442 (2012).

215. *Mesa v. California*, 489 U.S. 121, 134–35 (1989).

216. First-degree murder (ARIZ. REV. STAT. ANN. §§ 13-1105, 13-1101, 13-604, 13-703, 13-701, 13-702 (2015)); Second-degree murder (ARIZ. REV. STAT. ANN. §§ 13-1103, 13-1101, 13-604, 13-701, 13-702, 13-8010 (2015)); manslaughter (ARIZ. REV. STAT. ANN. §§ 13-1103, 13-1101, 13-604, 13-701, 13-702, 13-801 (West 2015)); negligent homicide (ARIZ. REV. STAT. ANN. §§ 13-1102, 13-1101, 13-604, 13-701, 13-702, 13-801 (2015)).

217. *Arizona v. Corbett*, No. 4:07-cr-01508-DCB-BPV (D. Ariz. Feb. 25, 2008), ECF No. 58.

218. *Id.* If allowed to stand by the court of appeals, however, a recent decision by a district judge in Texas may extend federal immunity to state and local official police officers who participate in federal task forces. *Texas v. Kleinert*, 143 F. Supp. 3d 551 (W.D. Tex. 2015). In *Texas v. Kleinert*, a district judge ruled that a white detective, Charles Kleinert, who was acting as a member of a federal task force when he shot an unarmed black man in 2013, was shielded from state prosecution by the federal immunity defense. *Texas v. Kleinert*, 143 F. Supp. 3d 551.

219. *When Do Foreigners Have Rights Under America's Constitution?*, THE ECONOMIST, (Feb. 22, 2017), <http://www.economist.com/blogs/democracyinamerica/2017/02/justice-border>; Nina Totenberg, *Supreme Court To Decide If Mexican Nationals May Sue For Border Shooting*, NPR, (Feb. 21, 2017), <http://www.npr.org/2017/02/21/515625917/supreme-court-to-decide-if-mexican-nationals-may-sue-for-border-shooting?sc=tw>; David H. Gans, *A Murdered Mexican Boy and the Abuse of American Power at the Border*, NEW REPUBLIC (Feb. 20, 2017), <https://newrepublic.com/article/140746/murdered-mexican-boy-abuse-american-power-border>; Jordan Rudner, *A Shot Fired Into Mexico Killed a Teenager, and Now, the Supreme Court Will Weigh In*, THE DALLAS MORNING NEWS, (Dec. 27, 2016), <http://www.dallasnews.com/news/politics/2016/12/27/shot-fired-mexico-killed-teenager-andnow-supreme-court-will-weigh>.

220. *See, e.g., Rodriguez v. Swartz*, 111 F. Supp. 3d 1025 (D. Ariz. July 9, 2015); *Gallegos v. United States*, No. 5:14-cv-00136 (S.D. Tex. Aug. 27, 2014); *Perez v. United States*, No. 13CV1417-WQH-BGS, 2014 WL 4385473 (S.D. Cal. Sept. 3, 2014).

221. *See, e.g., Estate of Ramirez-Galindo v. United States*, No. 3:15-cv-01694-W-NLS (S.D. Cal. July 30, 2015); *Andrade v. United States*, No. 2:15-cv-00103 (S.D. Tex. Feb. 27, 2015).

222. *See, e.g., Estate of Alvarado v. Tackett*, No. 3:13-cv-01202-W-JMA (S.D. Cal. May 20, 2013).

will determine the civil claims plaintiffs can bring against CBP agents and the government in the future. The first federal criminal prosecution of a CBP agent for a killing at the border is also moving forward.<sup>223</sup>

These cases will be decided amid national outcry over law enforcement violence in the United States. A number of highly public killings by law enforcement agents has shaken the public's faith in the criminal justice system's ability to hold state agents accountable for killings of unarmed civilians. The Black Lives Matter movement has brought thousands to the street to condemn the killing of African Americans and the taking of immigrant lives and to demand justice for the victims, their families, and their communities. Border communities and advocacy groups have also organized to coordinate advocacy strategies and policy initiatives that "ensure border enforcement policies and practices are accountable and fair, respect human dignity and human rights, and prevent the loss of life in the region."<sup>224</sup>

International pressure for the United States to address the lack of CBP accountability is also mounting. The Mexican government has consistently condemned border killings by CBP agents,<sup>225</sup> criticized the CBP's disproportionate use of force, and urged the United States to investigate and prosecute those responsible for killings.<sup>226</sup> Former Mexican President Felipe Calderón pledged to "use all resources available to protect the rights of Mexican migrants."<sup>227</sup> In an amicus brief before the U.S. Supreme Court in *Mesa v. Hernandez*, Mexico argued that criminal prosecution in the United States "affords no meaningful remedy" to victims' families because U.S. prosecutors have failed to bring charges in all shootings to date but one.<sup>228</sup> The brief states that "it is a priority to Mexico to see that the United States has provided adequate means to hold the agents [responsible for killing Mexican nationals] accountable and to compensate victims."<sup>229</sup>

Mexico has also increased pressure on the United States to hold its agents accountable by initiating criminal investigations in Mexico. Political officials have requested that Mexico's Attorney General's Office (*Procuraduría General de la República*) investigate several killings.<sup>230</sup> Under Mexican law, CBP agents who kill

223. Rob O'Dell, *Judge to Let Border Patrol Agent's Murder Case Proceed*, ARIZ. REPUBLIC (Mar. 27, 2017), <http://www.azcentral.com/story/news/politics/border-issues/2017/03/27/judge-let-border-patrol-agent-swartz-murder-case-proceed/99696226/>.

224. Border Communities Form Unprecedented Coalition to Assert Rights, ACLU (Mar. 8, 2011), <https://www.aclu.org/news/border-communities-form-unprecedented-coalition-assert-rights>.

225. The national government has issued more than twenty diplomatic notes of protest to the U.S. State Department regarding Mexicans killed or seriously injured by CBP agents. HUMAN RIGHTS WATCH, BRUTALITY UNCHECKED: HUMAN RIGHTS ABUSES ALONG THE U.S. BORDER WITH MEXICO 6 (1992).

226. Press Release, Secretaría de Relaciones Exteriores [Ministry of Foreign Affairs], Follow-Up to the Guillermo Martínez Rodríguez Case (Jan. 5, 2006) [hereinafter Martínez Rodríguez Case Follow-Up], [http://web.archive.org/web/20070927212556/http://www.sre.gob.mx/english/events/guillermo\\_case.htm](http://web.archive.org/web/20070927212556/http://www.sre.gob.mx/english/events/guillermo_case.htm).

227. *Mexico's Fury as U.S. Border Guard Shoots Dead Boy, 14. . . for Throwing Stones at Him*, DAILY MAIL (last updated June 9, 2010, 10:37 AM), <http://www.dailymail.co.uk/news/article-1285302/Mexico-demands-investigation-U-S-border-agent-shoots-teenager-dead—throwing-stones-him.html#ixzz3WA3xoZVJ>.

228. Brief of the Government of the United Mexican States as Amicus Curiae Supporting Petitioners at 9, *Hernandez v. Mesa*, 137 S. Ct. 291 (2016) (No. 15-118), 2016 WL 7210374.

229. *Id.* at 3.

230. Press Release, Embajada de México en Estados Unidos [Mex. Embassy to the U.S.], Reunión con la Familia de Anastasio Hernández Rojas en la Embajada de México [Meeting with the Family

Mexican nationals may be criminally liable for a domestic (e.g., homicide) or international crime (e.g., torture).<sup>231</sup> Mexican authorities may investigate and prosecute criminal offenses committed by CBP agents that occurred in Mexico or the United States if the United States has failed to investigate the crime and the accused is present in Mexico.<sup>232</sup> In 2006, for example, Mexico condemned the death of twenty-year-old Guillermo Martínez Rodríguez, who was shot in the United States by a CBP agent and taken to the Red Cross in Tijuana, where he died.<sup>233</sup> Mexico requested that the CBP, the DOJ, and the local police and prosecutor investigate and prosecute those responsible,<sup>234</sup> and the Attorney General's Office in Mexico opened a homicide investigation.<sup>235</sup> After fifteen-year-old Sergio Adrián Hernández Güereca was killed in 2010 by a CBP agent, Mexican authorities opened a criminal investigation and a

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of Anastasio Hernández Rojas at Embassy of Mexico] (May 10, 2012), <http://embamex.sre.gob.mx/eua/index.php/en/comunicados2012/571-reunion-con-la-familia-de-anastasio-hernandez-rojas-en-la-embajada-de-mexico>; Congreso del Estado de Chihuahua [State Congress of Chihuahua], Acuerdo No. 462/2012 II P.O. Unánime [Agreement No. 462/2012 II P.O. Unanimous] (2012), <http://www.congresochihuahua.gob.mx/biblioteca/dictamenes/archivosDictamenes/1429.pdf>; Press Release, Segunda Comisión de Trabajo de la Comisión Permanente del Congreso, [Second Working Group of the Permanent Congressional Commission], Acuerdo Que Exhorta a la Secretaría de Relaciones Exteriores y a la Embajada de México en los Estados Unidos de Norteamérica para que, en Colaboración con la Procuraduría General de la República, Gestionen la Extradición de Jesús Meza Jr., Agente de la Patrulla Fronteriza Estadounidense [Agreement that Calls on the Ministry of Foreign Affairs and the Embassy of Mexico in the United States of America, in Collaboration with the Attorney General's Office, to Request the Extradition of Jesús Meza Jr., U.S. Border Patrol Agent] (May 22, 2012), [http://sil.gobernacion.gob.mx/Archivos/Documentos/2012/05/asun\\_2885021\\_20120523\\_1337790827.pdf](http://sil.gobernacion.gob.mx/Archivos/Documentos/2012/05/asun_2885021_20120523_1337790827.pdf); Press Release, CNN México, Autoridades de México y EU investigan muerte de un mexicano en la frontera [Authorities in the U.S. and Mexico are Investigating the Death of a Mexican at the Border] (June 22, 2011), <http://mexico.cnn.com/nacional/2011/06/22/autoridades-de-mexico-y-eu-investigacion-muerte-de-un-mexicano-en-la-frontera>; Press Release, Arturo Zamora, Condena Senado el Asesinato de José Antonio Elena Rodríguez en Manos de la Patrulla Fronteriza de EU [Senate Condemns the Murder of José Antonio Elena Rodríguez at the Hands of the U.S. Border Patrol] (2015), <http://www.arturozamora.com/portafolio/condena-senado-el-asesinato-de-jose-antonio-elena-rodriguez-en-manos-de-la-patrulla>.

231. Like the United States, Mexico criminalizes homicide and those convicted of the crime face a sentence of thirty to sixty years. Código Penal Federal [CPF] [Federal Criminal Code], artículo [article] 320, Diario Oficial de la Federación [DOF] 14 de Agosto de 1931, últimas reformas [last amended] DOF 12-03-2015 (Mex.), <http://info4.juridicas.unam.mx/ijure/tcfed/8.htm?s>.

232. Under the Federal Criminal Code, crimes committed against Mexican citizens in foreign territories are punishable if: (i) the accused is physically on Mexican territory, (ii) he/she has not been sentenced in the foreign State; and (iii) the action he/she is accused of also constitutes a crime under the law of the State where the act occurred. Federal Criminal Code, Article 4 provides: "Crimes committed in a foreign territory by a Mexican against a Mexican or against a foreigner, or by a foreigner against a Mexican, will be punished in the Republic of Mexico, in accordance with federal law, if the following requirements are met:

1. That the accused be in the Republic of Mexico;
2. That the prisoner has not been definitively tried in the country where he committed the crime, and;
3. That the infraction with which he is charged be a crime both in the country where it was committed and in the Republic of Mexico." Código Penal Federal [CPF] [Federal Criminal Code], artículo [article] 4, Diario Oficial de la Federación [DOF], 14 de Agosto de 1931, últimas reformas [last amended] DOF 12-03-2015 (Mex.).

233. Martínez Rodríguez Case Follow-Up, *supra* note 226.

234. James C. McKinley, Jr., *A Border Killing Inflames Mexican Anger at U.S. Policy*, N.Y. TIMES (Jan. 4, 2006), <http://www.nytimes.com/2006/01/14/international/americas/14mexico.html?pagewanted=all>.

235. Martínez Rodríguez Case Follow-Up, *supra* note 226.

Mexican prosecutor issued a warrant for the agent's arrest.<sup>236</sup> The United States refused Mexico's request for extradition.<sup>237</sup>

The United States has also come under increased scrutiny by the international community as advocates intensify efforts to draw the attention of international human rights bodies to the issue of the use of deadly force by U.S. law enforcement. Since 2008, United Nations' human rights experts have repeatedly called on the United States to prevent the excessive use of force by the CBP, improve reporting of cases of excessive use of force, ensure agents adhere to use of force policy, and conduct independent, prompt, and thorough investigations of incidents.<sup>238</sup>

The Inter-American system has investigated the vulnerability of undocumented migrants to criminality, abuse, and racism in the United States,<sup>239</sup> and recognized undocumented migrants as a protected group that should be afforded human rights protections.<sup>240</sup> In a 2015 report about refugees and migrants in the United States, the Inter-American Commission on Human Rights ("Inter-American Commission" or "Commission") expressed concerns over allegations of sexual, physical, and verbal abuse committed by U.S. border officials while migrant and

236. John Carlos Frey, *Over the Line*, WASH. MONTHLY (May 2013), <http://washingtonmonthly.com/magazine/mayjune-2013/over-the-line/>.

237. Press Release, Cámara de Diputados Congreso de la Unión [Chamber of Deputies, Congress of the Union], Boletín No. 5156, Pide Diputada Pérez Reyes que SRE Solicite a E.U. Extradición del Agente Fronterizo Jesús Meza [Bulletin No. 5156, Deputy Pérez Reyes Asks that SRE Request U.S. Border Patrol Agent for the Extradition of Jesús Meza] (May 13, 2012), [http://www3.diputados.gob.mx/camara/005\\_comunicacion/a\\_boletines/2012\\_2012/005\\_mayo/13\\_13/5156\\_pide\\_diputada\\_perez\\_reyes\\_que\\_sre\\_solicite\\_a\\_e\\_u\\_extradicion\\_del\\_agente\\_fronterizo\\_jesus\\_meza](http://www3.diputados.gob.mx/camara/005_comunicacion/a_boletines/2012_2012/005_mayo/13_13/5156_pide_diputada_perez_reyes_que_sre_solicite_a_e_u_extradicion_del_agente_fronterizo_jesus_meza).

238. In 2008, the United Nations Committee on the Elimination of all forms of discrimination raised concerns about the impunity enjoyed by law enforcement officials who used excessive or deadly force at the U.S.-Mexico border. Comm. on the Elimination of Racial Discrimination, Concluding Observations of the Comm. on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/USA/CO/6, ¶25 (2008). See also Int'l Comm. on Civil and Political Rights, Concluding Observations on the Fourth Periodic Report of the United States of America, CCPR/C/USA/CO/4, at 6 (Apr. 23, 2014); Stephanie Nebehay, *U.S. Uses Excessive Force Along Mexican Border*, U.N., REUTERS (Oct. 18, 2012), <http://www.reuters.com/article/us-mexico-us-un-rights-idUSBRE89H13F20121018>.

239. See Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico, Inter-Am. Comm'n on Human Rights Human, OEA/Ser.L./V/II. doc. 48/13 ¶ 80 (2013); see generally Refugees and Migrants in the United States: Families and Unaccompanied Children, Inter-Am. Comm'n on Human Rights, OEA/Ser.L./V/II.55 doc. 16 (July 24, 2015) [hereinafter Refugees and Migrants in the United States] (discussing the vulnerability of undocumented migrant children who flee violence and poverty in their countries and travel to the United States). The Inter-American Commission has also investigated allegations of law enforcement violence against African Americans in several U.S. cities. In 2005, the Commission granted a hearing requested by human and civil rights organizations to examine allegations of torture of African Americans by police in Chicago. G. Flint Taylor, *The Long Path to Reparations for the Survivors of Chicago Police Torture*, 11 NW. J. L. & SOC. POL'Y 330, 336 (2016). In 2015, the Inter-American Commissioner sent a delegation to visit Florida, Missouri, and Louisiana to investigate racial discrimination in policing. Press Release, IACHR, IACHR Concludes Visit to Florida, Louisiana and Missouri, United States (Oct. 16, 2015), [http://www.oas.org/en/iachr/media\\_center/PReleases/2015/118.asp](http://www.oas.org/en/iachr/media_center/PReleases/2015/118.asp). In 2016, the Commission granted a hearing on police violence and the African-American community, issued a press release calling on the United States to bring law enforcement's use of force in line with international standards and effectively investigate incidents of police violence against African Americans. Press Release, IACHR, IACHR Expresses Concern with the Deficiencies in the Investigation of Cases Relating to Killing of Afro-Descendants by the Police in the United States (Aug. 23, 2016), [http://www.oas.org/en/iachr/media\\_center/PReleases/2016/120.asp](http://www.oas.org/en/iachr/media_center/PReleases/2016/120.asp).

240. See Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser.A) No. 18, ¶¶ 112-14 (Sept. 17, 2003); see also Dorzema v. Dominican Republic, Case 12.688, Inter-Am. Comm'n H.R., Report No. 174/10, ¶¶ 207-08 (2008).

refugee children and families are in state custody.<sup>241</sup> A petition regarding violence by anti-immigrant vigilante groups along the U.S.-Mexico border is pending before the Inter-American Commission.<sup>242</sup>

The Inter-American Commission is the only international human rights body with jurisdiction to adjudicate human rights complaints submitted by private citizens against the United States. Through the years, the Commission has consistently held that the American Declaration on the Rights and Duties of Man constitutes a source of binding international obligations for the United States<sup>243</sup> and therefore serves as the primary basis for individual petitions against the United States. The Commission has adjudicated cases against the United States involving the death penalty, the right to property of indigenous peoples, immigrants' rights, domestic violence, and the voting rights for residents of Washington, D.C.<sup>244</sup>

On March 30, 2016, the family members of Anastasio Hernández Rojas submitted a complaint before the Inter-American Commission alleging that the United States is responsible for the torture and unlawful killing of Hernández Rojas, and failed to exhaustively investigate the death or uphold the rights of the victim's family.<sup>245</sup> Despite eyewitness, video, and audio evidence of the beating of Hernández Rojas, prosecutors with the DOJ's Civil Rights Division closed the criminal investigation on November 6, 2015 without pursuing any criminal charges against the agents. The decision by the federal prosecutors to close the criminal investigation prompted family members to seek redress before an international body. This complaint is the Commission's first opportunity to adjudicate claims related to law enforcement violence at the U.S.-Mexico border.

The increased attention to CBP's use of force policies and practices generated by high profile cases has yielded modest efforts to improve the agency's accountability record. CBP published its use of force guidelines, agreed to pilot a body camera program, and strengthened internal investigations during the Obama administration.<sup>246</sup> Reported incidents involving the use of a firearm by CBP agents decreased significantly between 2012 and 2016 while the use of less lethal devices, including Tasers, remained constant.<sup>247</sup> In 2017, the United States also reached financial

241. Refugees and Migrants in the United States, *supra* note 239, ¶ 6.

242. Undocumented Migrant, Legal Resident, and U.S. Citizen Victims of Anti-Immigrant Vigilantes v. United States, Petition No. 478-05, Inter-Am. Comm'n H.R., Report No. 78/08 (Aug. 5, 2009).

243. Refugees and Migrants in the United States, *supra* note 239, ¶¶ 39–43.

244. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 48 (entered into force Dec. 13, 1951), *amended by* Protocol of Buenos Aires, 721 U.N.T.S. 324, O.A.S. Treaty Series, No. 1-A (entered into force Feb. 27, 1970), *amended by* Protocol of Cartagena, O.A.S. Treaty Series, No. 66, 25 I.L.M. 527 (entered into force Nov. 16, 1988), *amended by* Protocol of Washington, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), 33 I.L.M. 1005 (entered into force Sept. 25, 1997), *amended by* Protocol of Managua, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 I.L.M. 1009 (entered into force Jan. 29, 1996). *See also* Roach v. United States, Case 9647, Inter-Am. Comm'n H.R., Report No. 3/87, OEA/Ser.L/V/II.71, doc. 9 rev. ¶ 46 (1987); Smith v. United States, Petition 8-03, Inter-Am. Comm'n H.R., Report No. 56/06, OEA/Ser.L/VII.127, doc. 4 rev. ¶¶ 32–33 (2006).

245. *See* Hernández Rojas Complaint, *supra* note 33.

246. Adam Isacson, *Increases in Immigration and Border Agents Require Accountability*, WASH. OFF. ON LATIN AMERICA (Feb. 21, 2017), <https://www.wola.org/analysis/dramatic-increases-border-immigration-agents-require-attention-accountability/>.

247. U.S. CUSTOMS & BORDER PROTECTION, CBP BORDER SECURITY REPORT 4 (2016), <https://www.cbp.gov/sites/default/files/assets/documents/2016-Dec/CBP-fy2016-border-security-report.pdf>.

settlements with the family members of some victims, including the family of Anastasio Hernández.<sup>248</sup> However, the internal review board created to examine use of force incidents, including several high profile killings, has cleared the agents of wrongdoing in each of the cases reviewed.<sup>249</sup>

Systematic and structural reform is still needed to address the culture of impunity that permeates the CBP. According to reports by government agencies, experts, and advocacy groups, the CBP does not effectively screen its agents, track use of force incidents, or discipline misconduct and abuse.<sup>250</sup> The former chief of internal affairs for the CBP stated in 2016 that the agency resisted and in some instances opposed efforts to hold CBP agents accountable for excessive use of force: “[internal affairs] had a mandate to hold the Border Patrol accountable but were given very few to no authorities [sic] to do that job. . . . From Day 1, they aggressively resisted every effort.”<sup>251</sup> That same year a panel of government experts concluded that the CBP’s “discipline system [was] broken” and “undermine[d] the deterrence goals of discipline.”<sup>252</sup> Another study found that the CBP’s Internal Affairs Office failed to take any disciplinary action in ninety-seven percent of complaints about physical, sexual, and verbal abuse.<sup>253</sup> The next section draws on international human rights standards as a guide to identify and address the systemic barriers to redress faced by victims’ families.

#### IV. INTERNATIONAL STANDARDS ON EXTRAJUDICIAL KILLINGS

The recent spate of killings of unarmed African Americans and Latinos has

248. Cleve R. Wootson Jr., *Border Agents Beat an Undocumented Immigrant to Death. The U.S. is Paying His Family \$1 Million.*, WASH. POST (Mar. 28, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/03/28/border-agents-beat-an-undocumented-immigrant-to-death-the-u-s-is-paying-his-family-1-million/>; Kristine Phillips, *U.S. Border Officers Told Mexican Teen to Drink Liquid Meth. The U.S. Is Paying His Family \$1 Million.*, WASH. (Mar. 21, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/03/21/u-s-border-agents-made-a-mexican-teen-drink-liquid-meth-his-family-won-1-million-for-his-death/>.

249. Joseph Tanfani, *A Board Set Up to Investigate Border Patrol Shootings and Deaths Has Cleared Agents Every Time*, L.A. TIMES (Nov. 25, 2016), <http://www.latimes.com/nation/la-na-border-patrol-20161125-story.html>.

250. For example, a 2012 report by the Congressional Research Service on corruption investigations concluded that the CBP had failed to assess the effectiveness of screening tools used for hiring, to adequately implement oversight controls (such as periodic polygraphs or background investigations), or to develop a comprehensive strategy to prevent, detect, and investigate corruption by agents. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-59, BORDER SECURITY: ADDITIONAL ACTIONS NEEDED TO STRENGTHEN CBP EFFORTS TO MITIGATE RISK OF EMPLOYEE CORRUPTION AND MISCONDUCT 1 (2012), <http://www.gao.gov/products/GAO-13-59>; see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-769R, BORDER SECURITY: U.S. CUSTOMS AND BORDER PROTECTION PROVIDES INTEGRITY-RELATED TRAINING TO ITS OFFICERS AND AGENTS THROUGHOUT THEIR CAREERS 7 (2012), <http://gao.gov/products/GAO-13-769R> (stating that the CBP still had not developed a comprehensive integrity plan as of August 2013).

251. Binelli, *supra* note 29.

252. U.S. DEP’T OF HOMELAND SEC., FINAL REPORT OF THE CBP INTEGRITY ADVISORY PANEL 21 (2016), [https://www.dhs.gov/sites/default/files/publications/HSAC%20CBP%20IAP\\_Final%20Report\\_FINAL%20%28accessible%29\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/HSAC%20CBP%20IAP_Final%20Report_FINAL%20%28accessible%29_0.pdf).

253. DANIEL E. MARTINEZ ET AL., AMERICAN IMMIGRATION COUNCIL, NO ACTION TAKEN: LACK OF CBP ACCOUNTABILITY IN RESPONDING TO COMPLAINTS OF ABUSE 8 (2014), [https://www.americanimmigrationcouncil.org/sites/default/files/research/No%20Action%20Taken\\_Final.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/No%20Action%20Taken_Final.pdf).

focused the attention of the nation on law enforcement violence in the United States. There is a historic, and perhaps fleeting, opportunity for meaningful legal and institutional reform. This section argues that reformists should look to international human rights law, specifically the case law of the Inter-American human rights system, to guide efforts to provide victims and their families with redress.

Over the last several decades, the Inter-American Commission<sup>254</sup> and the Inter-American Court of Human Rights<sup>255</sup> (“Inter-American Court” or “Court”), which comprise the human rights branch of the Organization of American States (OAS), have decided dozens of cases involving killings by law enforcement. The Commission began to examine individual petitions in 1966 and the Court issued its first ruling in 1988.<sup>256</sup> An individual or group can file a petition before the Commission alleging a violation of the American Declaration or an Inter-American human rights treaty ratified by the State, such as the American Convention on Human Rights (“American Convention”).<sup>257</sup> The Commission will determine whether petitioners have met jurisdictional requirements, including the exhaustion of domestic remedies, and have proven a violation of the State’s human rights obligations.<sup>258</sup> During the Commission’s procedure, petitioners and the State submit written and oral arguments and present evidence, including witness and expert testimony.<sup>259</sup> If the petitioners prevail, the Commission will issue a decision that examines the violations of the State’s international obligations and details the reparation measures that the State should adopt to address the harms suffered by petitioners and prevent future violations.<sup>260</sup> The Commission will refer the case to the Court if it finds state responsibility for a violation and the State has ratified the Court’s jurisdiction.<sup>261</sup>

During the last three decades, the Inter-American human rights system has developed more extensive jurisprudence than any other human rights body or regional system on the causes and consequences of violence by state security forces. The Inter-American approach to state violence diverges in significant ways from U.S. law and policy. Inter-American case law on extrajudicial killings by state security forces (i) establishes a conceptual framework on use of force that articulates standards to assess state actions taken before, during, and after the incident; (ii) underscores the significance of a serious, thorough, impartial, and prompt criminal investigation; and (iii) adopts a holistic approach to ensuring family members a right to a remedy. Advocacy groups, such as the Southern Border Communities Coalition, have begun to draw on the Inter-American system’s expertise in extrajudicial killings cases to inform advocacy goals and strategies. Greater familiarity with Inter-American standards and

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254. The mandate of the Commission is to promote and protect human rights throughout the Americas by monitoring human rights conditions and issuing decisions and recommendations to OAS member states. The Commission adjudicates individual petitions, holds thematic and country specific hearings upon request, conducts visits to investigate human rights situations, and issues reports on human rights issues.

255. The Inter-American Court has the authority to issue binding judgments in human rights cases and advisory opinions.

256. *Velasquez-Rodriguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

257. American Convention on Human Rights art. 41, 44, July 18, 1978, 1144 U.N.T.S. 144, 155.

258. *Id.* at arts. 46–47.

259. *Id.* at art. 48.

260. *Id.* at art. 50.

261. *Id.* at art. 51.

procedures offers the opportunity to reframe CBP killings and lack of accountability as human rights abuses and challenge laws and policies that block access to effective redress by family members.

*A. The Inter-American System on Use of Force*

It is a maxim of international law that the State holds a monopoly over the means of violence and the use of force in society.<sup>262</sup> However, international law places limits on when the State can lawfully use force. Every major human rights treaty, including Inter-American human rights instruments,<sup>263</sup> protects the right to life and prohibits the arbitrary deprivation of life.<sup>264</sup>

According to Inter-American standards, the use of force by state security forces “must be grounded on the existence of exceptional circumstances”<sup>265</sup> in which the use of such force is “strictly unavoidable to protect [law enforcement] or other persons from imminent threat of death or serious injury.”<sup>266</sup> Absent the existence of exceptional circumstances, excessive force or disproportionate force by law enforcement that results in deprivation of life constitutes an arbitrary deprivation of life.<sup>267</sup> The U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (“U.N. Principles on Use of Force”) specify the circumstances justifying the use of force to include “self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient.”<sup>268</sup> Absent the existence of exceptional circumstances, excessive force or disproportionate force by law enforcement that results in deprivation of life constitutes an arbitrary deprivation of life.<sup>269</sup>

The Inter-American Commission and Court have examined the use of force by state agents at three distinct moments to determine whether the force used was excessive: preventive actions taken before the incident, actions accompanying the incident, and actions subsequent to the incident.<sup>270</sup> Preventive actions concern the

262. Max Weber first characterized the monopoly of the legitimate use of physical force as the defining feature of the modern state in his 1919 essay, *Politics as a Vocation*.

263. Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3, ¶ 53 (Sept. 8, 1983).

264. See, e.g., African Charter on Human and Peoples’ Rights art. 4, June 27, 1981, 1520 U.N.T.S. 217; American Convention, *supra* note 257, at art. 4; International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, 213 U.N.T.S. 221.

265. Press Release, IACHR, IACHR Condemns the Recent Death of Mexican National by U.S. Border Patrol Agents (July 24, 2012), [http://www.oas.org/en/iachr/media\\_center/PReleases/2012/093.asp](http://www.oas.org/en/iachr/media_center/PReleases/2012/093.asp).

266. Report on Terrorism and Human Rights, Inter-Am. Comm’n on Human Rights, OEA/Ser.L/V/II.116 doc. 5 ¶ 187 (Oct. 22, 2002) [hereinafter Report on Terrorism and Human Rights] (citing Basic Principles on the Use of Force and Firearms by Law Enforcement Officials).

267. *Id.* ¶ 92.

268. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990) [hereinafter Basic Principles on the Use of Force and Firearms by Law Enforcement Officials]. See also, e.g., Carandiru v. Brazil, Case 11.291, Inter-Am. Comm’n H.R., Report No. 34/00, ¶¶ 63, 88 (2000).

269. Report on Terrorism and Human Rights, *supra* note 266, ¶ 92.

270. Dorzema v. Dominican Republic, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct.

planning and regulation of the potential use of force in a state operation.<sup>271</sup> For example, state agents must have adequate training to instill the necessary elements of judgments to decide when to use force.<sup>272</sup> Additionally, state agents must have appropriate non-lethal and protective equipment to allow them to restrict as much as possible their use of lethal weapons that can cause injury or death.<sup>273</sup> Additionally, the Inter-American case law identifies the state obligation to enact a regulatory framework on the use of force by law enforcement.<sup>274</sup> According to the Inter-American Court, a regulatory framework is not an effective preventative measure unless law enforcement also receives training that is consistent with “the principles and provisions on protection of human rights and the limits to which the use of weapons by law enforcement officers is subject.”<sup>275</sup>

In evaluating use of force, Inter-American human rights bodies have examined a second discrete moment—actions accompanying any use of force.<sup>276</sup> Use of force is examined under the principles of legality, necessity, and proportionality.<sup>277</sup> Legality requires that domestic law establishes the exceptional circumstances in which force is lawful and defines the purpose for which the use of force is legitimate (e.g., legal). The legality standard also requires state agents to interpret use of force laws restrictively, in light of the other two principles taken into consideration in use of force cases.<sup>278</sup> The principle of absolute necessity requires that all other means of control must have been exhausted and failed, meaning that absolutely no “other means are available to protect the life and safety of the person or situation that [the use of force] is sought to protect.”<sup>279</sup> Finally, proportionality requires that “the level of force used must be in keeping with the level of resistance offered. . . . [A]gents must apply the criteria of differentiated and progressive use of force, determining the degree of cooperation, resistance or violence of the subject against whom the intervention is intended and, on this basis, employ negotiating tactics, control or use of force, as required.”<sup>280</sup>

In *Nadege Dorzema et al. v. Dominican Republic*, the Court found that state agents had violated all three principles of legality, absolute necessity, and proportionality in using deadly force against unarmed migrants fleeing a law enforcement checkpoint. First, the Court established that the state lacked a regulatory

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H.R. (ser. C) No. 251, ¶ 78 (Oct. 24, 2012) [hereinafter *Dorzema Judgment*].

271. *Hinojosa v. Ecuador*, Case 11.442, Inter-Am. Comm’n. H.R., Report No. XX/14, ¶ 178 (2014) [hereinafter *Hinojosa Report*].

272. *Montero-Aranguren v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 150, ¶ 78 (July 5, 2006); see also *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) ¶ 151 (1995); *Kakoulli v. Turkey*, App. No. 38595/97, Eur. Ct. H.R. ¶¶ 109, 110 (2005).

273. *Dorzema Judgment*, *supra* note 270, ¶ 80.

274. *Hinojosa Report*, *supra* note 271, ¶ 193.

275. *Id.* ¶ 77.

276. *Dorzema Judgment*, *supra* note 270, ¶¶ 82–83.

277. *Id.* ¶¶ 82–83.

278. *Barrios Family v. Venezuela*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 237, ¶ 49 (Nov. 24, 2011) [hereinafter *Barrios Family Judgment*]. The principle of legality is also discussed in *Dorzema*. See *Dorzema Judgment*, *supra* note 270, ¶ 100.

279. *Dorzema Judgment*, *supra* note 270, ¶ 85(ii); see also *Barrios Family Judgment*, *supra* note 278, ¶ 49.

280. *Dorzema Judgment*, *supra* note 270, ¶¶ 85(iii), 100; see also, *Barrios Family Judgment*, *supra* note 278, ¶ 49.

framework that governed the use of force at a checkpoint.<sup>281</sup> The Court reasoned that “even when abstaining from the use of force would have allowed the individuals that were the subject of the State’s action to escape, the agents should not have used lethal force against people who did not represent a threat or a real or imminent danger to the agents or third parties . . . this event did not constitute a situation of absolute necessity.”<sup>282</sup> Moreover, the Court has held that “the use of lethal force by state agents against individuals who no longer represent a threat, such as individuals under custody of the authorities, would amount to an extrajudicial execution.”<sup>283</sup>

Finally, States have an obligation to provide assistance and medical aid to persons injured due to use of force and to promptly investigate the legality in the use of force. The Inter-American Court has stated that “[t]he general prohibition to arbitrarily deprive someone of his life, which state officials must observe, would be ineffective without proceedings to verify the legality of the lethal use of force.”<sup>284</sup> The state obligation to conduct a rigorous, impartial and effective investigation is particularly important in cases involving extrajudicial killings by state agents.<sup>285</sup>

The lack of accountability in border killing cases results in part from the indeterminate constitutional limitations imposed by the U.S. Supreme Court on law enforcement’s use of force. The Supreme Court’s failure “to provide a principled basis for determining when police uses of force are reasonable under the Fourth Amendment” has led to “ad hoc, often inconsistent, and sometimes ill-considered” decisions by criminal and civil courts, according to legal scholars.<sup>286</sup> In contrast to the Supreme Court’s Fourth Amendment doctrine which hinges on an indeterminate concept of what is “objectively unreasonable,” the Inter-American human rights system has developed a framework for evaluating the proper scope and limits of use of force by law enforcement. Inter-American case law provides a principled conceptual structure for determining when, how, and why law enforcement may use deadly and non-deadly force and identified measures to ensure that law enforcement agents abide by use of force standards.

#### B. *The Inter-American System on Effective investigation and Prosecution*

Reformists in the United States have called for a panoply of measures to improve law enforcement accountability. They have pressed local, state, and national authorities to increase the use of independent agencies and prosecutors to investigate deaths involving law enforcement, reform the use of force standards, improve use of force training of law enforcement, require body cameras, increase public access to information following an incident of lethal force, enhance the collection and publication of data on deaths involving law enforcement, and expand the declaratory

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281. Dorzema Judgment, *supra* note 270, ¶¶ 85(i), 100.

282. *Id.* ¶¶ 85(ii), 100.

283. Velez v. Ecuador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 166, ¶ 108 (July 4, 2007). In the same case, the Commission determined that, “comparing the number of soldiers who participated in the operation with the number of weapons seized, and given that no information was provided regarding acts of resistance in the course of the operation, the Commission indicated that it is not possible to demonstrate the urgency required or to justify the volume of force used.” *Id.* ¶ 76.

284. *Id.* ¶ 88.

285. *Id.*

286. Harmon, *supra* note 193, at 1123.

and injunction relief available to the families of victims. One issue that is virtually ignored by reform efforts in the United States has been the primary focus of the Inter-American system's response to state violence for over three decades.

Much of the Inter-American case law has been aimed at developing standards to ensure that criminal investigations of torture, forced disappearances, and killings by state agents are exhaustive and independent.<sup>287</sup> Although these decisions address violations perpetrated by state security forces in countries with weak rule of law and a history of authoritarianism and armed conflict, the Inter-American standards related to criminal investigations are relevant to addressing killings by CBP agents in the United States. Inadequate criminal investigations of border killings, or interference with them, may have helped to shield CBP agents from legal accountability. For example, several of the use of the force cases referred to in this Article involve allegations of CBP agents tampering with evidence and obstructing justice.<sup>288</sup>

In its first decision in 1988, the Inter-American Court established that the State has an affirmative obligation to use the means at its disposal to carry out an effective criminal investigation in order to lay the foundation for the prosecution and punishment of those responsible for human rights abuses.<sup>289</sup> In ruling after ruling, the Inter-American Court has reiterated that criminal investigations must "be undertaken in a serious manner and not as a mere formality."<sup>290</sup> To be effective, according to Inter-American jurisprudence, an investigation must be serious, thorough, impartial, and prompt<sup>291</sup> "such that any failure to produce sufficient evidence to lay criminal charges was not the product of mechanical implementation of certain procedural formalities without the State genuinely seeking the truth."<sup>292</sup> A breach of the duty to investigate does not arise merely because the investigation conducted does not lead to a satisfactory result.<sup>293</sup> An investigation must be "capable of producing the result for which it was designed," and "must be truly effective in establishing whether there has been a violation of human rights."<sup>294</sup>

International law requires an impartial and independent investigation of an

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287. See, e.g., Alexandra Huneus, *International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts*, 107 AM. J. INT'L L. 1, 15–19 (2013); Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069, 1079 (2015).

288. See Rob O'Dell, *Court Filing Says Border Patrol Lost or Destroyed Original Video of Nogales Teen's Killing by Agent*, ARIZ. REPUBLIC (Mar. 17, 2017), <http://www.azcentral.com/story/news/politics/border-issues/2017/03/17/border-patrol-video-shooting-jose-antonio-elena-rodriguez/99310364/>; Cleve R. Wootson Jr., *Border Agents Beat an Undocumented Immigrant to Death. The U.S. is Paying His Family \$1 Million.*, WASH. POST (Mar. 28, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/03/28/border-agents-beat-an-undocumented-immigrant-to-death-the-u-s-is-paying-his-family-1-million/>; Pamela Colloff, *Badges of Dishonor*, TEX. MONTHLY (Sept. 2007), <http://www.texasmonthly.com/story/badges-dishonor?fullpage=1>.

289. *Velasquez-Rodriguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174 (July 29, 1988) [hereinafter *Velasquez-Rodriguez Judgment*].

290. *Id.* ¶ 177.

291. *Lenahan (Gonzales) v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 181 (2011).

292. Moreover, the Commission stated that a State "may not rely upon procedures or standards prescribed under its domestic law as a justification for a failure to conduct an investigation that complies with its international obligations." *Gayle v. Jamaica*, Case 12.418, Inter-Am. Comm'n H.R., Report No. 92/05, OEA/Ser.L/V/II.124, doc. 5, ¶ 83 (2005).

293. *Id.*

294. *Velasquez-Rodriguez Judgment*, *supra* note 289, ¶ 63.

extrajudicial killing.<sup>295</sup> Impartiality requires “not only institutional independence, but actual independence.”<sup>296</sup> An impartial investigation must ensure that the investigative authority is not connected to any party that could be the subject of the investigation.<sup>297</sup> The Inter-American Court has also stressed the importance of initiating the investigation in prompt and timely manner: “the passage of time has a directly proportionate relationship to the constraints . . . of obtaining evidence or testimonies that help clarify the facts under investigation . . . .”<sup>298</sup>

At a minimum, an investigation of a death involving law enforcement requires that the State collect, preserve and analyze evidence, including eye witness and forensic evidence, and follow-up on investigative leads.<sup>299</sup> In several cases, the Inter-American Court has identified specific measures that state investigators should adopt to ensure an effective criminal investigation of state sponsored violence.<sup>300</sup> For example, in the case of *Manuel Cepeda Vargas v. Colombia*, the Inter-American Court directed Colombia to take specific steps to investigate the 1994 murder of a senator by the Colombian security forces working in alliance with paramilitary groups.<sup>301</sup> The Court found that the official criminal investigation lacked due diligence and ordered the State to investigate the political context in which the murder occurred and examine patterns of systemic violence; focus on the masterminds behind the attacks, “even if senior civil authorities, high-ranking military officers or intelligence services are involved”; and improve coordination between investigative agencies.<sup>302</sup>

The Inter-American Commission and Court’s focus on the integrity of the criminal investigation is central to its effort to promote criminal prosecutions by States that are unwilling or unable to hold perpetrators of human rights abuses accountable. In many of the cases that have come before the Inter-American system, state authorities have sabotaged the criminal investigation in an effort to shield those responsible from prosecution. A weak criminal investigation can foreclose the possibility of bringing criminal charges or doom the criminal prosecution to failure. CBP recalcitrance to accountability measures and allegations of obstruction of justice underscore the relevancy in Inter-American standards to ensure the independence, impartiality, and quality of criminal investigation of border killing cases.

295. *Lenahan (Gonzales) v. United States*, Report No. 80/11, *supra* note 291, ¶ 181.

296. *Id.*

297. Guarantees for the Independence of Justice Operators, Inter-Am. Comm’n on Human Rights, OEA/Ser.L/V/II doc. 44 ¶ 39 (2013), <https://www.oas.org/es/cidh/defensores/docs/pdf/Justice-Operators-2013.pdf>.

298. *Castro v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶ 135 (Sept. 22, 2009).

299. *Gayle v. Jamaica*, Report No. 92/05, *supra* note 292, ¶ 86.

300. See, e.g., *Chang v. Guatemala*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 217 (Nov. 25, 2003); *Sisters Serrano v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 91 (Mar. 1, 2005); *Castro v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 390 (Nov. 25, 2006); *Tojin v. Guatemala*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 190, ¶ 77 (Nov. 26, 2008); *Lopez v. Brazil*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 249, ¶ 187 (July 4, 2006).

301. *Vargas v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 213 (May 26, 2010).

302. *Id.* ¶ 216.

### C. *Inter-American System on Victims' Rights*

Under international law, the victims of human rights violations that annul the human person and human dignity, such as extrajudicial or summary killings, have the right to reparations, among many other rights. Legal scholars have described the Inter-American system as awarding “the most wide-reaching remedies afforded in international human rights law.”<sup>303</sup> An empirical examination of state compliance with Inter-American Court rulings found that court orders and monitoring resulted in concrete changes in domestic prosecutorial strategies, convictions, justice-sector reforms, and the implementation of restorative justice measures.<sup>304</sup>

The Inter-American system’s approach to reparations “strive[s] both to ensure that victims gain access to adequate reparations at home and, even more ambitiously, to address broader patterns of violations at the structural level.”<sup>305</sup> In death cases, the Inter-American Commission and Court have recognized that the victims and their immediate relatives have suffered harms and are entitled to reparations.<sup>306</sup> The Inter-American Court presumes a violation of the family members’ personal integrity in cases of extrajudicial executions.<sup>307</sup> The Court has held that “the mere loss of a loved one as a result of the arbitrary use of force by security agents, in a permanent context of threat and vulnerability, followed also by the failure to elucidate the facts and their impunity, are elements that allow the violation of the right to integrity of the immediate family of the deceased to be inferred.”<sup>308</sup> The Court has also recognized that the lack of effective investigations “exacerbate[] [the family members’] feelings of frustration, helplessness, and anxiety.”<sup>309</sup>

The Inter-American Commission and Court’s approach to reparations for the victims and their relatives is based on the international principle of *restitutio in integrum*.<sup>310</sup> In accordance with this principle, “reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”<sup>311</sup> Full restitution or a return to the *status quo ante*, is impossible given the nature and gravity of the harm caused by killings.<sup>312</sup> Efforts by the Inter-American Court to eliminate the adverse consequences suffered by victims of extrajudicial or summary killings and their families has resulted in an innovative approach to remedies. The Inter-American

303. See Dinah Shelton, *Reparations in the Inter-American System*, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 151, 152 (David J. Harris & Stephen Livingstone eds., 1998).

304. Huneus, *supra* note 287, at 6.

305. *Id.* at 23 (finding that “at least thirty-nine prosecutions launched pursuant to the Court’s orders have yielded convictions”).

306. See, e.g., *Aloeboetoe v. Suriname*, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 71 (Sept. 10, 1993); *Blanca v. Guatemala*, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 76, ¶¶ 85–86 (May 25, 2001); *Street Children v. Guatemala*, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 77, ¶ 68 (May. 26, 2001).

307. *Gutierrez and Family v. Argentina*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 271, ¶ 139 (Nov. 25, 2013).

308. *Barrios Family Judgment*, *supra* note 278, ¶ 49.

309. *Id.* ¶ 310.

310. *Factory at Chorzów (Germ. v. Pol.)*, Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13, 1928).

311. See, e.g., *Moiwana Cmty. v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 170 (June 15, 2005).

312. Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT’L L. 351, 361 (2008).

Court routinely orders that States provide monetary compensation, non-monetary compensation, and equitable relief, which may include measures of satisfaction, cessation, and non-repetition, not only to victims but also to their families.<sup>313</sup>

In cases involving killings by state agents, the Court has awarded both material (including loss of earnings and indirect damages such as expenses) and moral damages. However, under Inter-American standards compensation alone is inadequate to address the harms caused by killings involving state agents.<sup>314</sup> Both the Commission and the Court routinely instruct states to investigate, prosecute, punish law enforcement personnel involved in human rights crimes, and monitor their progress in preventing future violations.<sup>315</sup> The Commission and the Court have taken steps to remove obstacles that may deter effective investigation, prosecution, and punishment of human rights violations by directing states to withdraw amnesty laws,<sup>316</sup> launch new criminal investigations,<sup>317</sup> exhume mass graves,<sup>318</sup> move cases from military to civil jurisdiction,<sup>319</sup> and bypass statutes of limitations that bar prosecutions of human rights crimes.<sup>320</sup>

Additionally, the Inter-American Court has afforded non-material damages redress that commemorate and dignify victims by ordering measures of satisfaction, such as public apologies by state officials for wrongdoing. For example, in a case involving the assassination of anthropologist Myrna Mack Chang by Guatemala's military intelligence, the president of Guatemala held a public event, ordered high-ranking military, judicial, and elected officials to attend, and apologized to the victims' family. The public apology was given in compliance with the Inter-American Court's order.<sup>321</sup> The Court has also ordered States to name schools in commemoration of children killed by police, construct a museum dedicated to the victims of armed conflict, and produce a documentary.<sup>322</sup> In recognition of the severe physical, psychological, and emotional damage to victims and their relatives caused by state violence, the Inter-American Court has also ordered measures of rehabilitation that have included the provision of medical and psychological care.<sup>323</sup>

313. *Id.* at 371–87.

314. *See, e.g.,* Feldman v. Colombia, Inter-Am. Comm'n H.R., Report No. 15/95 (1995) (holding that if an administrative remedy is only “a means . . . to obtain compensation for damages caused by abuse of authority,” it is not adequate to “redress human rights violations”).

315. *See* Huneus, *supra* note 287, at 26.

316. Engle, *supra* note 287, at 1091 (stating that in a series of rulings issued between 2001 and 2012, the Court found that amnesty laws in Peru, Chile, Brazil, Uruguay, and El Salvador violated the American Convention on Human Rights).

317. Antkowiak, *supra* note 312, at 366–67 (stating that an order for the State to criminally investigate matters that give rise to human rights violations is the centerpiece of the Court's jurisprudence from the mid-90's to the present).

318. *See, e.g.,* Bámaca-Velásquez v. Guatemala, Reparation, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 82 (Feb. 22, 2002).

319. Castillo-Petruzzi v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 52, ¶ 222 (May 30, 1999).

320. Huneus, *supra* note 287, at 2.

321. Chang v. Guatemala, Compliance, Inter-Am. Ct. H.R. ¶ 3 (Sept. 12, 2005).

322. David L. Attanasio, *Extraordinary Reparations, Legitimacy, and the Inter-American Court*, 37 U. PA. J. INT'L L. 813, 830 (2016).

323. *See, e.g.,* Cantoral-Benavides v. Peru, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 88, ¶ 50 (Dec. 3, 2001); Nineteen Tradesmen v. Colombia, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 278 (July 5, 2004).

## CONCLUSION

On January 25, 2017, President Donald Trump signed an executive order instructing the Department of Homeland Security to hire an additional 5,000 CBP agents to ensure enforcement of immigration laws at the border.<sup>324</sup> During a similar push to increase its ranks in the mid-2000s, the CBP lowered its hiring standards, relaxed training requirements, and failed to complete background checks.<sup>325</sup> A swell of corruption and abuse complaints soon followed.<sup>326</sup> Many of the excessive use of force cases discussed in this Article originated during that time period.

Trump's new hires will carry out a more aggressive mandate to enforce immigration laws within a system that turns a blind eye to the excessive use of force. The Supreme Court's decision in *Mesa v. Hernandez* may establish de jure impunity for agents who kill or injure Mexican nationals on Mexican territory. Courthouse doors in the United States are already closed to many because of a lack of political will to prosecute federal officers or broad immunity doctrines. Justice in the United States remains elusive for most families.

For decades, the Inter-American system has provided a forum to hold States to account for acts of violence when domestic legal systems are unwilling or unable to do so. The United States' legal system does not adequately protect the rights of those killed by CBP agents. Inter-American standards provide an important perspective on the steps the United States must take to remove structural obstacles to justice.

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324. Press Release, Office of the Press Sec'y, The White House, Executive Order: Border Security and Immigration Enforcement Improvements (Jan. 25, 2017) <https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements>.

325. Greg Moran, *Trump's Plan to Rapidly Expand Border Patrol Comes with Big Risks*, L.A. TIMES (Mar. 13, 2017), <http://www.latimes.com/local/lanow/la-me-border-patrol-20170313-story.html>.

326. Garrett M. Graff, *The Green Monster*, POLITICO (Nov. 2014), [http://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220\\_full.html](http://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220_full.html).