NOTES

LEGAL BLACK HOLES AT THE U.S.-MEXICO BORDER: AN EVALUATION OF CROSS-BORDER HARMS AND THE SHORTCOMINGS OF INTERNATIONAL AND DOMESTIC LAW IN PROVIDING REMEDIES

VICTORIA OCHOA*

ABSTRACT

At the U.S.-Mexico border, globalization and border militarization have increased the number of cross-border harms, harms originating in one country and impacting individuals in another. Despite these rising collisions, domestic and international legal remedies have failed to resolve these harms. International law privileges state actors and grants states tremendous latitude to decide domestic matters. When adjudicating cross-border harms at the U.S.-Mexico border, international tribunals merely recommend policy changes or highlight wrongdoing. Domestically, individuals within border zones are heavily policed by federal law enforcement, but like others in the country's interior, they have few viable remedies to hold these officers accountable for constitutional violations. Non-citizens who increasingly face harm at the hands of federal actors abroad have virtually none. This Note evaluates the legal black holes that exist at the U.S.-Mexico border, evaluating cross-border harms and the shortcomings of international and domestic remedies in resolving them. With a particular focus on border patrol cross-border shootings, one of the most visible forms of cross-border harms, this Note evaluates civil and criminal remedies Congress could enact to eliminate some of the legal black holes that make accountability elusive on the U.S.-Mexico border.

* Victoria Ochoa is a JD/MPP candidate at the University of Pennsylvania Law School and Harvard Kennedy School. She is from the Rio Grande Valley. © 2021, Victoria Ochoa.

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I. INTRODUCTION

Despite the rise of nationalism, international systems have never been more interconnected. Globalization has prompted the rise of transnationalization, "the process of growing cross-border interaction, cooperation and transaction by state actors, economic actors, and civil actors."[1] Yet, while increased cross-border interactions have generated positive advancements, they have also given rise to unique harms that impact communities on both sides of international borders.

These unique transboundary damages can be understood as harm caused by or originating in one state and adversely affecting the territory of another, or cross-border harms.[2] Within international law, most discussion of cross-border harm has focused on environmental damages and the inadequacy of international treaties on pollution, which do little more than outline state responsibility and fail to address issues of implementation.[3] While these types of cross-border harms should be addressed, it is critical to understand that new forms of cross-border harms have emerged as transnationalization has brought mass migration and border militarization. By privileging state actors to negotiate remedies and implement solutions, international law has failed to provide solutions for these new cross-border harms.

At its core, international law was created to privilege states and not individuals. The positivist approach to international law that predominated in the nineteenth century—the view that states are the only subjects of international law by virtue of sovereignty—still has roots in the present day.[4] Today, individuals are still only entitled to the benefits of international law through the intermediation of their national states.[5] And while globalization has also increased the influence of non-state actors, the current power structures of international law "still dictate that state consent remains a crucial element in [forming] the primary sources of international law."[6] With few primary sources of binding international law, individuals and other non-state actors must ely almost exclusively on domestic remedies to address any harm they may face.

Because of sovereignty, few U.S. legal remedies apply to cross-border harm. What few remedies that do exist are hardly enforced, and even when they are, they still frequently privilege the state over individual interests. By refusing to engage in international tribunals and failing to utilize the privileges it holds as a state actor to extend domestic remedies, the United States has created significant human rights protection gaps and legal black holes

1. Tilman Altwicker, *Transnationalizing Rights-International Human Rights Law in Cross Border Contexts*, 29 EUR. J. INT'L L. 581, 582-583 (2018).
2. HANQIN XUE, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW 1, 1 (2003).
3. *Id.*
4. Michele Olivier, *Exploring Approaches to Accommodating Non-State Actors within Traditional International Law*, 4 HUM. RTS. & INT'L LEGAL DISCOURSE 15, 18 (2010).
5. *Id.*
6. *Id.* at 20.

along its borders.[7] Despite encouraging the flow of labor and goods across international boundaries, U.S. systems have yet to provide remedies to respond to the rising number of violent interactions U.S. businesses and people have with individuals beyond our borders. Counterintuitively, nationalism has also increased these interactions by enlarging the number of federal law enforcement agents in border zones and with it, the number of interactions State actors now have with non-citizens both domestically and abroad.

At the U.S.-Mexico border, globalism and nationalism actively collide all too frequently, leaving migrants and border communities as collateral damage. Stymied by the lack of domestic legal remedies and a world in which states are the preeminent international actors with standing, it remains unclear how individuals impacted by cross-border harm can hold actors liable. Part I of this Note identifies the types of cross-border harms individuals have faced on the U.S.-Mexico border over the last thirty years. In Part II, this Note seeks to identify how international and domestic systems have failed to provide viable remedies or accountability measures for cross-border harms. Part III of this Note proposes new domestic remedies to help rectify this imbalance and offers solutions that utilize the deference international law grants to States. In doing so, this Note hopes to encourage dialogue on how the United States can fill critical protection gaps that exist at its borders.

II. CROSS-BORDER HARMS ON THE U.S.-MEXICO BORDER

What happens on one side of a border impacts the other side. Nowhere is this more apparent than at the U.S.-Mexico border, where two vastly different countries have antagonized and depended on each other for centuries. For example, a wall built on the U.S. side of the border might cause transboundary environmental harm, impacting the flow of the Rio Grande and prompting flooding of Mexican towns across the border.[8] Separately, the Mexican government's inability to fulfill water treaty obligations can leave American farmers stranded and unable to irrigate their crops.[9] A U.S.-owned *maquiladora*[10] in Mexico might discriminate against pregnant people in Mexico, denying them employment so they can protect their bottom line.[11] As we

7. Notably, legal scholars have also described extraterritorial State activity at Guantanamo Bay as a legal "black hole." *See* Ralph Wilde, *Legal Black Hole - Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 MICH. J. INT'L L. 739 (2005); Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L.Q. 1 (2004).

8. Melissa del Bosque, *Trump's Border Wall Could Cause Deadly Flooding in Texas. Federal Officials are Planning to Build it Anyway*, TEXAS MONTHLY (Dec. 2018), https://perma.cc/6G3X-H5MW.

9. *See* Editorial, *It's Time to Review the US-Mexico Water Treaty*, THE MONITOR (Aug. 5, 2018), https://perma.cc/38TG-CEWH?type=image; *see also* NICOLE T. CARTER, STEPHEN P. MULLIGAN & CLARE RIBANDO SEELKE, CONG. RSCH. SERV., R43312, U.S.-MEXICAN WATER SHARING: BACKGROUND AND RECENT DEVELOPMENTS 16-18 (2017), https://perma.cc/7Z42-3APL.

10. A maquiladora is a foreign-owned factory in Mexico at which imported parts are assembled by lower-paid workers into products for export. *Maquiladora*, *Merriam-Webster*, https://perma.cc/W7HY-XXWR (last visited Sept. 19, 2021).

11. Reka S. Koerner, *Pregnancy Discrimination in Mexico: Has Mexico Complied with the North American Agreement on Labor Cooperation?*, 4 TEX. F. ON C.L. & C.R. 235, 238 (1999).

have seen during the COVID-19 pandemic, the movement of Americans into Mexico, such as to shop or get medical treatments, can propel the spread of deadly viruses.[12] So, too, can pressure exerted on the Mexican government by American companies eager to re-open their border factories in Mexico.[13]

Over the last thirty years, the U.S.-Mexico border has "transnationalized" more rapidly than ever before, often leading to a collision of individuals, transnational companies, and the institutions created by State actors to monitor these interactions. "State centeredness" pervades international systems, laws, and norms, creating "problematic protection gaps" where individuals on either side of the border are unable to raise issues related to transboundary pollution or the harmful cross-border effects of domestic immigration, economic, or national security policy.[14] At the border, legal black holes prevail.

A. *Cross-Border Harms in the Age of Border Militarization and Mass Migration*

Today, cross-border harm has taken on new forms as the world grapples with mass migration and countries like the United States respond by militarizing their borders.[15] The cross-border harm that stems from border militarization is both visible and invisible, in part because the government's ability to enforce immigration law and protect national security—two interests frequently invoked at the border—is emboldened by numerous exceptions to many constitutional rights. As one court has acknowledged, national policy "extends the [nation's] zone of security outward, ensuring that our physical border is not the first or last line of defense, but one of many."[16] The border is still territorial, linked to a physical fault line, but it is also a physical wall built a couple of miles from the Rio Grande, internal checkpoints where U.S. Customs and Border Protection (CBP) verify citizenship, and biometric data captured at a point of entry to aid in surveillance of individuals thousands of miles away. The extraterritorial enforcement of immigration law expands the number of ways federal agents are now legally permitted to interact with citizens and non-citizens. The extension of borders increases the likelihood that cross-border harms will occur.

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12. *Coronavirus: Mexicans Demand Crackdown on Americans Crossing the Border*, BBC NEWS (Mar. 26, 2020), https://perma.cc/8272-E2JF.

13. Kate Linthicum, Wendy Fry & Gabriela Minjares, *The U.S. is Pushing Mexico to Reopen Factories Even as Workers Die of COVID-19*, L.A. TIMES (Apr. 30, 2020), https://perma.cc/F9KA-CUEJ.

14. Altwicker, *supra* note 1, at 583.

15. *See Fleeing for Our Lives: Central American Migrant Crisis*, AMNESTY INT'L (Apr. 1, 2016), https://perma.cc/NC6L-KYCP; *see also* Moria Paz, *Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls*, 34 BERKELEY J. INT'L L. 1, 3-5 (2016) (noting the rise of border walls in Spain, Israel, Greece, Bulgaria, and Austria).

16. Brief for Human Rights et al. as Amici Curiae Supporting Appellants, Hernandez v. United States, 785 F.3d 117 (5th Cir. 2015), 2015 WL 5770412 [hereinafter Hernandez Amicus].

1. *Visible Cross-Border Harm: Cross-Border Deaths and Shootings*

Arguably, the most visible of these harms involve the deaths of migrants. Between January 2010 to March 2016, at least forty-six people died as a result of an encounter with U.S. border patrol along the U.S.-Mexico and U.S. Canadian border, a number that could very well be a low-end estimate as it is only based on media reports.[17] It is quite possible there are more incidents the public is simply unaware of: Migrants at the border are extremely vulnerable, frequently encounter agents in remote locations, and are unlikely to hold an abusive agent accountable.[18] Alarmingly, many CBP agents do not understand the legal parameters that dictate some of their interactions with individuals in the field.[19] Both the opaqueness of these harms and the power distance between migrants and CBP agents create conditions where border patrol agents can act with near impunity.

This is especially the case with cross-border shootings, where border patrol agents standing in the United States shoot a firearm at a non-citizen in Mexico. Since the 1990s, CBP agents have shot numerous Mexican nationals.[20] A vivid and recent cross-border shooting is that of Sergio Hernandez, a 15-year-old boy who was shot and killed by a border patrol agent standing on the U.S. side of the border while he was playing with friends on the Mexican side.[21] The U.S. legal system's failure to hold the individual agent accountable through an implied legal remedy illustrates how domestic law also privileges State interests and negotiations over individual interests in remedying harm.[22]

Over years of litigation, Sergio's family tried to hold the agent who killed their son accountable through a *Bivens* remedy, a court created remedy that allows individuals to sue federal officers who violate their constitutional rights. In 2020, the U.S. Supreme Court finally ruled on Sergio's case, nearly 10 years after he was killed, and effectively prevented *Bivens* remedies from being used by victims of cross-border shootings. The Court reasoned that by definition of being an international incident, these types of shootings implicate foreign policy, and it cautioned against an extension of the Bivens remedy.[23] In line with international and domestic adjudicative bodies privileging State actors as the sole arbitrators of cross-border harm, the Court also found that the case implicated foreign policy because Mexico and the United States

17. S. BORDER COMMUNITIES COAL., *Border Patrol Abuses Since 2010* (Mar. 2016), https://perma.cc/3ELW-XTPA.
18. Hernandez Amicus, *supra* note 16, at 9.
19. Brian Bennett, *Many Border Patrol Agents Don't Understand Use of Force Rules, Report Says*, L.A TIMES (Sept. 18, 2013, 12:00 AM), https://perma.cc/K32F-56RJ.
20. Roxanna Altholz, *Elusive Justice: Legal Redress for Killings by U.S. Border Agents*, 27 BERKELEY LA RAZA L.J. 1 (2017); S. BORDER COMMUNITIES COAL., *supra* note 17.
21. *Sergio Adrian Hernandez-Guereca,* S. BORDER COMMUNITIES COAL., https://perma.cc/42F4-VDL6.
22. *Id.*; s*ee also* Hernandez v. Mesa, 885 F.3d 811, 826 (5th Cir. 2018), *aff'd*, 140 S. Ct. 735 (2020).
23. *Mesa*, 140 S. Ct. at 744.

had already engaged in diplomatic discussions on the matter.[24] To provide an individual remedy outside of these negotiations would compromise the United States' interest in ensuring that border patrol agents are held to standards that do "not undermine [their] effectiveness and morale" and would also compromise Mexico's interest in exercising sovereignty over its territory.[25]

Yet, as the dissent recognized, the decision to uphold sovereignty and State interests makes it nearly impossible for the victims of cross-border shootings to have a viable remedy to resolve these grave harms.[26] Without *Bivens*, no other civil liability exists for cross-border shootings. Even if one were to exist, it remains unlikely that a civil plaintiff would prevail at trial in a case involving a CBP killing, as no plaintiff ever has.[27] Discipline and criminal prosecution are similarly unlikely. A report that reviewed over 800 complaints of alleged physical, verbal, or sexual abuse against border patrol agents between 2009 and 2012 found that 97 percent of the complaints that resulted in formal decisions had no disciplinary action taken.[28] Outside of agency disciplinary action, the United States can also hold agents accountable through criminal prosecution. Yet in another instance of state privilege and discretion, the Department of Justice (DOJ) has only prosecuted one CBP agent for a shooting in the agency's 100-year history.[29]

2. *Visible Cross-Border Harm: Border Wall Construction*

Another highly visible instance of cross-border harm is the construction of the U.S.-Mexico border wall. Border residents are essentially powerless to prevent the wall's construction. Further, border communities have demanded additional information on how a wall will impact the flow of the Rio Grande, despite predictions the planned levee wall will cause dangerous flooding in Mexico and the United States.[30] The construction of the border wall is yet another instance in which the United States relies on sovereignty and plenary power to advance policies that impact national security and immigration enforcement, with minimal opportunity for accountability from those most impacted.

Under the REAL ID Act of 2005,[31] the Secretary of the Department of Homeland Security (DHS) was given broad authority to waive *all* legal requirements deemed necessary for the expeditious construction of authorized barriers, allowing only judicial review for constitutional claims.[32] In the

24. *Id.* at 745.
25. *Id.*
26. *Id.* at 760.
27. *Id.*
28. *Id.*
29. *See id.*; United States v. Swartz, No. 15-cr-1723 at *1029 (D. Ariz. 2015).
30. Del Bosque, *supra* note 8.
31. Real ID Act of 2005, Pub. L. 109–13, 119 Stat 231.
32. MICHAEL JOHN GARCIA, CONG. RSCH. SERV., R43975, BARRIERS ALONG THE U.S. BORDERS: KEY AUTHORITIES AND REQUIREMENTS 22 (2017), https://perma.cc/HC69-CG6M.

most recent iteration of the construction of a border wall, the Trump Administration waived numerous laws including the Administrative Procedure Act (APA),[33] which would have allowed residents to bring forth comments and concerns about the wall's construction and required DHS to address them.[34] Without this accountability measure, individuals on the border are powerless to prevent or respond to the unique cross-border harm they are expected to experience.

Eminent domain, the legal process by which the government obtains land from private landowners to build the border wall, also does not appear to provide a fair or viable remedy to the harm brought by border wall construction. In 2008, the government designed the last iteration of the wall to be constructed through low-income U.S. neighborhoods where landowners had low-levels of English and educational attainment.[35] The wall's path was intentional: The government built the wall in these areas because it knew these landowners were least likely to know their rights or protest.[36] By purposely implicating the rights of people who would face the greatest challenges in court, the government pursued a path where it was least likely to hear individual objections.

3. *Invisible Cross-Border Harms: Constitutional Protections Contingent on Territorial Presence*

Beyond the visible cross-border harms presented by cross-border shootings and border wall construction, the United States—enabled by human rights courts—is actively creating an ecosystem where less-visible cross-border harms can persist. While international tribunals acknowledge that human rights are inherent to the individual, the tribunals still appeal to State sovereignty by only enforcing human rights when an individual has territorial presence in the State.[37] U.S. domestic case law further upholds this notion, finding that constitutional protections can only apply to non-citizens when they are on U.S. soil.[38] By creating physical barriers and funneling the flow of migration to dangerous regions of the border, the United States is making it harder for non-citizens to not only enter the country but also to access constitutional protections and remedies if harm were to occur.[39]

Making the path to the United States more treacherous and physically difficult privileges men who are strong enough to scale a border wall and evade

33. *See* 83 Fed. Reg. 50949, 50951 (Oct. 10, 2018).
34. Del Bosque, *supra* note 8.
35. *Fencing Along the Southwest Border: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 115th Cong. 14 (2017) (statement of Dr. Terence M. Garrett, Professor at University of Texas Rio Grande Valley).
36. J. Gaines Wilson, Jude Benavides, Karen Engle, Deninse Gilman, Anthony Reisinger, Jessica Spangler & Joe Lemen, *Due Diligence and Demographic Disparities: Effects of the Planning of U.S. Mexico Border Fence on Marginalized Populations,* 14 SOUTHWESTERN GEOGRAPHER 42, 51 (2010).
37. Paz, *supra* note 15, at 7.
38. United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990).
39. Paz, *supra* note 15, at 8.

other dangers.[40] Consequently, the United States silently privileges able-bodied young men, the individuals most able to obtain territorial presence and thereby obtain constitutional protections. In doing so, the United States exacts invisible harm on individuals who are not able-bodied young men by conditioning their access to remedies on their ability to survive difficult conditions.

4. *Invisible Cross-Border Harm: Virtual Legal Barricades*

"Virtual legal barricades," digital immigration control measures that push enforcement to the interior of the country or prevent people from even reaching our borders, also present new forms of invisible cross-border harm.[41] The collection of biometric data and use of other surveillance measures have the potential to erode the constitutional liberties of citizens and non-citizens who simply decide to cross a border or live near one.[42]

Border communities exist in a constant state of surveillance. Currently, municipal police, county sheriffs, and the Drug Enforcement Agency operate cell-site simulators, devices that trick phones within a certain radius to connect to the device rather than a cell tower, in three border counties.[43] Additionally, CBP operates Integrated Fixed Towers—towers equipped with radars, cameras, and communication equipment capable of tracking items of interest—in six counties and Remote Video Surveillance Systems—daylight and infrared cameras mounted on poles and buildings—in seven counties.[44] CBP also operates Tactical Aerostats and Tethered Aerostat Radar Systems—unmanned, unarmed surveillance blimps and balloons—in nine border counties. Further, the Texas Department of Public Safety operates spy planes—high altitude surveillance planes that fly at more than two miles above the Earth—in seven Texas border counties.[45]

These surveillance measures only offer a snapshot of the thousands of cameras, radars, and sensors that exist along the border.[46] These devices are located in the United States but their reach likely captures movement, data, and visuals of non-citizens in Mexico. While these surveillance policies are still unfolding, it remains unclear how domestic courts will address the implications of these devices on the individual civil liberties of citizens in border zones. Further, it remains especially unclear how courts will protect the civil liberties of non-citizens from these surveillance measures if they encounter

40. Paz, *supra* note 15, at 1.
41. Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 3 STAN. J. C.R. & C.L.165, 192 (2007).
42. Michael Lechuga, *Coding Intensive Movement with Technologies of Visibility: Alien Affects*, 1 CAPACIOUS: J. FOR EMERGING AFFECT INQUIRY 83, 84-85, 88, 90-91 (2017).
43. *Explore the Data: Surveillance Tech in Southwestern Border Communities*, ELECTRONIC FRONTIER FOUNDATION (Jan. 10, 2021), https://perma.cc/D3CX-FGK5.
44. *Id.*
45. *Id.*
46. *Id.*

them before reaching the border. By perpetuating an environment where the movement of migrants and citizens who cross the border is heavily tracked and monitored, the United States is silently equipping itself to encroach on the privacy of individuals who may or may not have established territorial presence.

III. A LACK OF ACCOUNTABILITY AND VIABLE REMEDIES IN BORDER ZONES

Despite many instances of cross-border harm, border zones lack accountability measures and viable remedies to address the injuries of border residents and migrants who traverse these regions. As the premier setting for the enforcement of federal immigration law and the point at which sovereignty begins and ends, the border poses an inherent exception to domestic constitutional promises and an impenetrable barrier that international human rights law cannot seem to overcome. The international law doctrine of sovereignty is foundational to U.S. immigration and national security law. This doctrine, coupled with plenary power, allows the United States to have broad power over issues of immigration and avoid accountability for harmful immigration policies in international tribunals.

A. *Shortcomings of Domestic Law*

In 1889, *Chae Chan Ping v. United States*, commonly known as the "Chinese Exclusion Case," articulated a view of sovereignty that provided the United States with expansive powers that could be "invoked for the maintenance of its absolute independence and security throughout its territory."[47] These powers included the ability to repeal invasion and admit "subjects" of other nations as citizens. The Court did not arrive at this decision through express constitutional provisions but rather derived it from an understanding of inherent powers of sovereign nation states, which include the right to exclude. With logic that does not seem too far off from contemporary political rhetoric, the Court further stated that this power to exclude was critical to preserving the country's independence and ability to provide "security against foreign aggression and encroachment."[48] Since *Chae Chin Pang*, this expansive view of sovereignty has been reaffirmed[49] and serves as the foundation for "plenary" federal power in the area of immigration and immigration enforcement.[50] Today, the Supreme Court continues to uphold plenary power, deferring to political branches on immigration and national security matters.[51]

47. Chae Chan Ping v. United States, 130 U.S. 581, 604 (1889).
48. *Id.* at 606.
49. Ekiru v. United States, 142 U.S. 651, 659 (1892) (deciding that every sovereign country has the right to exclude foreigners and that this is essential to self-preservation).
50. Elizabeth M. Bruch, *Open or Closed: Balancing Border Policy with Human Rights*, 96 KY. L.J. 197, 201 (2007).
51. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2408 (2018); *see also* Bruch, *supra* note 44, at 205. *See generally* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

The weight the courts give to immigration and national security interests pervades what few domestic remedies exist to hold federal agents accountable. Additionally, the court has found that many federal civil remedies do not apply to non-citizens who have faced cross-border harm abroad by U.S. federal actors. For example, *Hernandez v. Mesa* declined to extend *Bivens* remedies to cross-border shootings, citing national security and foreign policy concerns.[52] Further, the Court broadly justified its denial of a *Bivens* remedy, holding that "regulating the conduct of agents at the border unquestionably has national security implications." This holding implies that future attempts to extend a *Bivens* remedy to *any* adverse interactions with federal agents at the border are unlikely to prevail.[53]

42 U.S.C. § 1983, another civil remedy which permits the recovery of damages for constitutional violations by state officers acting under color of *state* law, is only available to citizens or individuals who faced harm within the United States.[54] The Torture Victim Protection Act, a damages action which may be brought by or on behalf of a victim of torture or extrajudicial killing carried out by a person who acted under the authority of a foreign state, cannot be used to sue a U.S. officer.[55] The Federal Tort Claims Act (FTCA)[56] specifically provides that the United States cannot be sued for claims arising in a foreign country,[57] which means that the United States is immune from "all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred."[58] Even if a claim were to arise from an assault or battery perpetrated by a federal law enforcement officer in the United States, the tension between FTCA's Law Enforcement Proviso[59] and Discretionary Function Exemption[60] poses significant obstacles.[61]

Victims of cross-border shootings may even be unable to rely on state tort law. If border patrol agents harm non-citizens while patrolling the border as assigned, then they are plausibly acting within the scope of their employment. Subsequently, the Westfall Act,[62] an amendment to FTCA, would bar a cross-border shooting victim from bringing a claim under state tort law because it "accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties."[63]

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52. *Hernandez*, 140 S. Ct. at 744.
53. *Id.* at 747.
54. *Id.*
55. *See* Meshal v. Higgenbotham, 804 F.3d 417, 430 (D.C. Cir. 2015) (Kavanaugh, J., concurring).
56. 28 U.S.C. §§ 1346, 2671-2680.
57. *See* 28 U.S.C. §§ 2674, 2680(h).
58. Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004).
59. *See* Act to Amend Reorganization Plan Numbered 2 of 1973, Pub. L. No. 93-253, § 2, 88 Stat. 50 (1974) (codified as amended at 28 U.S.C. §§1346, 2680(h) (2018)).
60. 28 U.S.C. § 2680(a) (2018).
61. *See* Eric Wang, *Tortious Constructions: Holding Federal Law Enforcement Accountable by Applying the FTCA's Law Enforcement Proviso over the Discretionary Function Exception*, 95 N.Y.U. L. REV. 1943, 1972-1997 (2020).
62. 28 U.S.C. § 2679.
63. Osborn v. Haley, 549 U.S. 225, 229 (2007).

Criminal prosecution of border patrol agents remains a possibility, but as mentioned previously, it rarely occurs. At the federal level, border patrol agents can *technically* be prosecuted for violating constitutional rights under 18 U.S.C. § 242 if a violation were to occur in the United States. However, in the specific case of cross-border shootings, which involve harms to non-citizens abroad, a court would be unlikely to extend an implied remedy and instead find, based on a clear reading of the statute, that it does not apply to harm experienced by non-citizens beyond the border.[64] Absent explicit congressional direction, a court would be even less likely to find that the standards of reasonable force we have come to expect and enjoy in domestic contexts should be the standard applied in extraterritorial situations.

With virtually no civil or criminal remedies for cross-border harm faced by non-citizens at the hands of U.S. federal agents,[65] the United States is able to act unilaterally on issues of immigration and national security, unchecked by domestic courts. At a time when border zones face unprecedented militarization, this lack of accountability is actively creating one of the largest legal black holes the U.S.-Mexico border has faced in recent memory.

B. *Shortcomings of International Law*

International law centers state actors, and grants states tremendous latitude to decide domestic matters and by extension, the fate of individuals under its jurisdiction.[66] As explored below, these principles make it difficult for individuals to resolve cross-border harms in international tribunals.

1. *International Tribunal Deliberations on Border Walls and U.S. Immigration Policy*

Among other things, border walls are an intentional attempt to limit a State's human rights obligations to those within its borders and to prevent non-citizens from obtaining those protections. International tribunals typically only discuss the physical structures of walls or observe their impact on the human rights of residents, very rarely deciding their legality as a whole.[67] The tribunals do not focus on the implications walls have on redrawing borders, demarcating where sovereignty begins and ends, or if states need to provide protections for the harm that occurs at boundary lines.[68] Though border walls have proliferated around the world, international tribunals have yet to

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64. *See* 18 U.S.C. § 242 (providing a remedy only to actions occurring within a state or territory of the United States).

65. "In short, it is all too apparent that to redress injuries like the one suffered here, it is Bivens or nothing." Hernandez v. Mesa, 140 S. Ct. 735, 760 (2020).

66. Bruch, *supra* note 50, at 214.

67. *See* Denise Gilman, *Seeking Breaches in the Wall: An International Human Rights Law Challenge to the Texas-Mexico Border Wall*, 46 TEX. INT'L L. J. 257 (2011), for a summary and evaluation of cross-border harm the 2008 construction posed to border residents and that was merely observed by the Inter American Commission on Human Rights.

68. *See* Moria Paz, *The Law of Walls*, 28 EUROPEAN J. INTL. L. 601, 624 (2017).

fully deliberate and regulate the impact of these structures on human rights.[69] Yet by acknowledging that migrants can trigger a State's human rights protections once inside its territorial boundaries, international tribunals have upheld the notion, in other areas of law, that if an individual is outside of a wall, they are beyond a state's human rights responsibility.[70]

At the same time, the European Court of Human Rights found extraterritorial rights obligations when evaluating maritime interdiction, the practice of border control agents interdicting a boat of migrants before they can reach the shore, finding that the act of border control itself triggers a State's human rights.[71] Accordingly, if a State, acting through its agents, exercises control and authority over an individual, it owes that individual fundamental forms of due process.[72] While it remains unclear if other tribunals will find that human rights obligations apply extraterritorially in border wall contexts, these competing conceptions of human rights protections will likely fuel debate about the human rights obligations border control agents around the world owe to non-citizens they encounter extraterritorially in the field.

Globally, regulation of border walls is underdeveloped and understudied.[73] At the U.S.-Mexico border, this lack of regulation has prompted some advocacy groups to argue that the lack of domestic remedies and the inability of international tribunals to reach border zones has transformed the U.S.-Mexico border into a "lawless zone—a legal black hole—between nations."[74] It is worth noting that lack of domestic remedies and drastic deference to State sovereignty do not comport with international treaties and declarations, such as the Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR), which demand that individuals have national tribunal remedies for acts violating individual rights.[75] Notably, the United States is a signatory party of ICCPR and voted in support of UDHR.

This is not to suggest that international tribunals have not monitored or provided recommendations about U.S. immigration or use of force policy but merely that international tribunals, out of deference to State sovereignty, cannot and do not have a binding impact on State actions. In one case involving the United States' right to deport an individual, the Inter-American Commission on Human Rights acknowledged that, while Member States have the "right . . . to control the entry, residence, and expulsion of aliens," their immigration policy and decisions "must still respect the right to life, physical and mental integrity" and the execution of this policy must not give

69. *See* Paz, *supra* note 15, at 26.
70. *See* Paz, *supra* note 68, at 603; *see also* Paz, *supra* note 15, at 21.
71. Hirsi Jamaa v. Italy, App. No. 27765/09 (Feb. 23, 2012), https://perma.cc/XTR2-GDFJ.
72. *Id.* at 60–80.
73. Paz, *supra* note 68, at 611.
74. Hernandez Amicus, *supra* note 16, at 16-18.
75. *Id.*

rise to "cruel, degrading and inhumane treatment."[76] The Commission made clear in this decision that a State cannot exercise its sovereign rights in a way that runs counter to core non-derogable rights but ultimately there was nothing the Commission could legally do to enforce this finding. To this end, the United States continues to assert that, as a non-State party to the American Convention, there is "no provision in the Commission's organic document, the American Convention on Human Rights, or the Commission's Statute, which would provide specific authority for the Commission to request precautionary measures."[77]

Within domestic courts, the influence of the Inter-American Commission and any limitations it seeks to impose on State sovereignty is complex. Since the United States has not ratified many treaties, including the American Convention of Human Rights, the "nature of customary human rights law is the key issue relating to the enforceability of human rights norms in [U.S.] courts."[78] The most frequent use of international human rights law by U.S. courts involves references to norms not technically binding upon the United States. They are identified as interpretive yet persuasive aids that do not have the status of customary law.[79]

2. *The Limited Role of Customary Law*

Customary law, international obligations arising from established international practices, is not always helpful in the context of addressing cross-border harm. Determinations of international customary law by the Supreme Court are binding on U.S. states.[80] Absent this type of determination, customary law can still be persuasive in U.S. domestic courts and is most typically evaluated in cases brought under the Alien Tort Statute (ATS), which grants jurisdiction to federal district courts of "all causes where an alien sues for a tort only in violation of the law of nation or of a treaty of the United States."[81] Most notably, in *Filartiga v. Pena Irala*, the Second Circuit determined the ATS granted the United States jurisdiction over claims for torts committed abroad, finding that the torture of a teenager in Paraguay violated customary international law.[82] Following *Filartiga*, several circuits broadly applied this holding to award damages for foreign human rights violations.

76. Mortlock v. United States, Case 12.534, Inter-Am. Comm'n H.R., Report No. 63/08, OEA/Ser. L./V/II.134, doc 5 rev. ¶ 78 (2008).

77. *Id.* at ¶ 41.

78. *See* Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 Mich. Int'l L. Rev. 1, 4 (1992).

79. *See* Roper v. Simmons, 543 U.S. 551, 576 (2005) (noting that every country in the world, with the exception of the United States and Somalia, has ratified Article 37 of the United Nations Convention on the Rights of the Child, prohibiting capital punishment for crimes committed by juveniles under 18).

80. Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984).

81. 28 U.S.C. § 1350.

82. Filartiga v. Pena-Irala, 630 F.2d 876, 884-89 (2d Cir. 1980).

However, *in Sosa v. Alvarez-Machin*, a case challenging the kidnapping of a Mexican national into the United States by federal actors, the Supreme Court narrowed the scope of the ATS. In *Sosa*, the Supreme Court clarified that the ATS did not create a cause of action but simply "furnish[ed] jurisdiction for a relatively modest set of actions alleging violations of the law of nations."[83] These actions must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[84] Most cases that have successfully alleged a violation of customary law involve egregious and widely accepted violations of international law like genocide, torture, summary execution, disappearance, war crimes, or crimes against humanity.[85]

Considering this precedent, cases involving cross-border shootings or other instances of harm perpetuated by federal agents at the border are unlikely to prevail under the ATS. Further, it remains unclear if American-owned companies in Mexico could also be held accountable under the ATS for cross-border harm, as the Supreme Court has only ruled that foreign companies may not be sued under this statute.[86] Though domestic courts can consider international customary law, they only do so to provide relief for the most foundational of human rights violations brought against State actors and have been narrowing the corporate liability for cross-border harms. At best, customary international law is aspirational; at worst, it is a set of principles that do not create enforceable federal rights within the United States and therefore do not provide a viable legal remedy for cross-border harm on the U.S.-Mexico border.

3. *Applying Pressure on Domestic Policy from Abroad*

Mindful of the limitations of international and customary law to enforce binding change to U.S. domestic policy, the Inter-American Commission on Human Rights has applied extrajudicial policy pressure to cross-border harm committed by the United States, issuing numerous press releases condemning killings by U.S. border patrol agents. In 2012, the Commission condemned CBP's disproportionate use of force and the deaths of Juan Pablo Pérez Santillán, Anastasio Hernández Rojas, and 15-year-old Sergio Adrian Hernández Güereca, all of whom were non-citizens killed by excessive force at the U.S.-Mexico border.[87] Two years later, the Commission also decried the death of Jesus Flores Cruz, a Mexican migrant who died from gunshot

83. Sosa v. Alvarez-Machain, 542 U.S. 692, 720 (2004).
84. *Id*. at 725.
85. Beth Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 BROOKLYN J. INT'L L. 773, 813 (2008).
86. Jesner v. Arab Bank, PLC, 138 S.Ct. 1386 (2018) (Alito, J., Concurring).
87. *IACHR Condemns the Recent Death of Mexican National by U.S. Border Patrol Agents*, ORG. OF AMERICAN STATES (July 24, 2012), https://perma.cc/JD6W-AD55.

wounds inflicted by U.S. border patrol agents.[88] Yet these press releases are not effective remedies to resolving cross-border rights violations. They merely observe tragedies rather than remedy violations.

IV. PROPOSING NEW CIVIL RIGHTS LEGISLATION TO REMEDY CROSS-BORDER HARM

The legal shortcomings of international law, tribunals, and customary law demonstrate how there are few domestic remedies and fewer international remedies available to remedy cross-border harm. Additionally, few remedies are available for any harm that implicates immigration and national security, two areas of domestic law bolstered by state sovereignty. As national security increasingly justifies immigration policy and border militarization, border zones are in desperate need of a legal remedy to hold accountable the influx of federal agents who, through virtual impunity are authorized to use excessive force domestically and abroad.

While this Note has identified many forms of cross-border harms that have emerged and failed to be addressed through remedies, cross-border shootings are arguably the most grievous and severe. International tribunals have failed to hold the United States and its federal agents accountable for these shootings and likely lack the authority to do so. International law defers to State actors to create solutions for cross-border harm, providing yet another signal that the most realistic opportunity for a solution must come from domestic institutions. However, as previously mentioned, domestic legal remedies are virtually non-existent, and attempts to create them through litigation have been exhausted. Conservative courts, increasingly the bulk of the judiciary, have declined to extend implied remedies to a range of constitutional violations and instead point to the legislative branch to provide a solution.[89]

The shortcomings of domestic and international institutions clearly indicate that the only realistic remedy for cross-border shootings must come from Congress. Legislating legal remedies can likely never eliminate cross-border shootings or other harms perpetrated by federal law enforcement abroad but doing so, can begin to construct an accountability apparatus that does not yet exist. There has never been a better time to consider a legislative remedy to cross-border shootings. Police brutality and the criminalization of immigration dominate mainstream conversation. In the post-Trump era, Americans are reevaluating the police state and the impact of immigration enforcement on communities of color.[90] Cross-border shootings are a small, yet critical

88. *The IACHR Expresses Deep Concern Over the Deaths of Migrants Caused by the U.S. Border Patrol*, ORG. OF AMERICAN STATES (Feb. 24, 2014), https://perma.cc/Q77Z-S48D.

89. *See Ziglar v. Abassi*, 137 S. Ct. 1843, 1857 (2017), for further discussion on why extending *Bivens* is now a "disfavored" judicial action and for a range of violations the Supreme Court has declined to extend the implied remedy to.

90. *See* Collen Long, Kat Stafford & R.J. Rico, *Summer of Protest: Chance for Change, But Obstacles Exposed*, ASSOCIATED PRESS (Sept. 6, 2020), https://perma.cc/AQ5P-EQZ9; *see also*

part of that reevaluation. Of all the cross-border harms presented in this Note, cross-border shootings present the most straightforward path to a remedy.

This section evaluates two potential remedies Congress can provide to address cross-border harms: (A) a criminal remedy that permits a narrow extension of 218 U.S.C. § 242 to prosecute federal actors who use excessive force abroad, and (B) a civil remedy that finally legislates a *Bivens* remedy and creates a federal analogue to 42 U.S.C. § 1983.

A. *Proposing a Criminal Remedy to Cross-Border Harm*

Congress could create an amendment to 18 U.S.C. § 242 that criminalizes a federal agent's use of unreasonable force abroad. Currently, 18 U.S.C. § 242 allows DOJ to prosecute public officials for violating an individual's constitutional rights while acting under color of the law. Created through the Civil Rights Act of 1866 to address the problem of Black codes emerging in the Post-Reconstruction South,[91] 18 U.S.C. § 242 has increased "the level of power and presence that the federal government ha[s] over . . . states (and persons within those states) who [are] resistant to ensuring the basic rights of [minorities are] met."[92] Though many today see the need to ensure the basic rights of citizens and non-citizens are protected against federal actors like border patrol, a basic textual understanding of 18 U.S.C. § 242 makes clear that the statute only applies to harm these agents perpetuate domestically and not harms they engage in abroad.[93]

By amending 18 U.S.C. § 242 to import domestic constitutional standards surrounding force to non-citizens abroad, this new statute would fill the critical constitutional gap identified by the Fifth Circuit when it held there was "no clearly established law confirming that the U.S. Constitution applied to injuries abroad."[94] This Note evaluates how the following language could provide a criminal remedy for cross border harms:

> Individuals who, acting under color of the law, use excessive force against individuals who do not have a Fourth Amendment right against unreasonable use of force may still be prosecuted under this law.

This text essentially allows for a limited extension of the Constitution and does not pose a substantive expansion of Fourth Amendment rights. This amendment does not redefine the Fourth Amendment standard of reasonable force; it simply extends these protections to interactions federal agents have

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Demonstrations and Political Violence in America: New Data for Summer 2020, ARMED CONFLICT LOCATION AND EVENT DATA PROJECT (Sept. 3, 2020), https://perma.cc/8P7X-48C7.

91. Brian R. Johnson & Phillip B. Bridgmon, *Depriving Civil Rights: An Exploration of 18 U.S.C. 242 Criminal Prosecutions 2001-2006*, 34 CRIM. JUST. REV. 196, 197 (2009).

92. *Id.*

93. 18 U.S.C. § 242 ("willfully subjects any person in any State, Territory, Commonwealth, Possession, or District").

94. Altholz, *supra* note 20, at 10.

with non-citizens. In the absence of an absolute ban on the use of force abroad by federal law enforcement (or an absolute reimagining of federal law enforcement at our borders), this statute could provide a measure to hold state actors accountable for excessive force abroad.

1. *Advantages of a Criminal Remedy to Cross-Border Shooting*

There are certain advantages to advancing a criminal remedy to address cross-border shootings. A criminal remedy, as opposed to a civil remedy, might make individual actors more aware of the consequences of using excessive force abroad because it would impose punishment on individual agents. Under a civil remedy, federal agents may not actually face individual accountability as the government could pay all damages on behalf of federal agents, as it does under FTCA.

A criminal remedy also allows the government, rather than individuals, to bring forth claims. This may be invaluable to economically, legally, and politically vulnerable individuals, who are most frequently abused by border patrol. Past study of prosecution under criminal civil rights statutes illuminates how victims of law enforcement misconduct are "so likely to be unaware of their rights."[95] When aware of their rights, these vulnerable populations often do not wish to be "instrumental in initiating criminal prosecution against persons of power and influence" when blowback could have grave results.[96] Under the complaint process of 18 U.S.C. § 242, victims or advocates would only have to submit a complaint in the form of a phone call, letter, or personal visit to DOJ, local U.S. Attorney's Offices, or local FBI office. In theory, this would reduce the time and legal fees an individual would have to invest to see a claim through from start to finish.

Lastly, criminal prosecution documents and details constitutional violations for posterity, furnishing a record of law enforcement brutality that has been historically elusive in border regions.[97] This in itself is a form of accountability, though limited, that could promote public confidence in the justice system and deter federal agents from engaging in misconduct in a region where these lofty goals remain distant.

2. *Disadvantages of a Criminal Remedy for Cross-Border Shootings*

At the same time, there are inherent shortcomings to a criminal remedy. A remedy like the one proposed does not criminalize the use of force abroad by federal agents. A criminal remedy does not reduce, minimize, or even eliminate the presence of federal agents at our borders, which would likely be the *best* way to prevent cross-border shootings. It only criminalizes *excessive*

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95. Arthur B. Caldwell & Sydney Brodie, *Enforcement of the Criminal Civil Rights Statute, 18 U.S. C. Section 242, in Prison Brutality Cases*, 52 GEO. L. J. 706, 708 (1964).
96. *Id*; *See also* Johnson & Bridgmon, *supra* note 91, at 199.
97. *See The History of Racial Violence on the Mexico-Texas Border*, REFUSING TO FORGET, https://perma.cc/62MJ-L6ZR (last visited Sept. 21, 2021).

force abroad. While advocates should push for legislation that would prohibit unfettered use of force abroad, build solidarity with interior communities facing police brutality, and completely reimagine policing and surveillance at the border, this remedy presents a politically expedient step and an interim solution.

Still, there are inherent challenges to prosecuting law enforcement misconduct. Prosecutors must navigate potential federal-state conflict of interest and circumvent erroneous views held by the public that non-citizens are undeserving of civil rights.[98] As we have seen in the local law enforcement context, the public may push back at prosecuting individual federal agents because doing so might diminish the reputation of immigration and other law enforcement agencies.

The enforcement of criminal civil rights statutes also underscores how DOJ, the agency tasked with implementing these laws, is unable to completely eradicate law enforcement misconduct. Because of the large number of civil rights cases and small number of staff tasked with enforcing numerous civil rights statutes, current prosecution under 18 U.S.C. § 242 is limited to a select number of cases. From 1993-1997, DOJ examined more than 45,000 complaints, reviewed more than 12,500 investigations conducted by FBI, and only filed 246 charges.[99] In a review of 242 referrals from 1986 to 2003, Transactional Records Access Clearinghouse found that DOJ received 43,331 complaints, and of these complaints, only 423 individuals were convicted.[100] This data revealed that 98.28 percent of the complaints received by DOJ never resulted in a successful prosecution.[101] With the expansion of this civil rights statute, a similar pattern may emerge here, limiting widespread justice on the border. To that end, this Note makes no presumption that an amended 18 U.S.C. § 242 will be able to address *every* cross-border shooting or that prosecution of border patrol agents will completely reform CBP misconduct.

Prosecutorial guidelines and discretion may also limit the effectiveness of the proposed statute. As previously mentioned, DOJ's Civil Rights Division can hear of alleged constitutional violations from a number of sources, including 42 U.S.C § 1983 cases or local police departments. In instances where individuals submit complaints themselves, FBI investigates allegations of abuse and forwards a report to DOJ's Civil Rights Division, which then determines if a substantial case investigation is warranted. If this investigation clearly indicates a civil rights violation, DOJ attorneys, in consultation with counterparts from the U.S. Attorney's Office, can convene a grand jury. However, not all cases are recommended for prosecution.[102] For acts that

98. *See* Caldwell & Brodie, *supra* note 95, at 710.
99. Johnson & Bridgmon, *supra* note 91, at 198.
100. *Id.* at 200.
101. *Id.*
102. *Id.* at 199.

have been previously prosecuted by state or federal courts, DOJ abides by the Petite Policy, which urges prosecution in instances when there is a substantive federal interest, the federal interest remains unvindicated, and when there is sufficient evidence to win the case.[103]

Notably, insufficient evidence might pose hurdles for cross-border shooting cases, as it does with other instances of law enforcement abuse, because these incidents frequently occur in isolated areas with few witnesses. In fact, DOJ denied prosecuting the agent who killed Anastacio Hernadez-Rojas because it "could not disprove agents' claim they used reasonable force," despite Anastacio's physical condition indicating that he may have been the subject of excessive force.[104] Anastacio Hernadez-Rojas's case indicates that DOJ may have a propensity to yield to agent claims in situations where a victim is unable to provide an account because they have passed. More broadly, DOJ's requirement that there be clear and overwhelming evidence of a constitutional violation, a guideline that one would hope *all* prosecutors abide by, may make it difficult to prosecute crimes that typically occur in remote and isolated areas with few witnesses.

Lastly, prosecuting border patrol agents does not provide restorative justice, a theory of justice that emphasizes repairing the harm caused by criminal behavior by allowing all willing stakeholders to meet and participate in a resolution.[105] This remedy does not bring back victims or undo the harms wrought by agents. Moreover, this process may not always center victims. Criminal law scholars increasingly find punishment to be "a kind of relic"[106] and are exploring ways to deter without relying on the criminal justice system to punish or inflict harsh treatment.[107] These arguments have particular hold: Prosecution of local police for violence and abuse against Mexican-Americans has not deterred abuse.[108] Similarly, doubts remain about the adequacy of Fourth Amendment remedies for African-Americans, and by extension, other racial and ethnic minorities.[109]

B. *Proposing a Civil Remedy to Cross-Border Harm*

As the Supreme Court suggested in *Hernandez*, Congress could also legislate a *Bivens* remedy, allowing individuals to recover damages in federal

103. U.S. Dep't. of Just., Just. Manual § 9-2.031 (2020).

104. Lupe S. Salinas, *Lawless Cops, Latino Injustice, and Revictimization by the Justice System*, 2018 MICH. ST. L. REV. 1095, 1200–1201 (2018).

105. *Lesson 1: What is Restorative Justice?*, CTR. FOR JUST. AND RECONCILIATION, https://perma.cc/JRD4-6PYG (last visited Sept. 21, 2021).

106. Michael L. Carrodo, *The Abolition of Punishment*, 35 SUFFOLK U. L. REV. 257, 259 (2001).

107. *Id.* at 261.

108. "Regrettably, police abuse continues even though lawless cops have been prosecuted over the years." Salinas, *supra* note 105, at 1146–47.

109. *See generally* Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt,* 23 CAP. U. L. REV. 151 (1994).

court against federal officers who violate their constitutional rights.[110] Originally created by the Supreme Court in *Bivens v. Six Unknown Federal Agents*, a *Bivens* remedy serves as an analogue to 42 U.S.C. § 1983, which provides an individual with the right to sue *state* government employees acting "under color of state law."[111] *Hernandez* signaled not only the infeasibility of non-citizens to hold border patrol agents accountable for cross-border harms, but also the near impossibility of any individual—citizen or not—to hold *any* federal agent accountable for a civil rights violation through an implied civil remedy.[112]

Acting under its authority to "regulate Commerce with foreign Nations," Congress should consider formally creating a federal analogue to 42 U.S.C. § 1983 and finally legislating the damages remedy created in *Bivens*. This legislation could read as follows:

> Any person who, acting under color of any federal statute, regulation, or custom, subjects, or causes to be subjected, deprives any person of the Fourth Amendment right to be free from unreasonable force shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer or Member of Congress for an act or omission taken in such officer's or member's judicial or legislative capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

1. *Advantages of a Civil Remedy to Cross-Border Harm*

Like the proposed criminal remedy, this legislation extends and formalizes pre-existing protections. It essentially allows individuals—citizens or not—to bring suit against federal actors who violate their constitutional rights. The proposed civil remedy avoids criminal prosecution altogether, bypassing the criminal justice system and empowering individuals to hold federal agents accountable in nonviolent ways. Currently, individuals have few redress measures to hold accountable the agents that work across the federal government's 114 federal law enforcement agencies.[113] As federal law enforcement expands to new contexts, interacting with individuals further in the country's

110. Hernandez v. Mesa, 140 S. Ct. 735, 750 (2020).

111. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 427 (1971) (Black, J., dissenting) (referencing 42 U.S.C. § 1983 (1996)).

112. *See Hernandez*, 140 S. Ct. at 750 (quoting *Abassi*, 137 S. Ct. at 1857) ("When evaluating whether to extend Bivens, the most important question 'is 'who should decide' whether to provide for a damages remedy, Congress or the courts?' The correct 'answer most often will be Congress.' That is undoubtedly the answer here.").

113. *See id.*

interior, the need for civil accountability measures becomes not just a border issue but a national one as well.[114]

Yet, the basis for this remedy can and should derive from the impact that federal law enforcement at the border has on national commerce. At ports of entry, CBP officers enforce laws, duties, and taxes regarding the import and export of goods, people, and materials. In these same regions, FBI and ICE agents monitor and intercede to halt illicit commerce. Any oversight of these federal agents inherently impacts commerce. For better or worse, these agents form the corps of people who explicitly and *implicitly* moderate and surveil our national commerce. This country's immigration apparatus enforces immigration laws to moderate who can legally work in the United States and relies on federal law enforcement to expel migrants and control who can remain in the labor force. Our immigration enforcement apparatus also implicates our national commerce and is fueled in large part by who can and cannot partake in it.

Providing accountability measures for individuals at the border provides accountability for individuals in the interior, empowering minority communities that disproportionately interact with federal actors. As federal law enforcement continues to expand, largely in response to perceived national security threats and anxiety over who can partake in national commerce, the need for a civil remedy has never been greater.

2. *Disadvantages of a Civil Remedy*

Again, this Note acknowledges that there are inherent shortcomings to any proposed remedy—criminal or civil. Critics of a civil remedy may pause at its expansive scope, allowing individuals to bring a suit against thousands of additional actors, many of whom also oversee and implement national security measures. Yet additional oversight of the people who surveil, monitor, and even use force against people perceived to be a threat to our nation should not be seen as a disadvantage, but as a necessity.

Even so, the legal doctrine of qualified immunity has eroded the effectiveness of *Bivens* and § 1983 to hold actors accountable. Qualified immunity is a legal doctrine that prevents government officials from being held personally liable for civil damages if they have not violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[115] To successfully show that the law is clearly established, a victim must point to a previously decided case that addresses the same act and context.[116] Qualified immunity "freezes constitutional law," allowing courts to avoid resolving constitutional issues due to a lack of sufficiently similar

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114. *See* ACLU, *Documents Obtained by ACLU Reveal Border Patrol Agents Were Authorized to Use Deadly Force At George Floyd's Funeral* (Oct. 1, 2020), https://perma.cc/9WY8-JBHU.

115. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

116. Amir H. Ali & Emily Clark, *Qualified Immunity: Explained*, THE APPEAL (June 19, 2019), https://perma.cc/W57X-G4S8.

precedent that is now rarely produced.[117] Just as qualified immunity has limited the ability of individuals to hold state and federal actors accountable, this legal doctrine could also undermine the ability of victims of cross-border shootings to seek justice.

C. *Impact of Remedies on International Law*

Out of deference to States and sovereignty concerns, international law fails to prevent States from denying human rights to individuals who have failed to access its territory and constitutional protections. These remedies, in extending domestic protections to a narrow set of incidents abroad, expand human rights while balancing the current constraints posed by sovereignty. The civil remedy would enable non-citizens to bring a civil suit within domestic courts and both remedies would provide a domestic venue for a jury or a judge to make a *binding* decision to deter future abuse—a reality currently unavailable to many. While these remedies do not address the State-centeredness of international law, they do utilize State sovereignty to advance a remedy that currently does not exist within international tribunals. In doing so, these remedies have the potential to address the legal black holes that exist at the U.S.-Mexico border.

V. CONCLUSION

Cross-border harm is not a recent phenomenon; it is simply an underexplored one and dangerously so. Border communities are rapidly changing and increasingly becoming the focal point at which nationalism and globalism collide. On the U.S.-Mexico border, nationalism has brought thousands of troops, a militarized wall, and hostile attitudes about who can and cannot enter the country. And through the expansion of international trade and the inherent connectedness of our economy with Mexico, globalization has dramatically increased transnational interactions in border zones. Now, more than ever, border communities need and deserve accountability measures to remedy the cross-border harm that will inevitably emerge from the collision of these two ideologies. Individuals can no longer be caught in the middle.

The failure of the North American Free Trade Agreement (NAFTA) labor and environmental agreements to protect border zones illustrates how international accountability measures frequently fail because they privilege the State—and not individuals. The ability of border patrol agents to kill migrants in Mexico with impunity similarly reflects the State-centeredness that pervades all aspects of international law and demonstrates why international tribunals are unable to provide a remedy to cross-border harm. Through sovereignty and plenary power, domestic law also grants the United States immense latitude to create immigration policy and to advance national

117. *Id.*

security. Subsequently, domestic legal remedies to address cross-border harm are scarce. Courts have declined to extend implied remedies to some cross-border harms, finding that Congress has greater authority to determine if one can and should exist.

Clearly, the most viable path forward is through domestic congressional action. The remedies evaluated in this Note are not the only solution to address cross-border harms nor are they a one-size-fits-all solution. Yet, they represent a potential first step to constructing an accountability apparatus where one does not yet exist. At a minimum, Congress must create legislative remedies that explicitly allows for accountability of federal actors—even when they harm people who ordinarily lack constitutional rights. While there are many advantages and disadvantages to the proposed civil and criminal remedies, they have the potential to provide an accountability measure to individuals within border zones as they navigate the rapid change happening within their communities.

Border militarization continues unabated and progress is slow. Acknowledging these realities, these proposed solutions extend the scope of pre-existing civil rights statutes to offer an interim solution as advocates call for an end to militarization. These remedies make clear that the constitution does not stop a couple of miles from a territorial border, but rather, extends to the places where State actors perpetuate harm, regardless of whether the harm occurs within the border militarization context. Inadvertently, these remedies grant non-citizens constitutional protections, not based on their ability to scale a wall or reach U.S. territory, but on their connection to an adverse State actor. International law may uphold territoriality as the sole way individuals can access rights, but domestic law, acting through sovereignty, can grant a narrow extension of rights based on an alleged violation. Domestic law *can and should* begin to address the significant legal black holes that exist at the U.S.-Mexico border.

There is too much at stake. Allowing federal agents to act with impunity in border zones has the potential to erode the unique duality of border communities. We are neither here *nor* there. We exist at fault lines we had no part in making, controlled by distant governments thousands of miles away. Yet, we are no less deserving of human rights protections than our compatriots in the interior and no more deserving than our neighbors on the other side. We do not deserve to be casualties of the ongoing collision between nationalism and globalism.

We deserve to just be.