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***Hernández v. Mesa* and Police Liability for Youth Homicides Before and After the Death of Michael Brown**

*Delores Jones-Brown, Joshua Ruffin, Kwan-Lamar Blount-Hill, Akiv Dawson and Cicely J. Cottrell**

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ABSTRACT

In a five-to-four decision announced in February of 2020, the United States Supreme Court ruled that the parents of an unarmed fifteen-year-old Mexican national killed by a U.S. Border Patrol agent in a cross-border shooting, cannot sue for damages in U.S. civil court. Here, we critique the majority and dissenting opinions and attempt to reconcile the strikingly different approach each used to resolve the case. Using a publicly available data set, we examine the homicide in *Hernández v. Mesa*, against the circumstances and context in which underage youth were killed by police *within* the United States over a five year period before, during and after the death of Michael Brown. The circumstances of the 121 cases suggest a greater need for police accountability if the justice system is to remain true to the protective “child saving” ideology that launched the founding of the juvenile court.

I. INTRODUCTION

On February 25, 2020, in a five-to-four decision, the United States Supreme Court decided that the family of a fifteen-year-old Mexican national who was shot by a U.S. Border Patrol agent would not be allowed to sue for damages.¹ At the time of his death, Sergio Adrián Hernández Güereca was unarmed and on the Mexico side of the U.S./Mexico border. A grainy video² shows Border Patrol Agent Jesus Mesa, Jr., point a gun at Sergio³ as he is running away, crossing back into Mexico from the United States, over a concrete culvert separating the two countries.⁴ On film, Agent Mesa approaches on a bicycle on the U.S. side of the border; apprehends one of Sergio’s friends; then fires his weapon twice in Sergio’s direction as the teen

¹ *Hernandez v. Mesa*, 140 S. Ct. 735, 206 L. Ed. 2d 29 (2020).

² Grosscrime2, *Video Shows Border Shooting Scene*, YOUTUBE (Jun. 10, 2010), <https://www.youtube.com/watch?v=oa2Ljg40KE>.

³ In his work, sociologist Victor Rios shows that juveniles of color are often seen as more mature, more criminal, and less innocent than their White counterparts. See VICTOR RIOS, *PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS* (2011); VICTOR RIOS, *HUMAN TARGETS: SCHOOLS, POLICE, AND THE CRIMINALIZATION OF LATINO YOUTH* (2017) [hereinafter “RIOS, HUMAN TARGETS”]. Accordingly, except when directly quoting from a court opinion, we will refer to the victim by his first name in this article. In our view, this serves to humanize rather than objectify Sergio, reflects his youthful status, and affirms his innocence. See also, e.g., Phillip Atiba Goff, Matthew Christian Jackson, Brook Allison Lewis Di Leone, Carmen Marie Culotta, & Natalie Ann DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 *INTERPERS. REL. & GROUP PROCESSES* 526 (2014).

⁴ The culvert is not a wall, fence, or raised separation. The opinion notes that, “[t]he border runs through the center of the culvert, which was designed to hold the waters of the Rio Grande River but is now largely dry.” *Hernández*, 140 S. Ct. at 740.

flees toward the Mexican border.⁵ Accounts indicate that one bullet struck Sergio in the face, causing his death.⁶ The killing occurred on June 7, 2010.⁷

The incident was investigated by the U.S. Department of Justice (DOJ), which in April of 2012, concluded that Agent Mesa had not violated any Customs and Border Patrol (CBP) policies or training.⁸ Consequently, no criminal charges were brought against Agent Mesa by the federal government.⁹ Moreover, the United States denied a request from Mexico that Mesa be extradited there to face charges in its criminal courts.¹⁰ Sergio's parents brought suit in the U.S. District Court for the Western District of Texas seeking damages, alleging that Mesa violated Sergio's Fourth and Fifth Amendment rights. The District Court granted a motion to dismiss that was filed on behalf of Agent Mesa.¹¹ The dismissal was affirmed twice by the Court of Appeals for the Fifth Circuit.¹²

Sergio's parents had filed the suit under authority of the U.S. Supreme Court's 1971 ruling in *Bivens v. Six Unknown Federal Narcotics Agents*,¹³ which held that the victim of an unlawful arrest and search could bring a Fourth Amendment claim for damages against the agents who engaged in the conduct, even in the absence of a federal statute authorizing such a claim.¹⁴ In *Hernández v. Mesa*, the majority opinion acknowledges that *Bivens* actions have also

⁵ *Hernández*, 140 S. Ct. at 740.

⁶ *Hernández*, 140 S. Ct. at 754 (Ginsburg, J., dissenting).

⁷ Press Release, Dep't of Just., Federal Officials Close Investigation into the Death of Sergio Hernández Güereca (Apr. 27, 2012) [hereinafter "DOJ, Press Release"], <https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca>.

⁸ See DOJ Press Release, *supra* note 7. This conclusion, however, is difficult to reconcile with the general guidelines of the agency's Handbook since Sergio was unarmed, retreating from the agent, and was not involved in a recognizable crime. See U.S. CUSTOMS & BORDER PROT., USE OF FORCE POLICY, GUIDELINES AND PROCEDURES HANDBOOK (2014) [hereinafter "CBP, USE OF FORCE POLICY"], <https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf>; see also *infra* at notes 100–117 and accompanying text.

⁹ *Hernández*, 140 S. Ct. at 740.

¹⁰ *Hernández*, 140 S. Ct. at 740.

¹¹ See *Hernández v. U.S.*, 802 F. Supp. 2d 834 (W.D. Tex. 2011), *aff'd*, 757 F.3d 249 (5th Cir. 2014), *adhered to in part on reh'g en banc*, 785 F.3d 117 (5th Cir. 2015), *vacated and remanded*, 137 S. Ct. 2003, 198 L. Ed. 2d 625 (2017) and *aff'd*, 785 F.3d 117 (5th Cir. 2015).

¹² *Hernández v. U.S.*, 785 F.3d 117 (5th Cir. 2015).

¹³ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

¹⁴ *Bivens*, 403 U.S. at 389.

been recognized to cover Fifth Amendment¹⁵ and Eighth Amendment claims,¹⁶ but notes that the practice of the Court implying a remedy for federal constitutional violations in the absence of Congressional text explicitly authorizing the same has become “a ‘disfavored’ judicial activity.”¹⁷ The danger, according to the majority, is a potential violation of the separation of powers (judicial versus legislative); and, in the current case, potential interference with the executive authority entrusted to the Customs and Border Protection Agency.¹⁸

The *Hernández* case made its way to the Supreme Court because the parents’ Fourth Amendment claim had been dismissed by the lower courts on a basis that some might find controversial—a finding that Sergio was not entitled to Fourth Amendment protection because he was “a Mexican citizen who had no ‘significant voluntary connection’ to the United States” and “was on Mexican soil at the time that he was shot.”¹⁹ On the Fifth Amendment claim, the lower court concluded that Agent Mesa was entitled to qualified immunity.²⁰ In reaching its decision, the Supreme Court majority side-steps both these potentially thorny analyses by adopting what legal scholar Philip Bobbitt terms a structural argument, supplemented by doctrinal and prudential ones.²¹

Like the dissenting Justices, we find this rather impersonal approach to the death of an unarmed teen, under circumstances that do not appear to be legally justified,²² both disturbing and in contrast

¹⁵ See *Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846, 19 Fair Empl. Prac. Cas. (BNA) 1390, 19 Empl. Prac. Dec. (CCH) P 9241 (1979) (involving a claim regarding a former Congressional staffer’s dismissal based on sex).

¹⁶ See *Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980) (involving a federal prisoner’s claim for failure to provide adequate medical care).

¹⁷ *Hernández v. Mesa*, 140 S. Ct. 735, 751–52, 206 L. Ed. 2d 29 (2020) (citing *Ziglar v. Abbasi*, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017)).

¹⁸ *Hernández*, 140 S. Ct. at 752–53.

¹⁹ *Hernández v. U.S.*, 785 F.3d 117, 119 (5th Cir. 2015), vacated and remanded on other grounds, 137 S. Ct. 2003, 198 L. Ed. 2d 625 (2017) (per curiam).

²⁰ *Hernández*, 785 F.3d at 120.

²¹ See PHILIP BOBBITT, *CONSTITUTIONAL FATE: A THEORY OF THE CONSTITUTION* 7–8 (1982) (positing a typology of constitutional arguments that include historical, textual, doctrinal, prudential, structural, and ethical arguments).

²² *Hernández*, 140 S. Ct. at 753–60 (Ginsburg, J., dissenting, joined by Breyer, Kagan, and Sotomayor, J.J., dissenting). Based on our review and interpretation of the video, *supra* note 2, and other publicized evidence about the case, we agree with the view articulated in the dissent. See, e.g., Mark Sherman, *Court Closes Courthouse Door on slain Mexican Teen’s family*, ASSOCIATED PRESS (Feb. 25, 2020), <https://www.aol.com/article/news/2020/02/25/court-closes-courthouse-door-on-slain-mexican-teens-family/23934090>.

to the American ethos of “child saving” that dates back to the 1800s.²³ The Court ruling came at a time when the authors here were already involved in research examining the frequency, circumstances, and context in which children under the age of eighteen²⁴ were killed by police in the year before, during, and after the controversial shooting of eighteen-year-old Michael Brown by police officer Darren Wilson in Ferguson, Missouri.²⁵ Here, we use these data to argue that the Court’s focus on the cross-border feature of Sergio’s death allows the majority to make a decision that devalues the lives of young people and gives undue deference to law enforcement behavior that is, at best, legally questionable.

In our data, we found that the risk of becoming a youthful victim of a homicide committed by a law enforcement officer cuts across racial, ethnic, and gender barriers; was not limited to urban settings; was not limited to being shot; included the very young—in one case, a fetus; and, that despite the prolonged protests that followed the death of Michael Brown, the number of such deaths²⁶ had increased rather than decreased nationally three years later; and, specifically for Latinx youth. Though only a small number of our cases involved a federal law enforcement officer (2 out of 121), we agree with Justice Ginsburg’s dissent²⁷ that until Congress acts, a *Bivens* claim²⁸ may be the only means of potentially deterring “overreach”²⁹ by an individual federal law enforcement officer, because criminal prosecutions or convictions in cases where federal, state or local officers kill

²³ See BOBBITT, *supra* note 21, at 93–124; see also Anthony Platt, *The Rise of the Child-Saving Movement: A Study in Social Policy and Correctional Reform*, 381 ANNALS AM. ACAD. POL. & SOC. SCI. 21 (1969).

²⁴ The original research design included eighteen-year-olds among the victims, but that number ($n = 212$) exceeded the capacity of the small number of students who were initially involved in this student-led project to gather all of the relevant data. Accordingly, the present study is limited to victims age seventeen and younger.

²⁵ A grand jury in St. Louis County declined prosecution of Darren Wilson on November 24, 2014. Jon Swaine, Paul Lewis, & Dan Roberts, *Grand Jury Decline to Charge Darren Wilson for Killing Michael Brown*, THE GUARDIAN (Nov. 25, 2014), <https://www.theguardian.com/us-news/2014/nov/24/ferguson-police-darren-wilson-michael-brown-no-charges>.

²⁶ Reported through media outlets and tracked through internet databases like Killedbypolice.net. *Police Shootings Database - Killed by Police*, KILLEDDBYPOLICE.NET, <https://killedbypolice.net/> (last visited May 19, 2020).

²⁷ *Hernández*, 140 S. Ct. at 753 (Ginsburg, J., dissenting).

²⁸ Lawsuits filed pursuant to 42 U.S.C.A. § 1983 serve this purpose against state and local police who act “under color of law”—that is, who violate the federal constitutional rights of individuals when acting in their official capacity.

²⁹ *Hernández*, 140 S. Ct. at 757 (Ginsburg, J., dissenting).

civilians are rare.³⁰ In our data, for roughly sixty percent of cases, no criminal charges were sought and the rate of civil recovery was less than one in five.³¹

II. *HERNÁNDEZ V. MESA*: THE MAJORITY OPINION

In his classic book, *Constitutional Fate*,³² Bobbitt makes two points about structural arguments that are relevant to the decision in *Hernández v. Mesa*. First, “[s]tructural arguments are inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures.”³³ Second, “[s]tructural arguments are largely factless and depend on deceptively simple logical moves from the entire Constitutional text rather than from one of its parts.”³⁴

Bobbitt describes doctrinal argument as that which “asserts principles derived from precedent or from judicial or academic commentary on precedent.”³⁵ And, he explains prudential argument as “self-conscious to the reviewing institution”³⁶ [in this case the U.S. Supreme Court] and notes that it “need not treat the merits of the particular controversy (which itself may or may not be constitutional), instead [it] advance[s] particular doctrines according to the [perceived] practical wisdom of using the courts in a particular way.”³⁷ A primary feature of Bobbitt’s prudential argument is that it requires a balancing of competing (federal) constitutionally relevant interests. To illustrate this point, Bobbitt refers to a hypothetical given by Justice Hugo Black in his Charpentier Lectures at Columbia University:

Referring to the text of the last clause of the Fifth Amendment—the prohibition against taking private property without just compensation—Justice Black constructed an imaginary opinion which he attributed to “Judge X.” Judge X’s opinion, in pompous and convoluted tones, came to the conclusion that a family farm might be seized by the Defense Department without compensation being paid, since the takings Clause of the Fifth Amendment must be *balanced* against the provision for the war power in Article I.³⁸

Bobbitt continues his explication of the hypothetical and the

³⁰Delores Jones-Brown & Kwan-Lamar Blount-Hill, *Convicted: Do Recent Cases Represent a Shift in Police Accountability?*, 56 CRIM. L. BULL. 270 (2020).

³¹See Tables 11 and 12 *infra* at Part VI, Section E.

³²BOBBITT, *supra* note 21.

³³BOBBITT, *supra* note 21, at 74.

³⁴BOBBITT, *supra* note 21, at 74.

³⁵BOBBITT, *supra* note 21, at 7.

³⁶BOBBITT, *supra* note 21, at 7.

³⁷BOBBITT, *supra* note 21, at 7.

³⁸BOBBITT, *supra* note 21, at 59–60 (citing Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960) (emphasis in original)).

prudential argument by noting that, “the opinion reasoned that given such competing texts, prudence required that a balance be struck between a calculation of the great necessity³⁹ and great benefits of the official act⁴⁰ and the small harm⁴¹ incidentally worked.”⁴²

Elements of each of these constitutional arguments can be found in the majority opinion crafted by Justice Alito and joined by Chief Justice Roberts and Justices Thomas, Gorsuch, and Kavanaugh. There is much discussion of the ways in which the issues in the case implicate the separation of powers between the judicial, legislative, and executive branches of government (a structural argument);⁴³ considerable discussion of the continued need to limit the applicability of the *Bivens* remedy as expressed in prevailing precedence (a doctrinal argument);⁴⁴ and, the need to balance the individual constitutional claims being made,⁴⁵ against the decision’s potential

³⁹BOBBITT, *supra* note 21, 60. This is a reference to the Defense Department’s acquisition of the strategically located land (500 acres) at a time when the government could not afford to compensate the owner for it. The hypothetical describes the location of the land as particularly valuable for “carrying out the defense program” and makes reference to the “great national emergency that exists.” BOBBITT, *supra* note 21, 60.

⁴⁰BOBBITT, *supra* note 21, at 60. In the hypothetical, Congress passes an act authorizing seizure without compensation of all the lands required for the defense establishment.

⁴¹The “small harm” referred to is delayed or no compensation to the owner. In this scenario, it is unlikely that the owner would see the “taking” of his 500 acres of land without compensation as a “small harm.” For an example of how the government’s exercise of eminent domain is a continuing constitutional problem, see Ilya Somin, *The Growing Battle over the Use of Eminent Domain to Take Property for Pipelines*, VOLOKH CONSPIRACY (June 7, 2016, 11:45 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/06/07/the-growing-battle-over-the-use-of-eminent-domain-to-take-property-for-pipelines/>; Ilya Somin, *Donald Trump’s History of Eminent Domain Abuse*, VOLOKH CONSPIRACY (Aug. 19, 2015, 3:05 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/19/donald-trump-s-abuse-of-eminent-domain/>.

⁴²BOBBITT, *supra* note 21, at 60.

⁴³*Hernández v. Mesa*, 140 S. Ct. 735, 743–47, 206 L. Ed. 2d 29 (2020).

⁴⁴See *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017); *Carlson v. Green*, 446 U.S. 14, 18, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980). In fact, in Justice Thomas’ concurring opinion, joined by Justice Gorsuch, he recommends that the *Bivens* decision be overruled. *Hernández*, 140 S. Ct. at 750 (Thomas, J., concurring).

⁴⁵There is a structural concern here as well, since neither Sergio nor his parents were/are U.S. citizens and because the death occurred on Mexican “soil” according to the lower court decisions they were not subject to the jurisdiction of the U.S. and therefore not entitled to its constitutional protections. However, as argued by the dissent, since the action which caused the death of Sergio was performed by a U.S. border patrol agent, standing on U.S. “soil”, reportedly in furtherance of his

impact on national security and foreign relations (a prudential argument).⁴⁶

In arriving at its ruling that the *Bivens*' holding does not extend to claims based on a cross-border shooting,⁴⁷ the majority opinion effectively denied Sergio's parents access to the U.S. civil courts as an albeit hollow remedy for the loss of the life of their teenage son, despite the otherwise clear applicability of *Bivens*. That is, the killing occurred at the hands of a federal law enforcement agent while Sergio was apparently unarmed, running away, and not engaged in a forcible felony—circumstances which the Court has ruled violates the federal constitution.⁴⁸ Structural, doctrinal, and prudential arguments allowed the majority to make their decision without having to address the substantive constitutional claims raised by Sergio's parents on behalf of their dead son—i.e., that Sergio was unlawfully seized under the Fourth Amendment and denied due process under the Fifth Amendment. Indeed, the majority never addresses the merit of these claims. Instead, the majority adopts the findings of a DOJ investigation that concluded Agent Mesa's actions were reasonable under the circumstances and not in violation of CBP policies or training.⁴⁹ The majority reaches this conclusion via a cursory reference to a DOJ press release, rather than by a full, complete, and independent analysis of the DOJ's investigatory report and the facts of the case.⁵⁰

The differences in the legal reasoning used by the majority and the dissenting Justices are as stark as their personal identities.⁵¹

duty to "protect" the integrity of the U.S. border, Sergio was subject to the jurisdiction of the United States. It seems mere folly to suggest that the Fourteenth Amendment might be applicable to Sergio's death had he been killed by state or local law enforcers but he was not entitled to any constitutional protection from being killed by a federal law enforcement agent.

⁴⁶ *Hernández*, 140 S. Ct. at 743–47. It should be noted that Justice Black derided the prudential argument as "subversive" of the Constitution. See BOBBITT, *supra* note 21, at 59.

⁴⁷ *Hernández*, 140 S. Ct. at 739.

⁴⁸ See *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985) (holding the Fourth Amendment limits police use of deadly force to apprehend fleeing suspects).

⁴⁹ *Hernández*, 140 S. Ct. at 740.

⁵⁰ *Hernández*, 140 S. Ct. at 744.

⁵¹ Social psychologists have documented ways in which one's personal identity can influence behavior and thought. See, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) (describing the relational nature of women's decision-making as compared to men's); Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie, & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004) (explaining the concept of implicit bias and its effects on individual interpretation of visual cues);

Five men,⁵² four of whom are White⁵³ and one of whom is Black,⁵⁴ ruled against Sergio's parents, who are Latinx.⁵⁵ Three women,⁵⁶ one of whom is Latina,⁵⁷ and one White man⁵⁸ dissented from the majority decision using an analysis that includes legal reasoning *and* a close examination of the facts of the underlying case. For the Court's majority, the Hernández incident was entirely or primarily a question of whether the Hernández family was entitled to a *Bivens* action.⁵⁹ As noted previously, under *Bivens*, the Court announced its power to craft a legal remedy (i.e., money damages) for violations of rights guaranteed under the U.S. Constitution even in the absence of specific congressional authorization to do so.⁶⁰ In that case, the Court (1) set aside any argument that state law alone provides

Rebecca C. Hetey & Jennifer L. Eberhardt, *The Numbers Don't Speak for Themselves: Racial Disparities and the Persistence of Inequality in the Criminal Justice System*, 27 CURRENT DIRECTIONS IN PSYCHOL. SCI. 183 (2018) (documenting that bringing racial disparities to mind can trigger fear and stereotypic associations linking Blacks with crime). We believe that Juliet Stumpf's work on crimmigration supports the likelihood of similar thoughts about Latinx immigrants. Juliet P Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. UNIV. L. REV. 367 (2006).

⁵²Chief Justice John Roberts and Associate Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh.

⁵³Justices Roberts, Alito, Gorsuch, and Kavanaugh.

⁵⁴Justice Thomas.

⁵⁵See Sherman, *supra* note 22. Sergio's mother, Maria Guadalupe Güereca, said she will continue to seek justice for her son. See KTSM 9 News, *Mother Speaks Out Following Supreme Court Ruling in Teenage Son's Death Case*, YOUTUBE (Feb. 25, 2020), <https://www.youtube.com/watch?v=yWHGQeAP2vU>.

⁵⁶Associate Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan.

⁵⁷Justice Sotomayor.

⁵⁸Justice Stephen Breyer.

⁵⁹See *Hernández*, 140 S. Ct. at 753 (Ginsburg, J., dissenting). Justice Ginsburg's dissent points out that, "[w]hen the case first reached this Court, the Court remanded it, instructing the Court of Appeals to resolve a threshold question: Is the *Bivens* remedy available to noncitizens (here, the victim's parents) when the U.S. Officer acted stateside, but the impact of his alleged wrongdoing was suffered abroad." In the majority opinion, the Court appears to abandon this particular structural argument in favor of one less contentious—separation of powers and the presence or absence of Congressional intent to provide a *Bivens*-like remedy for individuals who claim they were harmed by federal law enforcement behavior in violation of provisions of the federal constitution.

⁶⁰*Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 389, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). The Court writes,

The Fourth Amendment provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." In *Bell v. Hood*, 327 U.S. 678 (1946), we reserved the question whether violation of that command by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct. Today we hold that it does.

adequate civil remedies for the improper actions of federal agents;⁶¹ and (2) asserted that courts could grant legal remedies to these violations in much the same way as Congress has authorized them to grant other equitable remedies.⁶² The *Bivens* opinion supported the general proposition that a right without a corresponding remedy is no right at all.⁶³

Bivens, 403 U.S. at 389. The Court finds the language of the Fourth Amendment sufficient to authorize a remedy for its violation:

That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition . . . Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But "it is . . . well settled that, where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."

Bivens, 403 U.S. at 396 (citing *Bell v. Hood*, 327 U.S. 678, 684, 66 S. Ct. 773, 90 L. Ed. 939, 13 A.L.R.2d 383 (1946)).

⁶¹On this matter, the Court writes,

[J]ust as state law may not authorize federal agents to violate the Fourth Amendment . . . neither may state law undertake to limit the extent to which federal authority can be exercised . . . The inevitable consequence of this dual limitation on state power is that the federal question becomes . . . an independent claim both necessary and sufficient to make out the plaintiff's cause of action.

Bivens, 403 U.S. at 395.

⁶²In *Bivens*, the Court responds to whether money damages are an appropriate relief for violations of the Fourth Amendment:

[W]e cannot accept respondents' formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.

Bivens, 403 U.S. at 397. In his concurrence, Justice Harlan adds,

[A]t the very least, it strikes me as no more appropriate to await express congressional authorization of traditional judicial relief with regard to these legal interests [recognized in the Bill of Rights] than with respect to interests protected by federal statutes . . . [I]t seems to me that the range of policy considerations we may take into account is at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy.

Bivens, 403 U.S. at 407. Justice Harlan also finds implied authorization from Congress to grant both equitable and legal relief:

Congress provided specially for the exercise of equitable remedial powers by federal courts, see Act of May 8, 1792, § 2, 1 Stat. 276; C. WRIGHT, LAW OF FEDERAL COURTS 257 (2d ed., 1970) . . . [I]f a general grant of jurisdiction to the federal courts by Congress is thought adequate to empower a federal court to grant equitable relief for all areas of subject matter jurisdiction enumerated therein, see 28 U.S.C.A. § 1331(a), then it seems to me that the same statute is sufficient to empower a federal court to grant a traditional remedy at law.

Bivens, 403 U.S. at 404–05.

⁶³The majority writes,

[The Fourth Amendment] guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And "where federally protected rights have been invaded, it has been the rule from the

In *Hernández v. Mesa*, the majority notes that *Bivens* was decided at a time when the Court exhibited a greater willingness to interpret law in accordance with its “spirit” as opposed to being constrained by its “letter,”⁶⁴ and, as noted in Justice Thomas’s concurrence, the Court has embraced something of a presumption against future applications of *Bivens*.⁶⁵ The majority opinion makes much of the fact that the *Bivens*’ remedy has been extended in only two cases subsequent to its announcement in 1971, nearly five decades ago.⁶⁶ Justice Alito specifically quotes Justice Kennedy’s opinion in *Ziglar v. Abbasi*⁶⁷ in which the majority referred to *Bivens* as part of an *ancien régime*—an old rule.⁶⁸ Nevertheless, the majority rejects Justice Thomas’ inclination to overrule the *Bivens* decision,⁶⁹ and maintains that the ruling remains controlling law for cases that involve facts similar to those presented in it.⁷⁰ For cases with facts that are substantively different from *Bivens*, the majority maintains that the availability of the remedy is limited. Citing *Ziglar v. Abbasi*⁷¹ and *Correctional Services Corporation v. Malesko*⁷² as precedent, the majority applied a three-part analysis in determining whether the parents of Sergio Hernández would be entitled to seek relief. In their view,

beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.”

Bivens, 403 U.S. at 392 (quoting *Bell v. Hood*, 327 U.S. at 392).

⁶⁴ *Hernández*, 140 S. Ct. at 741.

⁶⁵ *Hernández*, 140 S. Ct. at 750 (Thomas, J., concurring).

⁶⁶ *Hernández*, 140 S. Ct. at 741 (citing *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980)).

⁶⁷ *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855, 198 L. Ed. 2d 290 (2017).

⁶⁸ *Hernández*, 140 S. Ct. at 741.

⁶⁹ *Hernández*, 140 S. Ct. at 753 (Thomas, J., concurring).

⁷⁰ *Hernández*, 140 S. Ct. at 743; *Hernández*, 140 S. Ct. at 752 (Thomas, J., concurring). In *Bivens*, Justice Brennan sums the facts of the case:

This case has its origin in an arrest and search carried out on the morning of November 26, 1965. Petitioner’s complaint alleged that, on that day, respondents, agents of the Federal Bureau of Narcotics acting under claim of federal authority, entered his apartment and arrested him for alleged narcotics violations. The agents manacled petitioner in front of his wife and children, and threatened to arrest the entire family. They searched the apartment from stem to stern. Thereafter, petitioner was taken to the federal courthouse in Brooklyn, where he was interrogated, booked, and subjected to a visual strip search. On July 7, 1967, petitioner brought suit in Federal District Court. In addition to the allegations above, his complaint asserted that the arrest and search were effected without a warrant, and that unreasonable force was employed in making the arrest; fairly read, it alleges as well that the arrest was made without probable cause. [Footnote 1] Petitioner claimed to have suffered great humiliation, embarrassment, and mental suffering as a result of the agents’ unlawful conduct, and sought \$15,000 damages from each of them.

Bivens, 403 U.S. at 389.

⁷¹ *Abbasi*, 137 S. Ct. at 1849.

⁷² *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001).

under that existing case law, when there is a case involving a new “context” or a “new class of defendants,” *Bivens* can only be extended to cover such facts where there can be found no “reason to pause” before applying the doctrine.⁷³

The majority succinctly summarizes the holding and rationale in this somewhat complex, multi-part, twenty-page majority opinion as follows:

We are asked in this case to extend *Bivens v. Six Unknown Fed. Narcotics Agents* . . . and create a damages remedy for a cross-border shooting. As we have made clear in many prior cases, however, the Constitution’s separation of powers requires us to exercise caution before extending *Bivens* to a new “context,” and a claim based on a cross-border shooting arises in a context that is markedly new.⁷⁴

The summary continues:

Unlike any previously recognized *Bivens* claim, a cross-border shooting claim has foreign relations and national security implications. In addition, Congress has been notably hesitant to create claims based on allegedly tortious conduct abroad. Because of the *distinctive* characteristics of cross-border shooting claims, we refuse to extend *Bivens* into this new field.⁷⁵

⁷³*Hernández*, 140 S. Ct. at 743. It appears, under this majority, that all future *Bivens* claims will be in a new context. The facts of *Bivens* might be summarized as an instance where federal law enforcement overstepped constitutional bounds by unlawfully asserting Fourth Amendment search and seizure authority and causing the plaintiff material damage. But one might also note that, in *Bivens*, it was the Federal Bureau of Narcotics specifically that caused the injury; perhaps asserting a claim against a different law enforcement agency is sufficient to make the context “new.” In fact, in *Hernández*, Justice Alito distinguishes U.S. Customs and Border Patrol from the agencies in previous cases, writing,

There is a world of difference between those claims and petitioners’ cross-border shooting claims . . .

While Border Patrol agents often work miles from the border, some, like Agent Mesa, are stationed right at the border and have the responsibility of attempting to prevent illegal entry. For these reasons, the conduct of agents positioned at the border has a clear and strong connection to national security, as the Fifth Circuit understood.

Hernández, 140 S. Ct. at 744, 746. Nonetheless, agents of the Drug Enforcement Administration; the Federal Bureau of Investigation; the Bureau of Alcohol, Tobacco, Firearms, and Explosives; and other federal law enforcement agencies handle cases involving transnational criminal markets or international terrorists plots. Might the international nature of their work also make claims against their agents a “new context”? As the majority’s “understanding of a ‘new context’ is broad,” it is unclear what constitutes a sufficient difference in circumstances to trigger *Malesko*’s limitations.

⁷⁴*Hernández*, 140 S. Ct. at 739 (internal citations omitted).

⁷⁵*Hernández*, 140 S. Ct. at 739. Consider the core questions whose affirmative answers give “reason to pause”: (1) Is there “risk of interfering with the authority of the other branches’ ”? *Hernández*, 140 S. Ct. at 743. (2) Are there “ ‘sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy’ ”?

III. THE *HERNÁNDEZ V. MESA* DISSENT

A powerfully written dissenting opinion authored by Justice Ginsburg and joined by Justices Breyer, Sotomayor, and Kagan, elucidates the problem with approaching the *Hernández* case in the stoic,⁷⁶ legally formulaic manner taken by the majority. As noted previously, the majority's discussion stands in stark contrast to the detailed findings of the dissent, which drives the latter to draw contrary conclusions. In fact, Justice Ginsburg and her fellow dissenters opined that a *Bivens* remedy should be available to the noncitizen parents of Sergio Hernández because "[r]ogue U.S. officer conduct falls within a familiar, not a 'new,' *Bivens* setting."⁷⁷ They also note that, "[e]ven if the setting could be characterized as 'new,' plaintiffs lack recourse to alternative remedies,"⁷⁸ a point on which the *Bivens* ruling turns.⁷⁹

Again, in direct contrast to the majority, the dissenting opinion

Hernández, 140 S. Ct. at 743. (3) Is the judicial branch "well-suited" to consider the consequences of granting a remedy? *Hernández*, 140 S. Ct. at 743.

The answer to the first question will inevitably be "yes" whenever a case implicates Fourth Amendment restrictions on search and seizure powers. In *Bivens*, Justice Harlan writes, "The judiciary has a particular responsibility to assure the vindication of constitutional interests . . . [T]he Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities." *Bivens*, 403 U.S. at 407. As the Fourth Amendment was especially designed to "interfere" with the Executive branch, it is hard to imagine where granting a remedy for its violation would not do so.

To the second question— setting aside the practical impossibility of ascribing single-minded certainty to a body of 535 equals—it is easy to "doubt" lawmakers' desire to allow individuals to sue in response to federal misconduct given the Congress' incentive to reserve the public purse for its own priorities. That the Constitution protects individual liberty "in the face" of Congress and the popular majority it represents makes Congress' doubt about remedies for its violation irrelevant.

As for this third question, the Justices spoil the surprise by emphasizing the notions that creating a legal remedy is a lawmaking act; that courts neither have the authority nor expertise to make law; and, in case the conclusion is not clear, that "[t]he correct 'answer most often will be Congress.'" *Hernández*, 140 S. Ct. at 741–43, 750. It may be a high bar to convince this majority that the courts are well suited to craft legal remedies absent input and approval from Congress. Despite the majority's failure to overrule *Bivens* in the instant case, a cruder reading of the majority's opinion is that *Bivens* is dead letter law.

⁷⁶The majority opinion's isolated reference to Sergio's death as presenting a "tragic case" notwithstanding, *Hernández*, 140 S. Ct. at 739, the tone of the majority opinion is devoid of human compassion or empathy.

⁷⁷*Hernández*, 140 S. Ct. at 753 (Ginsburg, J., dissenting).

⁷⁸This was a key point in the *Bivens* ruling. *Hernández*, 140 S. Ct. at 755 (Ginsburg, J., dissenting) (citing *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 409–10, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) (Harlan, J., concurring)).

⁷⁹*Bivens*, 403 U.S. at 392.

finds that, “no ‘special factors’ counsel against a *Bivens* remedy.”⁸⁰ Similarly, the opinion notes that “[n]either U.S. foreign policy nor national security is in fact endangered by the litigation.”⁸¹ Later in the dissent, the dissenters note that the impact of the majority opinion is likely to be “quite the opposite”⁸² of the governmental interests that it purports to safeguard.⁸³ In the view of the dissenters, “[w]ithholding a *Bivens* suit here threatens to exacerbate bilateral relations . . . and in no way fosters our international commitments.”⁸⁴ To support this contention, the dissent notes that concerns about interference with the executive branch’s foreign policy and national security powers is immaterial as the *officer conduct* at issue took place *within* the domestic territory of the United States.⁸⁵

The opinion highlights the fact that, in addition to the effort to make plaintiffs whole, the intent of the *Bivens* Court was that such claims would be used to deter misconduct of constitutional dimensions by federal law enforcement agents.⁸⁶ Consequently they further find that, Sergio’s “location at the precise moment that the bullet landed should not matter one whit”⁸⁷ since throughout the litigation, “[i]t is *not* asserted that Mesa ‘knew on which side of the boundary line [his] bullet would land’,”⁸⁸ and, that “[a]t the time of the incident, it is uncontested that the officer did not know whether the boy he shot was a U.S. National or a citizen of another land.”⁸⁹ Finally, and perhaps most damning to the majority’s position, the dissent takes note that, at oral argument, Mesa acknowledged that “Hernandez’s parents could have maintained a *Bivens* action had the bullet hit

⁸⁰ *Hernández*, 140 S. Ct. at 753 (Ginsburg, J., dissenting).

⁸¹ *Hernández*, 140 S. Ct. at 753 (Ginsburg, J., dissenting).

⁸² *Hernández*, 140 S. Ct. at 759 (Ginsburg, J., dissenting).

⁸³ *Hernández*, 140 S. Ct. at 753 (Ginsburg, J., dissenting).

⁸⁴ *Hernández*, 140 S. Ct. at 753 (Ginsburg, J., dissenting).

⁸⁵ *Hernández*, 140 S. Ct. at 757 (Ginsburg, J., dissenting) (emphasis added).

⁸⁶ *Bivens* claims allow federal officers to be sued in much the same way that § 1983 suits were designed for this purpose in cases that involve state and local law enforcement action. See, e.g., James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117 (2009) (arguing that Congress has enacted legislation that expressly confirmed the availability of civil actions against federal officials for violations of the Constitution and, therefore, that *Bivens* actions should routinely be applicable against federal actors to the same extent that § 1983 applies to state actors).

⁸⁷ *Hernández*, 140 S. Ct. at 756 (Ginsburg, J., dissenting).

⁸⁸ *Hernández*, 140 S. Ct. at 757 (Ginsburg, J., dissenting) (emphasis added).

⁸⁹ *Hernández*, 140 S. Ct. at 753 (Ginsburg, J., dissenting).

Sergio while he was running up or down the United States side of the embankment.”⁹⁰

In keeping with the opinion’s consistent condemnation of Agent Mesa’s conduct, the dissenters contend that he should not reap the benefit of happenstance—“the fortuity that the bullet happened to strike Hernández on the Mexican side of the embankment.”⁹¹ They emphasize that the *Bivens* ruling should be applicable in the *Hernández* case because “the primary purpose of the tort rule involved is to deter or punish [federal law enforcement] misconduct.”⁹² Consequently, they conclude that, “although the bullet happened to land on the Mexican side of the culvert, the United States . . . unquestionably has jurisdiction to prescribe law governing a Border Patrol agent’s conduct [and] [t]hat prescriptive jurisdiction reaches ‘conduct that . . . takes place within [United States] territory.’ ”⁹³ In sum, the dissenting opinion finds that the *Malesko* limitations relied on by the majority were inappropriately applied because Hernández’s case presents no new context; and, even if it did, it involves no reason to pause because foreign policy and the integrity of the borders are no more implicated here than in a domestic shooting of a similarly situated victim.

IV. “SEEING” *HERNÁNDEZ v. MESA* THROUGH COMPETING INTERPRETIVE LENSES⁹⁴

Examining the sharp contrasts in the conclusions drawn by these legal scholars and guardians of the public trust begs the question: How could they “see” the matter so differently? Public opinion polls document the fact that law enforcement behavior is a highly political governmental function about which there is the least amount of public consensus.⁹⁵ By adopting a structural argument in its final determination of *Hernández v. Mesa*, the majority of the Justices

⁹⁰ *Hernández*, 140 S. Ct. at 756 (Ginsburg, J., dissenting) (internal citations omitted).

⁹¹ *Hernández*, 140 S. Ct. at 756 (Ginsburg, J., dissenting).

⁹² *Hernández*, 140 S. Ct. at 757 (Ginsburg, J., dissenting) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (AM. LAW INST. 1986)).

⁹³ Presumably, the dissenters see Agent Mesa’s firing a weapon at Sergio Hernández as in violation of the Court’s ruling in *Garner* because it involved using lethal force against a person who “pose[d] no immediate threat to the officer and no threat to others.” *Hernández*, 140 S. Ct. at 756 (citing *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985)). For a detailed discussion of the implications of the *Garner* ruling, see Jones-Brown & Blount-Hill, *supra* note 30.

⁹⁴ See GILLIGAN, *supra* note 51; Eberhardt et al., *supra* note 51; Goff et al., *supra* note 3.

⁹⁵ See, e.g., U.S. District Judge Shira Scheindlin’s decision on the stop-question-frisk controversy in New York City in *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013), for additional opinion, see, 959 F. Supp. 2d 668 (S.D.N.Y. 2013), stay pending appeal denied, 959 F. Supp. 2d 691 (S.D.N.Y. 2013)

avoid grappling with the underlying facts in the case, which the dissent and multiple amicus briefs demonstrate, negatively implicate law enforcement practices at the U.S./Mexico border.⁹⁶ From the view of the majority, “[w]hen evaluating whether to extend *Bivens*, the most important question ‘is ‘who should decide’ whether to provide for a damages remedy, Congress or the courts?’”⁹⁷ Without even attempting an independent examination or analysis of the constitutionality of the behavior complained of, they decide that the answer is “undoubtedly” Congress.⁹⁸ However, in the view of the dissenters, the most important question is whether “the plaintiffs can sue Mesa in federal court for violating their son’s Fourth and Fifth Amendment rights?”⁹⁹ This question is consistent with the plaintiffs’ claim that Agent Mesa’s conduct amounts to “rogue action of a rank-and-file law enforcement officer acting in violation of the rules controlling his office.”¹⁰⁰

The following excerpt from CBP policy calls into question the majority’s blanket acceptance of the DOJ’s investigative conclusion “that Agent Mesa had not violated Customs and Border Patrol policy or training.”¹⁰¹

1. CBP policy on the use of force by Authorized Officers/Agents is derived from constitutional law, as interpreted by federal courts

and subsequent determination, 302 F.R.D. 69, 89 Fed. R. Serv. 3d 121 (S.D. N.Y. 2014), *aff’d* in part, appeal dismissed in part, 770 F.3d 1051, 201 L.R.R.M. (BNA) 3309, 89 Fed. R. Serv. 3d 1690 (2d Cir. 2014); *see also* EMILY EKINS, POLICING AMERICA: UNDERSTANDING PUBLIC ATTITUDES TOWARD THE POLICE: RESULTS FROM A NATIONAL SURVEY, CATO INST. (2016), <https://www.cato.org/sites/cato.org/files/survey-reports/pdf/policing-in-america-august-1-2017.pdf> (reporting on racial, ethnic, and political differences in attitudes toward the police); MICHAEL D. WHITE & HENRY F. FRADELLA, STOP AND FRISK: THE USE AND ABUSE OF A CONTROVERSIAL POLICE TACTIC (2016) (evaluating the legal and social contexts of New York’s stop-question-frisk policing strategy); Shaun L. Gabbidon, George Higgins, & Kidesti Wilder-Bonner, *Black Supporters of Racial Profiling: A Demographic Profile*, 24 CRIM. JUST. POL’Y REV. 422 (2013) (analyzing multiple demographic variables and political differences among Blacks who support racial profiling even though such policing practices typically negatively affect communities of color).

⁹⁶ *Hernández*, 140 S. Ct. at 759–60 (Ginsburg, J., dissenting).

⁹⁷ *Hernández*, 140 S. Ct. at 750 (citing *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857, 198 L. Ed. 2d 290 (2017); *Bush v. Lucas*, 462 U.S. 367, 380, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983)).

⁹⁸ *Hernández*, 140 S. Ct. at 750.

⁹⁹ *Hernández*, 140 S. Ct. at 760 (Ginsburg, J., dissenting).

¹⁰⁰ *Hernández*, 140 S. Ct. at 760 (Ginsburg, J., dissenting) (citing 8 C.F.R. § 287.8(a)(2)(ii) (2019) (limiting the use of deadly force by federal agents)).

¹⁰¹ *Hernández*, 140 S. Ct. at 740. We do note that since Agent Mesa killed Sergio in 2010, the guidelines excerpted here may differ from those at the time of the shooting. However, since the guidelines do not include any case law that was not already in existence at the time of the shooting, with the exception of the requirement to render assistance, we have no reason to suspect that they do.

in cases such as *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) and *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), federal statutes and applicable DHS and CBP policies.

2. Authorized Officers/Agents may use “objectively reasonable” force only when it is necessary to carry out their law enforcement duties.
3. The “reasonableness” of a particular use of force is based on the totality of circumstances known by the officer/agent at the time of the use of force and weighs the actions of the officer/agent against the rights of the subject in light of the circumstances surrounding the event. Reasonableness will be judged from the perspective of a reasonable officer/agent on the scene, rather than with the 20/20 vision of hindsight.
4. The calculus of reasonableness embodies an allowance for the fact that law enforcement officers/agents are often forced to make split-second decisions in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.
5. A use of force is “necessary” when it is reasonably required to carry out the Authorized Officer’s/Agent’s law enforcement duties in a given situation, considering the totality of facts and circumstances of such particular situation. A use of deadly force is “necessary” when the officer/agent has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer/agent or to another person.
6. An Authorized Officer/Agent may have to rapidly escalate or de-escalate through use of force options, depending on the totality of facts and circumstances of the particular situation.
7. Based on the totality of circumstances, different officers/agents may have different responses to the same situation, any of which may be both reasonable and necessary. The level of force applied must reflect the totality of circumstances surrounding the situation, including the presence of imminent danger to the officer/agent or others.
8. If feasible, and if to do so would not increase the danger to the officer/agent or others, a verbal warning to submit to the authority of the officer/agent shall be given prior to the use of force. If a particular situation allows for the issuance of a verbal warning, the officer/agent:
 - a. Should have a reasonable basis to believe that the subject can comprehend and comply with the warning; and
 - b. Allow sufficient time between the warning and the use of force to give the subject a reasonable opportunity to voluntarily comply with the warning.

9. Following any incident involving the use of force, Authorized Officers/Agents shall seek medical assistance for any person who appears, or claims to be, injured.¹⁰²

Much of the language in these general guidelines is drawn nearly verbatim from the case law cited. As we, and apparently the dissenting justices, read these guidelines and the cases from which they are drawn, there are several key standards that must be met for an agent's conduct to be compliant with policy and law. The agent's use of force, whether deadly or less than lethal, must be "necessary," "objectively reasonable,"¹⁰³ and used (only) to carry out legitimate enforcement duties.¹⁰⁴ The guidelines specifically note that the reasonableness assessment includes weighing the officer's actions against the rights of the subject. Additionally, the guidelines limit the use of deadly force to those situations in which there is factual evidence that indicates imminent danger—specifically, the risk of death or serious physical injury—to the agent or others.¹⁰⁵ The guidelines also require that, when practicable, agents must (1) issue a verbal warning prior to the application of force; (2) consider the ability of the subject to comprehend and comply with the warning; (3) allow sufficient time for voluntary compliance before applying force; and (4) if after the application of force, the person appears injured or claims to be injured, the guidelines impose an affirmative duty on the agent to seek medical assistance for that person. These are pretty high standards that we nor the dissenting justices believe were met by the conduct that appears on the grainy video of the incident.¹⁰⁶

Since different reports of the events that led to Sergio's death have been provided by Agent Mesa and Sergio's companions who were present at the scene of the shooting, it seems likely that the divergence in the majority's opinion and its underlying reasoning

¹⁰²CBP, USE OF FORCE POLICY, *supra* note 8, at 1–2.

¹⁰³See *Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) for a fuller explication of what this requirement means.

¹⁰⁴We interpret the word "necessary" in this context as meaning that the lawful objective of the agent could not be achieved by means other than the use of force. See, e.g., SEATTLE POLICE DEPARTMENT MANUAL § 8.050 (2019) (" 'Necessary' means that no reasonably effective alternative to the use of force appeared to exist and that the amount of force used was reasonable to effect the lawful purpose intended."), <http://www.seattle.gov/police-manual/title-8---use-of-force/8050---use-of-force-definitions>. For a more in-depth explanation of what "objectively reasonable" means, see *Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).

¹⁰⁵In *Garner*, the majority concludes that the quantum of factual evidence required must amount to probable cause. *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985).

¹⁰⁶See *Grosscrime2*, *supra* note 2.

from that of the dissent may be due, in large part, to each adopting one recitation of the facts over the other. The majority opinion notes that:

Petitioners and Agent Mesa disagree about what Hernández and his friends were doing at the time of the shooting. According to petitioners, they were simply playing a game, running across the culvert, touching the fence on the U.S. side, and then running back across the border. [But] [a]ccording to Agent Mesa, Hernández and his friends were involved in an illegal border crossing attempt, and they pelted him with rocks.¹⁰⁷

Based on our viewing, the rock throwing reported by Agent Mesa is not visible on the video and, because Sergio was running away from the U.S. side of the culvert, it seems clear that the illegal border crossing had ended or was in the process of being terminated at the time Mesa drew his weapon and fired. Even giving deference to the *Graham v. Connor* observation that enforcement officers/agents are often forced to make split-second decisions in circumstances that are tense, uncertain, and rapidly evolving, we ask what law enforcement duties were being carried out by Mesa when he drew his weapon and shot at Sergio? And what facts led him to believe that he was in imminent danger of death or serious physical injury from the fleeing teen?

The majority's acceptance of the DOJ's determination that Agent Mesa's conduct did not violate the policies and training of the agency for which he worked is substantially at odds with Justice Ginsburg's dissent. In that opinion, Justice Ginsburg affirmatively states that she accepts Sergio's parents' allegations as true because the case was resolved on a motion to dismiss the complaint:

In 2010, Sergio Adrian Hernández Güereca, a 15-year-old citizen of Mexico, was playing with his friends in the dry culvert that divides El Paso, Texas, from Ciudad Juarez, Mexico The game Hernández and his friends were playing involved running up the embankment on the United States side, touching the barbed-wire fence, and running back down to the Mexican side.¹⁰⁸

She continues: "While the game was ongoing, Border Patrol Agent Jesus Mesa, Jr., appeared on his bicycle and detained one of Hernández's friends as he was running down the embankment on the U.S. side. Hernández, who was unarmed, retreated into Mexican territory."¹⁰⁹

As noted previously, under this version of the facts, any violation associated with an illegal border crossing had ended. Therefore, in our view and that of the dissenting Justices, in the obvious absence

¹⁰⁷ *Hernández v. Mesa*, 140 S. Ct. 735, 740, 206 L. Ed. 2d 29 (2020).

¹⁰⁸ *Hernández*, 140 S. Ct. at 753 (Ginsburg, J., dissenting).

¹⁰⁹ *Hernández*, 140 S. Ct. at 753 (Ginsburg, J., dissenting).

of evidence supporting an imminent threat of serious physical injury or death, what is described as happening next can only be legally justified if the statute prohibiting illegal border crossings makes provision for a penalty of death upon arrest and conviction.¹¹⁰ Yet, as the dissent makes clear, “Mesa pointed his weapon across the border, ‘seemingly taking careful aim,’ and fired at least two shots . . . one of [which] struck Hernández in the face, killing him.”¹¹¹

The readiness of Agent Mesa to interpret Sergio’s behavior as conduct warranting the application of deadly force—as well as the majority’s and DOJ’s acceptance of Mesa’s actions as legally appropriate—have strong implications for a concept that law professor Juliet P. Stumpf calls *crimmigration*. In her *American University Law Review* article titled, “The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power,” Professor Stumpf uses the term to describe what she has identified as the confluence of the criminal and immigration law apparatuses.¹¹² She posits that, in the United States, crimmigration is manifested through criminalizing immigration violations and procedures, and militarizing and intensifying immigration enforcement.¹¹³ According to Stumpf,¹¹⁴ crimmigration specifies some individuals as “legal” or innocent and others as “illegal” or guilty. Members of groups that are designated as illegal are not entitled to the rights and protections of citizenship (e.g., undocumented immigrants or felons).¹¹⁵ Building on Stumpf’s ideas, criminology professors Jize Jiang and Edna Erez maintain that crimmigration practices are bolstered by racialized societal narratives about threat and biopolitical notions of illegality and citizenship which are used to justify the punitive treatment of undocumented immigrants,¹¹⁶ or, as in the instant case, even temporary border crossers. Various sources

¹¹⁰ *Cf. Tennessee v. Garner*, 471 U.S. 1, 7–22, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). Note that the complaint filed by Garner’s father alleged that the shooting violated the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. The Eighth Amendment claim stemmed from the fact that the offense of burglary, of which young Garner was suspected, was no longer punishable by death. Consequently, to subject him to deadly force while only a suspect, denied him due process and subjected him to a greater consequence than authorized by statute had he been convicted.

¹¹¹ *Hernández*, 140 S. Ct. at 753 (Ginsburg, J., dissenting).

¹¹² Stumpf, *supra* note 51, at 380–92.

¹¹³ Stumpf, *supra* note 51, at 380–92; *see also* García Hernández & César Cuauhtémoc, *Creating Crimmigration*, 2013 BYU L. REV. 1457 (2014); García Hernández & César Cuauhtémoc, *Deconstructing Crimmigration*, 52 U.C. DAVIS L. REV. 197 (2018).

¹¹⁴ Stumpf, *supra* note 51, at 380.

¹¹⁵ Stumpf, *supra* note 51, at 401.

¹¹⁶ Jize Jiang & Edna Erez, *Immigrants as Symbolic Assailants: Crimmigration and Its Discontents*, 28 INT’L CRIM. JUST. REV. 5, 5 (2018) (explaining crimmigration as

confirm that Latinos are racialized as undocumented immigrants in the public consciousness¹¹⁷ and that, as a group, they are disproportionately harmed by crimmigration.¹¹⁸ Existing scholarship documents the ways in which immigration enforcement, particularly measures that involve the police, subject Latinos to macro- and micro-aggressions,¹¹⁹ ethno-racial profiling,¹²⁰ and police abuses.¹²¹

To support its claim that the Court must deny the Hernández family access to a *Bivens* claim as a matter of national security, the majority expends considerable ink describing the “dangerous people” (in its view) federal agents, including those who patrol the border regularly encounter.¹²² Consider, for example, the following statement from the Court:

During the last fiscal year, approximately 850,000 persons were apprehended attempting to enter the United States illegally from Mexico, and large numbers of drugs were smuggled across the border. In addi-

“the interactive product of minority threat, partisan politics, and federalism of the American government system, which have jointly formed a ‘multilayered patchwork’ of immigration control”); see also AMADA ARMENTA, PROTECT, SERVE, AND DEPORT: THE RISE OF POLICING AS IMMIGRATION ENFORCEMENT 147 (2017) (explaining crimmigration law as “a new mode of social control designed to exclude and punish non-citizens”); KATJA FRANKO, THE CRIMMIGRANT OTHER: MIGRATION AND PENAL POWER (2020) (documenting the emergence of the “crimmigrant other” as a central figure in immigration discourse); Michael Light & Ty Miller, *Does Undocumented Immigration Increase Violent Crime?*, 56 CRIMINOLOGY 370 (2017) (answering the question posted in the article title in the negative); Graham C. Ousey & Charis E. Kubrin, *Immigration and Crime: Assessing a Contentious Issue*, 2018 ANN. REV. OF CRIMINOLOGY 1 (2018) (reporting the results of a meta-analysis on fifty-one studies that immigration is linked to a *reduction* in crime); Akiv Dawson, “The Keyword Is Illegal”: Police Violence in America’s New Crimmigration Control System (2020) (unpublished Ph.D. dissertation, Howard University) (on file with authors).

¹¹⁷ARMENTA, *supra* note 116; LEO CHAVEZ, COVERING IMMIGRATION: POPULAR IMAGES AND THE POLITICS OF THE NATION (2001).

¹¹⁸Amada Armenta, *Racializing Crimmigration*, 3 SOC. RACE & ETHNICITY 82 (2017).

¹¹⁹Mary Romero, *Racial Profiling and Immigration Law Enforcement: Rounding Up of Usual Suspects in the Latino Community*, 32 CRITICAL SOC. 447 (2006); Seline Szkupinski-Quiroga, Dulce M. Medina, & Jennifer Glick, *In the Belly of the Beast: Effects of Anti-Immigration Policy on Latino Community Members*, 58 AM. BEHAV. SCI. 1723 (2014).

¹²⁰Katharine M. Donato & Leslie Ann Rodríguez, *Police Arrests in a Time of Uncertainty*, 58 AM. BEHAV. SCI. 1696 (2014).

¹²¹See Justin T. Pickett, *On the Social Foundations for Crimmigration: Latino Threat and Support for Expanded Police Powers*, 32 J. QUANTITATIVE CRIMINOLOGY 103 (2016). Recently, sociologist Akiv Dawson examined lethal force as a consequence of crimmigration enforcement. DAWSON, *supra* note 116. Her study focused on the interior United States. Cases such as *Hernández v. Mesa* highlight the need for more attention to the effects of crimmigration at the U.S.-Mexico border, generally, and the use of deadly force by U.S. border patrol agents, in particular.

¹²²*Hernández v. Mesa*, 140 S. Ct. 735, 746, 206 L. Ed. 2d 29 (2020).

tion, powerful criminal organizations operating on both sides of the border present a serious law enforcement problem for both countries.¹²³

The opinion goes on to note that,

[o]n the United States' side, the responsibility for attempting to prevent the entry of dangerous persons . . . rests primarily with the U.S. Customs and Border Protection Agency, and one of its main responsibilities is to "detect, respond to, and interdict terrorists, drug smugglers and traffickers, human smugglers and traffickers, and other persons who may undermine the security of the United States."¹²⁴

These statements are emblematic of the confluence of criminal law (or more accurately criminalization) and immigration enforcement about which Stumpf warns.

By its own admission, one of the reasons the majority denies the Hernández family access to a *Bivens* claim is the fear that allowing such civil actions will undermine border security,¹²⁵ especially because the threat of civil liability might impact the behavior of border patrol agents.¹²⁶ In our view, this is a political decision, although the opinion suggests that only the other branches of government are political.¹²⁷

Recalling our assertion that law enforcement behavior is highly political and a governmental function about which there is the least amount of public consensus,¹²⁸ consider the subjectivity of the following claim the majority made in *Hernández*: "The United States has an interest in ensuring that agents assigned this difficult task of policing the border are held to standards and judged by procedures that satisfy United States law *and do not undermine the agent's effectiveness and morale*."¹²⁹ In our view, this is perhaps one of the most controversial statements in the Court's opinion, as it denigrates the law-making and procedural standards of Mexico and prioritizes the *life* of one of its young citizens below the potential hurt *feelings* of a U.S. border patrol agent. Additionally, the Court fails to provide any factual evidence that unfettered CBP discretion and action has effectively curbed illegal immigration or cross-border criminal activity. By conflating border crossings and undocumented immigration with transnational crime, it is possible that the DOJ's determination that

¹²³ *Hernández*, 140 S. Ct. at 746 (internal citations omitted).

¹²⁴ *Hernández*, 140 S. Ct. at 746 (citing 6 U.S.C.A. § 211(c)(5)).

¹²⁵ *Hernández*, 140 S. Ct. at 747.

¹²⁶ The majority suggests that ruling in favor of Sergio's parents might interfere with border patrol agent's willingness to do their jobs. In the domestic law enforcement context, this would be called de-policing.

¹²⁷ *Hernández*, 140 S. Ct. at 744, 746–47.

¹²⁸ See *supra* note 95 and accompanying text.

¹²⁹ *Hernández*, 140 S. Ct. at 745 (emphasis added).

Mesa's conduct did not violate his agency training is correct—especially if such training similarly encouraged agents to adopt a presumption of criminality and dangerousness for all Mexican nationals they encounter at the border.¹³⁰

Although Justice Ginsburg concludes her dissent by noting the shocking scale of use-of-force abuses committed by those responsible for border enforcement,¹³¹ the majority discounts these complaints by noting that the action complained of has been addressed “diplomatically” by the other branches of government.¹³² This, the majority claims, strengthens its opposition to an extension of *Bivens* in the *Hernández* case.

In contrast to the analysis presented by the majority, by seeing the behavior of Sergio and his companions as childish, albeit unwise, play (rather than as a bona fide “illegal” border crossing), the dissenters place the onus on the adult law enforcement agent and his agency to legally justify the fatal conduct.¹³³ They do not see the case as merely involving the balancing of government necessity against a “small harm.”¹³⁴ They and we see the facts leading up to Sergio's death as eerily similar to those surrounding the death of fifteen-year-old Edward Garner, at the hands of Memphis, Tennessee officer Elton Hymon, in 1974—except that in Sergio's case, we are hard pressed to find an underlying felony from which he can legitimately be said to be fleeing.¹³⁵ In the absence of factual evidence supporting suspicion of such a felony in the *Hernández* case, we are equally hard pressed to understand how or why Agent Mesa fired two shots at the fleeing teen, or how the DOJ found that the shooting was within CBP policy.¹³⁶

We also note that our criminal law has long recognized the diminished capacity of juveniles to reason in ways that produce punishable conduct by adults. The Common Law recognized a

¹³⁰ *Hernández*, 140 S. Ct. at 746; cf. *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013), for additional opinion, see, 959 F. Supp. 2d 668 (S.D.N.Y. 2013), stay pending appeal denied, 959 F. Supp. 2d 691 (S.D. N.Y. 2013).

¹³¹ *Hernández*, 140 S. Ct. at 759–60 (Ginsburg, J., dissenting).

¹³² *Hernández*, 140 S. Ct. at 745.

¹³³ See *Hernández*, 140 S. Ct. at 756 (Ginsburg, J., dissenting).

¹³⁴ See *supra* note 41 and accompanying text; see also *supra* note 38–46 and accompanying text (concerning Justice Hugo Black's hypothetical used to explain the prudential constitutional argument).

¹³⁵ Compare *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985) (involving the victim's unlawful flight from the scene of an alleged burglary), with *Hernández*, 140 S. Ct. at 740 (involving the victim's playing with friends at the U.S.-Mexico border).

¹³⁶ See *supra* note 102 and accompanying text.

defense of infancy or immaturity to take account of this fact.¹³⁷ And, the Court's own contemporary case law has outlawed capital punishment and mandatory confinement for life without parole for behavior engaged in before the age of eighteen.¹³⁸ Immaturity makes juveniles particularly vulnerable to the "overreaching" behavior by law enforcement that the dissent affirms *Bivens* claims were designed to remedy and deter.¹³⁹ Section 1983 suits cover this action when engaged in by state or local officers. But, as the remainder of this Article makes clear, our data show that even when fatal encounters take place between law enforcement and youths who are not at the border (and, therefore, do not involve political issues attendant to cross-border shootings), parents face results that do not satisfy their sense of justice.¹⁴⁰

V. STUDYING POLICE YOUTH HOMICIDES BEYOND THE BORDER

Between 2013 and 2015, the United States experienced a number of highly publicized police killings of civilians under circumstances that led to public protests not seen since the 1960s.¹⁴¹ The death of

¹³⁷ Under the common law rule, children under age seven were legally incapable of criminal responsibility; children age seven to fourteen were presumed under the law to be incapable of criminal responsibility, but the prosecution could present evidence to rebut that presumption; and children age fourteen and above were presumed to have the same capacity for criminal responsibility as adults. See, e.g., Andrew Walker, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. Rev. 503 (1984).

¹³⁸ See *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407, 78 A.L.R. Fed. 2d 547 (2012) (holding that the Eighth Amendment's Cruel and Unusual Punishment Clause prohibits mandatory sentences of life imprisonment without parole for those who were younger than eighteen years of age at time of their offenses); *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (holding that the Eighth Amendment's Cruel and Unusual Punishment Clause prohibits sentences of life imprisonment without parole for juvenile offenders who did not commit homicide offenses); *Roper v. Simmons*, 543 U.S. 551, 569–74, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (holding that the Eighth and Fourteenth Amendments prohibit the execution of individuals who were younger than eighteen years of age at time of their offenses).

¹³⁹ See generally DEV. SERV. GROUP, INC., OFF. JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T. JUST., INTERACTIONS BETWEEN YOUTH AND LAW ENFORCEMENT (2018), <https://www.ojjdp.gov/mpg/litreviews/Interactions-Youth-Law-Enforcement.pdf> (summarizing the research on the legal and extralegal factors involved in police interactions with juveniles).

¹⁴⁰ As we explain in Part VI, we note that in five of the incidents in which children were killed, the killer was a parent who was a law enforcement officer.

¹⁴¹ See, e.g., JENNIFER E. COBBINA, HANDS UP, DON'T SHOOT: WHY THE PROTESTS IN FERGUSON AND BALTIMORE MATTER, AND HOW THEY CHANGED AMERICA (2019); Erin M. Kerrison, Jennifer E. Cobbina, & Kimberly Bender, "Your Pants Won't Save You": Why Black Youth Challenge Race-Based Police Surveillance and the Demands of Black Respectability Politics, 8 RACE & JUST. 7 (2018); see also Kwan-Lamar Blount-Hill, Book Review, *Hands Up, Don't Shoot: Why the Protests in Ferguson and Baltimore*

Michael Brown in Ferguson, Missouri, became the galvanizing incident that focused attention on the vulnerability of Black male youth to inadequately explained police violence.¹⁴² The failed prosecution in this and other cases—especially the killing of Eric Garner in New York and the killing of Tamir Rice in Cleveland, both in 2014¹⁴³—led to calls for abandoning the grand jury system.¹⁴⁴ Such cases also energized the Black Lives Matter Movement (BLM), which was created in the wake of the failed prosecution of George Zimmerman for fatally shooting Trayvon Martin, an unarmed, Black seventeen-year-old in a gated community in Sanford, Florida during 2012.¹⁴⁵

The protests surrounding the death of Michael Brown at the hands of White police officer Darren Wilson were covered by national and international media. Additionally, the Ferguson, Missouri, Police Department's reaction to the protesters has been largely condemned

Matter, and How They Changed America, CRIM. JUST. REV. (advance online publication Mar. 17, 2020), <https://doi.org/10.1177/0734016820912321> (reviewing Jennifer Cobbina's book).

¹⁴²COBBINA, *supra* note 141, at 1–3; see also Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html>; Matt Pearce, *Back Story: What Happened in Michael Brown Shooting in Ferguson, Mo.?*, L.A. TIMES (Nov. 24, 2014), <http://www.latimes.com/nation/la-na-back-story-ferguson-shooting-story.html>.

¹⁴³Jericka Duncan, *Eric Garner Case: Video of Chokehold's Aftermath Raises New Questions*, CBS NEWS (Dec. 6, 2014), <http://www.cbsnews.com/news/second-tape-of-nypd-chokehold-raises-new-questions-in-eric-garner-case/>; Sean Flynn, *The Tamir Rice Story: How to Make a Police Shooting Disappear*, GQ.COM (July 14, 2016), <https://www.gq.com/story/tamir-rice-story>.

¹⁴⁴See J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), <https://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-s-taten-island-chokehold-death-of-eric-garner.html>; Melody Gutierrez, *Calls Grow to Eliminate Grand Juries' Secrecy in Police Killings*, SFGATE.COM (Dec. 14, 2014), <http://www.sfgate.com/crime/article/Calls-grow-to-eliminate-grand-juries-secrecy-5956945.php>; Tierney Sneed, *Garner, Brown Decisions Spark Calls for Grand Jury Reform*, U.S. NEWS & WORLD REP. (Dec. 12, 2014), <https://www.usnews.com/news/articles/2014/12/12/after-eric-garner-michael-brown-decisions-calls-for-grand-jury-reform>.

¹⁴⁵See Akiv Dawson, *A Space for Countering Colorblind Discourse: Constructions of Police-Perpetrated Homicides of African-American Males*, 35 CRITICAL STUD. IN MEDIA COMM. 300 (2018); see also Delores Jones-Brown & Henry F. Fradella, *From Simpson to Zimmerman: Examining the Effects of Race, Class and Gender in the Failed Prosecutions of Two Highly Publicized, Racially Divisive Cases*, in DEADLY INJUSTICE: TRAYVON MARTIN, RACE, AND THE CRIMINAL JUSTICE SYSTEM (Devon Johnson, Patricia Warren & Amy Farrell eds., 2015).

as militaristic, overly aggressive, and illegitimate.¹⁴⁶ The DOJ investigation, conducted in the wake of Michael Brown's death, exposed a municipal government system that preyed on its poor and racial and ethnic minority residents through excessive and discriminatory law enforcement, fines, fees, and confinement.¹⁴⁷ The police killing of Michael Brown, who was eighteen-years-old at the time of his death, was followed in rapid succession by several other high-profile police killings,¹⁴⁸ leading some mainstream and social media sources to declare a police violence epidemic.¹⁴⁹

It was against this backdrop that the first author of this Article was hired to teach a course on "Youth, Race, and Justice" at a small liberal arts college in the South. While preparing to teach the policing portion of the course, specifically the segment on police use of force, Google searches continued to turn up the names of young people who were killed by the police, but for whom there had not been much media coverage in the area around the college. As a research project, the six students in the class were assigned to find as many of these incidents as possible occurring in the United States between January 1, 2013, the calendar year before the death of Michael Brown, through October 16, 2017, the time of the class. The upper age limit for victims was set at eighteen. The expectation was that the students would likely find twenty-five or thirty such incidents and then spend time studying the cases in-depth. One student found the data source from which we make the findings reported here.¹⁵⁰ To our surprise, we retrieved 208 names from the internet site

¹⁴⁶COBBINA, *supra* note 141, at 1–3; *see also* AMNESTY INT'L, ON THE STREETS OF AMERICA: HUMAN RIGHTS ABUSES IN FERGUSON (2014), <https://www.amnestyusa.org/wp-content/uploads/2017/04/onthestreetsofamericaamnestyinternational.pdf>.

¹⁴⁷U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf.

¹⁴⁸*See* ALEX S. VITALE, *THE END OF POLICING 1* (2017).

¹⁴⁹In 2018, New York University hosted a discussion in Washington, D.C., titled, "The Epidemic of Police Brutality." The presenters were Jonathan Capehart, a Pulitzer prize winning journalist and member of the *Washington Post* editorial Board, and Andrea Ritchie, a civil rights attorney and researcher in residence at the Barnard Center for Research on Women. *See The Epidemic of Police Brutality*, NYU.EDU. (May 7, 2018), <https://www.nyu.edu/washington-dc/nyu-washington—dc-events/the-epidemic-of-police-brutality.html>; *see also* Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.*, SMITHSONIAN MAG. (July 27, 2017), <https://www.smithsonianmag.com/smithsonian-institution/long-painful-history-police-brutality-in-the-us-180964098/>; Maame Banahene, *Epidemic of Police Brutality in America*, ARCGIS STORYMAPS (Mar. 18, 2020), <https://storymaps.arcgis.com/stories/6d201d3be1084eb5838967efe8e4a348>.

¹⁵⁰*Police Shootings Database - Killed by Police*, <https://killedbypolice.net/> (last visited May 15, 2020).

Killedbypolice.net.¹⁵¹ The site did not include the name of Kimani Gray, a sixteen-year-old killed by police in New York City in March of 2013.¹⁵² Our findings include his information, but exclude the cases involving eighteen-year-olds because we limit this Article to the 121 victims who were minors, like Sergio Adrian Hernández Güereca.

A. Purpose

The original purpose of the study was to determine the prevalence of youth homicides perpetrated by police, the characteristics of victims and officers, and the context in which such homicides occur. Given the number of cases we found, we thought that it was also important to determine if departments took disciplinary actions against such officers, and if they were subject to criminal or civil law consequences.

B. Methods

Through internet searches, undergraduate and graduate students at three universities and co-authors on this paper completed the labor-intensive task of collecting and coding case-relevant information. This included demographic factors, such as age, race/ethnicity, and gender of the victims and the officers. We also coded for a host of contextual variables, many of which we report here. In total, we coded thirty-nine variables, but note that following the shooting of police officers in Dallas and New York,¹⁵³ information about police officers involved in the cases we studied—including

¹⁵¹Killedbypolice.net is a privately run website that collects and provides information about officer-involved deaths in conjunction with *mappingpoliceviolence.org*. Because we were able to find information on each of the cases listed on the website during the time period of interest, we are confident that the site does not overcount the number of underage persons killed by the policed during the period of interest. However, since the site appears to have a method for mining other public and official sources for information regarding officer-involved killings, and cases involving juveniles are subject to non-disclosure rules, it is possible that the site undercounts cases with juvenile victims, such as we discovered with Kamani Gray.

¹⁵²In addition to the omission of the name of Kimani Gray, we note that for two incidents, the names of the victims are listed as “anonymous” but the year they were killed, their age and the state in which they were killed is reported. The fetus carried by 16-year-old Elena Mondragon is not coded as a separate victim. See Sam T. Levin, *Police Shot a Pregnant California Teen—But With No Video, the Case Dried Up*, THE GUARDIAN (Mar. 15, 2018), <https://www.theguardian.com/us-news/2018/mar/15/elena-mondragon-police-shooting-california-no-video>.

¹⁵³See, Ron Jenkins, *5 Police Officers Killed in Dallas Shooting*, 21 CBS (Dallas-Ft. Worth local affiliate, July 7, 2016), <https://dfw.cbslocal.com/photo-galleries/2016/07/08/five-police-officers-killed-in-dallas-shooting/> (online slideshow); *Female NYPD Officer Ambushed and Shot Dead in the Bronx as She Finished Shift*, TELEGRAPH (July 5, 2017), <https://www.telegraph.co.uk/news/2017/07/05/new-york-city-police-officer-ambushed-shot-dead-patrol/> (describing the shooting death of two additional officers in 2014).

their names—became much more difficult to find.¹⁵⁴ In many instances, such information was not revealed at all. Although such measures were ostensibly taken in the name of officer privacy and safety, the nondisclosure has resulted in a great deal of missing data for many of the cases we analyzed. Despite this limitation, we find the data quite telling.

VI. FINDINGS

As previously mentioned, we examined the details of 118 incidents nationwide involving 121 victims under the age of eighteen that occurred between January 1, 2013 and October 16, 2017.

A. The Number of Incidents

We were disturbed to see that, despite the prolonged protests in Ferguson and other places, and the multi-city DOJ investigations and consent decrees, the number of victims did not decrease in the years following the 2014 death of Michael Brown (see Table 1). In fact, twelve more victims were killed in the first three quarters of 2017 than in all of 2014 (see Table 1). Of the thirty-four reported victims in 2017, through October 16th, ten were coded as Hispanic/Latinx—nearly a third (see Table 2).

<i>Year of Incident</i>	<i>Number of Victims</i>
2013	19
2014	22
2015	24
2016	22
2017	34
Total:	<u>121</u>

¹⁵⁴See Katie Blackly & Megan Harris, *Bill Would Withhold Police Officers' Names after Shooting or Use of Force*, 90.5 WESA (Pittsburgh NPR, Mar. 22, 2017), <https://www.wesa.fm/post/bill-would-withhold-police-officers-names-after-shooting-or-use-force#stream/0>.

¹⁵⁵The 2017 data includes all incidents from that year up until October 16, 2017, the date on which data collection ended for this study.

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<i>Year of Incident</i>	<i>Number of Victims</i>
2013	5
2014	9
2015	4
2016	3
2017	10
Total:	31

B. The Victims

Mirroring police killings of adults,¹⁵⁷ our data reveal that the juvenile victims were disproportionately youth of color; in fact, as Table 3 reveals, youth of color account for 65.3% of the total number of child victims, compared to 30.6% who were White. Consistent with statistics for incidents involving adults killed by police,¹⁵⁸ a substantial majority of these underage victims were male ($n = 104$, 85.9%), one of whom presented as openly gay. There were fifteen victims who were female (12.4%) and the sex of one victim is unknown.

As Table 4 illustrates, and as might be expected, the overwhelming majority of victims were adolescents between the ages thirteen to seventeen ($n = 101$), but victims also included children ages four to twelve ($n = 13$), as well as toddlers and infants ($n = 6$).

<i>Race</i>	<i>Number of Victims</i>	<i>Percent</i>
White	37	30.58
Black or African American	43	35.54
Hispanic/Latinx	31	25.62
Asian or Pacific Islander	2	1.65
Native American	2	1.65
Other	1	0.83
Missing/Unknown	5	4.1
Total:	121	100.0

¹⁵⁶As with Table 1, the 2017 data in Table 2 includes all incidents from that year up until October 16, 2017, the date on which data collection ended for this study.

¹⁵⁷Jones-Brown & Blount-Hill, *supra* note 30, at 295.

¹⁵⁸Jones-Brown & Blount-Hill, *supra* note 30, at 296.

<i>Age Range</i>	<i>Number of Victims</i>	<i>Percent</i>
Less than 1 Year (Infant)	4	3.31
1 to 3 Years (Toddler)	2	1.65
4 to 6 years (Young Child)	3	2.48
7 to 12 years (Child)	10	8.26
13 to 17 years (Adolescent)	101	83.47
Missing/Unknown	1	0.83
Total:	<u>121</u>	<u>100.0</u>

C. The Officers

There are so much missing officer data that it is impossible to definitively identify a specific demographic profile. This issue is compounded by the fact that some incidents involved one officer while others involved multiple officers, some of whom were of different racial and ethnic identities. Of the fifty-nine cases for which the race or ethnicity of at least one officer is known, forty-two (71.2%) were White (see Table 5). Table 6 presents officer ages for the thirty-nine cases in which the age of at least one officer is known.

<i>Race</i>	<i>Number of Officers</i>	<i>Percent</i>
White	42	71.19
Black or African American	5	8.48
Hispanic/Latinx	8	13.56
Asian or Pacific Islander	2	3.39
Native American	1	1.70
Other	1	1.70
Total:	<u>59</u>	<u>100.0</u>

<i>Race</i>	<i>Number of Officers</i>	<i>Percent</i>
18 to 25	3	7.69
26 to 30	13	33.33
31 to 35	6	15.39
36 to 40	6	15.39
41 to 45	4	10.26
45 or Older	7	17.95
Total:	<u>39</u>	<u>100.0</u>

We were able to determine the sex of at least one officer in ninety four of the cases. Of those, ninety-one officers (96.8%) were male and three (3.2%) were female. Their agency types are presented in Table 7.

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Table 7: Agency Types for Officers		
<i>Race</i>	<i>Number</i>	<i>Percent</i>
Federal	2	1.65
State	12	9.92
County/Local/Municipal	98	80.99
Missing/Unknown	9	7.44
Total:	121	100.0

D. Incident Settings

Tables 8 and 9 provide information about the spatial distribution of these youth homicide cases. Not surprisingly, the greatest number ($n = 55$) occurred in urban settings, but as Table 8 shows, suburban and rural settings were not immune from such incidents.

Table 8: Community Setting		
<i>Race</i>	<i>Number</i>	<i>Percent</i>
Urban	55	45.45
Suburban	29	23.97
Rural	14	11.57
Missing/Unknown	23	19.01
Total:	121	100.0

Table 9 presents the states in which each victim was killed. Most of the killings occurred in the South ($n = 51$, 42.15%), followed, in descending frequency, by the West ($n = 31$, 25.62%), the Midwest ($n = 27$, 22.31%), and the Northeast ($n = 12$, 9.92%). Three states—California, Illinois,¹⁵⁹ and Texas—accounted for nearly forty percent of the cases.

¹⁵⁹This includes locations outside of the City of Chicago.

<i>State</i>	<i>Number of Killings</i>	<i>Percent</i>
Alabama	4	3.31
Alaska	1	0.83
Arizona	3	2.48
Arkansas	1	0.83
California	19	15.70
Colorado	3	2.48
Connecticut	1	0.83
Florida	8	6.61
Georgia	4	3.31
Illinois	15	12.40
Indiana	3	2.48
Kansas	1	0.83
Kentucky	1	0.83
Louisiana	5	4.13
Maryland	1	0.83
Michigan	4	3.31
Mississippi	1	0.83
Missouri	3	2.48
New Jersey	3	2.48
New Mexico	2	1.65
New York	5	4.13
North Carolina	6	4.96
Ohio	2	1.65
Pennsylvania	2	1.65
Tennessee	3	2.48
Texas	14	11.57
Utah	2	1.65
Virginia	2	1.65
Washington	1	0.83
Wisconsin	1	0.83
Total:	121	100.0

In more than half of the cases ($n = 69, 57.0\%$), the young victim was armed with a gun or knife, mostly guns.¹⁶⁰ But in forty-eight cases (39.7%), the victim was unarmed. Whether the victims in the remaining four deaths were armed could not be determined ($n = 3.30\%$). In ten of the sixty-nine cases (14.4%) in which the victim was reported to be armed, the facts suggest that the victim was hav-

¹⁶⁰This says something tragic about gun availability in the United States. For discussions about how easy it is for minors to obtain firearms, see Tessa Duvall, *Where Do Children Get Guns? Inmates Reveal How Easy It Is*, ASSOCIATED PRESS (Sept. 22, 3018), <https://apnews.com/3011b3d3ba014d21a66c1b6eea48120d/Where-do-children-get-g>.

ing a mental health crisis; in fact, nine of these cases are suspected episodes of “suicide by cop.”¹⁶¹

As with their adult counterparts,¹⁶² the overwhelming majority ($n = 96$, 79.3%) of youth victims were shot. But twenty-four (19.8%) were killed by other means, most frequently by having been struck by a vehicle operated by an officer. The method of killing could not be determined for only one case. Notably, though, the data include both on-duty and off-duty police behavior. Consequently, there were domestic situations in which police officers who were parents harmed their own children. Specifically, in two incidents, children died from being left in hot cars. In another incident, two children were killed in a murder-suicide. And one additional case concerned a reported accidental shooting involving a police officer and his teenage son.

E. Case Outcomes

It bears repeating once more that law enforcement behavior is a highly political governmental function about which opinion polls and other social scientific data document there is little public consensus.¹⁶³ With that in mind, we report the outcomes in the youth homicide cases in the aggregate, without attempting to make an independent assessment as to whether those results are legally appropriate. We highlight a few cases that raise questions of equity and accountability to emphasize the salience of these issues beyond law enforcement activity at the border.¹⁶⁴

If, as we will discuss in the final section of this Article, the justice system in the United States is more committed to protecting than punishing children and adolescent¹⁶⁵ because as a society we recognize their unique vulnerability on account of their immaturity, one might expect that cases involving the death of minors would receive a high level of scrutiny. In fact, they do when the suspected

¹⁶¹“Suicide by cop” refers to situations in which a suicidal individual deliberately behaves in a threatening manner with the intent to provoke a lethal response from the police. See REBECCA A. STINCELLI, *SUICIDE BY POLICE: VICTIMS FROM BOTH SIDES OF THE BADGE* (2004).

¹⁶²See Jones-Brown & Blount-Hill, *supra* note 30, at 271 n.1.

¹⁶³Ekins, *supra* note 95, at 1 (explaining “stark racial and partisan divides in favorability toward police”).

¹⁶⁴Although it is beyond the scope of this Article to provide detailed accounts of each of the cases in the dataset, we want to acknowledge the limitations of relying on publicly available data from official and private sites. Nonetheless, we contend that having some collective knowledge of these incidents puts us all in a better position than having none.

¹⁶⁵See, e.g., RIOS, *HUMAN TARGETS*, *supra* note 3, at 14, 155–66 (discussing the distinction between a juvenile justice system focused on care versus one focused on control); Marvin Ventrell, *The Practice of Law for Children*, 66 MONT. L. REV. 1, 11 (2005) (explaining how the child savers movement focused the justice system on caring for children, rather than just “keeping the streets free” of them).

perpetrators are civilian parents, guardians, or members of the general public.¹⁶⁶ The dissent in *Hernández v. Mesa* seems concerned that the majority's decision will exempt the behavior of federal law enforcement agents from the kind of scrutiny that a nation dedicated to the protection of children must exercise or allow to be exercised.

We were able to learn the outcome of departmental disciplinary proceedings for eighty-one (66.9%) of the 121 incidents in our dataset. Those outcomes are presented in Table 10. Note that in fifty-six of the eighty-one cases (69.1%) in which disciplinary outcomes are known no disciplinary action was taken against the officer(s) who killed an underage person.

Action	Number	Percent
No Disciplinary Action	56	46.28
Termination	13	10.74
Reprimand	4	3.31
Suspension	3	2.48
Resignation	2	1.65
Transfer	1	0.83
Other Disciplinary	1	0.83
Counseling or Retaining	1	0.83
Unknown/Missing	40	33.06
Total:	121	100.0

Similarly, as Table 11 illustrates, in sixty-nine of the ninety-three (74.1%) cases for which we were able to obtain information, the officer(s) were not charged criminally for causing the minor's death. In the seven cases (7.5%) that resulted in a criminal conviction either by plea or verdict, two resulted in sentences of probation and five resulted in a sentence of a period of confinement. One of those five custodial sentences involved a six-month jail sentence, followed by probation for up to five years; the other four resulted in prison sentences.

¹⁶⁶ Consider laws requiring sex offenders to continuously register with law enforcement agencies once convicted (also known as Megan's Laws, named after a seven-year-old rape and murder victim in New Jersey in 1994). Under some circumstances, these laws allow information about registrants to be released to the public. Relevant to child protection, the laws impose restrictions that prohibit certain classes of sex offenders from having contact with children. See generally Jill S. Levinson, David A. D'Amora, & Andrea L. Hern, *Megan's Law and its Impact on Community Re-Entry for Sex Offenders*, 25 BEHAV. SCI. & L. 587 (2007) (explaining the purposes and consequences of sex-offender notification laws).

POLICE LIABILITY FOR YOUTH HOMICIDES

Table 11: Criminal Law Outcomes Against Officers		
<i>Action</i>	<i>Number</i>	<i>Percent</i>
No Charges Filed	69	57.02
No Bill (Not Indicted)	9	7.44
True Bill (Indicted)	5	4.13
Not Guilty Verdict	3	2.48
Guilty Plea or No Contest Plea	2	1.65
Guilty Verdict/Convicted	5	4.13
Unknown/Missing	28	23.14
Total:	121	100.0

Finally, we were unable to learn whether surviving family members filed civil lawsuits in forty-two (34.7%) of the incidents. Of the seventy-nine incidents in which we were able to learn if subsequent civil actions had been filed, forty-six families (58.2%) had done so, whereas thirty-four families (44.1%) did not. Table 12 presents the outcomes of the forty-six cases in which lawsuits were filed. Note that in ten cases, we were unable to confirm the status of the lawsuits.

Action	Number	Percent
Settlement	17	
Finding of No Liability	3	
Finding of Liability	2	
Lawsuit Still Pending	14	
Status Unknown	10	
Total:	46	

In our view, and we believe in the view of the dissent, the *Hernández* case raises concerns about the level of care we expect law enforcement agents to show toward the young. By opening the juvenile court system in 1899, we contend that the United States signaled an acceptance of the responsibility for treating children with care.¹⁶⁷ Within the dataset, we found two cases in which officers who had been speeding killed three teenage girls and were not held criminally liable.¹⁶⁸ In another motor vehicle case, an officer was using his agency vehicle to transport his children when he crashed into a civilian car killing nine-month-old Raiden Saechao. Despite his distracted driving, the officer was not criminally charged.¹⁶⁹ Two different officers left their children (one a four-month-old boy, the other a three-year-old girl) in hot cars alone for hours; each child died, but only the female officer was charged with criminal homicide.¹⁷⁰ These

¹⁶⁷RIOS, HUMAN TARGETS, *supra* note 3, at 14, 155–66 (discussing the distinction between a juvenile justice system focused on care versus one focused on control).

¹⁶⁸In the case of Isabella Chinchilla and Kylie Lindsey, the officer was found to have been traveling at ninety-one miles-per-hour in a fifty-miles-per-hour zone even though the officer was not on a service call. See Alexis Stevens, *Ex-trooper Avoids Charges in Fatal Crash, Families of Teens Angry*, ATLANTA J. CONST. (Mar. 18, 2016), <https://www.ajc.com/news/local/trooper-avoids-charges-fatal-crash-families-teens-angry/xdvYXTdpR3IQ5YOHuAbq2M/>. In the case of fourteen-year-old Terry Difalco, she was struck and killed by an automobile driven by an off-duty state police trooper who was texting while driving; the trooper was not criminally charged. See Rebecca Panico, *Off-Duty Trooper was Texting Before Striking and Killing N.J. Teen in Westfield, Lawsuit Alleges*, NJ.COM (Nov. 15, 2019), <https://www.nj.com/union/2019/11/off-duty-trooper-who-struck-killed-14-year-old-accused-in-lawsuit-of-texting-just-before-crash.html>.

¹⁶⁹Nashelly Chavez, *Sacramento Will Pay \$9.75 Million to Parents of Baby Killed When Police Officer Crashed into Their Car*, SACRAMENTO BEE (July 18, 2017), <https://www.sacbee.com/news/local/article162121623.html>.

¹⁷⁰Mark Fanfarillo, a police officer in Rome, New York, was not charged in the death of his son Michael. See Tiffany Head, *No Charges for Police Officer Whose Baby Died After Being Left in Car*, WJLA.COM (July 26 2016), <https://wjla.com/news/nation-world/no-charges-for-police-officer-whose-baby-died-after-being-left-in-car/>; By contrast, Cassie Clark, a former Long Beach, Mississippi police officer, was convicted of second degree manslaughter for the death of her daughter, Cheyenne Heyer, in April of 2019 and sentenced to twenty years in prison. She had previously

cases suggest a police accountability problem that extends beyond the border.

VII. A CALL TO (RE)PRIORITIZE CHILD SAVING

Justice Ginsburg concludes her dissent in *Hernández v. Mesa* by noting the shocking scale of verbal, physical, and even sexual abuse taking place in the course of border enforcement,¹⁷¹ with eerie similarity to Justice Sotomayor's forceful dissent in *Utah v. Strieff*¹⁷² in which she decried domestic abuses of law enforcement powers. The final component of Bobbitt's typology for understanding Supreme Court decisions is what he calls the ethical argument. He spends nearly one hundred pages explaining and applying it.¹⁷³ Though some might conclude that the dissent's analysis in *Hernández* turns on their consideration of the precedents set in *Garner* and *Bivens*, there is a subtext that implies ethical argument. Bobbitt notes that the patches of opinion that invoke ethical argument contain "expressions of considerable passion and conviction."¹⁷⁴ Indeed, such passages appear throughout the dissenting opinion and culminate with Justice Ginsburg quoting from the amicus brief submitted by former Customs and Border Protections officials:

[T]he United States has not extradited a Border Patrol agent to stand trial in Mexico, and to [the amici's] knowledge has itself prosecuted only one agent in a cross-border shooting . . . [W]ithout the possibility of civil liability, the unlikely prospect of discipline or criminal prosecution will not provide a meaningful deterrent to abuse at the border.¹⁷⁵

She closes her dissent by saying, "[i]n short, it is all too apparent that to redress injuries like the one suffered here, it is *Bivens* or nothing. I resist the conclusion that 'nothing' is the answer in this case."¹⁷⁶

We believe that, unlike the majority, Justice Ginsburg and her fellow dissenters were deeply shaken by the considerable evidence of violent harm occurring at the border; the fact that it was being perpetrated by U.S. government agents; and that, in the instant case, the violence was perpetrated against a child. They did not

been involved in another incident in which she left Cheyenne in a car. *Former Long Beach Police Officer Gets 20 Years in Prison for the Hot-Car Death of Her Three-Year Old Child*, SEA COAST ECHO (Apr. 1, 2019), https://www.seacoastecho.com/news/former-long-beach-police-officer-gets-20-years-in-prison-for-the-hot-car-death/article_c3f14ea0-54c6-11e9-afda-e3b2f2246ddd.html

¹⁷¹*Hernández v. Mesa*, 140 S. Ct. 735, 759–60, 206 L. Ed. 2d 29 (2020).

¹⁷²*Utah v. Strieff*, 136 S. Ct. 2056, 2068–71, 195 L. Ed. 2d 400 (2016) (Sotomayor, J., dissenting).

¹⁷³BOBBITT, *supra* note 21, at 93–167.

¹⁷⁴BOBBITT, *supra* note 21, at 94.

¹⁷⁵*Hernández*, 140 S. Ct. at 760 (Ginsburg, J., dissenting).

¹⁷⁶*Hernández*, 140 S. Ct. at 760 (Ginsburg, J., dissenting).

want such behavior to be an accepted or acceptable part of the American *ethos*—its character or its institutions.¹⁷⁷ As we understand Bobbitt’s ethical perspective, it is clear that the dissenters did not believe that the majority’s decision “comports with the sort of people we [Americans] are . . .” or want to be.¹⁷⁸ Agent Mesa’s and the Justices in the *Hernández* majority’s characterization of youthful play as criminal is an example of why the child saving movement was developed in the nineteenth century.¹⁷⁹

The “child savers” were a group of reformers who sought to protect children from physical and moral harm, particularly those considered wayward, delinquent, or criminal.¹⁸⁰ As mentioned previously, it was believed that youth were less responsible for their actions, and more susceptible to positive change through rehabilitation than were adults.¹⁸¹ The child savers championed reforms and advocated for a wide range of policies such as child labor laws, mandatory schooling, early childhood education and recreation, and a separation of adolescent offenders from adults, which led to the creation of the juvenile justice system.¹⁸²

The purpose of the child saving movement was to establish protections for children and support their development as productive members of society.¹⁸³ The majority opinion in *Hernández* suggests that such protections are only available to children inside the United States. They seem comfortable with the notion that agents of the U.S. government can end the life of an unarmed juvenile, so long as it is done in the name of national security. But, as Justice Ginsburg notes, prior case law warns against this broad adoption of national security claims.¹⁸⁴ And our data show that we may already be losing

¹⁷⁷ BOBBITT, *supra* note 21, at 94.

¹⁷⁸ BOBBITT, *supra* note 21, at 95.

¹⁷⁹ Roger J. R. Levesque, *Child Savers*, in *ENCYCLOPEDIA OF ADOLESCENCE* (Roger J. R. Levesque ed., Springerlink living ed. 2016), https://doi.org/10.1007/978-3-319-32132-5_669-2; Ventrell, *supra* note 165, at 11 (“The result of the child savers’ efforts and the development of the juvenile court was that children became a recognized . . . class . . . worthy of society’s service . . . a kind of benevolent caregiving.”).

¹⁸⁰ Melissa M. Moon, Jody L. Sundt, Francis T. Cullen, & John Paul Wright, *Is Child Saving Dead? Public Support for Juvenile Rehabilitation*, 46 *CRIME & DELINQ.* 38 (2000).

¹⁸¹ Moon et al., *supra* note 180, at 39.

¹⁸² Moon et al., *supra* note 180, at 38.

¹⁸³ Levesque, *supra* note 179; Ventrell, *supra* note 165, at 11–12.

¹⁸⁴ *Hernández v. Mesa*, 136 S. Ct. 735, 758 (2020) (Ginsburg, J., dissenting) (“*Abbasi* cautioned against invocations of national security of this very order: “[N]ational-security concerns must not become a talisman used to ward off inconvenient claims—a ‘label’ used to ‘cover a multitude of sins.’”) (citing *Ziglar v.*

ground on protecting youth from law enforcement harm inside the border.

The child savers believed that government intervention should provide treatment and rehabilitation for young offenders, not strip them of constitutional rights and even life itself, with impunity.¹⁸⁵ The advent of crimmigration has meant that Latinx youth who are not closely supervised at the U.S./Mexico border run the risk of their leisure time activities being perceived as dangerous conduct requiring the application of fatal social control. Critics of the child saving movement pointed to differential rates of incarceration by class, race, gender, and immigrant status as an indicator that the rehabilitative goal needed to be applied more equitably.¹⁸⁶ If a civil remedy is not available to address constitutional violations for youth at the border, they are in danger of contributing more significantly to the number of youth who die at the hands of sworn law enforcers. Our data suggest that number is already too high.

Abbasi, 137 S. Ct. 1843, 1862, 198 L. Ed. 2d 290 (2017) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 523, 105 S. Ct. 2806, 86 L. Ed. 2d 411, 2 Fed. R. Serv. 3d 221 (1985))).

¹⁸⁵Randie P. Ullman, *Federal Juvenile Waiver Practices: A Contextual Approach to the Consideration of Prior Delinquency Records*, 68 *FORDHAM L. REV.* 1329 (2000).

¹⁸⁶Meda Chesney-Lind, *Challenging Girls' Invisibility in Juvenile Court*, 564 *ANNALS AM. ACAD. POL. SOC. SCI.* 185 (1999); Roger R. J. Levesque, *The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint*, 6 *MD. J. CONTEMP. LEGAL ISSUES* 1 (1995); Patrick J. Morrisette, *The Holocaust of First Nation People: Residual Effects on Parenting and Treatment Implications*, 16 *CONTEMP. FAM. THERAPY* 381 (1994).