FROM JAILS TO EMERGENCY SHELTERS: DISMANTLING UNCONSTITUTIONAL BORDER PATROL DETENTION

I. INTRODUCTION

D.A.[1] fled Honduras to escape domestic violence.[2] Her ex-

1. Initials are used to protect the identity of the interviewee.

2. Interviews with D.A. in New Orleans, Louisiana (Jan. 14, 2017 and Jan. 18, 2017). The following narrativization of her story is drawn from these two interviews.

partner had become involved with one of the violent street gangs that terrorize the country. He beat her, raped her, and threatened to kidnap their six-year-old son and force him to sell drugs for the gangs.

Sexual violence, domestic abuse, and femicide are widespread in Honduras.[3] Police typically do very little to intervene on behalf of women experiencing domestic abuse, and street gangs operate with impunity throughout the region.[4] Like so many people in Central America living under the constant threat of violence with no hope of protection from the authorities, D.A. decided that the only way she could escape her persecutor was to leave the region.

D.A. and her son fled Honduras to seek asylum in the United States where her friends and family could help them resettle. For over two weeks, she and her son traveled by bus and on foot across Guatemala and Mexico before finally trekking across a desert with dwindling supplies. When they reached the border, exhausted and dehydrated, they were the very definition of tired, poor, "huddled masses yearning to breathe free."[5] But their ordeal was far from over.

Once across, she turned herself in so that she could get shelter for her son and ask for asylum. Border Patrol agents took her to one of their short-term detention facilities, which are formally called "hold rooms," but are more commonly known to both migrants and Border Patrol agents as *hieleras* ("freezers") because the cells are so cold.[6] When D.A. arrived, a female guard forcibly removed her jacket and other protective clothing.[7] She

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3. A United Nations report concluded that "[a] climate of fear, in both the public and private spheres, and a lack of accountability for violations of human rights of women are the norm." U.N. Human Rights Counsel, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences: Mission to Honduras*, ¶ 9, U.N. Doc. A/HRC/29/27/Add.1 (Mar. 31, 2015).

4. *Id.* at ¶ 82. *See also Home Sweet Home? Honduras, Guatemala and El Salvador's Role in a Deepening Refugee Crisis*, AMNESTY INT'L, 1, 14–15 (2016) [hereinafter *Home Sweet Home*] (explaining that women flee the country due to insufficient protection from law enforcement) .

5. Emma Lazarus, *The New Colossus*, POETRY FOUNDATION.ORG (2002), https://www.poetryfoundation.org/poems-and-poets/poems/detail/46550.

6. Cindy Carcamo & Richard Simon, *Immigrant Groups Complain of 'Icebox' Detention Cells*, L.A. TIMES (Dec. 5, 2013), http://articles.latimes.com/2013/dec/05/nation/la-na-ff-detention-centers-20131206.

7. It is Border Patrol's policy to confiscate sweaters and jackets from migrants "for security reasons." Def.'s Opp'n to Pl.'s Mot. For Prelim. Inj. at 7, Doe v. Johnson, No. CV-15-00250-TUC-DCB (D. Ct. Ariz. Feb. 25, 2016).

and her son were then moved into a large concrete cell packed with people. The temperature was bone-chilling, even with a big crowd. There are no beds in Border Patrol holding cells, and the lights remain on at all times, day and night.[8] The toilets in the cells are not enclosed, so detainees must use the bathroom in front of one another and the guards.[9] D.A. sat on the floor, holding her son in her lap so that he could avoid the cold concrete and try to sleep. A pregnant woman from Guatemala cried out in pain. The guards did nothing to help.

As days and nights merged in the fluorescent blur of the *hielera*, D.A. watched others get released. She sat on the floor, wondering when it would be her turn. She could not sleep and barely ate because she gave most of her food to her son so he would not get too fussy. Two, three, four days passed. People constantly cycled in and out of the cell, tracking dirt and grime across the floor where D.A. sat holding her son. Cleaning crews came through periodically to sweep and sometimes mop, but not often enough to keep the cell sanitary. At one point, she attempted to sleep on the floor using a metallic mylar blanket, but the guards quickly confiscated the blankets and threw them away.

On the fifth day, she broke down. D.A. approached the guard window weeping in desperation. She had watched countless people rotate out of the cell, and she wanted to know why she and her son were still there. She had not showered in over a week and had eaten very little. She stood at the window for six hours, trying to get someone's attention. Finally, a guard took pity and looked into her case. Her file had been lost, he said. He would see what he could do. On the fifth night, the cell became so crowded that D.A. was forced to sleep next to the toilet. On the sixth day, Border Patrol finally released D.A. to Immigration and Customs Enforcement (ICE) custody, which transferred her to a longer-term detention facility to start processing her asylum claim.

While D.A.'s case is not typical, it is not necessarily

8. Def.'s Opp'n to Pl.'s Mot. for Prelim. Inj. at 24, Doe v. Johnson, No. CV-15-00250-TUC-DCB (D. Ct. Ariz. Feb. 25, 2016).

9. Complaint for Declaratory and Injunctive Relief at 18, Doe v. Johnson, No. CV-15-00250-TUC-DCB (D. Ct. Ariz. Jun. 8, 2015). *See also A Culture of Cruelty: Abuse and Impunity in Short-Term U.S. Border Patrol Custody*, NO MORE DEATHS 21, 69 (2011) [hereinafter *Culture of Cruelty*] (describing how the bathrooms in the *hieleras* afford the migrants no privacy).

extraordinary. Between 2014 and 2015, 67% of people detained in Border Patrol hold rooms were kept for over twenty-four hours, 29% spent more than two days in hold rooms, and 14% were held for more than seventy-two hours.[10] At Border Patrol facilities in the Laredo, Texas sector, over half of the detainees spent more than three days in custody.[11]

Border Patrol detention, like longer-term immigration detention administered by ICE, is legally classified as "non-punitive"[12] because the detainees have not yet been charged with or convicted of a crime, and many never will be. Most immigration violations are adjudicated as civil offenses in immigration court, not as crimes in federal criminal court.[13] Despite the fact that most immigration violations are not adjudicated in the criminal system, advocacy groups, scholars, and the media have documented harsh conditions and brutal treatment in Border Patrol *hieleras*.[14] A federal district court judge in the District of Arizona noted that "the conditions of confinement for civil immigration detainees improve once they are transferred from Border Patrol holding cells to [criminal] detention centers operated by the United States Marshals."[15]

The Immigration and Naturalization Act and federal regulations provide that Border Patrol agents have the power "to arrest any alien in the United States, if [they have] reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest."[16] Once a Border Patrol agent has reason to believe someone has violated an immigration law, "a determination will be made within forty-eight hours of the arrest . . . whether the alien will be continued

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10. Guillermo Cantor, *Detained Beyond the Limit: Prolonged Confinement by U.S. Customs and Border Protection Along the Southwest Border*, AMERICAN IMMIGRATION COUNCIL 5 (Aug. 2016).

11. *Id.* at 8.

12. Def.'s Opp'n to Pl.'s Mot. for Prelim. Inj. at 5–6, Doe v. Johnson, No. CV-15-00250-TUC-DCB (D. Ct. Ariz. Feb. 25, 2016).

13. ACLU, *Issue Brief: Criminalizing Undocumented Immigrants* 2 (2010) [hereinafter *Issue Brief*].

14. *See* Carcamo & Simon, *supra* note 6; Complaint, *supra* note 9; *Culture of Cruelty*, *supra* note 9; Cantor, *supra* note 10; Jesus A. Trevino, *Border Violence Against Illegal Immigrants and the Need to Change the Border Patrol's Current Complaint Review Process*, 21 HOUS. J. INT'L L. 85 (1998).

15. Order, Unknown Parties v. Johnson, No. 4:15-cv-00250-DCB at 10 (D. Ct. Ariz. Nov. 18, 2016).

16. INA § 287(a)(2) (2009); 8 C.F.R 287.5 (2017).

in custody or released on bond or recognizance and whether a notice to appear and warrant of arrest . . . will be issued."[17] What occurs in that forty-eight hours between arrest and release or continued custody is the focus of this Comment.

Recent Border Patrol detention litigation has focused exclusively on improving conditions of confinement in the holding cells. While this is undoubtedly important in the short run for those suffering through Border Patrol detention, it ignores the greater structural injustice. Immigration detention in any form reinforces the concept of political borders—and the right of nations to punish those who transgress them—in turn perpetuating systems of dominance and exploitation. To achieve true and dignified freedom of movement, the paradigm must shift away from hostile nationalism and toward open borders.[18] In the meantime, however, there is room for meaningful and radical change within the current structure.

This Comment argues that the entire Border Patrol detention format is unconstitutional, and thus should be radically transformed into an emergency shelter system. Yet President Donald Trump will not spearhead these changes. He made it clear in his campaign rhetoric and through his executive orders that immigrants and refugees are to be viewed as a threat,[19] and construction companies have unveiled prototypes of President Trump's infamous border wall.[20] It is also unlikely that Congress will pass legislation to transform Border Patrol detention practices, given its recent failures to agree on immigration reform of any kind.[21] Thus, constitutional challenges to Border Patrol

17. 8 C.F.R § 287.3(d) (2017).

18. *See* Teresa Hayter, *Why We Need Open Borders*, JACOBIN (Oct. 20, 2015), https://www.jacobinmag.com/2015/10/open-borders-refugees-rights-europe/; Alex Tabarrok, *The Case for Getting Rid of Borders—Completely*, THE ATLANTIC (Oct. 10, 2015), https://www.theatlantic.com/business/archive/2015/10/get-rid-borders-completely/409501/.

19. *See* Michael Finnegan, *Donald Trump Emphasizes Immigrants' Crimes as Campaign Nears Finish*, L.A. TIMES (Nov. 6, 2016), http://www.latimes.com/nation/politics/trailguide/la-na-trailguide-updates-donald-trump-stresses-immigrants-1478465311-htmlstory.html; Executive Order, *Border Security and Immigration Enforcement Improvements* (Jan. 25, 2017).

20. Michelle Mark, *The Trump Administration Just Unveiled 8 Prototypes for the Border Wall—See What They Look Like*, BUS. INSIDER (Oct. 26, 2017), http://www.businessinsider.com/trump-border-wall-construction-prototypes-photos-cbp-2017-10.

21. Rachel Weiner, *How Immigration Reform Failed, Over and Over*, WASH. POST (Jan. 30, 2013), https://www.washingtonpost.com/news/the-fix/wp/2013/01/30/how-immigration-reform-failed-over-and-over/.

detention are more important now than ever before.

Part II provides background on Border Patrol detention and the immigration enforcement system. Part III contextualizes Border Patrol detention within general immigration detention and the recent Central American refugee crisis. Part IV argues that the government cannot constitutionally confine people in jail cells at the border before they have been criminally or administratively charged. Finally, Part V proposes a profound restructuring of border detention that goes above and beyond the constitutional minimum and envisions a policy of radical compassion for migrants.

II. BACKGROUND

E.M. is a 17-year-old child who fled Guatemala after she was raped and impregnated and her family subsequently threatened . . . . After E.M. was apprehended near Falfurrias, Texas, she was detained in a CBP holding facility. An officer with the nickname "Mala Cara," or "Bad Face" told E.M., "Welcome to hell" and repeatedly addressed her as "princess." After E.M. complained to other officials, "Mala Cara" treated E.M. even worse. When E.M. was finally transferred to ORR [Office of Refugee Resettlement] custody, "Mala Cara" threatened, "We're going to put you on a plane, and I hope it explodes. That would be the happiest day of my life."[22]

A. STATUTORY AUTHORITY FOR BORDER PATROL

Congress drastically restructured the country's immigration enforcement system through the Homeland Security Act of 2002, which abolished the Immigration and Naturalization Service and established the Department of Homeland Security (DHS).[23] The Act assigned administration of the "Border Patrol program" to the newly-created Directorate of Border and Transportation Security within DHS.[24] Using its congressionally-delegated authority, the Department of Homeland Security established the Bureau of Customs and Border Protection (CBP), which was further subdivided into enforcement at ports of entry, such as airports, and enforcement between ports of entry, which is the purview of

22. *Systemic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection,* NAT'L IMMIGRATION JUSTICE CTR. 11 (June 11, 2014) [hereinafter *Systemic Abuse*].

23. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2142 (2002).

24. *Id.* at 2192.

the Border Patrol, a distinct entity within CBP.[25] Prior to 2015, Border Patrol's authority to carry out immigration enforcement was derived not from any specific statute, but rather from regulations interpreting the Immigration and Nationality Act.[26] These regulations granted Border Patrol agents the power to arrest, search, and detain noncitizens along the border but did not specifically address the structure or conditions of short-term detention.[27] In October 2015, CBP issued a policy manual entitled *National Standards on Transport, Escort, Detention, and Search*, which suggested a bare minimum of humane treatment and sanitary conditions for detainees in Border Patrol hold rooms. The manual is characterized by qualifying language, such as "whenever operationally feasible, soap may be made available," and "when available, clean blankets must be provided to adult detainees upon request."[28]

The Trade Facilitation and Trade Enforcement Act of 2015 was the "first comprehensive authorization of U.S. Customs and Border Protection."[29] In other words, this Act was the first time that Congress specifically named and authorized CBP and Border Patrol as executive agencies. The Act established an "Office of Professional Responsibility" to investigate misconduct by CBP and Border Patrol agents.[30] It also defined "short-term detention" as "detention in a U.S. Customs and Border Protection processing center for 72 hours or less"[31] and required CBP to "make every effort to ensure that adequate access to food and water is provided to an individual apprehended and detained at a United States port of entry or between ports of entry."[32]

B. CONDITIONS IN BORDER PATROL DETENTION

Border Patrol currently operates over seventy holding

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25. Chad C. Haddal, *Border Security: The Role of the U.S. Border Patrol,* CONG. RESEARCH CTR. 1, 2–3 (Aug. 10, 2011).

26. 8 C.F.R. § 287.5 (2017)*; see also* Haddal, *supra* note 25, at 3.

27. *See* 8 C.F.R § 287.7 (2017).

28. *National Standards on Transport, Escort, Detention, and Search*, U.S. CUSTOMS & BORDER PROTECTION 17 (2015) [hereinafter *National Standards*].

29. *CBP and the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA*), U.S. CUSTOMS & BORDER PROTECTION, https://www.cbp.gov/trade/trade-enforcement/tftea (last visited Oct. 1, 2017).

30. Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, 130 Stat. 205 (2016).

31. *Id.* at 208.

32. *Id.* at 205.

facilities in nine "sectors" along the U.S.-Mexico border.[33] These stations are supposed to be processing facilities where agents expeditiously determine whether migrants qualify for immediate deportation or whether they must be released to ICE custody for an asylum claim or some other form of removal relief.[34] In reality, Border Patrol detention facilities have been known for decades to be harsh, punitive spaces meant to deter migrants from crossing the border.[35]

According to Border Patrol's own policy, "detainees should generally not be held for longer than 72 hours."[36] An earlier internal policy memo from 2008 directed that "[w]henever possible, a detainee should not be held for more than 12 hours."[37] The agency itself concedes that "Border Patrol stations are not designed for sleeping, and Border Patrol does not provide detainees with beds, nor does it turn off the lights at night in stations."[38] And yet, thousands of people sleep in hold rooms every year, many for multiple nights.[39]

The fact that so many people spend more than twenty-four hours in facilities that are "not designed for sleeping" is troubling enough. However, the conditions in the hold rooms and the behavior of Border Patrol agents severely compound the problem. Between 2008 and 2011, the organization No More Deaths interviewed 12,895 individuals who had been held in Border Patrol custody.[40] Researchers for the organization recorded thousands of incidences of abuse and inhumane conditions.[41]

Despite the fact that the majority of detainees are apprehended in the desert and are severely dehydrated,[42] 1,402

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33. *Border Patrol Sectors*, U.S. CUSTOMS & BORDER PROTECTION, https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors (last visited Oct. 1, 2017).

34. Def.'s Opp'n to Pl.'s Mot. for Prelim. Inj. at 7-8, Doe v. Johnson, No. CV-15-00250-TUC-DCB (D. Ct. Ariz. Feb. 25, 2016).

35. *See* Trevino, *supra* note 14.

36. *National Standards*, *supra* note 27, at 14.

37. *Detention Standards,* U.S. BORDER PATROL POLICY 3 (Jan 31, 2008) https://www.documentcloud.org/documents/818095-bp-policy-on-hold-rooms-and-short-term-custody.html.

38. Def.'s Opp'n to Pl.'s Mot. for Prelim. Inj. at 24, Doe v. Johnson, No. CV-15-00250-TUC-DCB (D. Ct. Ariz. Feb. 25, 2016).

39. Cantor, *supra* note 10, at 2.

40. *Culture of Cruelty*, *supra* note 9, at 5.

41. *Id.*

42. *Id.* at 17.

people reported insufficient access to water, and 863 interviewees reported that Border Patrol denied them water altogether.[43] Nearly all of the interviewees reported inadequate access to food (i.e., only given a package of crackers as a meal or frozen or moldy food), and some received no food at all.[44] Detainees alleged that officers threw food onto the floor of the holding rooms and told them to eat it like dogs.[45]

In addition to the inadequacies in food and water supply, Border Patrol keeps hold rooms at uncomfortably cold temperatures, and agents confiscate jackets and sweaters.[46] Nearly 3,000 people described the temperature of Border Patrol hold rooms as "extreme cold."[47] One detainee reported that "it was so cold we felt our hands and feet getting numb."[48] In a complaint letter to DHS about conditions for unaccompanied minors in Border Patrol detention, advocates summarized the testimony of one boy:

> Y.C. is not certain how long he was detained because the lights in the holding cell were never turned off. The temperature in the holding room was so cold that the children could not sleep and Y.C. believed the officials were turning the temperature down to make it colder.[49]

In addition to extremely cold temperatures, thousands of detainees also complained of overcrowding.[50] One man described being put into a cell that was so crowded that no one could even sit down.[51] These reports are illustrative:

> Some women had to sleep next to the toilet because there was no room. We were stepping on each other because [we] couldn't see with all the aluminum blankets—even stepping on pregnant women.[52]

> There were a lot of people. There were people who slept standing up. Even a woman who was eight months pregnant

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43. *Culture of Cruelty*, *supra* note 9, at 17.

44. *Id.* at 19.

45. *Id.*

46. *See* Def.'s Opp'n to Pl.'s Mot., *supra* note 7.

47. *Culture of Cruelty*, *supra* note 9, at 21.

48. Guillermo Cantor, *Hieleras (Iceboxes) in the Rio Grande Valley Sector*, AM. IMMIGRATION COUNCIL 11 (2015).

49. *Systemic Abuse*, *supra* note 21, at 15.

50. *Culture of Cruelty*, *supra* note 9, at 21.

51. *Id.* at 2.

52. Cantor, *supra* note 48, at 12.

with swollen legs slept standing up.[53]

While harsh conditions in Border Patrol hold rooms can be explained away by insufficient resources or the extreme influx of people into an inadequate infrastructure, blatantly abusive behavior cannot and should not be rationalized. Of the individuals interviewed by No More Deaths, 10% reported physical abuse, such as Border Patrol agents hitting people, committing sexual assault,[54] using chokeholds, and forcing people to remove their shoes and walk through the desert.[55] For example,

> Feb. 16, 2010, anonymous man, 16, from Guatemala. He walked for two days until being apprehended by the Border Patrol. He was thrown to the ground and kicked in the knee. Agents took his $20 and hit him in the back of the head with a flashlight. As he told the story, he appeared confused about why they had beaten him. "They didn't understand me and treated me like a dog," he said.[56]

There have also been reports of verbal abuse and psychological torture.[57] Two summaries of sworn accounts included in a complaint letter to DHS highlight particularly malicious behavior:

> G.G. is a 16-year-old girl. When Border Patrol agents apprehended her in Texas, they threatened to kill her if she moved or ran away . . . . CBP detained G.G. for nine days, in five different detention centers . . . . The bathrooms were filthy—the floors were covered with used sanitary napkins and soiled toilet paper, and there were no garbage cans, no doors, and no privacy. The only water available to G.G. to drink came from the bathroom sink. Officials repeatedly told her, "You're the garbage that contaminates this country."[58]
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> K.M. is a 15-year-old girl who was detained in CBP custody for four days . . . . In the hielera, CBP officials woke K.M.

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53. Cantor, *supra* note 48, at 12.

54. *ACLU of Northern California Files Claims Against Customs and Border Protection for Sexual Assault*, ACLU (Mar. 22, 2017), https://www.aclu.org/news/aclu-northern-california-files-claims-against-customs-and-border-protection-sexual-assault; *Culture of Cruelty*, *supra* note 9, at 25.

55. *Culture of Cruelty*, *supra* note 9, at 25.

56. *Id.* at 26.

57. *Id.* at 24.

58. *Systemic Abuse*, *supra* note 22, at 11.

> and the other children every 30 minutes as they tried to sleep, and K.M. could not keep track of the time because the lights were always left on. CBP officials called her and the other children "sluts," "parasites," and "dogs" . . . . When K.M. and the other detained girls told the CBP officials they were hungry, they cursed and said, "We don't sell food here." A CBP official entered the holding cell eating a Snickers bar and said, "Look sluts, look at me eat." The official added, "Hopefully when you are transferred the plane will crash and you will all die."[59]

Skeptics and optimists may be tempted to dismiss firsthand accounts of abuse and inhumane conditions as anomalies or exaggerations. However, as advocates for unaccompanied immigrant children noted in a complaint letter to DHS, "the sheer volume and consistency of these complaints reflects longstanding, systemic problems with CBP policy and practices."[60]

C. LACK OF ACCOUNTABILITY

Despite this evidence of widespread dysfunction and abuse, there is virtually no mechanism to hold Border Patrol accountable for its wrongdoing.[61] American Immigration Council (AIC) analyzed complaints and agency responses over a three-year period and found that "the complaint system is a rather ornamental component of CBP that carries no real weight in how the agency functions."[62] Of the complaints analyzed by AIC, 97% resulted in "no action taken" by the agency.[63] The lack of transparency is so blatant that members of Congress have introduced a bill to "increase transparency, accountability, and community engagement within U.S. Customs and Border Protection, provide independent oversight of border security activities," and "improve training for U.S. Customs and Border Protection agents and officers."[64] The bill has not moved past the congressional subcommittee.[65]

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59. *Systemic Abuse*, *supra* note 22, at 11–12.

60. *Id.* at 2.

61. Daniel E. Martinez, *No Action Taken: Lack of CBP Accountability Responding to Complaints of Abuse*, AM. IMMIGRATION COUNCIL 1 (2014).

62. Martinez, *supra* note 61, at 3.

63. *Id.*

64. Border Enforcement Accountability, Oversight, and Community Engagement Act of 2015, H.R. 3576, 114th Cong. (2015).

65. *Id.*; *All Actions H.R. 3576,* CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/house-bill/3576/all-actions?overview=closed#tabs (last visited Oct. 17,

D. THE ENTRY FICTION DOCTRINE AND PLENARY POWER

Constitutional challenges to government action along the border are often stymied by the entry fiction doctrine. Under this doctrine, a noncitizen "seeking admission has not 'entered' the United States, even if [the noncitizen] is in fact physically present."[66] Because noncitizens who have not yet been admitted have not "entered" the United States, the government can remove them from the territory with little or no procedural due process.[67] Though the entry fiction doctrine limits the procedural rights of excludable noncitizens, it may not limit substantive rights to the same degree. In *Matthews v. Diaz*, the United States Supreme Court held that Congress could limit access to Medicare to citizens and lawfully admitted permanent residents who have lived in the United States continuously for less than five years.[68] Despite rejecting the noncitizens' constitutional claims in this narrow context, the Court stated in dicta that noncitizens have due process rights, adding that "[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection."[69]

In *Jean v. Nelson*, the Supreme Court avoided ruling on the degree to which unadmitted noncitizens are protected by the Constitution, resolving the case on statutory grounds instead.[70] In his dissent, Justice Marshall criticized the Court's unwillingness to grant substantive protections to detained noncitizens, stating that "even in the immigration context, the principle that unadmitted aliens have no constitutionally protected rights defies rationality . . . . Only the most perverse reading of the Constitution would deny detained aliens the right to bring constitutional challenges to the most basic conditions of their confinement."[71]

Numerous circuit courts have echoed Justice Marshall's view that undocumented noncitizens should be afforded substantive rights.[72] In *Lynch v. Cannatella*, a group of Jamaican stowaways

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66. Kwai Fun Wong v. United States, 373 F.3d 952, 971 (9th Cir. 2004).

67. *Id.* (citing Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953)).

68. Matthews v. Diaz, 426 U.S. 67, 69 (1976).

69. *Id.* at 77.

70. Jean v. Nelson, 472 U.S. 846, 854–57 (1985).

71. *Id.* at 874 (Marshall, J., dissenting).

72. *See* Chi Thon Ngo v. Immigration and Naturalization Serv., 192 F.3d 390, 396 (3rd Cir. 1999) (explaining that "[e]ven an excludable alien is a 'person' for purposes

alleged that New Orleans Harbor Police abused them in short-term custody before transferring them to Immigration and Naturalization Service custody.[73] The stowaways claimed that the Harbor Police "denied [them] such minimal physical comforts as proper bedding, protection from the cold, and adequate access to toilet facilities."[74] The U.S. Fifth Circuit Court of Appeals held that the plaintiffs' constitutional claims were cognizable because "excludable aliens . . . are entitled under the due process clauses of the Fifth and Fourteenth Amendments to be free of gross physical abuse at the hands of state or federal officials."[75] The Fifth Circuit further held that "[t]he 'entry fiction' . . . determines the aliens' rights with regard to immigration and deportation proceedings. It does not limit the right of excludable aliens detained within United States territory to humane treatment."[76] In *Martinez-Aguero v. Gonzalez*, the Fifth Circuit acknowledged the government's power to limit procedural rights for noncitizens in the interest of maintaining "national self-determination," but reasoned that substantive constitutional rights should be recognized because "[t]here are . . . no identifiable national interests that justify the wanton infliction of pain."[77]

Given the abundance of circuit court case law in favor of substantive constitutional rights for unadmitted noncitizens and the absence of a Supreme Court ruling directly on point, advocates should argue that the entry fiction doctrine does not limit the substantive rights of Border Patrol detainees. Though the United States may deny removal procedures to anyone who has not yet been admitted into the country, it cannot deny basic substantive rights to those detained at the border.

Similar to the entry fiction doctrine, the plenary power doctrine has given immense power to immigration law enforcement officers. Under this doctrine, "Congress has virtually unlimited power to regulate the admission, exclusion, and deportation of aliens from the United States."[78] However, the

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of the Fifth Amendment and is thus entitled to substantive due process"); Rosales-Garcia v. Holland, 322 F.3d 386, 410 (6th Cir. 2003) (excludable non-aliens must be given substantive due process rights to protect them from mistreatment at the hands of government officials).

73. Lynch v. Cannatella, 810 F.2d 1363, 1367 (5th Cir. 1987).

74. *Id.*

75. *Id.* at 1374.

76. *Id.* at 1373.

77. Martinez-Aguero v. Gonzalez, 459 F.3d 618, 623 (5th Cir. 2006).

78. Evangeline G. Abriel, *Rethinking Preemption for Purposes of Aliens and*

Supreme Court has recognized that the plenary power of Congress and the Executive branch to control immigration does not extend to the substantive treatment of noncitizens once they cross into U.S. territory.[79] In *Zadvydas v. Davis*, the Court stated that the plenary power "is subject to important constitutional limitations" such as "considerations of public policy and justice which control, more or less, the conduct of all civilized nations."[80] This dicta indicates that the Supreme Court is not prone to excusing substantive mistreatment of detained noncitizens at the border as an element of the government's plenary power.

E. IMMIGRATION VIOLATIONS: CIVIL OR CRIMINAL?

Federal statutes make it both a crime and a civil offense to enter the United States without authorization and to re-enter after having been removed.[81] Typically, noncitizens who have crossed the border illegally are charged only with a civil violation, and are not prosecuted for federal immigration crimes, though rates of criminal prosecutions have risen in recent years.[82] Noncitizens convicted in a federal court for illegal entry or reentry may be sentenced to imprisonment.[83] In 2014, U.S. Marshals arrested over 81,000 people for immigration violations, constituting nearly 50% of all federal criminal arrests.[84] The same year, DHS initiated over 266,000 removal proceedings in civil immigration court.[85] Thus, while immigration violations make up a large part of federal criminal prosecutions, most cases are adjudicated solely in non-criminal immigration court as civil violations. If a noncitizen is denied all claims for relief in

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Public Benefits, 42 UCLA L. REV. 1597, 1613 (1995).

79. *See* Wong Wing v. United States, 163 U.S. 228, 237 (1896) ("No limits can be put by the courts upon the power of [C]ongress to protect, by summary methods, the advent of aliens . . . or to expel such if they have already found their way into our land, and unlawfully remain therein . . . [However,] it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth Amendments], and that even aliens shall not . . . be deprived of life, liberty, or property without due process of law.").

80. Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (quoting Chae Chan Ping v. U.S., 130 U.S. 581, 604 (1889)).

81. 8 U.S.C. §§ 1325, 1326 (2012).

82. *Issue Brief*, *supra* note 13, at 2–3.

83. 8 U.S.C. § 1326 (2012).

84. Mark Motivans, *Federal Justice Statistics 2014 Statistical Tables*, U.S. DEP'T OF JUST. BUREAU OF JUSTICE STAT. 4 (2017), https://www.bjs.gov/content/pub/pdf/fjs14st.pdf.

85. *New Filings Seeking Removal Orders in Immigration Courts Through July 2017*, TRAC IMMIGRATION, http://trac.syr.edu/phptools/immigration/charges/apprep_newfilings.php (last visited Oct. 1, 2017).

immigration court, the consequence is removal, rather than incarceration.[86]

III. BORDER PATROL DETENTION IN THE CURRENT CONTEXT

While several scholars have highlighted Border Patrol abuses and strategies for combating them,[87] little has been written on the topic since the 1990s. Since that time, two paradigm shifts have occurred that necessitate a serious reconsideration of Border Patrol detention: (1) a theory has emerged about the inherently punitive nature of nominally civil immigration detention, and (2) political instability and violence in El Salvador, Guatemala, and Honduras have forced hundreds of thousands of people to flee the region and seek asylum in the United States. These two factors provide necessary context for understanding why the right moment to challenge the structure of Border Patrol detention is now.

A. IMMIGRATION DETENTION AS PUNISHMENT

The United States government categorizes immigration detention as civil, rather than criminal.[88] In his article "Immigration Detention as Punishment,"[89] immigration law scholar César Cuauhtémoc García Hernández seeks to dismantle the myth of "civil" long-term immigration detention.[90] He asserts that in its form and intent, immigration detention is punitive.[91] García Hernández first looks to a series of Supreme Court cases that examine the use of legislative intent to determine whether a government-imposed sanction is civil or criminal.[92] For example, in *Hudson v. United States*, the Court explained that, when determining whether an action is punitive, "[a] court must first ask whether the legislature, 'in establishing the penalizing mechanism, indicated either expressly or impliedly a preference

86. 8 U.S.C. § 1229a(a) (2012).

87. *See* Trevino, *supra* note 14; Steve Helfand, *Desensitization to Border Violence & the* Bivens *Remedy to Effectuate Systemic Change*, 12 LA RAZA L. J. 87, 106–07 (2000).

88. *Detention Management,* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, https://www.ice.gov/detention-management (last visited Oct. 27, 2017).

89. César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1346 (2014).

90. *Id.* at 1349.

91. *Id.*

92. *Id.* at 1358.

for one label or the other.'"[93] García Hernández employs "a broad view of legislative intent" and concludes that "[i]f Congress developed the immigration detention statutory scheme within a political context infused with a desire to punish immigrants . . . then to detain is necessarily to punish."[94]

García Hernández contextualizes his legislative intent analysis with the War on Drugs and policies of the 1980s–1990s that created mass incarceration.[95] During this time period, Congress passed both drug enforcement laws and sweeping immigration reform, part of which *mandated* civil immigration detention for certain classes of noncitizens, including asylum seekers and those convicted of certain crimes (including drug offenses).[96] By expanding immigration detention, García Hernández argues, "[T]he U.S. Congress drastically expanded the executive branch's power—and at times obligation—to confine people pending immigration proceedings largely by tapping the nation's growing concern about drug activity. Congress in effect envisioned immigration detention as a central tool in the nation's burgeoning war on drugs."[97] He concludes that "because immigration and criminal confinement were intended to stigmatize and penalize those who engage in drug activity, imposition of both ought to be considered punishment."[98]

This theory acts as an organizing principle when considering how to best challenge all aspects of immigration detention, including short-term Border Patrol detention. The fundamental problem, as developed by García Hernández, is that the United States labels immigration detention "civil," when in fact it closely resembles punitive incarceration. As civil, rather than criminal detainees, noncitizens receive far fewer procedural due process protections because they are technically not being punished. They are effectively treated like criminals without being afforded any of the criminal due process protections.[99] This is perhaps even truer in the border detention context, where conditions of

93. Hudson v. United States, 522 U.S. 93, 99 (1997).

94. García Hernández, *supra* note 89, at 1359.

95. *Id.* at 1350.

96. *Id.* at 1361–62, 1370.

97. *Id.* at 1349.

98. *Id.* at 1350.

99. In 2009, the Department of Homeland Security published a report detailing the similarities between criminal incarceration and immigration detention. *See* Dora Schriro, *Immigration Detention Overview and Recommendations*, DEP'T OF HOMELAND SEC. 4 (Oct. 6, 2009).

confinement and documented abuses are even more extreme than in general immigration detention. Because Congress and CBP have such wide discretion when setting immigration law enforcement policy, and because detainees in Border Patrol detention are "civil" offenders with no right to counsel and little political power, inhumane policies and abuses go largely unchecked. While drilling down on specific arguments against the basic structure of Border Patrol detention is key, it is equally important to keep in mind the profound structural injustice of the immigration detention system as a whole.

B. IMMIGRATION DETENTION AS DETERRENCE

In addition to questioning the fundamentally punitive intent of immigration detention, scholars and courts have questioned the constitutionality of wielding immigration detention as a deterrent to future migration.[100] Since at least the 1950s, the United States government has implemented operations designed to intimidate and deter migrants from attempting to cross the border.[101] These efforts intensified in the 1990s, when President Bill Clinton launched Operation Gatekeeper in San Diego and Hold the Line in El Paso.[102] These programs introduced a new official Border Patrol strategy: "Prevention Through Deterrence."[103] As part of the new strategy, the government greatly increased Border Patrol personnel and technology in urban areas, such as San Diego and El Paso, to discourage migration at the safer, more accessible portions of the border.[104] These new Prevention Through Deterrence programs "placed added emphasis on enhancing the Border Patrol's ability to rapidly deploy its agents to respond to emerging threats. Tactical, operational, and strategic intelligence [was] critical to this emphasis on rapid deployment."[105] As a result of increased militarization at urban ports of entry, "migrants increasingly

100. *See generally* Michael Kagan, *Limiting Deterrence: Judicial Resistance to Detention of Asylum-Seekers in Israel and the United States*, 51 TEX. INT'L L. J. 191 (2016).

101. Yanan Wang, *Donald Trump's 'Humane' 1950s Model for Deportation, 'Operation Wetback', Was Anything But*, WASH. POST (Nov. 11, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/09/30/donald-trumps-humane-1950s-model-for-deportation-operation-wetback-was-anything-but/.

102. Chad C. Haddal, *Border Security: The Role of the U.S. Border Patrol*, CONG. RESEARCH SERV. 4 (Aug. 11, 2010), https://fas.org/sgp/crs/homesec/RL32562.pdf.

103. *Id.* at 4.

104. *Id.*

105. *Id.* at 6.

moved through the Sonoran desert toward new crossing points along the border with Arizona."[106]

In 2014, a "surge" of women and children from El Salvador, Guatemala, and Honduras fled to the United States to seek asylum from extreme violence.[107] Prior to 2014, DHS had routinely released asylum-seekers traveling as a family unit on a low bond or on their own recognizance after a preliminary screening interview.[108] In response to the "surge," however, the government instituted a policy of setting high bonds or refusing to offer bonds at all to asylum-seekers, even after they had passed their initial "credible fear" interviews.[109] To explain this change in position, the government asserted that "the current detainees already are motivated . . . by the belief that they would receive release from detention. Validating this belief further encourages mass migration, which only increases the already tremendous strain on our law enforcement and national security agencies."[110] In 2015, as the numbers of Central American asylum-seekers declined, Secretary of Homeland Security Jeh Johnson declared that DHS had "discontinued invoking general deterrence as a factor in custody determinations in all cases involving families."[111]

In 2015, the United States District Court for the District of Columbia issued a preliminary injunction against the no-bond policy, citing in part the probable unconstitutionality of using general deterrence as a justification for civil immigration detention.[112] The court held that the government's position that "one particular individual may be civilly detained for the sake of sending a message of deterrence to other Central American individuals who may be considering immigration" was "out of line

106. Douglas S. Massey et al., *Why Border Enforcement Backfired*, 121 AM. J. SOC. 1557, 1573 (Mar. 2016).

107. Kagan, *supra* note 100, at 201.

108. *Id.*; *see also* R.I.L-R. v. Johnson, 80 F. Supp. 3d 164, 172 (D.D.C. 2015) (explaining that many families seeking asylum were released on bond if they did not show a "danger to the community").

109. Kagan, *supra* note 100, at 201. A credible fear interview is "an individualized determination [of whether a person is] a flight risk or danger to the community." *Id.*

110. Declaration of Philip T. Miller, Assistant Director of ICE Field Operations, 2 ¶ 12 (Aug. 7, 2014), https://innovationlawlab.org/wp-content/uploads/2014/12/miller-lembke-declarations.pdf.

111. Press Release, *Statement by Secretary Jeh C. Johnson on Family Residential Centers*, DEP'T OF HOMELAND SEC. (June 24, 2015), https://www.dhs.gov/news/2015/06/24/statement-secretary-jeh-c-johnson-family-residential-centers.

112. *R.I.L-R*, 80 F. Supp. 3d at 188–90.

with analogous Supreme Court decisions" because it was justified by deterrence rather than the particular noncitizen's "risk of flight or danger to the community."[113]

Given the harsh nature of Border Patrol detention and the government's history of using deterrence as a rationale for immigration enforcement policies, it is likely that the design and operation of the *hieleras* aim, at least in part, to intimidate and deter migrants. The Supreme Court has rejected the use of "general deterrence" as a justification for civil detention in the context of civil commitment of sexual offenders.[114] Though no higher courts have directly addressed the issue in the immigration detention context, the D.C. District Court decision suggests that there is ample room to argue that immigration detention used as deterrence is unconstitutional.

C. CENTRAL AMERICAN REFUGEE CRISIS

In fiscal year 2016, CBP apprehended over 70,000 migrants traveling as family units from El Salvador, Guatemala, and Honduras, combined.[115] In 2015, over 56,000 people from those same countries applied for asylum in the United States, an increase of 597% from 2010.[116] Violence and political collapse in Central America have boiled over, causing thousands of people to flee the region and seek asylum in the United States.[117] Many of these migrants have traveled long distances on foot, essentially walking from Central America to the U.S.-Mexico border. As a result, they are often dehydrated and wounded by the time they reach the border.[118] These statistics paint a clear picture of who is currently filling Border Patrol hold rooms: people, like D.A., who have no choice but to flee extreme violence to ensure safety and survival for themselves and for their children.[119]

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113. R.I.L-R v. Johnson, 80 F. Supp. 3d, 164, 188–90 (D.D.C. 2015).

114. Kansas v. Crane, 534 U.S. 407, 411–13 (2002).

115. *U.S. Border Patrol Southwest Border Apprehensions by Sector*, U.S. CUSTOMS & BORDER PROTECTION, https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions (last visited Oct. 1, 2017).

116. *Home Sweet Home*, *supra* note 4, at 25.

117. Nina Lakhani, *Central America's Rampant Violence Fuels an Invisible Refugee Crisis*, THE GUARDIAN (Oct. 13, 2016), https://www.theguardian.com/world/2016/oct/13/central-america-violence-refugee-crisis-gangs-murder.

118. *Culture of Cruelty*, *supra* note 9, at 20–21.

119. Kirk Semple, *Fleeing Gangs, Central American Families Surge Toward U.S.*, N.Y. TIMES (Nov. 12, 2016), https://www.nytimes.com/2016/11/13/world/americas/fleeing-gangs-central-american-families-surge-toward-us.html.

IV. THE UNCONSTITUTIONALITY OF BORDER PATROL DETENTION

Insofar as the Supreme Court has addressed the constitutionality of immigration detention, it has focused primarily on the permissible duration of detention.[120] In regards to conditions of confinement, the Court held in *Wong Wing v. U.S.* that civil immigration detainees cannot be subjected to "infamous punishment at hard labor" without first receiving criminal due process.[121] Current litigation of conditions of confinement in Border Patrol hold rooms focuses primarily on issues of unconstitutional punishment through deprivations of basic necessities,[122] and extending the *Flores v. Reno* settlement agreement to children held in Border Patrol detention.[123] There has also been scholarship suggesting the possibility of *Bivens* actions[124] against Border Patrol agents to hold them personally responsible for constitutional violations.[125] But litigating specific conditions of confinement and targeting specific Border Patrol agents is too narrow of an approach—the act of confinement in jail cells itself is unconstitutional.

A. JUSTIFYING PRE-ADJUDICATION DETENTION

The government can constitutionally detain suspected criminal and civil violators prior to adjudication if "the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[126] Currently, the foundational case for requirements of conditions of confinement in pre-trial detention is *Bell v. Wolfish*.[127] In *Bell*, the Supreme

120. *See* Zadvydas v. Davis, 533 U.S. 678, 695 (2001); Demore v. Kim, 538 U.S. 510 (2003).

121. Wong Wing v. United States, 163 U.S. 228, 237 (1896).

122. *See* Brief in Support of Pl.'s Mot. for Prelim. Inj., Doe v. Johnson, No. 4:15-cv-00250-DCB (D. Ct. Ariz. Aug. 17, 2016).

123. *Judge: Government Still Failing to Meet Standards for Detaining Children*, AM. IMMIGRATION LAWYERS ASS'N (Jun. 28, 2017), http://www.aila.org/advo-media/press-releases/2017/judge-government-still-failing-to-meet-standards-.

124. "*Bivens* actions" come from *Bivens v. Six Unknown Named Agents*. 456 F.2d 1339 (1972). The term refers to a federal cause of action for a violation of an individual's Fourth Amendment rights by a federal officer.

125. *See* Steve Helfand, *Desensitization to Border Violence & the* Bivens *Remedy to Effectuate Systemic Change*, 12 LA RAZA L. J. 87, 106–07.

126. Jackson v. Indiana, 406 U.S. 715, 738 (1972).

127. Bell v. Wolfish, 441 U.S. 520 (1979).

Court declined to extend strict scrutiny to the rights of pre-trial prisoners to be free from harsh conditions of confinement.[128] The Court shifted the focus away from pre-trial detainees' fundamental liberty interest in being free from harsh conditions and instead focused the inquiry on "whether those conditions amount to punishment of the detainee"[129] because detainees who have not yet received a trial and have not yet been convicted of a crime cannot be punished. The Court held that "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment,'" but also clarified that "if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted."[130] The Court condoned any condition of confinement that did "not amount to punishment"—even those that infringe on fundamental liberty interests—on the basis that there had been a requisite "judicial determination of probable cause" and that the government has an interest in ensuring an accused criminal's presence at trial.[131]

Though *Bell* provides a constitutional floor for conditions of confinement for non-convicted detainees, it addresses only the *criminal* pre-trial context. In *Youngberg v. Romeo*, the Supreme Court noted that detainees "involuntarily committed [to a state mental health facility] are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."[132] Though the Court in *Youngberg* discussed only post-commitment conditions, the U.S. Eleventh Circuit Court of Appeals extended the "more considerate" rule to conditions of confinement in pre-commitment detention in *Lynch v. Baxley*.[133] In that case, the Eleventh Circuit addressed Alabama's practice of housing mentally ill detainees in an overcrowded and unsafe county jail for "emergency detention" while they awaited a determination of probable cause for confinement and commitment proceedings.[134] The state statute at issue provided that individuals awaiting civil commitment

128. Bell v. Wolfish, 441 U.S. 520, 532 (1979).
129. *Id.* at 535.
130. *Id.* at 539.
131. *Id.* at 536–37.
132. Youngberg v. Romeo, 457 U.S. 307, 321–22 (1982).
133. Lynch v. Baxley, 744 F.2d 1452 (11th Cir. 1984).
134. *Id.* at 1454.

proceedings could be placed in a jail if they "[posed] an immediate threat to [themselves] or others and no other facility [was] available to safely detain [them]."[135]

While the Eleventh Circuit acknowledged the State's compelling interest in detaining mentally ill people who pose a threat of serious violence, the court employed a strict scrutiny "least restrictive means" test when analyzing the State's methods, despite the fact that "[i]n the context of involuntary civil commitment the Court has not spoken directly to the issue."[136] Relying on a body of circuit court decisions, the Eleventh Circuit held that "[e]mergency detention in jail cannot be considered as the least restrictive means available for Alabama to hold people pending commitment proceedings."[137]

The court in *Baxley* based its higher level of scrutiny on the distinction between pre-adjudication civil detainees and pretrial criminal detainees, indicating that for those who are not facing criminal charges, pre-adjudication conditions of confinement should be even less restrictive than for pretrial detainees in the criminal system: "pretrial detainees are taken into custody because of their own actions and understand the procedures surrounding their detention. By contrast, the mentally ill are apprehended and held because they have mental health problems and other people believe that commitment is necessary."[138] Though this specific distinction has not been addressed by the Supreme Court, it opens the door to possible arguments in the pre-adjudication immigration context.

Subsequent to *Baxley*, the U.S. Ninth Circuit Court of Appeals in *Jones v. Blanas* affirmed the Eleventh Circuit's approach in the context of civil detainees awaiting commitment proceedings under California's Sexually Violent Predator Act (SVPA).[139] The court held that, prior to commitment proceedings, civil detainees could not be kept in conditions "identical to, similar to, or more restrictive than, those in which [their] criminal counterparts are held," nor can they be kept in conditions "more restrictive than those the individual would face following SVPA commitment."[140] However, their non-punitive

135. Lynch v. Baxley, 744 F.2d 1452, 1457 (11th Cir. 1984).
136. *Id.* at 1458–59.
137. *Id.* at 1459.
138. *Id.* at 1460.
139. Jones v. Blanas, 393 F.3d 918, 922 (9th Cir. 2004).
140. *Id.* at 932–33.

confinement itself was justified by "probable cause to believe the individual is likely to commit sexually violent offenses upon release."[141]

B. CURRENT BORDER PATROL DETENTION LITIGATION: *DOE V. JOHNSON*

In June 2015, detainees in Border Patrol detention in the Tucson sector filed a class action complaint for declaratory and injunctive relief.[142] The complaint asserted five constitutional claims for relief based on alleged violations of the Due Process Clause of the Fifth Amendment: (1) deprivation of sleep, (2) deprivation of hygienic and sanitary conditions, (3) deprivation of adequate medical screening and care, (4) deprivation of adequate food and water, and (5) deprivation of warmth.[143]

The plaintiffs argued that the conditions of confinement for Border Patrol detainees violated due process because they were not reasonably related to a legitimate government interest—in other words, they were punitive.[144] Despite the lenient rational basis standard of review and the government's arguments that the rapid nature of Border Patrol operations and the large volume of migrants justified the hold room conditions,[145] the court held that "there is no objectively reasonable relationship between 24-7 immigration processing or security and the conditions of confinement which Plaintiffs have preliminarily shown exist in the Tucson Sector Border Patrol stations related to sleeping, sanitation, food, and medical care."[146] The court granted a preliminary injunction ordering Border Patrol to: (1) provide clean bedding and mats to all detainees held longer than twelve hours, (2) provide a way for detainees held longer than twelve hours to "wash or clean themselves," (3) "implement the universal use" of medical screening procedures, (4) ensure that bathrooms and drinking water are sanitary, (5) keep cell temperatures at

141. Jones v. Blanas, 393 F.3d 918, 923 (9th Cir. 2004).

142. Pl.'s Compl. for Declaratory and Inj. Relief, Doe v. Johnson, No. 4:15-cv-00250-DCB (D. Ariz. Jun. 8, 2015).

143. *See id. at* 45–51.

144. Brief in Support of Pl.'s Mot. for Prelim. Inj. at 2–3, Doe v. Johnson, No. 4:15-cv-00250-DCB (D. Ariz. Aug. 17, 2016).

145. Def.'s Opp'n to Pl.'s Mot. for Prelim. Inj. at 3, Doe v. Johnson, No. CV-15-00250-TUC-DCB (D. Ariz. Feb. 25, 2016).

146. Unknown Parties v. Johnson, No. 4:15-cv-00250-DCB, 2016 WL 8188563, 27–28 (D. Ariz. Nov. 18, 2016).

reasonable levels, and (6) provide adequate hygiene products.[147] Several weeks after the court issued the preliminary injunction, the government filed a Motion for Clarification and Motion for Reconsideration, asking the court to modify its ruling to accommodate Border Patrol operations.[148] Judge David Bury declined to alter the preliminary injunction, stating "The Court cannot suspend what it believes are constitutional rights."[149]

C. EXPANDING THE SCOPE OF BORDER PATROL LITIGATION

While this preliminary injunction at the district court level represents an important step in securing more humane conditions in Border Patrol detention, the Constitution requires more. The *Doe v. Johnson* opinion indicates that the federal judiciary is willing to rule against the government in border detention litigation, even under rational basis review. Advocates should push this tendency to its outer limit and argue that the carceral format of the hold rooms is itself unconstitutional. Furthermore, *Baxley* suggests that pre-adjudication civil detention that occurs prior to a determination of probable cause should be reviewed under strict scrutiny. There are two related but distinct due process threads that form the constitutional argument against holding migrants in jail cells at the border: (1) this "nature . . . of commitment" does not "bear some reasonable relation to the purpose for which" migrants are detained at the border,[150] and (2) typically, there has been no determination of probable cause when migrants are initially put into holding cells. Migrants and asylum-seekers who have just crossed the border and have not yet been civilly or criminally charged with immigration violations are entitled to be processed into ICE custody in conditions that resemble an emergency shelter, rather than a jail.

1. NATURE OF CONFINEMENT

The jail-like nature of Border Patrol detention facilities does not bear any reasonable relation to the purpose of confinement. The Supreme Court has held that pre-adjudication immigration detention is a "constitutionally valid aspect of the deportation

147. Unknown Parties v. Johnson, No. 4:15-cv-00250-DCB, 2016 WL 8188563, 28 (D. Ariz. Nov. 18, 2016).

148. *See generally id.*

149. *Id.* at 2.

150. Jackson v. Indiana, 406 U.S. 715, 738 (1972).

process"[151] because "detention necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings."[152] The purpose of Border Patrol detention, however, is distinct from general immigration detention administered by ICE. According to federal regulations, noncitizens arrested and detained without a warrant can generally be held only up to forty-eight hours while the government decides "whether the alien will be continued in custody or released on bond or recognizance and whether a notice to appear and warrant of arrest . . . will be issued."[153] The purpose of this confinement is to determine whether the noncitizen will be removed immediately under expedited removal, charged with an immigration violation and put into removal proceedings, or transferred to ICE custody for a determination of asylum eligibility.[154] Customs and Border Protection itself characterizes Border Patrol stations as "short-term processing facilities," which implies that the purpose of this detention is to determine status rather than to detain immigrants and thus ensure their presence at immigration hearings—the ostensible purpose of longer-term immigration detention.[155]

The purpose of Border Patrol's contact with noncitizens along the border is to determine if and how they might be in violation of civil immigration laws. Harsh physical confinement does not bear a reasonable relation to this purpose. In *Youngberg*, the Supreme Court mandated more considerate confinement for people involuntarily committed to state mental hospitals.[156] In *Baxley*, the Eleventh Circuit urged a "least restrictive means" analysis for the nature of confinement because mentally ill detainees do not possess the same level of culpability or comprehension as criminal detainees.[157] An even higher degree of leniency should be extended to migrants who have just crossed the border. While most, if not all, surely understand that they are not entering the United States legally, they are often doing so out of desperation or fear for their lives. They do not understand the specifics of U.S. immigration law. Many of them

151. Demore v. Kim, 538 U.S. 510, 523 (2003).

152. *Id.*

153. 8 C.F.R. § 287.3(d) (2017).

154. *See* Def.'s Opp'n to Pl.'s Mot. for Prelim. Inj., at 7–8, Doe v. Johnson, No. CV-15-00250-TUC-DCB (D. Ct. Ariz. Feb. 25, 2016); 8 C.F.R. § 1235.3 (2017).

155. *See id.* at 6.

156. Youngberg v. Romeo, 457 U.S. 307, 321–22 (1982).

157. Lynch v. Baxley, 744 F.2d 1452, 1460 (11th Cir. 1984).

have committed no crime other than crossing a border without authorization—the quintessential *malum prohibitum* crime.[158] Furthermore, many have crossed the border to exercise their legal right to request asylum.[159]

In the case of involuntarily committed patients in state mental health facilities, the Supreme Court has justified some level of non-punitive confinement and restraint because mentally unstable detainees may pose a threat of violence.[160] Thus, the restrictive nature of the confinement is reasonably related to the purpose of providing safe treatment for mental illness. Unlike some mentally ill detainees, migrants and asylum seekers do not pose a heightened risk of unpredictable violence. In fact, many studies suggest that immigrants are less likely to commit crimes than U.S. citizens.[161]

Given the vulnerable, non-criminal nature of the migrant population and the preliminary "processing" purpose of Border Patrol detention, jail-like incarceration is inappropriate. Like involuntarily-committed mental facility detainees, recently-arrived migrants should be afforded custody that accords with their particular needs.[162] Though the government can constitutionally confine noncitizens awaiting removal proceedings, it cannot crowd migrants into frigid, barren cells for days at a time before they have even been served with an order of removal or notice to appear in civil immigration proceedings. The nature of this confinement is not reasonably related to the processing purpose.

2. STANDARDS FOR ARREST AND DETENTION

In *Bell*, the Supreme Court held that pre-trial criminal detainees could not be subjected to punitive conditions because they had not yet been convicted; however, they could be restricted

158. *Contrast Malum Prohibitum*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("An act that is a crime merely because it is prohitbited by statute, although the act itself is not necessarily immoral.") with *Malum in se*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A crime or an act that is inherently immoral, such as a murder, arson, or rape.").

159. 8 U.S.C. § 1158(a) (2013).

160. Youngberg v. Romeo, 457 U.S. 307, 319–20 (1982).

161. *Immigration and Crime—What the Research Says*, CATO INST., https://www.cato.org/blog/immigration-crime-what-research-says (last visited Oct. 1, 2017).

162. *See* Lynch v. Baxley, 744 F.2d 1452, 1458 (11th Cir. 1984) (explaining that mentally ill detainees have special needs that must be taken into account when considering the nature of their detention).

in any manner reasonably related to legitimate government interests such as ensuring that the detainee appears for trial and "maintaining jail security."[163] The Court justified the "extended restraint of liberty following [an] arrest" by noting that there had been a "judicial determination of probable cause."[164] Similarly, restricting the liberty of those awaiting commitment hearings for sexually violent offender programs is predicated on the "probable cause to believe the individual is likely to commit sexually violent offenses upon release."[165]

Short-term Border Patrol detention is different from pre-trial detention of criminal detainees and pre-adjudication detention of sexually violent offenders because there has not been a definitive finding of probable cause.[166] The Immigration and Naturalization Act and federal regulations provide that Border Patrol agents have the power "to arrest any alien in the United States, if he has *reason to believe* that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest."[167] The meaning of the phrase "reason to believe" in this context is not monolithic.

In *United States v. Cortez,* the Supreme Court specifically stated that in the context of Border Patrol investigative stops, the "reason to believe" standard is lower than probable cause, and that the relevant question is "whether, based upon the whole picture, they, as experienced Border Patrol officers, could reasonably surmise" that a person had violated the law.[168] The Supreme Court has not revisited the meaning of "reason to believe" when it comes to Border Patrol arrests and detentions that go beyond investigative stops. The circuit courts, however, generally agree that "reason to believe" should be read as "probable cause" when determining whether immigration officers are justified in seizing and detaining noncitizens for any significant period of time.[169]

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163. Bell v. Wolfish, 441 U.S. 520, 540 (1979).

164. *Id.* at 536.

165. Jones v. Blanas, 393 F.3d 918, 923 (9th Cir. 2004).

166. Customs and Border Protection explains that its custody ends when the noncitizen is either deported or formal procedures for removal are initiated by ICE. *See* Def.'s Opp'n to Pl.'s Mot. for Prelim. Inj. at 7–8, Doe v. Johnson, No. CV-15-00250-TUC-DCB (D. Ct. Ariz. Feb. 25, 2016).

167. 8 U.S.C. § 1357(a)(2) (2013) (emphasis added).

168. United States v. Cortez, 449 U.S. 411, 421 (1981).

169. Morales v. Chadbourne, 793 F.3d 208, 216 (1st Cir. 2015); United States v. Quintana, 623 F.3d 1237, 1239 (8th Cir. 2010); Babula v. INS, 665 F.2d 293, 298 (3d

Even with a body of circuit court case law that essentially requires probable cause for warrantless detention of an immigrant, the contours of the issue remain hazy. The plain language of the statute is not "probable cause," but rather "reason to believe." Given enough conservative votes on the Supreme Court, the final decision on the issue could swing right of the circuit consensus. Furthermore, even in the circuit court decisions that favor reading "reason to believe" as "probable cause," the requirement that officers must actually have probable cause to search and detain remains uncertain. In *Au Yi Lau v. United States Immigration and Naturalization Service*, the D.C. Circuit stated that "the arrest provision [of the Immigration and Nationality Act (INA)] must be read in light of constitutional standards, so that 'reason to believe' must be considered the equivalent of probable cause,"[170] but ultimately held that:

> [I]mmigration officers, in accordance with the Congressional grant of authority found in Section 287(a)(1), may make forcible detentions of a temporary nature for the purposes of interrogation under circumstances creating a reasonable suspicion, not arising to the level of probable cause to arrest, that the individual so detained is illegally in this country.[171]

Border Patrol could effectively argue that its detention operations along the border are "of a temporary nature" such that probable cause is not required. Though many circuits have held that the standard for warrantless arrest set forth in INA § 287 is effectively probable cause, that is not the black letter law, nor has it been definitively determined by the Supreme Court.[172] Such uncertainty should not form the justification for a large-scale immigration detention operation that closely resembles pretrial criminal detention in county jails.

Once a Border Patrol agent has reason to believe someone has violated an immigration law, "a determination will be made within 48 hours of the arrest . . . whether the alien will be continued in custody or released on bond or recognizance and whether a notice to appear and warrant of arrest . . . will be

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Cir. 1981); Tejada-Mata v. INS, 626 F.2d 721, 725 (9th Cir. 1980); United States v. Cantu, 519 F.2d 494, 496 (7th Cir. 1975), cert. denied, 423 U.S. 1035; Au Yi Lau v. U.S. Immigration & Naturalization Serv., 445 F.2d 217, 222 (D.C. Cir. 1971), cert. denied, 404 U.S. 864 (1971).

170. *Au Yi Lau*, 445 F.2d at 222.

171. *Id.* at 223.

172. *See* United States v. Varkonyi, 645 F.2d 453, 458 (5th Cir. 1981).

issued."[173] It is not disputed that the Border Patrol has the power to arrest and detain migrants at the border. Unfortunately, current laws even provide that immigration officials at or near the border can summarily deport anyone they deem to be inadmissible.[174] These actions, regardless of whether they are good policy, are within the plenary power of Congress and the Executive to control immigration. However, the power to control who enters the United States does not give executive agencies carte blanche to infringe on the substantive rights of people within U.S. territories who have not yet been formally charged or even arrested with definitive probable cause.

Border Patrol agents have forty-eight hours to decide whether to charge, release, or transfer an individual. During that time, the person is detained pursuant to the agent's reasonable belief that the detainee has violated immigration laws or otherwise committed a crime. Under these circumstances, nearly anyone who happens to be near the border without citizenship or residency documents at hand could be arrested and detained by Border Patrol. Unlike pre-trial detainees in jail, migrants apprehended by Border Patrol are not detained under probable cause to believe that they have committed a crime or because they have been deemed sexually violent predators likely to commit acts of violence if left unrestricted. They have not even been formally charged with immigration violations. The Supreme Court and circuit courts have established a range of permissible confinement for various classes of detainees, both criminal and civil. In the context of Border Patrol detention, the low standard for arrest and custody, combined with the nonviolent *malum prohibitum* nature of all immigration violations, suggests that the government is not justified in detaining migrants in jail-like facilities, no matter how adequate the conditions of confinement. In the unregulated haze that surrounds reasonable suspicion detention on the border, it is possible to imagine bridging the gap between bare constitutional minimums and actively humane policies.

V. RADICALLY COMPASSIONATE BORDER PATROL CUSTODY

Even if the current Supreme Court would not find that processing migrants in emergency shelters, rather than jails, is

173. 8 C.F.R. § 287.3(d) (2015).

174. 8 U.S.C.A. § 1225(b)(1)(a)(i) (2017).

constitutionally required, it is still the best policy. In his book *Traditions of Compassion: From Religious Duty to Social Activism*, philosopher Khen Lampert proposes the notion of "radical compassion."[175] Radical compassion "represents a state of mind in which a person, in becoming aware of the pain and distress of another, is driven to concrete action toward changing that reality for the other."[176] Many of the migrants who attempt to cross the U.S. border without authorization are in an extreme state of distress, whether physical, emotional, or financial.[177] Rather than recognizing this distress and taking action to alter the reality that created it, the United States instead prolongs the suffering by overcrowding migrants into jail cells with deplorable conditions. While refraining altogether from confining and processing migrants is ideal,[178] it is not practicable under the current system of criminalized movement across borders. In the absence of a humane immigration system, this Comment proposes two strategies for enacting radically compassionate Border Patrol custody: (1) discontinuing the use of jail-like holding cells and instead processing migrants in secure emergency shelters, and (2) allocating resources to seriously address political and economic instability in Central America that was caused in part by U.S. military intervention.

A. SHELTERS, NOT JAILS

Border Patrol detention should not only meet the constitutional minimum of being non-punitive and reasonably related to preliminary processing, it should also be considerably less restrictive than other civil detention facilities. As a matter of good policy, Border Patrol should transform its jail-like processing facilities into monitored emergency shelters. While this would represent a radically compassionate action in comparison to the current policy, it is actually a mainstream proposal. In 2012, the American Bar Association introduced Civil Immigration Detention Standards, a resolution suggesting a complete overhaul of the civil immigration detention system.[179] The ABA suggests that "[c]ivil detention facilities might be closely

175. Khen Lampert, *Traditions of Compassion: From Religious Duty to Social Activism*, xix (2005), https://www.scribd.com/document/344988452/Khen-Lampert-Traditions-of-Compassion-From-Reli-BookFi-pdf.

176. *Id.*

177. *See Home Sweet Home*, *supra* note 4.

178. *See generally* Hayter, *supra* note 18; *see generally* Tabarrok, *supra* note 18.

179. *See Civil Immigration Detention Standards*, AM. BAR ASS'N 1 (2012).

analogized to 'secure' nursing homes, residential treatment facilities, domestic violence shelters, or in-patient psychiatric treatment facilities."[180]

DHS should rebuild its border processing facilities to resemble emergency shelters: facilities equipped with clean drinking water, medical clinics, locker room facilities, and large dormitories with cots, blankets, and dimmed lighting. Furthermore, DHS should contract with food vendors to supply large quantities of low-cost and nutritious food. These facilities would not be elaborate or luxurious by any means, but they would operate according to principles of common human decency, rather than deterrence and intimidation.

B. IMPROVING CONDITIONS IN THE NORTHERN TRIANGLE

According to Lampert's theory,

> [R]adical compassion is an intentionality toward the other that includes an unravelling of a reality of distress and an identification of the elements whose alteration will lead to an easing or complete disappearance of the distress. This is compassion that is not satisfied with feeding of the hungry person, but rather requires a change in reality to eliminate any possibility of hunger.[181]

The United States should allocate resources to eliminate the catalysts of forced migration from Central America. If no one felt the urgent need to flee from imminent violence and deplorable economic conditions, far fewer would attempt to cross the border illegally, and the need for Border Patrol operations would be greatly diminished.

The United States has never been reluctant to interfere with El Salvador, Guatemala, and Honduras (collectively known as the Northern Triangle).[182] In 1954, the U.S. military overthrew Guatemala's democratically-elected president, Jacobo Arbenz Guzman, because of his "communist sympathies."[183] The coup destabilized Guatemala for decades, catalyzing a brutal civil

180. *Civil Immigration Detention Standards*, *supra* note 178, at 4.

181. Lampert, *supra* note 175, at 174.

182. *See* John H. Coatsworth, *United States Intervention*s, REVISTA, http://revista.drclas.harvard.edu/book/united-states-interventions (last visited Oct. 1, 2017).

183. *See Guatemala 1954*, COLD WAR MUSEUM, http://www.coldwar.org/articles/50s/guatemala.asp (last visited Oct. 1, 2017).

war.[184] In the 1970s and 1980s, the Carter and Reagan administrations funded and trained violent anti-communist "death squads" in Central America's civil wars.[185] In 2009, the State Department supported the overthrow of Manuel Zelaya, the democratically elected leader of Honduras.[186] The Central American street gang crisis itself is a byproduct of political strife, migration to the United States, and subsequent deportation of gang members.[187] There is little doubt that the political turmoil stoked by the United States' efforts to politically control Central America has contributed to the region's current dysfunction.[188]

In addition to direct military intervention in Central America, the United States has developed extensive trade with the region. In 2004, Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica, and the Dominican Republic signed a free trade agreement with the United States.[189] As a result of increased trade with the United States, the manufacturing industry in Central American countries has grown significantly.[190] Poverty rates have generally declined in the region since 1989, but "extreme poverty has remained at relatively high levels."[191] In 2015, 63% of the population in Honduras lived in poverty; this is the same poverty rate that existed in 2001.[192] While globalization and free trade agreements have boosted the economies of the Northern Triangle by creating a high volume of low-skill manufacturing jobs, the data indicate that this form of economic intervention has not in any significant

184. *See Guatemala 1954*, *supra* note 183.

185. *See* Benjamin Schwarz, *Dirty Hands*, THE ATLANTIC, Dec. 1998.

186. *See* Karen Attiah, *Hillary Clinton's Dodgy Answers on Honduras*, WASH. POST (Apr. 19, 2016), https://www.washingtonpost.com/blogs/post-partisan/wp/2016/04/19/hillary-clintons-dodgy-answers-on-honduras-coup/?utm_term=.c5e3792b4e14.

187. See *MS 13*, INSIGHT CRIME (Mar. 9, 2017), http://www.insightcrime.org/el-salvador-organized-crime-news/mara-salvatrucha-ms-13-profile.

188. *See* Roque Planas, *Here's How the U.S. Sparked A Refugee Crisis on the Border, in 8 Simple Steps*, HUFFINGTON POST (Jul. 18, 2014), http://www.huffingtonpost.com/2014/07/18/refugee-crisis-border_n_5596125.html; *see* Theta Pavis, *Decades of U.S. Intervention in Central America Echo in Present Border Crisis*, HUFFINGTON POST (Jul. 22, 2014), http://www.huffingtonpost.com/theta-pavis/decades-of-us-interventio_b_5610684.html.

189. Hugo Beteta, *Central American Development: Two Decades of Progress and Challenges for the Future*, MIGRATION POLICY INST., 5 (August 2012), https://www.migrationpolicy.org/research/RMSG-CentAm-development.

190. *Id.* at 6–7.

191. *Id.* at 8.

192. *Poverty Headcount Ratio at National Poverty Lines (% of Population)*, WORLD BANK, https://data.worldbank.org/indicator/SI.POV.NAHC?end=2015&locations=HN&start=2001&view=chart (last visited Nov. 1, 2017).

way improved the lives of most people in those countries.

As violence and instability in the Northern Triangle have fueled the refugee crisis in recent years, policymakers have contemplated solutions.[193] In 2014, El Salvador, Guatemala, and Honduras signed the Plan for the Alliance for Prosperity, "a comprehensive strategy to promote economic growth and security throughout the region."[194] In 2016, Congress committed $750 million to the Alliance for Prosperity.[195] Proponents of the plan applaud it for "correctly identif[ying] increased private-sector opportunity as the key to long-term improvement in quality of life in the Northern Triangle."[196] Critics condemn the Alliance for Prosperity as another in a long line of policies tailored to "the long-term economic concerns of the elite . . . not the systemic change Central America needs."[197]

As politicians in Central America and Washington, D.C. debate how best to incentivize private-sector growth, migrants and asylum seekers continue to leave the Northern Triangle because they live in abject poverty with no prospect of finding work or because they are besieged by the pervasive violence of street gangs that the governments cannot control.[198] The most effective—and by far the most challenging—way to transform Border Patrol's operations would be to diminish the violence and economic instability that drive people to migrate in the first place. After decades of military intervention in Central America, the United States should allocate resources to stabilize the region and make it possible for people to live and work there in peace.

To accomplish this, the United States government should abandon its focus on private investment and instead invest in research and programs to understand and address the crisis as a consequence of imperialism and interventionism. Congress should create a small agency tasked specifically with conducting this research and development. This agency should focus on

193. *See* Christina Perkins, *Achieving Growth and Security in the Northern Triangle*, CTR. FOR STRATEGIC & INT'L STUDIES (Dec. 2016), https://csis-prod.s3.amazonaws.com/s3fs-public/publication/161201_Perkins_Nothern Triangle_Web.pdf.

194. *Id.* at VI.

195. *Id.*

196. *Id.* at 14.

197. Dawn Paley, *The Alliance for Prosperity Will Intensify the Central American Refugee Crisis*, THE NATION (Dec. 21, 2016), https://www.thenation.com/article/the-alliance-for-prosperity-will-intensify-the-central-american-refugee-crisis/.

198. *See Home Sweet Home*, *supra* note 4.

implementing programs that employ and enable community leaders in El Salvador, Guatemala, and Honduras to conceptualize political and cultural revolutions. For example, the United States could fund the construction of shelters and education centers for women. Land reforms could require agricultural corporations to invest a percentage of their profits directly back into the communities and redistribute a certain amount of land for small-scale sustenance farming. Economic experts could work on plans to build national economies in a manner that would genuinely benefit the people, rather than enriching the upper classes of business owners and politicians that currently hoard the wealth in Central America.[199]

These proposals are broad and ambitious. It is beyond the scope of this Comment to delve too deeply into what humane and culturally-appropriate intervention in Central America would look like, but a conversation about de-escalating Border Patrol operations would be incomplete without considering how the U.S. could "secure the border" by preemptively exercising compassion rather than reactively exercising brutality.

VI. CONCLUSION

Current Border Patrol detention is unconstitutionally oppressive. Like much of U.S. immigration law and policy, Border Patrol operations ignore the complicated and morally-nuanced reality of mass migration from failed states into a geopolitical and economic hegemon. Holding recently-arrived migrants in crowded jail cells with deplorable conditions for days at a time should be unconstitutional because it is not reasonably related to the preliminary processing purpose of Border Patrol detention centers and because migrants are detained without a finding of probable cause. Regardless of whether the United States government acts to concretely improve conditions in Central America, it must build processing centers that comply with the constitutional requirements for civil detention and act as emergency shelters. While critics may balk at the potential cost of such an undertaking, it surely cannot come close to the estimated $21.6 billion it will take to build President Trump's

199. Benedicte Bull, *Towards a Political Economy of Weak Institutions and Strong Elites in Central America*, EUROPEAN REV. LATIN AM. & CARIBBEAN STUDIES, NO. 97, 117, 120–21 (October 2014), http://doi.org/10.18352/erlacs.9799. In Central America, particularly in the Northern Triangle, a small group of elites has historically controlled the resources and political systems. In Guatemala, for example, private companies frequently evade taxes with impunity. *Id.* at 121–22.

proposed border wall.[200] As long as there is an extreme wealth disparity between the world's nations and violence-ridden failed states, there will be forced migration. The United States can and should choose to exercise compassion, rather than cruelty, along its southern border.[201]

M. Kate Richardson

200. Julia Edwards Ainsley, *Trump Border 'Wall' to Cost $21.6 Billion, Take 3.5 Years to Build: Internal Report*, REUTERS (Feb. 9, 2017), http://www.reuters.com/article/us-usa-trump-immigration-wall-exclusive-idUSKBN15O2ZN.

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