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No More *Hieleras*: *Doe v. Kelly*'s Fight for Constitutional Rights at the Border

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ABSTRACT

U.S. Customs and Border Protection's (CBP) short-term holding cells have received mass media attention because of their inhumane and punitive conditions. CBP agents and immigration detainees alike refer to these cells as *hieleras*, Spanish for freezers or iceboxes, because these cells, which hold migrants arrested while crossing the U.S.-Mexico border, have unbearably cold temperatures—as low as 58.8 degrees Fahrenheit. Along with freezing temperatures, detainees must endure overcrowded and unsanitary cells, prolonged detention, deprivations of basic human needs such as food, water and hygiene, and inadequate medical care.

Despite widespread media attention, legal scholarship has not yet explored the constitutional and policy issues raised by the deplorable *hielera* conditions. This Comment draws attention to rights violations inside *hieleras* and is the first to analyze a groundbreaking class action lawsuit brought by an immigrants' rights coalition to challenge the conditions in CBP holding cells. In addition to analyzing this promising litigation strategy, this Comment also argues that the U.S. Congress should explore solutions, such as federal legislation and independent monitoring, to improve confinement standards.

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TABLE OF CONTENTS

INTRODUCTION.....	820
I. <i>HIELERA</i> CONDITIONS	829
A. Overview of Immigration Detention’s Civil Nature	829
B. <i>Hieleras</i> and Their Abhorrent Conditions	832
1. Prolonged Detention	834
2. Sleep Deprivation.....	835
3. Food, Water, and Hygiene Deprivation.....	838
4. Inadequate Medical Care	841
II. CHALLENGING TUSCON-SECTOR <i>HIELERAS</i> IN COURT: <i>DOE V. KELLY</i>	842
A. The Preliminary Injunction.....	843
B. Shortcomings of the Preliminary Injunction	845
III. POLICY SOLUTIONS TO IMPROVE <i>HIELERA</i> CONDITIONS.....	849
A. Passing Legislation to Make <i>Hielera</i> Standards a Matter of Federal Law.....	849
1. Hygienic Toiletries	851
2. Medical Professionals	851
3. Food and Water	852
4. Temperatures	852
5. Bedding.....	853
B. Creating an Independent Institution to Monitor and Enforce Standards	853
CONCLUSION	859

INTRODUCTION

The hielera turned out to be a freezing cold cell where dozens—as many as sixty in one case—of detainees were locked up together, for as long as eleven days. The hielera had no beds, no chairs, and a single sink and toilet sitting in plain view in the cell. The temperature in the hielera was so cold that the peoples' lips chapped and split, and their fingertips turned blue. The lights were kept on 24 hours a day. They were forced to sleep on the concrete floor without even a blanket. They huddled together on the floor at night for warmth, but slept very little. They had no access to a bath or shower. They were not provided with even the most basic personal hygiene products like toothbrushes, toothpaste, combs, or soap. Nor were they ever provided with a change of clothing. CBP officers coerced them into signing documents relinquishing their rights, which they did not even understand.¹

The United States operates the world's largest immigration detention system.² According to the Global Detention Project, “[o]n any given day, the [United States] has some 30,000 people in administrative immigration detention The country's sprawling detention estate counts on some 200 facilities, including privately operated detention facilities, local jails, juvenile detention centres, field offices, and euphemistically named ‘family residential centres.’”³ This ever-expanding immigration detention system is not surprising, given that since the 1980s Congress has only intensified immigration control and enforcement policies,⁴ increased immigration enforcement funding at unprecedented levels,⁵

1. *AI Justice Tackles Abuse and Injustice on the Texas Border*, 17 AM. IMMIGRANT JUST. NEWSL., no. 2 (Americans for Immigrant Justice, Miami, Fla.), Spring 2013, http://www.aijustice.org/ai_justice_tackles_abuse [<https://perma.cc/Q49D-KG5E>] (discussing the complaints in federal tort claim actions “on behalf of four immigrants who were subjected to inhumane and unlawful treatment by U.S. Customs and Border Protection (CBP)”).

2. *United States Immigration Detention*, GLOBAL DETENTION PROJECT, <https://www.globaldetentionproject.org/countries/americas/united-states> [<https://perma.cc/8VH2-FXFS>] (last updated May 2016).

3. *Id.*

4. See CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *CRIMMIGRATION LAW* 240 (2015) (“The immigration detention estate began to grow in the 1980s and expanded dramatically in the years since 1996.”). By way of example, the Immigration Control and Reform Act (IRCA) of 1986 “combined the legalization of certain undocumented immigrants with stepped up internal enforcement and control measures. . . . [Further,] the adoption of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA) [significantly expanded] the number of non-citizens who could be placed in mandatory immigration detention.” *Id.*

5. According to a 2005 assessment:

and created congressional mandates, for example, requiring Immigration and Customs Enforcement (ICE)—the agency in charge of enforcing immigration laws within the United States—to maintain at least 44,000 detention beds at all times.⁶

Overall spending on enforcement activities has ballooned from pre-IRCA levels, with appropriations growing from \$1 billion to \$4.9 billion between fiscal years 1985 and 2002 and staffing levels increasing greatly. Resources have been concentrated heavily on border enforcement, particularly the Border Patrol. Spending for detention and removal/intelligence activities multiplied most rapidly over this period, with an increase in appropriations of over 750 percent.

DAVID DIXON & JULIA GELATT, MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT SPENDING SINCE IRCA (2005), https://www.migrationpolicy.org/sites/default/files/publications/FactSheet_Spending.pdf [<https://perma.cc/48F7-UXLA>]. For data on the rise of the immigration enforcement budget and personnel since the 1990s, see AM. IMMIGRATION COUNCIL, THE COST OF IMMIGRATION ENFORCEMENT AND BORDER SECURITY (2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_cost_of_immigration_enforcement_and_border_security.pdf [<https://perma.cc/MW85-CR82>].

6. The expansion of the immigration detention system has been attributed to the congressional bed mandate. See, e.g., GARCÍA, CRIMMIGRATION LAW, *supra* note 4, at 242 (“Aside from the many statutes that authorize or require detention . . . the size of today’s civil immigration detention estate can be attributed to a congressional directive known as the ‘bed mandate.’”). The mandate first appeared in the DHS Appropriations Act of 2010, requiring Immigration and Customs Enforcement (ICE) to maintain a minimum of 33,400 detention beds. See Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, 123 Stat. 2142 (2009), <https://www.gpo.gov/fdsys/pkg/PLAW-111publ83/pdf/PLAW-111publ83.pdf> [<https://perma.cc/ER2X-5H66>]. In March 2017, President Donald Trump’s administration “requested bringing the total number of beds up to 45,700, arguing the additional capacity was necessary to achieve the president’s goal of ‘enhancing interior enforcement efforts and ending “catch and release” for those apprehended at the border.’” See Julia Edwards Ainsley & Mica Rosenberg, *Congress to Fund More Detention Beds Despite Drop in Border Crossings*, REUTERS (May 1, 2017, 1:02 PM), <https://www.reuters.com/article/us-usa-immigration-detention/congress-to-fund-more-detention-beds-despite-drop-in-border-crossings-idUSKBN17X2C3> [<https://perma.cc/HY6C-QJMW>]; see also H.R. REP. NO. 115-239, at 154 (2017), <https://www.congress.gov/congressional-report/115th-congress/house-report/239/1> [<https://perma.cc/L2XU-X7VM>] (noting that the Department of Homeland Security (DHS) 2018 Appropriations Bill “provides a \$705,000,000 increase for immigration enforcement in the interior of the United States, including an average daily population in detention of 44,000 detention beds, an increase of 4676 from the current year and 10,000 above fiscal year 2016”). Certain legislators have interpreted the detention bed mandate to be a mandatory quota. See, e.g., Sarah Chacko, *Administration Warned to Keep Detention Beds Full*, CQ ROLL CALL, May 4, 2015, 2015 WL 1964623 (“Rep. John Culberson, R-Texas, says he expects the Obama administration to find enough illegal immigrants to fill the detention beds Congress funds—or face budgetary consequences. . . . [because] the agency is required to fill the beds, not just have them on hand.”); see also T.J. Raphael & Oliver Lazarus, *Immigration Detention Quotas Cost Taxpayers Billions—A “Mindless Policy” Says One Congressman*, PRI (Aug. 2, 2017, 2:00 PM), <https://www.pri.org/stories/2017-08-01/immigration-detention-quotas-cost-taxpayers-billions-mindless-policy-says-one> (asserting immigration detention bed quota “came to be interpreted as a mandatory minimum”). Cf. *Department of Homeland Security Oversight* at 03:22:00–03:22:45, C-SPAN (May 29, 2014), <https://www.c-span.org/video/?319614-1/homeland-security-department-oversight-hearing&start=12115> (former Homeland Security Secretary Jeh Johnson interpreting the congressional mandate to require a minimum number of beds, but not that U.S. Immigration

The United States treats immigration detention like a “standard operating procedure” or “fact of life . . . self-evident [from a] ‘violation’ of the law.”⁷ Yet, many detained immigrants are “guilty” of nothing other than their ‘unauthorized’ (illegalized) status, penalized simply for being who and what they are, and not at all for any act of wrong-doing.⁸ As a result of their status, immigration detainees “are subjected to a condition of direct confinement by state authorities, often castigated to a station effectively outside the law, and thereby rendered veritably rightless”⁹ Though immigrants in the United States have constitutional rights, including the right to due process under the Fifth Amendment,¹⁰ federal authorities involved in the immigration detention system violate these rights every day.¹¹

Every year the U.S. Customs and Border Protection (CBP) detains hundreds of thousands of immigrants in short-term holding cells called *hieleras* after apprehension at or along the United States–Mexico border.¹² The term *hieleras* is Spanish for “freezers” or “iceboxes,” and has become a notorious term that CBP

and Customs Enforcement (ICE) must always fill those beds). For more information on the congressional bed mandate and its implications on the immigration detention system, see Anita Sinha, *Arbitrary Detention? The Immigration Detention Bed Quota*, 12 DUKE J. CONST. L. & PUB. POL’Y 77 (2017).

7. See Nicholas De Genova, *Detention, Deportation, and Waiting: Toward a Theory of Migrant Detainability* 3 (Global Detention Project, Working Paper No. 18, 2016), <https://www.globaldetentionproject.org/wp-content/uploads/2016/12/De-Genova-GDP-Paper-2016.pdf> [<https://perma.cc/LS7G-FZAS>]
8. *Id.* at 4. *But see* 8 U.S.C. § 1325 (2018) (criminalizing improper entry to the United States); Laura Jarrett, *Are Undocumented Immigrants Committing a Crime? Not Necessarily*, CNN (Feb. 24, 2017, 8:13 PM), <https://www.cnn.com/2017/02/24/politics/undocumented-immigrants-not-necessarily-criminal/index.html> [<https://perma.cc/5HB9-777Z>].
9. De Genova, *supra* note 7, at 4.
10. See *Unknown Parties v. Johnson*, No. CV-15-00250-TUC-DCB, 2016 U.S. Dist. LEXIS 189767, at *10 (D. Ariz. Nov. 18, 2016), *aff’d sub nom. Doe v. Kelly*, 878 F.3d 710, 716 (9th Cir. 2017) (noting that immigration detainees in *hieleras* have due process rights under the Fifth Amendment); Imani Gandy, *Boom! Lawyered: Immigrants’ Constitutional Rights Edition*, REWIRE.NEWS (Jan. 31, 2018, 1:27 PM), <https://rewire.news/ablc/2018/01/31/boom-lawyered-immigrant-constitutional-rights-edition> [<https://perma.cc/M945-RFWR>] (asserting that undocumented immigrants have constitutional rights because, for example, the Fourth, Fifth, Sixth, and parts of the Fourteenth Amendment apply to “persons” and are not only reserved for “citizens,” “Americans” or “people we like”).
11. See, e.g., Press Release, U.S. Comm’n on Civil Rights, U.S. Commission on Civil Rights Releases Report on Condition in Immigration Detention Centers and Family Detainees (Sept. 17, 2015), https://www.usccr.gov/press/2015/PR_ReportReleasedCCR_9-17-15.pdf [<https://perma.cc/QN7L-VNNE>] (announcing release of annual report examining the civil rights and due process conditions at immigration detention facilities and finding that “DHS is not respecting the civil rights and due process rights of detainees”).
12. *Unknown Parties*, 2016 U.S. Dist. LEXIS 189767, at *1; *cf.* U.S. CUSTOMS & BORDER PROT., UNITED STATES BORDER PATROL SECTOR PROFILE—FISCAL YEAR 2017, <https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/USBP%20Stats%20FY2017%20sector%20profile.pdf> [<https://perma.cc/8KAH-LD8U>] (showing that U.S. Border Patrol apprehended 310,531 individuals nationwide in Fiscal Year 2017).

agents¹³ and immigration detainees alike use to refer to the holding cells¹⁴ because of their extremely cold temperatures.¹⁵ The unbearably cold temperatures, which can reach as low as 58.8 degrees Fahrenheit,¹⁶ is not the only area of concern. Images of overcrowded, dirty cells where detainees share aluminum blankets and a gallon of water fill the results page of a simple Google search.¹⁷ In addition, detainees testify that CBP has deprived them of food, water, hygienic toiletries, medical care, and the right to seek asylum in the United States.¹⁸ These inhumane

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13. While some sources say that CBP agents refer to the holding cells as *hieleras*, in others, CBP agents deny this. See Molly Redden, *Why Are Immigration Detention Facilities So Cold?*, MOTHER JONES (July 16, 2014, 10:00 AM), <https://www.motherjones.com/politics/2014/07/why-are-immigration-ice-detention-facilities-so-cold> [https://perma.cc/3B9S-VJAA].
 14. Throughout this Comment, I use “CBP short-term holding cells” interchangeably with *hieleras*. *Hieleras*, however, are not the only type of short-term holding cells CBP operates. Migrants call other such cells *perreras*, Spanish for “dog kennel,” because the “cells are separated by chain-link fencing and resemble cages.” MICHAEL GARCIA BOCHENEK, HUMAN RIGHTS WATCH, IN THE FREEZER: ABUSIVE CONDITIONS FOR WOMEN AND CHILDREN IN US IMMIGRATION HOLDING CELLS (2018), <https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells> [https://perma.cc/U2QA-3PJR]. The treatment migrants receive in both *hieleras* and *perreras* is concerning, yet this Comment focuses on *hieleras*, which are often the first facility in which CBP holds migrants after apprehension. Many of the propositions and arguments in this Comment apply to the immigration detention system as a whole.
 15. See Complaint for Declaratory and Injunctive Relief, Unknown Parties v. Johnson, No. 4:15-CV-00250-DCB (D. Ariz. June 8, 2015), 2016 U.S. Dist. LEXIS 189767; AM. IMMIGRATION COUNCIL, FORMER DETAINEES DESCRIBE HORRIFIC CONDITIONS IN CBP DETENTION (2015), https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/doe_v_johnson_former_detainees_describe_horrific_conditions_in_cbp_detention.pdf [https://perma.cc/C9YU-RVWC] (recounting former detainee testimonials describing the extremely cold temperatures inside *hieleras*); AM. FOR IMMIGRANT JUSTICE, *THE “HIELERAS”*: A REPORT ON HUMAN AND CIVIL RIGHTS ABUSES COMMITTED BY U.S. CUSTOMS AND BORDER PROTECTION AGENCY (2013), http://d3n8a8pro7vbm.cloudfront.net/aijustice/pages/391/attachments/original/1398795271/The_Hieleras_A_Report.pdf?1398795271 [https://perma.cc/8RY9-ZH6F] (“The temperature in the cells is so cold that . . . [d]etainees’ fingers and toes turn blue and their lips chap and split due to the cold.”); NO MORE DEATHS, A CULTURE OF CRUELTY: ABUSE AND IMPUNITY IN SHORT-TERM U.S. BORDER PATROL CUSTODY (2011), <http://forms.nomoredeaths.org/wp-content/uploads/2014/10/CultureOfCruelty-full.compressed.pdf> [https://perma.cc/8RMW-PAYA] (noting reports of agents “turning on the air conditioning or placing fans outside the cells after receiving complaints about cold cells”); *AI Justice Tackles Abuse and Injustice on the Texas Border*, *supra* note 1.
 16. Brief for Plaintiffs-Appellants-Cross-Appellees at 8, *Doe v. Kelly*, 878 F.3d 710 (9th Cir. 2017) (No. 17-15381).
 17. For example, see “hieleras cbp” on a Google Image search. *Hieleras CBP*, GOOGLE IMAGES (Mar. 4, 2019), <https://perma.cc/U3HA-DFG8>.
 18. See sources cited *supra* note 15.

conditions reflect the well-documented mistreatment and abuse individuals suffer in Border Patrol custody.¹⁹

These conditions violate CBP's own policies, the Fifth Amendment's Due Process Clause,²⁰ and arguably meet international law's definition of torture.²¹ Further, while detained immigrants are civil, not criminal, detainees, the conditions and immigrants' treatment inside *hieleras* are comparable to conditions and prisoners' treatment in U.S. jails and prisons.²² To the public, civil

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19. Alexa Garcia-Ditta, *Report: Detained Migrants Held in Border 'Iceboxes'*, TEX. OBSERVER (Dec. 17, 2015, 1:38 PM), <https://www.texasobserver.org/hieleras-iceboxes-border-report> [<https://perma.cc/47PC-HW4L>].
 20. See U.S. CONST. amend. V, § 1 (laying out the constitutional right to not "be deprived of life, liberty, or property, without due process of law."); *Doe v. Johnson: Challenge to Deplorable Detention Conditions in U.S. Customs & Border Protection Facilities* (Sept. 2016), NAT'L IMMIGR. L. CTR. (NILC), <https://www.nilc.org/issues/immigration-enforcement/doe-v-johnson-issue-brief> [<https://perma.cc/RP75-B64J>].
 21. NO MORE DEATHS, *supra* note 15, at 5. U.S. law defines torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." 18 U.S.C. § 2340 (2018). The conditions and treatment of immigration detainees arguably fit within this definition. See Complaint for Declaratory and Injunctive Relief, *supra* note 15, at 22–23 (noting that subjecting detainees to punitive and painfully cold temperatures causes physical and psychological harm); KATHLEEN O'CONNOR ET AL., UNITARIAN UNIVERSALIST SERV. COMM., NO SAFE HAVEN HERE: MENTAL HEALTH ASSESSMENT OF WOMEN AND CHILDREN HELD IN U.S. IMMIGRATION DETENTION 8 (2015), http://www.uusc.org/sites/default/files/mental_health_assessment_of_women_and_children_u.s._immigration_detention.pdf [<https://perma.cc/ZE8C-DM6B>] (finding that time in CBP holding cells were "the most difficult and traumatic" detention period for women and children arriving to the United States); Colin Dayan, *On Ice: In U.S. Customs and Border Protection Facilities, The Law's Reach Is Tenuous*, BOS. REV. (Sept. 21, 2016), <http://bostonreview.net/us/colin-dayan-on-ice> [<https://perma.cc/DPB2-NQLT>] (noting that detainees "routinely describe their treatment as 'humiliating,' a form of torture"). For example, detainees testify that Border Patrol agents punitively decrease the cell temperatures after detainees complain of being extremely cold. See, e.g., *id.* ("When they complained about cold, they were mocked and threatened. 'When people asked the guards to make it warmer, they made it colder,' a detainee said. 'Sometimes they laughed at us when we complained about the temperature.'"). If these conditions and practices are not torture in and of themselves, they may be torture if carried out against asylum seekers. Being detained in *hieleras* can cause asylum seekers who have experienced torture in their home countries to "relive their horrid experience of torture, including the profound sense of powerlessness and loss of sense of self, contributing to further psychological damage." ANNIE SOVCIK ET AL., CTR. FOR VICTIMS OF TORTURE, TORTURED & DETAINED: SURVIVOR STORIES OF U.S. IMMIGRATION DETENTION (2013), https://www.cvt.org/sites/default/files/Report_TorturedAndDetained_Nov2013.pdf [<https://perma.cc/GY4C-7YGL>].
 22. Dora Schriro, *Improving Conditions of Confinement for Criminal Inmates and Immigrant Detainees*, 47 AM. CRIM. L. REV. 1441, 1444 (2010) ("[C]ivily detained and criminally incarcerated inmates tend to be seen by the public as comparable, and both confined populations are managed in similar ways."). According to Schriro, criminal detainees fare even better than civil detainees. *Id.* at 1445. ("Both case law and statutes have positively impacted the operation of jails and prisons and, by and large, the conditions of criminal incarceration have improved over time. Still,

and criminal detainees are one and the same, but as a matter of law, they are different.²³ For example, the U.S. Supreme Court in *Youngberg v. Romeo*²⁴ acknowledged the legal difference between civil and criminal detainees and held that civil detainees “are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.”²⁵ Therefore, in order to uphold the due process rights of civil immigration detainees, *hielera* conditions should be better, not similar to or worse, than the conditions afforded to criminal detainees in prisons and jails.

Although immigration scholars have begun to document conditions in ICE²⁶ facilities in the United States,²⁷ to date, academics have scarcely explored conditions

conditions vary appreciably place and in general, criminal inmates fare better than do civil detainees.” (footnote omitted)).

23. Criminal detainees are incarcerated pursuant to “the authority the government has to incarcerate an individual charged with, or convicted of, a criminal offense. . . . [Civil detainees in immigration detention are incarcerated pursuant to] the authority ICE has to detain aliens who may be subject to removal for violations of administrative immigration law.” *Id.* at 1442 n.4 (citation omitted); see also *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (distinguishing between criminal and civil detention for Fifth Amendment purposes); cf. *Padilla v. Kentucky*, 559 U.S. 356 (2010) (standing for the proposition that immigration detention’s criminal and civil divide has eroded).
24. 457 U.S. 307 (1982).
25. *Id.* at 321–22 (citation omitted).
26. ICE and CBP are two DHS components with different functions. While CBP protects the nation’s borders and thus apprehends and detains migrants at or near the border, ICE enforces federal immigration laws in the country’s interior, detaining immigrants and asylum seekers in the United States that have passed through CBP facilities. See *Find an Answer: Difference Between U.S. Customs and Border Protection (CBP), U.S. Citizenship and Immigration Services (USCIS) and U.S. Immigration and Customs Enforcement (ICE)*, U.S. CUSTOMS & BORDER PROTECTION (July 10, 2018, 10:23 AM), https://help.cbp.gov/app/answers/detail/a_id/1040/~/-difference-between-u.s.-customs-and-border-protection-%28cbp%29%2C-u.s.citizenship [<https://perma.cc/B78K-VS35>]; see generally *allegralove1, A Very Complicated Legal Explanation about ICE and Immigrants and Parole*, MEDIUM (June 19, 2017), <https://medium.com/@allegralove1/a-very-complicated-legal-explanation-about-ice-and-immigrants-and-parole-ba9db3fe947a> [<https://perma.cc/A2MM-BN9Q>].
27. Scholarship on immigration detention is far less developed than commentary on prisons and jails, but scholars have begun to explore a range of immigration detention–related concerns such as inadequate confinement conditions; coercion and due process violations; mandatory, prolonged, and indefinite detention; and inadequate access to counsel. See, e.g., *IMMIGRATION DETENTION, RISK AND HUMAN RIGHTS: STUDIES ON IMMIGRATION AND CRIME* (Maria João Guia et al. eds., 2016); *MARY BOSWORTH, INSIDE IMMIGRATION DETENTION* (2014); *CHALLENGING IMMIGRATION DETENTION: ACADEMICS, ACTIVISTS AND POLICY-MAKERS* (Michael J. Flynn & Matthew B. Flynn eds., 2017); *MICHAEL WELCH, DETAINED: IMMIGRATION LAWS AND THE EXPANDING I.N.S. JAIL COMPLEX* (2002); Kristina M. Campbell, *A Dry Hate: White Supremacy and Anti-Immigrant Rhetoric in the Humanitarian Crisis on the U.S.-Mexico Border*, 117 W. VA. L. REV. 1081 (2015); Jennifer M. Chacón, *Immigration Detention: No Turning Back?*, 113 S. ATLANTIC Q. 621 (2014); César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245 (2017); César Cuauhtémoc García Hernández, *Immigration Imprisonment’s Failures*, 36 IMMIGR. & NAT’LITY L. REV. 37 (2015); Anil Kalhan, *Rethinking Immigration Detention*, 110

in CBP short-term holding cells.²⁸ These cells are a crucial point in an immigrant's journey, serving as a precursor to immediate deportation or longer-term ICE detention. Given the alarming number of constitutional concerns,²⁹ this Comment seeks to examine the punitive and *unconstitutional* conditions in CBP holding cells and explore legal and policy challenges to holding cell practices.

Despite minimal academic exploration, the media has focused mass attention on *hielera* conditions,³⁰ as a consortium of legal groups have filed administrative

COLUM. L. REV. SIDEBAR 42 (2010); Juliet P. Stumpf, *Civil Detention and Other Oxymorons*, 40 QUEEN'S L.J. 55 (2014).

28. At the time of this writing, only one law review article addresses confinement conditions in *hieleras*; and it does so through a feminist theory lens. See Sara Riva, *Across the Border and Into the Cold: Hieleras and the Punishment of Asylum-Seeking Central American Women in the United States*, 21 CITIZENSHIP STUD. 309 (2017). In her article, Riva proposes a feminist reading of asylum detention, arguing that *hieleras* are sites of punishment in which the state deploys punitive practices against female asylum seekers as a deterrence mechanism. *Id.* This Comment draws on Riva's work, but is the first to explore legal and policy reforms.
29. In addition to the due process violations discussed in this Comment, CBP agents are accused of forcing some detainees to relinquish their rights to seek asylum or other forms of relief. See Alvaro Peralta, *Bordering Persecution: Why Asylum Seekers Should Not Be Subject to Expedited Removal*, 64 AM. U. L. REV. 1303 (2015); Ryan Devereaux, *U.S. Illegally Denying Immigrants Their Right to Seek Asylum at the Mexican Border, According to Lawsuit*, INTERCEPT (Nov. 16, 2017, 11:38 AM), <https://theintercept.com/2017/11/16/immigration-asylum-seekers-denied-border-entry-lawsuit> [<https://perma.cc/8KEP-2NG6>] (noting that CBP officers in *hieleras* were denying detainees their rights to seek asylum, "singing the national anthem and taunting them . . . and telling them that they're going to be deported back to their country and to tell their family not to come"); see also Complaint for Declaratory and Injunctive Relief, *Al Otro Lado v. Kelly* at 1, No. 2:17-cv-05111 (C.D. Cal. July 12, 2017), ECF No. 1, <https://ccrjustice.org/sites/default/files/attach/2017/07/AOL%20Complaint%207.12.2017.pdf> [<https://perma.cc/HD6F-7BC2>] (suing CBP for turning away asylum seekers at ports of entry along the U.S.-Mexico border); Riva, *supra* note 28, at 317–18; Margaret H. Taylor, *Symbolic Detention*, 20 DEF. ALIEN 153, 155 (1997), ("Prolonged incarceration under harsh conditions also operated to dissuade detainees from pursuing their asylum claims."); HUMAN RIGHTS WATCH, "YOU DON'T HAVE RIGHTS HERE": US BORDER SCREENING AND RETURNS OF CENTRAL AMERICANS TO RISK OF SERIOUS HARM (2014), <https://www.hrw.org/report/2014/10/16/you-dont-have-rights-here/us-border-screening-and-returns-central-americans-risk> [<https://perma.cc/L6VR-CBPX>] (noting that despite CBP's duty to screen migrants for asylum, many migrants testify that CBP agents ignored their expressions of fear or forced them to abandon their claims); B. Shaw Drake, *Immigration Detention: Worse Than Death?*, HUFFINGTON POST (May 24, 2017, 12:16 AM), https://www.huffingtonpost.com/entry/immigration-detention-worse-than-death_us_59250720e4b0dfb1ca3a0fa3 [<https://perma.cc/8HUB-EB22>] (stating that some CBP officials are "systematically turn[ing] away asylum seekers from U.S. ports of entry").
30. See, e.g., Rachael Bale, *Detained Border Crossers May Find Themselves Sent to 'The Freezers'*, REVEAL NEWS (Nov. 18, 2013), <https://www.revealnews.org/article/detained-border-crossers-may-find-themselves-sent-to-the-freezers> [<https://perma.cc/WQ2G-4LNR>]; Daniel Gonzalez, *Expert: Border Patrol 'Housing People in Conditions That Are . . . Harsh, Dangerous'*, AZCENTRAL (Aug. 26, 2016, 11:29 AM), <https://www.azcentral.com/story/news/politics/border-issues/2016/08/18/first-look-inside-border-patrols-crowded-dirty-holding-cells/88926270> [<https://perma.cc/8GV7-SEE9>]; Ed Pilkington, *Freezing Cells and Sleep Deprivation: The Brutal Conditions Migrants Still Face After Capture*, GUARDIAN (Dec. 12, 2014, 12:44 PM),

complaints³¹ and lawsuits³² on immigration detainees' behalf, and U.S. Congressmembers have introduced legislation addressing the widespread abuse, punitive conditions, and unconstitutional practices to which CBP specifically, and the Department of Homeland Security (DHS) more generally, subjects immigrants.³³ The inhumane and punitive conditions inside CBP short-term holding cells continue to this day.³⁴ All of the *hieleras*-related bills in Congress

<https://www.theguardian.com/us-news/2014/dec/12/migrants-face-brutal-conditions-after-capture-sleep-deprivation> [<https://perma.cc/3MHY-ZWB9>].

31. These administrative complaints, filed with DHS's Office of the Inspector General (OIG) and Office for Civil Rights and Civil Liberties (CRCL), however, have been largely unsuccessful in improving detention conditions. See, e.g., Letter from Ashley Huebner, Nat'l Immigrant Justice Ctr., Erika Pinheiro, Esperanza Immigrant Rights Project, Joe Anderson, Am. for Immigrant Justice, Lauren Sasse, Florence Immigrant Rights & Refugee Project, and James Lyall, ACLU Border Litig. Project to Megan H. Mack, Officer for Civil Rights & Civil Liberties, Dep't of Homeland Sec. and John Roth, Inspector Gen., Dep't of Homeland Sec. at 7 (June 11, 2014), <https://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf> [<https://perma.cc/6MG9-J29U>] ("For example, from 2009 to 2011, No More Deaths and partner organizations filed 75 CRCL complaints regarding CBP abuses, but did not receive a response from the agency in a single case. This is consistent with the American Immigration Council's (AIC) recent findings that 97 percent of the 809 abuse complaints filed against Border Patrol agents between January 2009 and January 2012 resulted in the classification 'no action taken.'" (footnotes omitted)); Letter from Blanca Navarrete, Programa de Defensa e Incidencia Binacional (PDIB), Trina Realmuto, Nat'l Immigration Project of the Nat'l Lawyers Guild, and Vicki B. Gaubeca, Am. Civil Liberties Union of N.M. to John Roth, Inspector Gen., U.S. Dep't of Homeland Sec., and Megan Mack, Officer for Civil Rights & Civil Liberties, U.S. Dep't of Homeland Sec. (Feb. 2, 2016) (copy on file with author) (noting the public outcry about extreme temperatures and that CBP continues to disregard the requirement that short-term detention facility temperatures be kept at a "reasonable and comfortable range").
32. See *Flores v. Johnson*, 212 F. Supp. 3d 864, 880–82 (C.D. Cal. 2015), *aff'd in part, rev'd in part sub nom. Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016) (finding DHS in violation of the 1997 Flores Settlement Agreement—which sets standards for holding children in unlicensed and unsecured detention facilities—and seeking to enforce it); Complaint for Declaratory and Injunctive Relief, Unknown Parties v. Johnson, 163 F. Supp. 3d 630 (D. Ariz. 2016) (No. 4:15-CV-00250-DCB); Complaint, Quiñonez Flores v. United States, 108 F. Supp. 3d 126 (E.D.N.Y. 2015) (No. 14-CV-03166).
33. See S. 2849, 115th Cong. (2018) (proposing a moratorium on the expansion of immigration detention facilities and increased detention facility oversight, including "unannounced annual inspections" and "investigations of civil rights and civil liberties complaints"); S. 349, 115th Cong. (2017) (requiring that CBP and ICE detention be for the "briefest term and the least restrictive conditions practicable," and mandating "access to food, water, and rest room facilities") (identical bill introduced in the U.S. House of Representatives as H.R. 1006); Protect Family Values at the Border Act, H.R. 3130, 113th Cong. (2013) (directing DHS to promulgate regulations establishing short-term custody standards providing for basic minimums of care at all CBP facilities and providing training to CBP agents regarding safety and family concerns, such as preserving a child's best interest and family unity); Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013) (as passed by U.S. Senate, June 27, 2013) (limiting the number of people held in a cell and requiring access to food and potable water, bathroom facilities, hygiene items, medical care, and adequate climate control).
34. See, e.g., BOCHENEK, *supra* note 14; *infra* Part II.

remain inactive.³⁵ DHS has failed to respond to administrative complaints and merely records them in a database while failing to take any responsive action.³⁶

This Comment argues that *hielera* conditions must change. Part I provides an overview of immigration detention's civil nature and *hielera* conditions, focusing on how these conditions violate CBP's own internal policies and procedures. Part II discusses *Doe v. Kelly*,³⁷ current litigation against DHS, and CBP's Tucson Sector³⁸ to reveal how advocates are striving to improve *hielera* conditions and show that CBP's practices are punitive and unconstitutional. Finally, in Part III, I propose two policy solutions to complement the litigation strategy pursued in *Doe v. Kelly*. First, Congress should pass a federal law establishing confinement standards for CBP short-term holding cells, as they have done for federal prisons. This will add legitimacy to the immigration detention system and allow detainees to challenge CBP misconduct in a court of law. Second, Congress should create an independent oversight institution to monitor CBP short-term holding cells, which will ensure CBP abides by its own internal guidelines and upholds immigration detainees' constitutional rights.

35. See *supra* note 33.

36. See, e.g., Email from the Office for Civil Rights & Civil Liberties, U.S. Dep't of Homeland Sec. to Blanca Navarrete, Programa de Defensa e Incidencia Binacional (PDIB), Trina Realmuto, Nat'l Immigration Project of the Nat'l Lawyers Guild, and Vicki B. Gaubeca, Am. Civil Liberties Union of N.M. (March 18, 2016) (copy on file with author) ("CRCL will take no further action on your information at this time."); see also *Neglect & Abuse of Unaccompanied Children by U.S. Customs and Border Protection*, ACLU SAN DIEGO (May 23, 2018), <https://www.aclu-sandiego.org/civil-rights-civil-liberties> [https://perma.cc/4CPJ-XSTX] ("In response to [a] FOIA request, CRCL released approximately 4600 pages of records, consisting of complaints submitted by legal service providers and immigrants' rights advocates on behalf of migrant children detailing various forms of abuse. The CRCL records also consist of internal agency records documenting the limited investigations it undertook."). To review the full set of CRCL records discussed in the report, see the appendix to the report. INT'L HUMAN RIGHTS CLINIC & ACLU BORDER LITIG. PROJECT, *NEGLECT & ABUSE OF UNACCOMPANIED CHILDREN BY U.S. CUSTOMS AND BORDER PROTECTION* app. (2018), https://www.dropbox.com/s/vsf7io4tb1tawsp/2018%2005%2022%20APPENDIX_MERGED%20Final.pdf?dl=0 [https://perma.cc/MS6Q-LLPX].

37. 878 F.3d 710 (9th Cir. 2017).

38. The lawsuit's name changed on appeal. In the district court, the case cite is *Unknown Parties v. Johnson*, No. CV-15-00250-TUC-DCB, 2016 U.S. Dist. LEXIS 189767 (D. Ariz. Nov. 18 2016). On appeal, the case cite is *Doe v. Kelly*, 878 F.3d 710 (9th Cir. 2017).

I. HIELERA CONDITIONS

A. Overview of Immigration Detention's Civil Nature

Immigration detention is a civil system, not a criminal one.³⁹ The U.S. Supreme Court articulated this distinction in the 1896 case *Wong Wing v. United States*.⁴⁰ In *Wong Wing*, the Court held that immigration detention was not imprisonment, and thus, civil immigration detainees were not entitled to procedural protections given to criminal defendants under the U.S. Constitution,⁴¹ such as protection against lengthy pretrial detention and the right to counsel at government expense.

Despite the legal distinction, in practice “immigration detention is the mirror image of criminal detention.”⁴² According to the American Bar Association, “[m]ost persons in DHS custody—both those held by [ICE] and the shorter-term detainees held by [CBP]—are housed in jails and jail-like facilities, which are mostly administered according to American Correctional Association (ACA)-based standards that apply to persons awaiting criminal trials.”⁴³ In this way, DHS confines civil immigration detainees to facilities that “operate true to their original design. Their layout, construction, staffing plans, and population-management strategies are largely based [on] traditional correctional principles of command and control.”⁴⁴ Further, although DHS has attempted to transform its detention model

39. See AM. BAR ASS'N, ABA CIVIL IMMIGRATION DETENTION STANDARDS 1 (2014); Chacón, *supra* note 27, at 622; César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, at 1351–55 (2014); Kalhan, *supra* note 27, at 44; Stumpf, *supra* note 27, at 57.

40. 163 U.S. 228 (1896).

41. *Id.* at 235; see Chacón, *supra* note 27, at 622 (noting that a criminal detainee, whether a citizen or not, would have protections that an individual placed in immigration detention would not, such as protections against lengthy pretrial detentions and right to counsel at the government's expense). *But see* Hindpal Singh Bhui, *Inspecting Immigration Detention: Her Majesty's Inspectorate of Prisons*, in CHALLENGING IMMIGRATION DETENTION: ACADEMICS, ACTIVISTS AND POLICY-MAKERS, *supra* note 27, at 82, 87 (“Given that in prisons the act of containment is in itself the punishment, it is also not hard to see why detainees see their detention as a punishment, despite this not being an officially stated purpose of administrative immigration detention.” (citation omitted)).

42. Stumpf, *supra* note 27, at 58 (characterizing civil immigration detention as an “oxymoron” because of its “close[] connection with criminal and national security law” and noting that the criminal and immigration detention systems are not so different).

43. AM. BAR ASS'N, *supra* note 39, at 1 (noting that DHS manages the immigration detention system under a criminal detention model); see Chacón, *supra* note 27, at 623 (noting that DHS standards for detention are modeled after those created for prisons and jails).

44. Schriro, *supra* note 22, at 1442.

into one that reflects its civil nature, it has failed because the current detention conditions remain comparable to criminal incarceration conditions.⁴⁵

Contrary to the claim that immigration detention “is simply a holding mechanism used to allow the government to effectuate its civil immigration enforcement goals,”⁴⁶ the government has historically used immigration detention punitively, aiming to deter migration and punish those who have crossed the border.⁴⁷ Jennifer Chacón writes:

The glaring problem with the legal doctrine that constructs immigration detention as nonpunitive is that it is a fiction. Detention is punitive, and it is experienced as such by immigrants. Immigrants in detention feel the punitive force of separation from families, inadequate conditions of detention, demeaning treatment, and lack of easy access to medical services.⁴⁸

For example, DHS detained a woman named Claudia in an *hielera*. Claudia had crossed the U.S.-Mexico border fleeing vicious gang violence in El Salvador. In recounting her experience, she stated that the CBP agents “make you feel like you’re worthless” and “like you’ve committed a horrible crime.”⁴⁹ Adonys, a fifteen-year-old asylum seeker from Honduras, also testified: “I bent over to untie my shoelaces [because I was told to remove my shoelaces, belt, and all layers of clothing except for a T-shirt], and I felt an agent pouring cold water on me. . . . He was laughing.”⁵⁰ After this humiliating act, Adonys suffered in an unbearably cold cell with his wet shirt.⁵¹ These testimonies are not the isolated experiences of a few immigrants, but rather, they reflect the experiences of many immigrants who are punished for crossing the border.⁵²

45. See Dora Schriro, *Women and Children First: An Inside Look at the Challenges to Reforming Family Detention in the United States*, in CHALLENGING IMMIGRATION DETENTION: ACADEMICS, ACTIVISTS AND POLICY-MAKERS, *supra* note 27, at 28, 33 (“Despite DHS’s best intentions in 2009 to make civil detention more civil for families and other detainees in its custody, ICE failed to take many meaningful steps to that end.”); see also Nina Bernstein, *Waging Accountability: Why Investigative Journalism Is Both Necessary and Insufficient to Transforming Immigration Detention*, in CHALLENGING IMMIGRATION DETENTION: ACADEMICS, ACTIVISTS AND POLICY-MAKERS, *supra* 27, at 11, 20–22 (discussing a 2009 report authored by Dora Schriro, then special advisor to ICE, whereby Schriro underscored “that by law the authority of ICE to hold people is purely administrative, not criminal, not punitive. Yet the system itself was (and remains) almost entirely penal.”).

46. Chacón, *supra* note 27, at 623.

47. *See id.*

48. *Id.*

49. Bale, *supra* note 30.

50. *Id.*

51. *Id.*

52. For more testimonials of former immigration detainees’ experiences in *hieleras*, see NO MORE DEATHS, *supra* note 15 and NO MORE DEATHS, CROSSING THE LINE: HUMAN RIGHTS ABUSES OF

The U.S. government has used detention conditions as part of an overall plan to punish and deter migration to the United States. For example, in June 2014, the Obama administration “announced that it would pursue widescale detention of mothers and children to deter other families from seeking asylum in the United States.”⁵³ Advocates brought a class action lawsuit to challenge this practice aimed solely at deterring future migrants, particularly asylum seekers. In February 2015, a federal district court held this practice to be an impermissible use of detention.⁵⁴ These recent examples show that detention conditions and practices are—sometimes blatantly—being used to punish migrants for crossing the border and deter future crossings.

Immigration detention conditions and practices are also part of a larger symbolic message to restore credibility to the immigration enforcement system. Margaret Taylor notes:

When policymakers use [the] phrase [“restore credibility to the immigration enforcement system”], they are usually talking about a targeted detention effort intended to send a message—either to the persons who are incarcerated or to others who are not yet ‘in the system.’ Sometimes the intended audience is broader still. Detaining aliens is a very visible way to convince the general public that something is being done about a particular problem. This use of detention to send a message, in the hopes of deterring certain conduct or building confidence in INS⁵⁵ enforcement efforts, is the symbolic component of immigration detention.⁵⁶

Mary Bosworth, a criminologist at the University of Oxford, notes, “[t]here is this very public display and investment in making these places of confinement look like they’re holding dangerous people” to legitimize the inhumane treatment of immigration detainees and heighten public anxieties and demands for the

MIGRANTS IN SHORT-TERM CUSTODY ON THE ARIZONA/SONORA BORDER 27–49 (2008) (report documenting the human rights abuses suffered by migrants while in CBP custody).

53. Schriro, *supra* note 45, at 37–38 (noting that “ICE denied release to nearly all detained families” from June 2014 to February 2015, even those who had received a favorable decision in their asylum screening interview). *See, e.g.,* R.I.L.-R v. Johnson, 80 F. Supp. 3d 164, 172 (D.D.C. 2015).

54. R.I.L.-R, 80 F. Supp. 3d at 191.

55. INS, or the Immigration and Naturalization Service, was a Department of Justice agency that handled all of the United States’s immigration and naturalization issues. In 2003, the INS dissolved, and the government transferred its functions into three new agencies within the newly formed DHS: ICE, CBP, and the U.S. Citizenship and Immigration Service (USCIS). *See Did You Know?: The INS No Longer Exists*, U.S. CITIZENSHIP & IMMIGR. SERV.: THE BEACON (Apr. 13, 2011), <https://www.uscis.gov/archive/blog/2011/04/did-you-know-ins-no-longer-exists> [<https://perma.cc/C2CT-SN4W>].

56. Taylor, *supra* note 29, at 154–55.

government to only get tougher.⁵⁷ In reality, many detainees are nonviolent and include “women and children, asylum seekers, and long-time legal residents.”⁵⁸

Hand in hand with the punitive immigration detention conditions is the growing anti-immigrant sentiment in the United States that is easily seen in political rhetoric,⁵⁹ the characterization of “immigration law as a weapon in the ‘war on terror,’”⁶⁰ and the view that immigrants arriving at the U.S.–Mexico border are a threat to national security.⁶¹ Recognizing this discourse’s pervasiveness helps contextualize current detention practices because, in this context, such talk makes it easier for many to view constitutional violations and human rights abuses as unproblematic despite immigration detention’s civil, and allegedly nonpunitive, nature.

B. *Hieleras* and Their Abhorrent Conditions

Every year CBP apprehends thousands of immigrants and confines them in *hieleras*.⁶² *Hieleras* are often the first immigration detention facility in which migrants are held, and they are designed to process migrants.⁶³ Processing detained

57. Bernstein, *supra* note 45, at 20.

58. *Id.* at 22.

59. President Trump’s rhetoric, such as describing Mexican immigrants as criminals and MS-13 gang members as “animals,” and noting that “illegal immigrants,” like MS-13 gang members, “infest” the country, shows that immigrants are not wanted by the United States’s highest officials. See Brian Resnick, *Donald Trump and the Disturbing Power of Dehumanizing Language*, VOX (Aug. 14, 2018, 11:24 AM), <https://www.vox.com/science-and-health/2018/5/17/17364562/trump-dog-omarosa-dehumanization-psychology> [<https://perma.cc/B9BT-KAAL>] (asserting that President Trump consistently uses “demeaning and dehumanizing language, especially when he’s talking about refugees [and] immigrants”). President Trump’s actions also show that the administration is willing to overlook CBP abuses and constitutional violations against immigrants. See Dialectic: Law and Disorder, Part I: The Pardon of Joe Arpaio with Professor Hiroshi Motomura, UCLA L. REV. (Oct. 22, 2017), <https://www.uclalawreview.org/law-disorder-part-pardon-joe-arpaio-professor-hiroshi-motomura> [<https://perma.cc/B3CH-LJTF>] (noting that President Trump’s controversial pardon of Joe Arpaio, former Maricopa County sheriff, for criminal contempt in Arizona against immigrants, “attempt[s] to send a message that it is okay to engage in constitutional violations and that criminal penalties won’t be used . . . [to ensure] that constitutional violations are not allowed.”).

60. Bernstein, *supra* note 45, at 16.

61. See Schriro, *supra* note 45, at 28 (noting that the Obama administration characterized the surge of women and children arriving at the U.S.–Mexico border in 2014 as a humanitarian situation that was a national security threat); see also Chacón, *supra* note 27, at 624 (“Unsurprisingly, the ballooning of immigration detention in the United States went hand in hand with the rise of toxic rhetoric on migrant criminality and dangerousness.”).

62. See *supra* note 15 and accompanying text.

63. U.S. CUSTOMS & BORDER PROT., NATIONAL STANDARDS ON TRANSPORT, ESCORT, DETENTION, AND SEARCH § 8.0, at 31 (2015), <https://www.cbp.gov/sites/default/files/assets/documents/2017-Sep/CBP%20TEDS%20Policy%20Oct2015.pdf> [<https://perma.cc/8NYA-7EZV>] (defining short

individuals includes determining their identity, immigration status, and criminal history.⁶⁴ Absent any significant criminal or immigration history, processing should take about two to two and one-half hours. Yet, it often takes days.⁶⁵ After processing, the government “repatriate[s], transfer[s] [to] another agency, refer[s] for prosecution in accordance with the law or, in rare circumstances, release[s]” the detained individual.⁶⁶

The conditions in *hieleras* are harsh, inhumane, and punitive. Notwithstanding CBP national guidelines that lay out holding cell policies and procedures, which include providing “safe, secure, and clean” facilities, “snacks and juice every four hours,” “a meal if detained more than 8 hours,” potable water, and toiletries, to name a few,⁶⁷ CBP agents do not adhere to these policies and have been accused of abusing their power. One lawsuit documents this abuse:

They have been packed into overcrowded and filthy holding cells with the lights glaring day and night; stripped of outer layers of clothing and forced to suffer in brutally cold temperatures; deprived of beds, bedding, and sleep; denied adequate food, water, and medical care, and basic sanitation and hygiene items such as soap, sufficient toilet paper, sanitary napkins, diapers, and showers; and held incommunicado in these conditions for days.⁶⁸

These accusations reveal what immigrants’ rights advocates have been trying to expose for years.⁶⁹ Former CBP Commissioner R. Gil Kerlikowske, who had direct authority over all CBP policies, procedures, and practices relating to CBP facilities, publicly admitted that conditions in CBP short-term holding cells are inadequate. A complaint was filed on behalf of 116 unaccompanied children who were subjected to abusive treatment in Border Patrol Custody, including being left

term detention as “[t]he temporary detention of a person at a CBP facility for the least amount of time necessary to complete processing, transfer, and/or repatriation”).

64. *Doe v. Kelly*, 878 F.3d 710, 713 (9th Cir. 2017).

65. *Id.* at 715.

66. *Id.*

67. Memorandum from David V. Aguilar, Chief, U.S. Customs & Border Prot., to all Chief Patrol Agents §§ 5.1, 6.8–6.10 (Jan. 31, 2008), <https://assets.documentcloud.org/documents/818095/bp-policy-on-hold-rooms-and-short-term-custody.pdf> [<https://perma.cc/Q23Q-SL7V>]; see also U.S. CUSTOMS & BORDER PROT., CBP SECURITY POLICY & PROCEDURES HANDBOOK, HB1400–02B, 492 (2009), <https://info.publicintelligence.net/CBP-SecurityHandbook.pdf> [<https://perma.cc/JN28-F6EU>]; U.S. CUSTOMS & BORDER PROT., *supra* note 63, §§ 4.13–4.15.

68. Complaint for Declaratory and Injunctive Relief, *supra* note 15, at 1.

69. Compare NO MORE DEATHS, *supra* note 15, at 5, 9, with GUILLERMO CANTOR, AM. IMMIGRATION COUNCIL, *HIELERAS (ICEBOXES) IN THE RIO GRANDE VALLEY SECTOR: LENGTHY DETENTION, DEPLORABLE CONDITIONS AND ABUSE IN CBP HOLDING CELLS* 2, 4, 19 (2015) (conducting independent qualitative and quantitative research over different time periods, finding similarly inhumane *hielera* conditions).

in uncomfortable housing with the lights on all night and being denied medical care. In a press interview regarding the complaint, Kerlikowske stated that the accusations about the facilities were “absolutely spot-on.”⁷⁰ Yet, no substantive improvements have occurred.

The most problematic conditions in CBP short-term holding cells fit into four areas: (1) CBP detains immigrants for a prolonged period of time, past the number of hours its internal guidelines permit; (2) detainees are unable to sleep in the holding cells due to glaring lights, lack of beds or mats, extremely cold temperatures, and overcrowding; (3) CBP deprives detainees of adequate food, water, hygienic provisions, and sanitary conditions; and (4) CBP does not provide adequate medical screening and care to detainees. Each of these conditions violate CBP’s internal guidelines and the Constitution.⁷¹

1. Prolonged Detention

Detainee processing, “if uninterrupted, absent any remarkable criminal or immigration history, takes between two and two and one-half hours.”⁷² A U.S. Border Patrol Policy memorandum addressing detention standards on January 31, 2008 states that detainees should not be held longer than twelve hours; yet, CBP does not adhere to this timeline.⁷³ CBP detains immigrants for prolonged periods, sometimes even days.⁷⁴ Discovery in *Doe v. Kelly*⁷⁵ revealed that between “June 10, 2015, and September 28, 2015, only about 3000 of approximately 17,000 detainees were processed out of detention within 12 hours. About 8644 detainees were held

70. Steve Inskeep, *Transcript: Commissioner Kerlikowske’s Full Interview*, NPR (July 18, 2014, 5:02 AM), <http://www.npr.org/2014/07/18/332286063/transcript-commissionerkerlikowskes-full-interview> [<https://perma.cc/4CC3-67CA>].

71. I gathered the conditions of confinement discussed in this Comment from various sources including reports from human rights and immigrants’ rights organizations that have interviewed former immigration detainees or obtained government data and documents through Freedom of Information Act requests, as well as pleadings, discovery, and court orders in the *Doe v. Kelly* litigation featured in Part II. See, e.g., sources cited *supra* note 15.

72. *Doe v. Kelly*, 878 F.3d 710, 715 (9th Cir. 2017).

73. Memorandum from David V. Aguilar, *supra* note 67, § 6.2.1.

74. *Border Patrol Continues to Abuse Immigrant Women*, AM. FOR IMMIGRANT JUST. (May 29, 2013), http://www.aijustice.org/border_patrol_continues_to_abuse_immigrant_women [<https://perma.cc/Y7TW-GVFH>] (asserting several women were held “in the *hieleras* for as long as 13 days”); see also AM. IMMIGR. COUNCIL, WAY TOO LONG: PROLONGED DETENTION IN ARIZONA’S BORDER PATROL HOLDING CELLS, GOVERNMENT RECORDS SHOW 2-3 (2015), https://www.americanimmigrationcouncil.org/sites/default/files/research/way_too_long_prolonged_detention_in_arizonas_border_patrol_holding_cells.pdf [<https://perma.cc/27QY-YDAH>] (noting that the average detention time for the 72,198 detained individuals in the Tucson Sector from January 1, 2013 through June 30, 2013 was “49.9 hours, with a median time of 39.4 hours”); NAT’L IMMIGR. L. CTR., *supra* note 20.

75. 878 F.3d 710 (9th Cir. 2017).

at a Border Patrol station up to 23 hours; 6807 were held for up to 47 hours; 1207 were held up to 71 hours; and 476 were held for 72 hours or more.⁷⁶ In October 2015, a few months after the *Doe v. Kelly* litigation began, CBP released its new National Standards on Transport, Escort, Detention, and Search (TEDS standards), which established that “detainees should generally not be held for longer than 72 hours in CBP hold rooms or holding facilities.”⁷⁷ Augmenting the number of hours that CBP agents are allowed to detain immigrants has not eradicated prolonged detention, but rather, has institutionalized it.⁷⁸

Prolonged detention in *hieleras* is especially problematic because these holding cells were not designed for prolonged stays.⁷⁹ In a February 20, 2017 memorandum, former Secretary of Homeland Security John Kelly stated that “CBP and ICE should also explore options for joint temporary structures that meet appropriate standards for detention given the length of stay in those facilities.”⁸⁰ These words acknowledge that despite the legal authority to detain immigrants for seventy-two hours, the conditions inside the cells need to improve given immigration detainees’ prolonged detention.

2. Sleep Deprivation

Besides detaining immigrants for lengthy periods, CBP holding cells inhibit sleep. These cells are generally small rooms with concrete floors and benches, no beds or mattresses, and glaring lights on twenty-four hours a day.⁸¹ CBP officials strip all detainees to one layer of clothing, set the thermostat at unreasonably low temperatures,⁸² and only give detainees a thin aluminum-like sheet called a Mylar

76. *Id.* at 715.

77. U.S. CUSTOMS & BORDER PROT., *supra* note 63, § 4.1; *see also* Memorandum from John Kelly, Sec’y of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Prot. et al., Implementing the President’s Border Security and Immigration Enforcement Improvements Policies 9 (Feb. 20, 2017) (noting short-term detention was defined as seventy-two hours or less under 6 U.S.C. § 211(m) (2018)).

78. CANTOR, *supra* note 69, at 3.

79. Riva, *supra* note 28, at 310.

80. Memorandum from John Kelly, *supra* note 77, at 9.

81. Brief for Plaintiffs-Appellants-Cross-Appellees, *supra* note 16, at 7.

82. *Id.* at 8.

blanket.⁸³ These conditions have caused medical problems like pneumonia⁸⁴ because “the Mylar blankets do not provide insulation from the cold concrete [floor and benches], but merely prevent evaporation and retain 80% of body heat when wrapped around a person.”⁸⁵

Additionally, despite CBP policies specifying holding cell size and maximum occupancy, CBP regularly permits “the number of detainees in holding cells to exceed the specified capacity, resulting in severe overcrowding and often making it impossible for all detainees in the holding cell to sit or lie down.”⁸⁶ CBP does not lack adequate space to hold detainees. Rather, Figure 1 and Figure 2, below, show that CBP unnecessarily subjects detainees to overcrowded cells.

FIGURE 1: Immigration detainees sleeping on the concrete floor and benches with Mylar blankets.⁸⁷



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83. See BOCHENEK, *supra* note 14, at 16 (describing Mylar blankets as “thin blankets similar to the foil wrappers used by marathon runners, which . . . [are] a material akin to plastic, aluminum, or nylon” (footnote omitted)); see generally Daniel Gross, *What Are Those Foil Wrappers at the Marathon?*, SLATE (Nov. 6, 2006, 4:03 PM), http://www.slate.com/articles/news_and_politics/explainer/2006/11/what_are_those_foil_wrappers_at_the_marathon.html [<https://perma.cc/R9G7-RCUV>].
84. Bale, *supra* note 30 (“Interviews and court records show many immigrants have been held for days in rooms kept at temperatures so low that they develop pneumonia and other illnesses.”).
85. *Doe v. Kelly*, 878 F.3d 710, 716 (9th Cir. 2017).
86. Complaint for Declaratory and Injunctive Relief, *supra* note 15, at 18.
87. *Unconstitutional Conditions in Border Patrol Facilities*, NAT’L IMMIGR. L. CTR., <https://www.nilc.org/issues/immigration-enforcement/hieleras> [<https://perma.cc/W7NL-3T2M>].

FIGURE 2: Two crowded cells with immigration detainees wrapped in Mylar blankets. The other cells are nearly empty. CBP did not provide mats despite there being unused mats in empty cells.⁸⁸



The figures, unsealed during discovery in *Doe v. Kelly*,⁸⁹ reveal that CBP packed detainees in a few rooms despite having empty holding cells available. Furthermore, although there were available mats in other rooms, CBP forced detainees to sleep on the floor, crushed from all sides by other detainees. These images are not the only instance of *hielera* overcrowding. For example, from fall 2008 to spring 2011, the advocacy group No More Deaths documented 4130 interviews from 12,895 individuals who were in CBP custody in the Arizona-Sonora region.⁹⁰ “The most commonly reported form[] of inhumane processing center condition[] [was] overcrowding,” receiving 5763 reports, followed by unsanitary conditions, extreme cold, and extreme heat.⁹¹ In addition, a 2018 Human Rights Watch report documents testimonies of women who said “they nearly touched the other occupants of the cells when they slept” and they “were one

88. *Id.*

89. 878 F.3d 710 (9th Cir. 2017).

90. NO MORE DEATHS, *supra* note 15, at 5.

91. *Id.*

on top of another.”⁹² Overcrowding is simply a part of the institutional culture of *hielera* detention.

3. Food, Water, and Hygiene Deprivation

According to a 2008 Memorandum, CBP policy requires that all detainees “be held in facilities that are safe, secure, and clean. Detainees [must] be provided food, water, properly equipped restrooms and hygiene supplies”⁹³ Unfortunately, this is not the reality for detainees confined in these holding cells.

With regards to food, the 2008 Memorandum states that detainees “will be provided snacks and juice every four hours” and “a meal” if their detention is anticipated to exceed eight hours.⁹⁴ Nevertheless, in previous reports,⁹⁵ and in the *Doe v. Kelly* complaint, detainees reported extreme hunger⁹⁶ or weakness while being detained because CBP agents did not provide them with a meal, or they only received “peanut butter crackers or cookies and juice, or small—often cold—bean burritos and nothing else.”⁹⁷ According to the complaint in *Doe v. Kelly*, CBP provided food that was expired or of “such poor quality that detainees [were] unable to eat it, or report[ed] feelings of nausea and stomach pain after trying to eat it.”⁹⁸ Difficulties eating and adverse reactions to food also occur because detainees eat in filthy, overcrowded, and foul-smelling cells, sometimes while sitting next to a toilet.⁹⁹ Many detainees have traveled through the desert for days and are hungry and dehydrated when CBP apprehends them,¹⁰⁰ thus, the lack of adequate food is problematic and especially detrimental to those at risk—children, adolescents, pregnant women, and the elderly.¹⁰¹

92. BOCHENEK, *supra* note 14, at 19.

93. Memorandum from David V. Aguilar, *supra* note 67, § 5.1.

94. *Id.* § 6.8.

95. See CANTOR, *supra* note 69; NO MORE DEATHS, *supra* note 15, at 19–20; NO MORE DEATHS, *supra* note 52, at 13, 29–32.

96. Complaint for Declaratory and Injunctive Relief, *supra* note 15, at 9 (“Plaintiff Jane Doe #2 has sporadically received burritos, cookies, and juice and has been hungry as a result.”).

97. *Id.* at 29.

98. *Id.*

99. *Id.* at 12 (explaining that detainees eating next to a toilet is a reasonable inference because toilets are inside the cells, and the cells are overcrowded).

100. See, e.g., Complaint, Quiñonez Flores v. United States, *supra* note 32, at 4 (“At the time she was taken into CBP custody, Ms. Quiñonez Flores had not eaten for two days.”).

101. Complaint for Declaratory and Injunctive Relief, *supra* note 15, at 30 (“In practice, [CBP and Border Patrol agents] do not provide regular hot meals, or any meals, to juveniles or young children; rather, children and adolescents receive the same cold snacks as other detainees on the same irregular and unreliable schedule.”).

Contrary to its own policy, CBP also deprives detainees of potable water.¹⁰² Former detainees have testified to drinking bad-tasting water from the sink above a toilet because CBP did not provide drinking water or cups.¹⁰³ Other times, as displayed in Figure 3, the water is given to detainees in a shared jug. Without cups, detainees must drink from the jug and, as a result, increase their susceptibility to germs and sickness.

FIGURE 3: Immigration detainee drinking water directly from a jug shared with many detainees.¹⁰⁴



CBP is also supposed to provide safe, secure, and clean cells, hygiene supplies, and properly equipped restrooms.¹⁰⁵ In reality, however, detainees must endure filthy cells, which CBP does not clean, as displayed in Figure 4. Neither do they receive basic hygiene supplies. CBP does not provide detainees with soap to wash their hands after using the bathroom, sufficient toilet paper, paper towels, sanitary napkins, diapers, toothpaste, toothbrushes, or access to showers, even though all but two CBP stations have shower facilities.¹⁰⁶

102. Memorandum from David V. Aguilar, *supra* note 67, § 6.9.

103. See, e.g., Complaint for Declaratory and Injunctive Relief, *supra* note 15, at 9 (“[T]he only water provided to Plaintiff Jane Doe #2 came from the sink above the toilet. There were no cups from which to drink and the water had a bad taste.”).

104. NAT’L IMMIGR. L. CTR., *Unconstitutional Conditions*, *supra* note 87.

105. See *supra* note 67 and accompanying text.

106. Brief for Plaintiffs-Appellants-Cross-Appellees, *supra* note 16, at 11–12.

FIGURE 4: Woman changing a child's diaper on top of a Mylar blanket on a trash-ridden cell's concrete floor.¹⁰⁷



Further, despite CBP policy requiring one working toilet for every fifteen detainees,¹⁰⁸ “[i]n practice, [CBP] regularly pack[s] large numbers of individuals into holding cells such that the ratio of detainees to toilets far exceeds CBP’s own guidelines”—a single toilet for forty people.¹⁰⁹ This CBP practice is even more concerning because CBP’s guidelines are even more lenient than prison standards. “[P]rison standards require one toilet for every 12 male prisoners and one toilet for every 8 female prisoners,” while in one CBP holding cell, there was “[o]ne large holding room with a capacity of 88 [with] one working toilet and one non-flushing toilet.”¹¹⁰ Given the overcrowding, some detainees are forced to eat and sleep next to the toilet. Lack of privacy is another significant concern as the toilets are in public view.¹¹¹

107. NAT’L IMMIGR. L. CTR., *Unconstitutional Conditions*, *supra* note 87.

108. U.S. CUSTOMS & BORDER PROT., *supra* note 67, at 493.

109. Complaint for Declaratory and Injunctive Relief, *supra* note 15, at 25; *see also* Brief for Plaintiffs-Appellants-Cross-Appellees, *supra* note 16, at 13.

110. *Doe v. Kelly*, 878 F.3d 710, 716 (9th Cir. 2017).

111. *See* Complaint, *Quiñonez Flores v. United States*, *supra* note 32, at 6. As the complaint notes:
 “The toilet and sink were not screened or walled off, and instead were clearly visible not only to the other detainees in the cell, but also to the CBP guards and detainees

4. Inadequate Medical Care

The medical care provided to immigration detainees in *hieleras* is inadequate. The *Doe v. Kelly*¹¹² complaint notes that CBP does “not mandate or provide adequate medical screening of all detainees for health problems—including for communicable diseases or mental illness—prior to confining them.”¹¹³ CBP agents confiscate prescription drugs, “fail to consistently and adequately provide access to qualified medical personnel for detainees in need of medical care; and fail to adequately and consistently provide for the emergency medical needs of detainees.”¹¹⁴ This is unacceptable given the health hazards of overcrowding and unsanitary conditions in *hieleras*, and given that detainees may arrive at an *hielera* already weak—food- and water-deprived, perhaps with broken bones, the flu, and prone to contracting pneumonia or other airborne diseases—because many have been travelling for days or weeks across many countries and through dangerous terrain.¹¹⁵ In fact, detention in *hieleras* can lead to new medical conditions. A San Antonio-based group of volunteer doctors, nurses, and social workers called *Sueños Sin Fronteras*, Spanish for “Dreams Without Borders,” runs a clinic to treat asylum seekers after their release from custody. They note that they see “a lot of boils and skin rashes, attributable to the lack of hygiene, and severe constipation, attributable to the dehydration and poor food intake. Almost everybody who [comes] through the clinic . . . complain[s] of flu symptoms or respiratory problems or both.”¹¹⁶ And, even more alarming are the reported deaths of migrants in CBP custody due to inadequate medical care.¹¹⁷

in other cells. Whenever Ms. Quiñones [sic] Flores used the toilet, she was visible to male CBP guards and male detainees in other cells. As a result of her open exposure, Ms. Quiñones [sic] Flores felt deeply humiliated and ashamed each time she used the toilet.”

Id.

112. See *infra* Part II.

113. Complaint for Declaratory and Injunctive Relief, *supra* note 15, at 26.

114. *Id.* at 48.

115. Sheri Fink & Caitlin Dickerson, *Border Patrol Facilities Put Detainees with Medical Conditions at Risk*, NY TIMES (Mar. 5, 2019), <https://www.nytimes.com/2019/03/05/us/border-patrol-deaths-migrant-children.html?module=inline> (“Migrants crossing the border from Mexico . . . may be suffering from dehydration, heat exhaustion or communicable illnesses—from influenza to chickenpox—that often spread in conditions of close confinement . . .”); Andrew Gumbel, *They Were Laughing at Us: Immigrants Tell of Cruelty, Illness, and Filth in US Detention*, GUARDIAN (Sept. 12, 2018, 4:00 AM), <https://www.theguardian.com/us-news/2018/sep/12/us-immigration-detention-facilities> [<https://perma.cc/D8AW-X55A>] (“Many migrants arrive in the United States already weak from their journeys and traumatized by violence at home.”).

116. *Id.*

117. See Fink & Dickerson, *supra* note 115. Fink and Dickerson write:

Because everyone knows of the harsh, inhumane, and punitive nature of *hielera* conditions, the important question is not what are *hieleras*, but what can be done through legal and policy means to reform and improve confinement conditions so that, at minimum, detainees' constitutional rights are respected.

II. CHALLENGING TUSCON-SECTOR *HIELERAS* IN COURT: *DOE V. KELLY*

Despite the difficulties associated with challenging CBP's failure to adhere to its own policies, a recent class action lawsuit in the District Court of Arizona is succeeding in challenging *hielera* conditions on constitutional grounds.¹¹⁸ In June 2015, a consortium of legal groups¹¹⁹ filed *Doe v. Kelly*,¹²⁰ a complaint on behalf of a class of immigration detainees subjected to deplorable conditions in Tucson Sector¹²¹ CBP holding cells.¹²² The plaintiffs alleged six causes of action, including five Due Process violations for deprivation of sleep, hygienic and sanitary conditions, adequate medical screening and care, adequate food and water, and warmth, as well as an Administrative Procedure Act (APA) violation on the grounds that CBP fails to adhere to its own guidelines and procedures.¹²³ The court

[M]ost of the [CBP] facilities along the border lack sufficient accommodations, staffing or procedures to thoroughly assess health needs or provide more than basic emergency care, a situation that has led to dangerous medical oversights. Six adults died in C.B.P. custody in the fiscal year ending in October [2018], at least three of whom had a medical emergency shortly after being apprehended. Another, who had serious chronic diseases and was hospitalized, died from health complications [in February 2019]. In December [2018], two migrant children . . . died within three weeks of each other after showing signs of illness while being held and transported by Border Patrol agents in Texas and New Mexico.

Id.

118. See *Unknown Parties v. Johnson*, No. CV-15-00250-TUC-DCB, 2016 U.S. Dist. LEXIS 189767 (D. Ariz. Nov. 18, 2016), *aff'd sub nom. Doe v. Kelly*, 878 F.3d 710, 716 (9th Cir. 2017).

119. The legal groups that filed the lawsuit are the NILC, American Immigration Council, ACLU Foundation of Arizona, the Lawyers' Committee for Civil Rights of the San Francisco Bay Area, and Morrison & Foerster LLP. Complaint for Declaratory and Injunctive Relief, *supra* note 15, at 54–55.

120. *Doe*, 878 F.3d 710. For narrative purposes, I use the District Court of Arizona case, named *Unknown Parties v. Johnson*, and the Ninth Circuit case, named *Doe v. Kelly*, interchangeably. Though the names changed on appeal, they involve the same individuals and institutional parties.

121. The "Tucson Sector covers most of the State of Arizona from the New Mexico State line to the Yuma County line. This area covers a total of 262 border miles and [is] one of the busiest sectors in the country. . . ." *Tucson Sector Arizona*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/tucson-sector-arizona> [<https://perma.cc/LCN3-G9WS>]. The eight CBP stations in the Tucson Sector are located in the Arizona cities of Why, Casa Grande, Tucson, Nogales, Willcox, Sonoita, Bisbee, and Douglas. *Id.*

122. Complaint for Declaratory and Injunctive Relief, *supra* note 15, at 1.

123. See *id.* at 45–51.

later dismissed the APA claim, noting that CBP guidelines and procedures, particularly the 2008 Memorandum and the CBP Security Policy and Procedures Handbook, are not substantive rules that are legally binding, but rather general rules of practice and procedure within the agency that have no force of law.¹²⁴ Because CBP is not legally obligated to follow its own guidelines and procedures, the plaintiffs did not have a legal claim to challenge the routine violation of CBP's policies.¹²⁵ More broadly, this presents a major barrier to challenging and reforming *hielera* conditions because there are no statutes or regulations governing CBP short-term holding cells.¹²⁶ The only legal recourse to challenge *hielera* conditions and detainee treatment is after due process violations have occurred—even if they are routine violations of CBP's policies and procedures, as is the case in *Doe v. Kelly*.

A. The Preliminary Injunction

In November 2016, District Court Judge David C. Bury found that “for purposes of the preliminary injunction . . . the Border Patrol’s 2008 Hold Rooms and Short Term Custody Policy . . . and the [TEDS standards] provided for constitutional conditions of confinement . . . [but] Plaintiffs had presented persuasive evidence that the basic human needs of detainees were not being met by [CBP’s] current practices.”¹²⁷ Therefore, the court held, the plaintiffs’ due process claims are likely to succeed on the merits because the evidence presented shows that *hielera* conditions are punitive¹²⁸ and unconstitutional.¹²⁹ The district court then issued a preliminary injunction requiring CBP to provide “a mat and a Mylar blanket for all detainees being held longer than 12 hours,” “implement the universal

124. Preliminary Injunction Order, *Unknown Parties v. Johnson*, No. 15-CV-00250-TUC-DCB, 2016 U.S. Dist. LEXIS 8391 (D. Ariz. Jan. 11, 2016).

125. *See generally* *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61 (2004) (“[T]he only agency action that can be compelled under the APA is action legally *required*.”); *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1071 (9th Cir. 2010) (holding that the National Park Service was not legally obligated by its own policies to restrict the use of motorized vehicles in Grand Canyon National Park because policies lacked the force of law and were instead “intended only to provide guidance within the Park Service, not to establish rights in the public generally”). Agency pronouncements have the force of law when the pronouncement (1) “prescribe[s] substantive rules,” meaning the rule is “legislative in nature, affecting individual rights and obligations,” and (2) the rule “conform[s] to certain procedural requirements,” such as having been “promulgated pursuant to specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress.” *Id.* (quoting *United States v. Fifty-Three Eclectus Parrots*, 685 F.2d 1131, 1136 (9th Cir. 1982) (citations omitted)).

126. CANTOR, *supra* note 64, at 2.

127. *Doe v. Kelly*, 878 F.3d 710, 715 (9th Cir. 2017).

128. *Unknown Parties*, 2016 U.S. Dist. LEXIS 189767, at *14–15.

129. *Id.* at *45–46.

use of [CBP's] Medical Screening Form at all stations and ensure that the form questions reflect the TEDS requirements for delivery of medical care to detainees," "monitor for compliance the . . . availability of working sinks and toilets and/or other materials sufficient to meet the personal hygiene needs of detainees on a per cell per station basis; cell temperatures [(maintaining them between seventy-one and seventy-four degrees)];¹³⁰ cell sanitation and cleanliness; delivery to detainees of bedding, including mats, personal hygiene items such as toilet paper, toothbrushes and toothpaste, feminine hygiene items, baby food, diapers, and meals," and clarified that "personal hygiene needs . . . include the need to wash or clean" oneself.¹³¹ The preliminary injunction is an important step toward improving *huelera* conditions and protecting immigration detainees' constitutional rights.

Although this lawsuit is still pending, the district court's order merits examination to understand how the due process rights of immigration detainees are being violated. In granting the plaintiffs' preliminary injunction, Judge Bury noted, "when the government takes a person into custody, it must provide for the person's 'basic human needs—e.g. food, clothing, shelter, medical care, and reasonable safety.'"¹³² The deprivation of these needs is a Due Process Clause violation when the conditions punish or intend to punish.¹³³ To determine whether *huelera* conditions amount to punishment, the court analyzed whether the conditions "impose[] some harm to the detainee that significantly exceeds or is independent of the inherent discomforts of confinement and is not reasonably related to a legitimate governmental objective or is excessive in relation to the legitimate governmental objective."¹³⁴

As a preliminary matter, Judge Bury considered the civil nature of immigration detention. Because immigrants in *hueleras* are civil detainees, due process standards for civil detainees apply. These standards differ "significantly from the standard relevant to convicted prisoners, who may be subject to punishment so long as it does not violate the Eighth Amendment's bar against cruel and unusual punishment."¹³⁵ Judge Bury explained:

Importantly, the Court notes that Plaintiffs are not pretrial detainees and that the civil nature of their confinement provides an important gloss on the meaning of "punitive" in the context of

130. *Doe*, 878 F.3d at 716.

131. *Unknown Parties*, 2016 U.S. Dist. LEXIS 189767, at *46–47.

132. *Doe*, 878 F.3d at 714 (citing *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199–200 (1989)).

133. *Unknown Parties*, 2016 U.S. Dist. LEXIS 189767, at *11–12.

134. *Id.* at *13 (citing *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473–74 (2015)).

135. *Id.* at *11 (citing *Pierce v. County of Orange*, 526 F.3d 1190, 1205 (9th Cir. 2008)).

their confinement. Because they are detained under civil, rather than criminal, process, they are most decidedly entitled to “more considerate treatment” than those who are criminally detained. In this way, decisions defining the constitutional rights of prisoners establish a floor for the constitutional rights of the Plaintiffs. Therefore, the Court should presume the Plaintiffs are being subjected to punishment if they are confined in conditions identical to, similar to, or more restrictive than those under which the criminally convicted are held. . . .

This is precisely the case here. Assistant Chief Patrol Agent for the Tucson Sector, George Allen, admitted, when this Court asked him to compare the conditions of confinement at Tucson Sector Border Patrol stations with those afforded criminal detainees at the Santa Cruz County jail, that in jail, detainees have a bed, with blankets, clean clothing, showers, toothbrushes and toothpaste, warm meals, and an opportunity for uninterrupted sleep.¹³⁶

Therefore, because the *hielera* conditions were even worse than for those convicted of a crime in jail, the court rightly found that plaintiffs were being subjected to punitive conditions in violation of their due process rights.

Continuing with the legal analysis, Judge Bury analyzed whether the *hielera* conditions were reasonably related to a legitimate government interest. The court found “no objectively reasonable relationship between 24-7 immigration processing or security and the conditions of confinement . . . in the Tucson Sector Border Patrol stations.”¹³⁷ Therefore, Judge Bury concluded that the plaintiffs were likely to succeed on the merits of their due process claims and granted their motion for a preliminary injunction.¹³⁸

B. Shortcomings of the Preliminary Injunction

At this stage of litigation, the plaintiffs have won a significant victory. Yet, the preliminary injunction also has shortcomings, which the plaintiffs highlighted in an appeal of portions of the preliminary injunction to the Ninth Circuit.¹³⁹ First, although the district court recognized the proper legal rule—that the Constitution requires that detainees be provided with beds and mattresses and that the “use of floor mattresses . . . is unconstitutional ‘without regard to the number of days a

136. *Id.* at *14–15 (citations omitted).

137. *Id.* at *45.

138. *Id.* at *45–46.

139. Brief for Plaintiffs-Appellants-Cross-Appellees, *supra* note 16, at 4.

prisoner is so confined”¹⁴⁰—the district court directed CBP to do exactly what it acknowledged to be unconstitutional: provide immigration detainees with only mats and Mylar blankets.¹⁴¹ In light of *Bell v. Wolfish*, the Ninth Circuit affirmed the district court’s order because of the “nature, purpose, and duration of an individual’s time in the station.”¹⁴² In *Bell*, the Supreme Court instructed lower courts to give deference to the expert judgment of prison officials and held that “[m]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted and pretrial detainees.”¹⁴³

Accordingly, the Ninth Circuit reasoned that “given the unique purposes of Border Patrol stations and [CBP’s] limited resources, the district court reasonably limited preliminary relief to mats and Mylar blankets. . . . [because] were the stations operating as intended, there would never have been any need for a bed or a mat. . . . [and mats and Mylar blankets] provide[] Plaintiffs with actual relief without imposing a huge cost on Defendants to alleviate what might be a temporary need.”¹⁴⁴ The court’s reasoning seems to be based on CBP’s assertions that they process *huelera* detainees quickly. However, there is ample evidence that CBP holds detainees for a prolonged time.¹⁴⁵ In sum, the district court and Ninth Circuit appear to have given CBP permission to violate the Constitution until the district court is required to evaluate again the evidence for purposes of a permanent injunction.¹⁴⁶

Another shortcoming of the preliminary injunction order is that while the district court recognized detainees’ constitutional right to personal hygiene, and properly ordered compliance monitoring “to ensure detainees have access to working toilets and sinks, soap, toilet paper, garbage receptacles, tooth brushes and toothpaste, feminine hygiene items, baby food, diapers and clean drinking

140. *Unknown Parties*, 2016 U.S. Dist. LEXIS 189767, at *19 (citation omitted).

141. Brief for Plaintiffs-Appellants-Cross-Appellees, *supra* note 16, at 44, 46 (“[A] jail’s failure to provide detainees with a mattress and bed or bunk runs afoul of the commands of the Fourteenth Amendment.” (quoting *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1448 (9th Cir. 1989), *overruled on other grounds by Bull v. City & County of San Francisco*, 595 F.3d 964, 980–81 (9th Cir. 2010) (en banc)); *Anela v. City of Wildwood*, 790 F.2d 1063, 1064, 1069 (3d Cir. 1986) (holding that forcing pretrial detainees to sleep on holding cell floors for one night “constituted privation and punishment in violation of the Fourteenth Amendment”).

142. 441 U.S. 520 (1979).

143. *Id.* at 546; *see id.* at 540 n.23.

144. *Doe v. Kelly*, 878 F.3d 710, 721 (9th Cir. 2017).

145. *See supra* notes 74, 76 and accompanying text.

146. *Doe*, 878 F.3d at 721–22 (“Evidence as to whether the need [for beds and mattresses is] likely to continue would certainly be relevant to the district court’s determination of Plaintiffs’ request for a permanent injunction.”).

water,”¹⁴⁷ the district court was reluctant to order CBP to provide showers to immigration detainees, which is the standard for the criminally convicted in jails.¹⁴⁸ Instead, CBP only needs to provide “some means or materials for washing and/or maintaining personal hygiene when detainees are held longer than 12 hours,” and providing detainees held longer than twelve hours with body wipes is sufficient.¹⁴⁹

Body wipes are inadequate for personal hygiene because many detainees are apprehended after a days- or weeks-long journey by foot through various countries,¹⁵⁰ and a body wipe will not do much to decrease the “risk of skin problems[,] [the] transmission of disease from person to person[,] and [the] foul and malodorous environment” that occurs when detainees are not allowed to take showers in these circumstances.¹⁵¹ Nevertheless, the Ninth Circuit affirmed the district court’s preliminary injunction order, noting that detainees “have a right to hygiene, [but] the Constitution does not require access to a shower within 12 hours or even 24 hours . . . [because] case law does not compel the conclusion that [immigration detainees] have a constitutional right to a shower when detained for fewer than two days.”¹⁵² The court’s reasoning, again, deferred to CBP’s concerns regarding shower availability, security, logistics, and CBP’s assertions that they process *hielera* detainees quickly,¹⁵³ which evidence shows is not the case.¹⁵⁴

Lastly, while the plaintiffs and defendants agreed that adequate medical care is a constitutional right, they disagreed on the adequacy of the medical care CBP provides to detainees.¹⁵⁵ Plaintiffs argued that *hielera* detainees were not provided adequate medical care because Border Patrol agents, who are not doctors, nurses, or specially trained medical personnel, perform intake screenings, are not capable of responding to medical emergencies, and heighten the risk of medical emergencies by confiscating medication from detainees at intake.¹⁵⁶ Plaintiffs also provided expert testimony showing the lack of standardized protocol in CBP’s field screening, which did not adequately identify urgent health care needs or possible

147. Unknown Parties v. Johnson, No. CV-15-00250-TUC-DCB, 2016 U.S. Dist. LEXIS 189767, at *31–32 (D. Ariz. Nov. 18, 2016).

148. *Id.* at *32 (“Jail standards require access to showers and washbasins with temperature controlled hot and cold running water 24 hours per day, with daily [showers] being available to general population jail-inmates.” (citation omitted)).

149. *Id.* at *34; *Doe*, 878 F.3d at 717.

150. Unknown Parties, 2016 U.S. Dist. LEXIS 189767, at *28 (“A person who has been trudging across the Arizona desert will likely arrive at a detention station dirty and in need of a shower . . .”).

151. *Id.* at *33.

152. *Doe*, 878 F.3d at 722.

153. *Id.*

154. See *supra* notes 74, 76 and accompanying text.

155. *Doe*, 878 F.3d at 717.

156. *Id.*

communicable diseases.¹⁵⁷ Nevertheless, the district court’s preliminary injunction order simply required “compliance with TEDS standards,”¹⁵⁸ “including measures to ensure the Medical Screening Form currently being used by Defendants at some stations is used in all stations, and that the form ask questions to ensure compliance with TEDS standards for screening and delivering medical care.”¹⁵⁹ According to the district court and the Ninth Circuit, only an outright denial of medical care would be inadequate; meanwhile, only three percent of detainees received medical treatment, yet both courts found that CBP’s practices and policies were sufficient.¹⁶⁰

In sum, because case law does not require medical professionals to provide all stages of medical care, there was no evidence of Border Patrol agents “denying critical medical care to a detainee with dire consequences.”¹⁶¹ The Ninth Circuit held, because most detainees are released within a day or two, that there was not enough evidence to conclude that CBP had not provided or would not provide adequate medical care.¹⁶² Again, this ruling shows the court’s deference to CBP in the preliminary injunction stage despite thousands of former *hielera* detainees testifying to instances of having medical care denied or inadequately provided.¹⁶³ This ruling also does not invalidate the evidence that shows that the medical care of *hielera* detainees would be inadequate in a different context—a jail, prison, or even this same court evaluating the facts at the permanent injunction stage.¹⁶⁴

157. *Id.*

158. *Id.* TEDS standards require that “before a detainee is placed in a hold room, an agent questions the individual and visually inspects for any sign of injury, illness, or physical or mental health concerns.” *Id.* If there is a medical emergency, CBP must transfer detainees to hospitals for emergency care. *Id.*

159. *Id.* at 717–18 (quoting *Unknown Parties v. Johnson*, No. CV-15-00250-TUC-DCB, 2016 U.S. Dist. LEXIS 189767, at *42–43 (D. Ariz. Nov. 18, 2016)).

160. *Id.* at 724–25, 724 n.8.

161. *Id.* at 724. The Ninth Circuit reasoned that *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986), provided that the U.S. Constitution does not prohibit all use of “unqualified” medical personnel, only “unqualified” medical personnel who “regularly engage in medical practice.” *Id.* at 723.

162. *Id.* at 712.

163. Compare former immigration detainees’ testimony in Complaint for Declaratory and Injunctive Relief, *supra* note 15, at 26–28 n.17–19, with the plaintiffs’ causes of action in *Hoptowitz v. Ray*, 682 F.2d 1237 (9th Cir. 1982), *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995). The court in *Hoptowitz* affirmed the district court’s holding that medical care at the Washington State Penitentiary was constitutionally deficient because medical staffing was inadequate; for example, the “[m]edication [was] prepared and dispensed by persons not trained or licensed to do so.” *Id.* at 1252. “The medication distribution system often . . . result[ed] in the denial or delay of distribution of proper medication.” *Id.* “Much discretion to decide which prisoners will get access to medical care is vested in the guards.” *Id.* The court noted that “[o]ften, guards fail to forward medical complaints and use their discretion as leverage over the inmates. . . . [Or] regularly fail to provide required escorts to inmates to go to the medical facilities.” *Id.*

164. See *Unknown Parties*, 2016 U.S. Dist. LEXIS 189767, at *43 (finding that if CBP fails to comply with TEDS standards, plaintiffs are likely to prevail on their constitutional claim).

On December 22, 2017, the Ninth Circuit affirmed the district court's preliminary injunction order and shortly thereafter denied a panel rehearing or a rehearing en banc.¹⁶⁵ Today, the preliminary injunction orders CBP to make some changes in their Tucson Sector stations and for the plaintiffs to continue monitoring CBP's compliance with TEDS standards and the preliminary injunction.¹⁶⁶ Next, the plaintiffs will likely seek a permanent injunction. The future of *hielera* conditions in CBP's Tucson Sector is still unclear.

III. POLICY SOLUTIONS TO IMPROVE *HIELERA* CONDITIONS

The *Doe v. Kelly*¹⁶⁷ litigation has already won a partial victory with the preliminary injunction. The litigation may result in a permanent order to reform *hielera* conditions in the CBP Tucson-Sector. Two supplemental solutions will improve *hielera* conditions: First, federal legislation should make CBP short-term holding cell standards a matter of federal law. This will add legitimacy to the immigration detention system and allow detainees to challenge CBP misconduct in a court of law. Second, an independent monitoring institution should oversee CBP to ensure adherence to its policies and procedures.

A. Passing Legislation to Make *Hielera* Standards a Matter of Federal Law

Currently, CBP, an administrative agency with no accountability to the American public,¹⁶⁸ sets all confinement standards and internal guidelines and procedures for apprehending and detaining immigration detainees.¹⁶⁹ While a detainee can submit complaints to CBP and DHS, the agency itself decides whether or not to enact any reform.¹⁷⁰ Further, while detainees can sue on their own behalf for violations of their constitutional rights, CBP's internal guidelines, policies, and procedures cannot be challenged because they are not legally binding on the agency; they are not laws, statutes, or regulations that carry the force of law.¹⁷¹

165. *Doe v. Kelly*, Nos. 17-15381, 17-15383, 2018 U.S. App. LEXIS 6269 (9th Cir. Mar. 13, 2018).

166. *Unknown Parties*, 2016 U.S. Dist. LEXIS 189767, at *46–47.

167. *Doe*, 878 F.3d 710.

168. See GUILLERMO CANTOR & WALTER EWING, AM. IMMIGRATION COUNCIL, STILL NO ACTION TAKEN: COMPLAINTS AGAINST BORDER PATROL AGENTS CONTINUE TO GO UNANSWERED (2017); DANIEL E. MARTÍNEZ ET AL., AM. IMMIGRATION COUNCIL, NO ACTION TAKEN: LACK OF CBP ACCOUNTABILITY IN RESPONDING TO COMPLAINTS OF ABUSE (2014).

169. See *supra* note 67 and accompanying text.

170. See *supra* note 31.

171. For a thorough explanation of why CBP internal guidelines, policies, and procedures cannot be legally challenged, see *supra* notes 125–126 and accompanying text. See Molly Redden, *No Water*,

Therefore, in order to improve *hielera* conditions and provide a legal avenue to challenge rights violations, Congress needs to enact a federal law establishing confinement standards so that CBP's failure to abide by such a law could be challenged in court. Taking the power to set confinement standards away from CBP will add a layer of accountability so that CBP does not violate detainees' constitutional rights in short-term holding facilities. The feasibility of passing a federal law improving confinement standards and detainee treatment is admittedly low—especially considering the political rhetoric surrounding immigration¹⁷² and the fact that Congressmembers have proposed unsuccessful bills addressing this issue in the past.¹⁷³

Nevertheless, at the right political time, if a federal law of this nature passes, it should, at a minimum, mandate that short-term holding cells meet the same standards as jails across the United States.¹⁷⁴ Congress should include the following standards: First, a federal law should provide a reasonable maximum time limit for *hielera* detention. Setting an upper time limit is important because the detention length is crucial in determining what provisions the Constitution requires.¹⁷⁵ In

No Toilet Paper, No Tampons: How the US Treats Border Detainees, MOTHER JONES (June 5, 2014, 10:00 AM), <https://www.motherjones.com/politics/2014/06/immigrant-detention-customs-border-protection-lawsuit> [<https://perma.cc/4B9K-YYLY>] (“[A]s far as legal relief goes, she doesn’t have any other options because CBP sets all guidelines for detainee treatment internally; those standards aren’t a matter of federal law. As a result, while Quiñones can sue on her own behalf, ‘we can’t also go to court on behalf of thousands of people being held in similar situations,’ . . . ‘[w]e can’t ask the court to stop what’s happening.’”).

172. See *supra* notes 59–61 and accompanying text.

173. See *supra* note 33.

174. This is not to say that current jail and prison standards are acceptable. A vast amount of case law addresses inadequate jail and prison conditions. See, e.g., *Brown v. Plata*, 563 U.S. 493, 501–02 (2011) (holding that overcrowding in California’s prisons resulted in cruel and unusual punishment in violation of the Eighth Amendment to the Constitution); *Darnell v. Pineiro*, 849 F.3d 17, 39 (2d Cir. 2017) (vacating the district court order and remanding claims challenging confinement conditions for pretrial detainees in Brooklyn, New York, including overcrowding, unusable toilets, garbage and inadequate sanitation, infestation, lack of toiletries and other hygienic items, inadequate nutrition, extreme temperatures and poor ventilation, deprivation of sleep, and crime and intimidation); *Toussaint v. McCarthy*, 597 F. Supp. 1388, 1411 (N.D. Cal. 1984), *aff’d in part and rev’d in part*, 801 F.2d 1080 (9th Cir. 1986) (holding that the conditions in the segregated lock-up units at San Quentin, Folsom, Soledad, and Deuel Vocational Institute were unconstitutional). See generally *Major Cases*, PRISON L. OFFICE, <http://prisonlaw.com/major-cases> [<https://perma.cc/94HZ-ULMY>].

175. See *Unknown Parties v. Johnson*, No. CV-15-00250-TUC-DCB, 2016 U.S. Dist. LEXIS 189767, at *45 (D. Ariz. Nov. 18, 2016) (“If detainees are held long enough to require them to sleep in these facilities, take regular meals, need showers, etc., then the Defendants must provide conditions of confinement to meet these human needs.”); see also *Doe v. Kelly*, 878 F.3d 710, 716 (9th Cir. 2017) (explaining that the district court in *Unknown Parties v. Johnson* noted that Border Patrol facilities could not be compared with short-term holding cells typically used for the booking process in jails because the booking process at a jail takes hours, not days).

determining the upper time limit, Congress should take into consideration the *hieleras*' nature and purpose. Since *hieleras* are meant for processing, and this process should take about two and a half hours if uninterrupted,¹⁷⁶ I propose an upper time limit of twenty-four hours. This period gives CBP sufficient time to process migrants but is not unreasonably short for situations in which there is a large detainee influx. Further, the following changes in the basic provisions given to detainees are needed.

1. Hygienic Toiletries

A federal law should mandate that CBP give every detainee free, hygienic toiletries, such as soap, toothbrushes, toothpaste, toilet paper, diapers, sanitary napkins, towels, and access to showers. Detainees need hygienic toiletries and provisions because many are apprehended after walking through the desert for days or weeks.¹⁷⁷ These provisions will also reduce the spread of disease and infection among detainees and CBP agents.¹⁷⁸

Currently, "jail standards require access to showers and washbasins with hot and cold running water, with daily showers available."¹⁷⁹ Providing daily showers with hot and cold water to *hielera* detainees will not unduly burden CBP as showers already exist in most CBP stations. Moreover, the benefit of reducing the risk of disease and germs from spreading among detainees outweighs any water costs.

2. Medical Professionals

A federal law should further mandate CBP to hire medical professionals to provide adequate medical care in *hieleras*. Adequate medical care is hard to define, but in broad strokes should include hiring medical professionals to uniformly conduct intake screenings, thoroughly investigate a detainee's physical and mental medical history, supervise medication dispersal, and promptly respond to medical emergencies that arise. Hiring medical professionals will benefit not only detainees, but will also allow Border Patrol agents more time to focus on quickly processing detainees. This will, in turn, reduce the duration of detention.

176. *Doe*, 878 F.3d at 715.

177. Declaration of Eldon Vail in Support of Plaintiffs' Motion for Preliminary Injunction at 27, *Unknown Parties v. Johnson*, No. CV-15-00250-TUC-DCB, 2016 U.S. Dist. LEXIS 189767 (D. Ariz. Aug 17, 2016).

178. *Id.* at 26–28.

179. *Doe*, 878 F.3d 717.

Increasing operational efficiency will offset some medical staff costs and may allow CBP to continue operating with similar funding.

Even if CBP's current practices do not amount to any constitutional violations, a federal law mandating improved medical care makes sense. Many detainees have been on a long journey through different countries and dangerous terrain, without food or water, and may be suffering psychological and emotional trauma, especially if they are coming to the United States as asylum seekers. Consequently, adequate medical care is necessary to ensure that detainees are healthy, are not suffering for medical reasons, are not spreading illness, and to prevent medical emergencies.

3. Food and Water

Moreover, a federal law should require that CBP provide warm, nutritious meals to all detainees. Although the TEDS standards have a decent food and water provision,¹⁸⁰ a law should further mandate that CBP consult with a professional nutritionist to outline a feasible plan to provide adequate calories and nutrition to all detainees given their age and weight. Further, CBP must provide an unlimited amount of water in every holding cell through clean, working water fountains and disposable cups to decrease the spread of germs and ensure sanitary conditions.

4. Temperatures

A law also should mandate that CBP maintain temperatures inside holding cells in a comfortable target range of 69–76 degrees Fahrenheit.¹⁸¹ To ensure compliance, the law should require an automated, centralized system controlled remotely from DHS headquarters to manage the temperature, instead of allowing CBP agents to set and change holding cell temperatures. With today's technology, this is a viable solution that can be instituted in the law to prevent abuse by individual agents. For example, if the temperature in a particular location goes above or below the prespecified comfortable temperature range, DHS headquarters would get an alarm notification and be able to act to correct the

180. U.S. CUSTOMS & BORDER PROT., *supra* note 63, at 18.

181. According to the National Institute of Corrections, "anything in a range of 69–76 degrees could be acceptable in terms of thermal comfort depending on levels of humidity (and factoring in ambient conditions in summer or winter)." *What Is the Appropriate Temperature for Jail/Prison Housing Units?*, NAT'L INST. CORRECTIONS (April 19, 2013), <https://nicic.gov/what-appropriate-temperature-jailprison-housing-units>. In *Doe v. Kelly*, District Court Judge Bury ordered CBP to maintain temperatures from 71 to 74 degrees Fahrenheit in his preliminary injunction order. *Doe*, 878 F.3d at 716.

temperature. Also, a Border Patrol agent can call headquarters if the temperature inside the holding cells needs to be changed due to unforeseen temperatures, humidity levels, or any other reason affecting the CBP station in a particular geographic location. Ultimately, however, DHS will be responsible for ensuring that the temperature never goes below or above a comfortable and reasonable temperature range. This will eradicate the extremely cold temperatures that give *hieleras* their notorious name and remove CBP agents' power to punish detainees through temperature manipulation.

5. Bedding

The federal law should also mandate that CBP provide bedding to all detainees. As the district court in *Doe v. Kelly* recognized, individuals held overnight in detention facilities have a constitutional right to a bed and a mattress.¹⁸² The *Doe v. Kelly* preliminary injunction merely ordered CBP to provide detainees with mats and Mylar blankets, but this normally inadequate provision was only appropriate because the order was in the context of a motion for a preliminary injunction. Legislation needs to require that CBP gives detainees in short-term holding cells beds and mattresses to align with Fifth Amendment constitutional rights.

B. Creating an Independent Institution to Monitor and Enforce Standards

In addition to the above-proposed provisions for a federal law, another solution to ensure that CBP is complying with its own policies and procedures and respecting detainees' constitutional and human rights in short-term holding cells is to pass a federal law that creates an independent monitoring institution¹⁸³ Such an

182. See *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1448 (9th Cir. 1989), *overruled on other grounds by* *Bull v. City & County of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (noting that a pretrial detainee who was "provided with neither a bed nor even a mattress unquestionably [has] a cognizable [constitutional] claim").

183. In 2008, the report NO MORE DEATHS, CROSSING THE LINE: HUMAN RIGHTS ABUSES IN SHORT-TERM CUSTODY ON THE ARIZONA/SONORA BORDER documented the constitutional and human rights abuses occurring in CBP short-term holding cells along the U.S.-Mexico border and recommended the creation of "[a]n independent system to guarantee ongoing access of community and human rights groups to all DHS facilities for the purpose of monitoring the implementation of all standards of care." NO MORE DEATHS, *supra* note 52, at 3. It has been over ten years since this report's publication, and there is still no monitoring mechanism in place. Constitutional violations and mistreatment of immigration detainees in *hieleras* continue, as evidenced in recent reports and the case study of *Doe v. Kelly*. See AM. IMMIGRATION COUNCIL,

institution has the potential to reform CBP practices, increase CBP transparency and accountability, and protect immigration detainees' constitutional and human rights.¹⁸⁴

Currently, the only check on Border Patrol agents is CBP and DHS, agencies largely governed by their own internal guidelines, policies, and procedures.¹⁸⁵ As previous reports, and now *Doe v. Kelly*, demonstrate, CBP does not follow its own policies and procedures and has mistreated and abused immigrants at the border for years. Hence, it is vital to have an independent institution composed of experts across various custodial skills that can arrive unannounced to inspect CBP short-term holding facilities and ensure that CBP is upholding DHS standards and policies and the Constitution.

Nick Hardwick, a former chief inspector of prisons for Her Majesty's Inspectorate of Prisons (HMIP), an independent, human rights-based monitoring institution in charge of inspecting prisons and immigration detention centers in the United Kingdom,¹⁸⁶ notes that independent scrutiny of criminal detention or immigration detention facilities has important influences. First, it helps alleviate "the power imbalance between the detainee[s] and jailors" because detainees depend on custodial staff—and in the case of *hieleras*, on CBP agents—to "not only . . . refrain from committing obvious acts of abuse[,] but also to avoid victimizing them in more subtle ways, such as restricted access to showers, clean underwear and toilet paper."¹⁸⁷ Because detainees are dependent on CBP agents, there is potential for abuse of power that independent monitoring can rectify.¹⁸⁸

Second, scrutiny from an independent monitoring institution like HMIP increases transparency, which is important because of immigration detention's closed nature.¹⁸⁹ Hardwick notes, "without HMIP[,] the public, media and most authorities can only find out what happens inside the walls of detention with the permission of managers."¹⁹⁰ In the same way, CBP has performed poorly regarding transparency and accountability, and this shortcoming calls for an independent

FORMER DETAINEES DESCRIBE HORRIFIC CONDITIONS IN CBP DETENTION, *supra* note 15; AM. FOR IMMIGRANT JUSTICE, *supra* note 15; CANTOR, *supra* note 69.

184. Former special advisor to ICE Dora Schriro noted that "a commitment to excellence, transparency and accountability within DHS and the administration" is necessary to produce better results in the immigration detention system. Schriro, *supra* note 45, at 43.

185. See *supra* note 67 and accompanying text.

186. Bhui, *supra* note 41, at 83–84. The Criminal Justice Act of 1982 established the HMIP, and the inspection of immigration detention facilities began after the Immigration and Asylum Act of 1999 and the Immigration, Asylum and National Act of 2006 passed. *Id.*

187. *Id.* at 91.

188. *Id.*

189. *Id.*

190. *Id.*

monitoring institution to resolve these prominent concerns in *hieleras*. For example, the American public had no idea what CBP short-term holding cells looked like until a district court judge ordered CBP to disclose its video surveillance of these facilities in *Doe v. Kelly*. CBP did not want to hand these videos over and the court granted a criminal contempt motion to enforce compliance. Without *Doe v. Kelly*, we would remain unaware of what CBP short-term holding cells look like, the confinement conditions inside these cells, and why the term *hieleras* is notorious among immigration detainees.

Third, independent scrutiny increases detainee credibility.¹⁹¹ “The supposed lack of credibility of detainees, whose criticisms may otherwise be dismissed, is countered by the centrality given to the detainees’ voices in the inspectorate’s methodology.”¹⁹² CBP is complicit in feeding the narrative of detainee incredibility. This is evident in the way that CBP dismisses detainee accounts of abuse by stating that short-term holding cells are not freezing cold, but rather cold by comparison to the hot desert through which many detainees have been walking before apprehension.¹⁹³ In this situation, it is a detainee’s word against an agent’s. A detainee’s word is not always believed or valued as evidenced in the amount of administrative complaints that are ignored or closed by the Office of Inspector General (OIG) and the Office of Civil Rights and Civil Liberties (CRCL) without any action taken,¹⁹⁴ and the fact that CRCL inappropriately relies on “CBP records and personnel[] accounts in what are supposed to be ‘independent’ investigations” against CBP agents.¹⁹⁵ Nevertheless, the successful preliminary injunction order in favor of the plaintiffs in *Doe v. Kelly* shows that former detainee testimony is credible in a court of law, especially if there are multiple accounts testifying to a specific matter, and even more so if the detainees’ testimony is supported with statistics. Moving forward, an independent organization should document former detainees’ testimony to help legitimize them.

191. *Id.*

192. *Id.*

193. Redden, *supra* note 13 (“We have heard those reports before, and you have to understand, when these folks come in from the desert, they’re hot . . . They’re sweating. . . We’re not going to adjust the temperature for a each new group [sic]. It would work the system too hard.”).

194. *See supra* note 31.

195. *See* INT’L HUMAN RIGHTS CLINIC & ACLU BORDER LITIG. PROJECT, *supra* note 36, at 34, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1001&context=ihrc> [<https://perma.cc/92H8-7P6H>] (“Indeed, rather than independently investigate complaints of abuse, CRCL refers those complaints *back to* CBP—i.e., the very entity accused of misconduct—to resolve. Additionally, CRCL often recommends the closure of complaints that cannot be verified by CBP’s records or personnel accounts . . .”). Also, “[C]RCL appears to combine multiple complaints by issue rather than undertaking individualized assessments into alleged abuses.” *Id.*

Fourth, independent scrutiny effaces “[t]he normative effects of custody. The nature of custody may lead [CBP Border Patrol agents] to become accustomed to things that they should not.”¹⁹⁶ Hence, independent scrutiny “combat[s] institutional drift whereby what is unacceptable becomes the norm; it exposes any such tendency to [higher ups] who have ceased to notice what is happening, and to media and public scrutiny.”¹⁹⁷

Finally, Hardwick notes that independent scrutiny will eradicate the notion of a “virtual prison.” “First coined by former chief inspector [of HMIP] Anne Owers [in 2007], this concept refers to the institution that managers think they are running, which may bear little relation to the reality.”¹⁹⁸ When DHS Secretary Kirstjen Nielsen issues memoranda outlining internal guidance and standards for CBP agents to follow in *hieleras*, the concept of the “virtual prison” is at play because CBP agents in practice are not following the policies and procedures outlined in the memoranda. When the notion of the “virtual prison” is eradicated, *hielera* conditions and detainee treatment will largely be improved from the status quo that is plagued with unconstitutional conditions and practices. Indeed, in *Doe v. Kelly*, Judge Bury found that “the Border Patrol’s 2008 Hold Rooms and Short Term Custody Policy... and the [TEDS standards] provided for constitutional conditions of confinement” but it was CBP’s current practices, presented as evidence by the plaintiffs, that led him to find that the plaintiffs were likely to succeed on the merits of their due process claims.¹⁹⁹

Given the influence that an independent monitoring institution can have in increasing transparency, accountability, and improving detainee treatment and conditions in CBP short-term holding cells, the UK’s HMIP inspection model or something similar should be adopted in the United States. Other countries have successfully implemented independent monitoring institutions through legislation.²⁰⁰ These institutions have improved confinement conditions and detainee treatment, and Congress should establish a similar institution in the United States.

196. Bhui, *supra* note 41, at 91.

197. *Id.*

198. *Id.* For case studies showing how inspection effectively leads to change, see *id.* at 91–94.

199. *Doe v. Kelly*, 878 F.3d 710, 715 (9th Cir. 2017).

200. For example, the United Kingdom established Her Majesty’s Inspectorate of Prisons (HMIP) in 1982. See Bhui, *supra* note 41, at 83–84. Ireland established the Office of the Inspector of Prisons in 2007. See OFFICE OF THE INSPECTOR OF PRISONS, <http://www.inspectorofprisons.gov.ie/> [<https://perma.cc/6FCD-5ZQW>]. Further, the European Committee for the Prevention of Torture (CPT) independently monitors prisons in all of the countries in the European Union, and it requires governments to create an independent custody monitoring body, or “National Preventative Mechanism.” See *About the CPT*, COUNCIL EUR., <https://www.coe.int/en/web/cpt/about-the-cpt> [<https://perma.cc/25MQ-FRK7>].

HMIP provides a successful model for the United States to emulate. “The inspectorate’s main objectives are to improve treatment of and conditions for those in custody, and to prevent inhumane or degrading treatment.”²⁰¹ HMIP Inspector Hindpal Singh Bhui states that she has observed firsthand the impact inspections have on improving detainee treatment.²⁰² In the immigration detention realm, Bhui notes that “[g]iven the relatively weak legal and procedural controls around the use of administrative detention, immigration detention arguably lacks legitimacy in a way that criminal imprisonment does not.”²⁰³ Therefore, independent monitoring of immigration detention facilities is even more crucial than monitoring of jails in the United States because effective monitoring can improve immigration detention conditions in a way that the legal system cannot easily do.²⁰⁴

HMIP’s inspection methodology includes having “full control over when and where it inspects[,] and in recent years has moved toward flexible risk-informed scheduling of inspections, which are nearly always unannounced. . . . Inspections take place over a two-week period.”²⁰⁵ In the first week, inspectors arrive and tour the detention center and ask all detainees about their treatment and the conditions inside the prison, jail, or immigration detention facility.²⁰⁶ In the second week, a larger inspection team “comprised of inspectors

201. Bhui, *supra* note 41, at 90.

202. For example, an HMIP inspection of a short-term holding facility at the port of Dover revealed: [P]eople, including a large number of children, were being detained at a nearby, previously unknown, site known as Longport, usually for a few hours but in one case for over 20 hours. Many of these people had previously been living in insanitary conditions in makeshift camps in France and had undertaken hazardous journeys. The Longport facility, which had been created as an emergency response, was simply a freight shed that lacked even basic facilities. . . . [Here,] the detainees . . . were held in some of the worst conditions that they had seen. Detainees were not given adequate food, . . . and conditions were unhygienic. [A]fter HMIP reported on the facility, the Home Office improved basic conditions, reduced the use of the facility, and then stopped using it altogether.

Bhui, *supra* note 41, at 92–93 (citations omitted). For other concrete examples, see *id.* at 94–95.

203. *Id.* at 82 (citations omitted).

204. See *supra* notes 124–126, 172 and accompanying text.

205. Bhui, *supra* note 41, at 84–85 (footnote omitted). Bhui writes:

The methods of inspection include group and individual meeting with detainees, a written survey of the population, observation of life in detention, discussions with staff and examination of official documentation. In most respects, inspection of immigration detention mirrors that of prisons. The main additional area is a consideration of immigration casework; inspectors have access to the Home Office’s database and examine a sample of cases, looking in particular at the detention of the most vulnerable and reasons for lengthy detentions.

Id.

206. *Id.*

with diverse experience . . . includ[ing] ex-prison managers, academics, lawyers, community sector professionals, healthcare and education specialists, ex-police officers, and ex-social workers and probation officers” come to the detention facility.²⁰⁷ At the end of the inspection, HMIP produces “final judgements on the outcomes for detainees against four tests of ‘healthy’ detention: safety, respect, purposeful activity and preparation for release and removal.”²⁰⁸ Although HMIP has no enforcement power, it publishes a full report of each facility accompanied by a press release and media interviews to engender public awareness and change.²⁰⁹ The HMIP model has been effective: Facilities accept 80 to 90 percent of their recommendations.²¹⁰

Taking HMIP as a model for the independent monitoring of CBP short-term holding cells will undoubtedly improve conditions and detainee treatment in CBP short-term holding cells. Notably, the independent monitoring institution would be independent from DHS and CBP to ensure transparency and accountability.²¹¹ As Bhui notes, “[i]nspection is concerned with outcomes for detainees, a disempowered group who would not otherwise have their voices heard so authoritatively; it redresses to an extent the power imbalance between detainees and authorities, particularly by ensuring that the voice of detainees is given weight, a critical point that can support reform efforts.”²¹² This can only happen if the monitoring is independent from the agency that is in charge of enforcing immigration laws.

Although DHS and CBP will likely contend that, as the nation’s largest enforcement agency, their operations should be independent and not subject to review by anyone, an independent monitoring institution does not challenge CBP operations but rather creates a mechanism to check the manner and means by which CBP carries out its operations. In *Doe v. Kelly*, the government made this argument, and Ninth Circuit Judge Callahan stated, “Plaintiffs do not seek to prevent Defendants from inspecting, apprehending, excluding, or removing aliens,” and do not ‘challenge the government’s power to detain individuals who are

207. *Id.*

208. *Id.* at 86 (footnote omitted).

209. *Id.*

210. *Id.* at 90 (“If success is measured on the basis of achievement of recommendations, 80–90 per cent are accepted and implementation—as checked by HMIP itself during follow-up inspections—varies from 50–60 per cent.” (citation omitted)).

211. *See id.* at 83 (noting that although HMIP’s “independent voice and role remains vulnerable” because it depends on the Ministry of Justice for funding, “few people doubt the current willingness of HMIP to challenge officials or their policies, and report on outcomes for those in detention” since they have come into “open conflict with senior government officials and ministers” before).

212. *See id.* at 95.

suspected of crossing the nation’s border without proper authorization,” but rather challenge the constitutional obligations that are implicated in “the manner and means by which the government carries out its responsibilities at the border.”²¹³ CBP is not above the Constitution, and it is proper for an independent organization to monitor CBP for constitutional violations, even if that organization would not be able to directly challenge the way that CBP carries out its operations.

CONCLUSION

The conditions and detainee treatment in CBP short-term holding cells along the border are punitive and unconstitutional. The legal team working on *Doe v. Kelly* is fighting for immigration detainees’ constitutional rights and may reform the conditions in CBP short-term holding cells. In reflecting on this case and its findings thus far, this Comment has offered supplemental solutions, including federal legislation to improve *hielera* conditions and an independent institution to monitor CBP’s respect for detainee rights. It is time to meaningfully protect detainee rights in CBP’s short-term holding cells by improving CBP transparency, accountability, and confinement conditions in *hieleras*—and, in the near future, have no more *hieleras*.

213. *Doe v. Kelly*, 878 F.3d 710, 721 n.5 (9th Cir. 2017) (citation omitted).